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ATTORNEYS FOR NEXPOINT ADVISORS, L.P.

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Debtor.	§	Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adv. No. 21-03005-sgj
vs.	§	Civ. Act. No. 3:21-cv-00880-C
	§	
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
Defendants.	§	

**NOTICE OF OBJECTION OF NEXPOINT ADVISORS, L.P. TO ORDER DENYING
MOTIONS TO EXTEND EXPERT DISCLOSURE AND DISCOVERY DEADLINES**

PLEASE TAKE NOTICE that, on January 5, 2022, NexPoint Advisors, L.P. (“NexPoint”) filed the following documents in the District Court under Civ. Act. No. 3:21-cv-00880-C, copies of which are attached hereto:

- *Objection of NexPoint Advisors, L.P. to Order Denying Motions to Extend Expert Disclosure and Discovery Deadlines* (Dist. Ct. Dkt. 21);
- *Brief in Support of Objection of NexPoint Advisors, L.P. to Order Denying Motions to Extend Expert Disclosure and Discovery Deadlines* (Dist. Ct. Dkt. 22); and



- *Appendix in Support of Objection of NexPoint Advisors, L.P. to Order Denying Motions to Extend Expert Disclosure and Discovery Deadlines (Dist. Ct. Dkt. 23).*

RESPECTFULLY SUBMITTED this the 5th day of January, 2022.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 5, 2022, a true and correct copy of the foregoing document, including any exhibit(s) thereto, was served on the following recipients via the Court's CM/ECF system:

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Plaintiff,	§	Adv. No. 21-03005-sgj
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NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
Defendants.	§	

OBJECTION OF NEXPOINT ADVISORS, L.P. TO ORDER DENYING MOTIONS TO EXTEND EXPERT DISCLOSURE AND DISCOVERY DEADLINES

COMES NOW NexPoint Advisors, L.P. (“NexPoint”), one of the defendants in the above styled and numbered Adversary Proceeding initiated by Highland Capital Management, L.P. as the plaintiff (the “Debtor”), and files this its *Objection to Order Denying Motions to Extend Expert Disclosure and Discovery Deadlines* (the “Objection”), respectfully stating as follows:

Pursuant to Rules 54(b), 72(a) and Local Civil Rule 72.1, NexPoint seeks the District Court’s review of the Bankruptcy Court’s *Order Denying Motions to Extend Expert Disclosure and Discovery Deadlines* (the “Order”). For the reasons set forth in its brief, filed

contemporaneously with this Objection and incorporated herein by reference, NexPoint submits that, in denying NexPoint leave to extend the expert disclosure and discovery deadlines, the Order is clearly erroneous and contrary to law and should, therefore, be reconsidered and reversed by the District Court.

RESPECTFULLY SUBMITTED this the 5th day of January, 2022.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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**ATTORNEYS FOR NEXPOINT ADVISORS,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 5, 2022, a true and correct copy of the foregoing document, including any exhibit(s) thereto, was served on the following recipients via the Court's CM/ECF system:

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Plaintiff,	§	Adv. No. 21-03005-sgj
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NEXPOINT ADVISORS, L.P., JAMES	§	
DONDERO, NANCY DONDERO, AND THE	§	
DUGABOY INVESTMENT TRUST,	§	
Defendants.	§	

**BRIEF IN SUPPORT OF OBJECTION OF NEXPOINT
ADVISORS, L.P. TO ORDER DENYING MOTIONS TO EXTEND
EXPERT DISCLOSURE AND DISCOVERY DEADLINES**

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COMES NOW NexPoint Advisors, L.P. (“NexPoint”), one of the defendants in the above styled and numbered Adversary Proceeding initiated by Highland Capital Management, L.P. as the plaintiff (the “Debtor”), and files this its *Brief* (the “Brief”) in support of its *Objection to Order Denying Motions to Extend Expert Disclosure and Discovery Deadlines* (the “Objection”), respectfully stating as follows:

I. RELIEF REQUESTED

1. By the Objection, and pursuant to Federal Rule of Civil Procedure 72(a) and Local Civil Rule 72.1, NexPoint seeks the District Court’s review of the Bankruptcy Court’s *Order Denying Motions to Extend Expert Disclosure and Discovery Deadlines* (the “Order”). NexPoint submits that, in denying NexPoint leave to extend the expert disclosure and discovery deadlines, the Order is clearly erroneous and contrary to law and should, therefore, be reconsidered and reversed by the District Court.

II. BACKGROUND

A. THE ADVERSARY PROCEEDING

2. The Debtor was a debtor and is now a reorganized debtor in a Chapter 11 case pending before the Bankruptcy Court.

3. The Debtor initiated this Adversary Proceeding with the filing of its original complaint against NexPoint on January 22, 2021.

4. By this Adversary Proceeding, the Debtor seeks to collect on a promissory note issued by NexPoint to the Debtor on May 31, 2017 in the original principal amount of \$30,746,812.33 (the “Note”). APP 008 ¶ 21.¹ The Note is a 30-year note and provides for an

¹ “APP” refers to the *Appendix in Support of Objection of NexPoint Advisors, L.P. to Order Denying Motions to Extend Expert Disclosure and Discovery Deadlines*, which is being filed contemporaneously herewith.

annual payment of principal and interest. APP 008 ¶ 22. After prior payments, the Debtor asserts that \$23,071,195.03 remains due and owing on the Note. APP 010 ¶ 31.

5. On July 28, 2021, the District Court entered an order adopting this Court’s report and recommendation and ordering that the reference for this Adversary Proceeding will be withdrawn once the Bankruptcy Court certifies this Adversary Proceeding as being trial ready. APP 002. As part of the same, the District Court necessarily agreed and ordered that NexPoint has a right to a trial by jury of this Adversary Proceeding.

6. Although not clear, it appears that the Bankruptcy Court is acting in the capacity of a magistrate judge, as the Bankruptcy Court itself appears to have concluded, although there is no order so specifying. APP 775 n.1; APP 776 n.5 Accordingly, in order not to waive its rights, NexPoint filed the Objection.

B. NEXPOINT’S AFFIRMATIVE DEFENSE

7. The Debtor alleges that the Note required NexPoint to make a payment of principal and interest on December 31, 2020, and that NexPoint failed to make this payment. APP 009 ¶ 26. Thus, in January 2021, the Debtor sent notice that the Note had been accelerated, and the Debtor demanded full and immediate payment. APP 009 ¶ 27.

8. One of NexPoint’s affirmative defenses in this Adversary Proceeding concerns that certain *Amended and Restated Shared Services Agreement* (the “Shared Services Agreement”) between the Debtor and NexPoint dated January 1, 2018. APP 086 ¶ 80; APP 105. The Shared Services Agreement was in place as of December 31, 2020, although the Debtor terminated it later, in 2021. APP 462 at 2–9. Under the Shared Services Agreement, the Debtor provided various services to NexPoint, including so-called “back office” services, including treasury, accounting, and payables services. APP 462 at 13–APP 464 at 9. NexPoint has alleged that, pursuant to the

Shared Services Agreement, the Debtor was responsible for ensuring that NexPoint made the allegedly required December 31, 2020 payment, although such payment would be made from NexPoint's funds. Indeed, Waterhouse (defined below) testified that it was "reasonable for NexPoint to rely on the debtors' employees to inform NexPoint of an upcoming payment due on the \$30 million promissory note." APP 473 at 22–APP 474 at 8.

9. NexPoint asserts that the Debtor failed to do so and, therefore, caused the alleged default, which it now seeks to exploit, and that, but for the Debtor's negligence, the Note would remain in place, unaccelerated. NexPoint has always asserted this as an affirmative defense. *See* Defendant's Original Answer, Docket No. 6. NexPoint's defense, however, was based on its belief that the Debtor and its employees, including Waterhouse, did nothing to facilitate or ensure the payment, as opposed to a conscious decision not to make the payment. In other words, until NexPoint deposed Mr. Waterhouse, NexPoint believed that the Debtor simply forgot to facilitate the December 31, 2020 payment of the Note as it had done in the past and as NexPoint was relying on the Debtor to do again (using NexPoint's funds of course).

10. On October 19, 2021, the Debtor deposed Frank Waterhouse ("Waterhouse"), as did NexPoint, in connection with this Adversary Proceeding. Waterhouse was the Debtor's chief financial officer in December, 2020, and either the treasurer or chief financial officer (either way an officer) of NexPoint in December, 2020. APP 155 at 3–6; APP 463 at 3–8; APP 549 ¶ 25. To be clear, Waterhouse was the Debtor's employee, although he provided services to NexPoint as well pursuant to the Shared Services Agreement. Among other things, at this deposition, Waterhouse testified that, in early December, 2020, James Dondero ("Dondero"), who at that time controlled NexPoint but did not control the Debtor, instructed Waterhouse not to cause NexPoint

to pay any more funds to the Debtor, including, expressly on the Note. APP 526 at 4–APP 528 at 17.

11. This changed the potential facts as NexPoint understood them from a situation where the Debtor simply failed utterly to facilitate the payment, as it has always done, to one where the Debtor intentionally, allegedly upon the instructions of Dondero, decided not to facilitate the payment. Assuming the Dondero instruction to be true, this raises the question of whether the Debtor thereafter had any affirmative duty with respect to the alleged instruction.

C. THE EXPERT WITNESS DEADLINES

12. NexPoint did not know that Waterhouse would provide this testimony. APP 791 ¶ 12. NexPoint understood that Dondero instructed Waterhouse to make no further payments on the Shared Services Agreement, because Dondero believed that NexPoint had overpaid by millions of dollars on the Shared Services Agreement. But NexPoint did not understand that Waterhouse would testify that Dondero instructed him also not to pay the Note.

13. If Dondero told Waterhouse in early December 2020 not to pay on the Note, then the question becomes whether Waterhouse or the Debtor thereafter “put their heads in the sand” in violation of any affirmative duty or obligation they may have had regarding the matter, such as: to ask Dondero whether they correctly understood him; to ask Dondero whether he meant NexPoint and the Note; to inform Dondero of the potential consequences of a default by potentially accelerating a 30-year promissory note; or to try to dissuade him from his decision. After all, the Debtor was responsible to facilitate the payment, the Debtor had various duties under the Shared Services Agreement, and it was in the Debtor’s interest that NexPoint would default, thus creating a conflict of interest.

14. At that time, NexPoint determined that it was appropriate, and would assist the finder of fact, to retain an expert on the “standard of care” provided for in the Shared Services Agreement. This is especially important because this will be a jury trial in the District Court. NexPoint did not believe that it would need to retain such an expert, and it had no reasonable grounds to suspect that it would need such an expert, prior to these depositions.

15. On September 6, 2021, the Bankruptcy Court entered a scheduling order that provided for a deadline of October 29, 2021 for the parties to designate experts and provide expert disclosures.

D. THE MOTION AND THE ORDER

16. On October 29, 2021, NexPoint filed its *Motion to Extend Expert Disclosure and Discovery Deadlines* (the “Motion”). APP 089. The Debtor objected, APP 534, and NexPoint filed a reply brief. APP 786.

17. The Bankruptcy Court held a hearing on the Motion on December 13, 2021. At the conclusion of the hearing, the Bankruptcy Court orally denied the Motion and stated its reasons for such denial on the record. APP 889–891.

18. The Bankruptcy Court entered the Order on December 21, 2021. APP 894.

E. NEXPOINT’S RETENTION OF STEVE PULLY AND HIS EXPERT REPORT

19. NexPoint filed its Motion as soon as it could after learning of Waterhouse’s testimony, and it filed its Motion before the deadline to designate an expert expired. However, NexPoint’s expert was not able to prepare his report before that deadline expired. Nevertheless, to demonstrate NexPoint’s speed and that there would be no delays to this Adversary Proceeding, NexPoint filed on the docket of this Adversary Proceeding its designation of Steve Pully as its

expert, together with Mr. Pully's completed expert report, on December 10, 2021. APP 830. Thus, by the time of the hearing on the Motion, NexPoint's expert had already completed his report.

III. ARGUMENTS AND AUTHORITIES

A. RECONSIDERATION OF ORDER AS ORDER OF MAGISTRATE JUDGE

20. The Bankruptcy Court is not a magistrate judge. The District Court's order on NexPoint's motion for the withdrawal of the reference provides that the Bankruptcy Court shall consider all pretrial matters, but does not state that the Bankruptcy Court shall do so as a magistrate subject to the rules applicable to magistrate judges. NexPoint therefore submits that the District Court may reconsider, modify, or reverse the Order and grant the Motion *de novo* as it could do with respect to any of its own pretrial orders under Rule 54(b), and NexPoint hereby seeks such review and reconsideration.

21. However, because the issue is uncertain, and because the Bankruptcy Court appears to understand that it is acting in the capacity of a magistrate judge, NexPoint also seeks the District Court's review of the Order under Rule 72(a). In this respect, the Federal Rules of Bankruptcy Procedure do not incorporate Rule 72, even though they incorporate most of the Federal Rules of Civil Procedure into an adversary proceeding such as this one. If Rule 72(a) applies, then the standard for reconsidering the Order is that the Order is "clearly erroneous or is contrary to law." FED. R. CIV. P. 72(a).

22. Because the Order is not dispositive, the "clearly erroneous" standard applies. *See, e.g., In re Geert Duizenstraal*, 1997 U.S. Dist. LEXIS 16506 a *3-*4 (N.D. Tex. 1997). Under this standard, an order is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Guzman v. Hacienda Records & Recording Studio Inc.*, 808 F.3d 1031,

1036 (5th Cir. 2015). *Accord Baylor Health Care Sys. v. Equitable Plan Servs.*, 955 F. Supp. 2 678, 689 (N.D. Tex. 2013).

B. STANDARD APPLICABLE TO THE MOTION

23. Rule 16(b) provides that a deadline in a scheduling order may be modified “for good cause,” although there is some uncertainty as to whether this standard applies only after a deadline has passed (which is not the case here). *See* Fed. R. Civ. P. 16(b)(4); *Marathon Fin. Ins. Inc. RRG v. Ford Motor Co.*, 591 F.3d 458, 470 (5th Cir. 2009) (“Federal Rule of Civil Procedure 16(b) governs amendment of pleadings after a scheduling order's deadline to amend has expired”).

24. When the issue concerns an “untimely submission of expert reports,” the Fifth Circuit has specified the following four factors as guiding the decision: “(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice.” *S&W Enters. v. Southtrust Bank of Ala.*, 315 F.3d 533, 536 (5th Cir. 2003). Again, this test applies to a deadline which has already expired. Logically, therefore, a lesser standard should apply when a party seeks relief prior to the expiration of a deadline, as NexPoint does here.

1. Explanation for Failure to Timely Designate Expert

25. The explanation for the requested extension of the expert deadlines was simply that the parties deposed Waterhouse on October 19, 2021, and it was not until that deposition that NexPoint knew or could reasonably have known that Waterhouse would testify that he was affirmatively instructed not to make the December 31, 2020 payment on the Note. APP 092 ¶ 12; APP 791 ¶ 11. This testimony directly contradicted Dondero’s recollection that he made no such instruction. Since NexPoint relied on Dondero’s recollection and had no reasonable grounds to believe that Waterhouse would testify differently, there was no reason for NexPoint to retain an

expert prior to the October 19, 2021 deposition of Waterhouse. In this respect, discovery worked as it should have and NexPoint should not be penalized for the natural evolution of this lawsuit.

26. Prior to this deposition, NexPoint believed that the Debtor had utterly failed to discharge its duties under the Shared Services Agreement by not facilitating the payment on the Note. This did not call for an expert. But, once Waterhouse testified that Dondero instructed him not to make the payment, the issue fundamentally changed. This important distinction has been aptly explained by the Fifth Circuit in a case where the issue was whether a trustee breached his duties:

Finders of fact are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn. Accordingly, we have explained that, as a general rule, expert testimony is not needed in many if not most cases. Moreover, although expert testimony may be necessary in a professional negligence case to establish the standard of care for the industry, an exception applies in instances of negligence that are a matter of common knowledge comprehensible to laymen.

Although Liberty Mutual contends that expert testimony was required in this case, Lamesa suggests that inasmuch as the Trustee failed to act in the face of obvious danger posed by Mrs. Schooler's ready access to the bankruptcy estate's assets, and in the face of repeated warnings and inquiries by a concerned creditor, a layperson could discern that the standard of care was not met in this case.

We agree with Lamesa that, under the facts of this case, expert testimony was not required to establish that the Trustee breached her duties. While the precise course of action the Trustee should have taken may be subject to reasonable debate, it requires no technical or expert knowledge to recognize that she affirmatively should have undertaken *some* form of action to acquire for the bankruptcy estate the assets to which it was entitled. As the bankruptcy court explained, by doing nothing, the Trustee ignored basic human nature.

In re Schooler, 725 F.3d 498, 514-15 (5th Cir. 2013) (internal citations and quotations omitted)

27. Thus, it was only after the Waterhouse deposition that NexPoint learned that, if the jury believes Waterhouse, the issue of the Debtor's standard of care under the Shared Services Agreement becomes much more complicated, thereby necessitating an expert on that standard of

care. Nor is the Debtor free of blame with respect to the timing of when NexPoint learned of Waterhouse's testimony. On May 11, 2021, the Debtor served its amended responses to NexPoint's discovery. APP 813. In those, the Debtor answered the following interrogatory:

INTERROGATORY NO. 2:

If the Debtor contends that it was not responsible for causing payments to be made under the Note on NexPoint's behalf pursuant to the Shared Services Agreement, explain the legal and factual basis for such contention.

RESPONSE TO INTERROGATORY NO. 2:

The Debtor objects to Interrogatory No. 2 on the ground that it seeks a legal conclusion or legal analysis. Subject to its objection, the Shared Services Agreement did not provide that the Debtor was responsible for causing payments to be made under the Note. The Debtor further states that after the Debtor sent NexPoint the Default Letters, NexPoint did not contend that the Debtor was required to make payments under the Note on NexPoint's behalf. The Debtor's personnel caused the January Payment to be processed upon instruction from NexPoint.

APP 819.

28. Even though NexPoint asked the Debtor to explain, factually, why the Debtor was not responsible for causing payments to be made, rather than including in its answer that Dondero gave Waterhouse the alleged instruction, the Debtor merely answered that the contract did not impose this responsibility on the Debtor. Yet, the Debtor's answer to the following request for production strongly suggests that the Debtor knew of the alleged instruction, which it did not include it in the interrogatory answer:

REQUEST FOR PRODUCTION NO. 1:

All Communications pursuant to which any director, officer, or employee of the Debtor was advised or instructed not to make the December Payment or to cause the December Payment to be made.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

Subject to the General Objections, the Debtor is unaware of any documents responsive to Request for Production No. 1. Any Communications responsive to Request for Production No. 1 were verbal.

APP 822 (emphasis added).

29. The Debtor could and should have stated what these verbal communications were in May, 2021. Instead, NexPoint was forced to wait until Waterhouse's deposition to learn of the alleged verbal communication. Alternatively, the Debtor too did not know ahead of time how Mr. Waterhouse would answer, but then it can hardly accuse NexPoint of any delay.

2. The Importance of the Expert

30. This is a jury trial where the issues concern the Debtor's standard of care under the Shared Services Agreement. "Expert testimony is generally required to prove the applicable standard of care." *Quijano v. United States*, 325 F.3d 564, 567 (5th Cir. 2003) (emphasis added); *Streber v. Hunter*, 221 F.3d 701, 724 (5th Cir. 2000) ("Breach of the standard of care must generally be proven by expert testimony"). [E]xpert testimony is necessary to establish the standard of care . . . Similarly, breach of a fiduciary duty or a conflict of interest requires proof of expert testimony." *Geiserman v. MacDonald*, 893 F.2d 787, 793-94 (5th Cir. 1990) (internal quotations removed) (emphasis added).

31. The Shared Services Agreement, in place during November and December, 2020 (when Dondero allegedly gave Waterhouse the instruction), provides as follows:

Section 6.01. Standard of Care. Except as otherwise expressly provided herein, each Covered Person shall discharge its duties under this Agreement with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. To the extent not inconsistent with the foregoing, each Covered Person shall follow its customary standards, policies, and procedures in performing its duties hereunder.

APP 115.

32. “Covered Person” includes the “Staff and Services Provider,” *i.e.* the Debtor, and its managers, directors, officers, and shareholders. APP 106. There can be no dispute that section 6.01 applied to the Debtor itself, and to Waterhouse.

33. The Shared Services Agreement identifies at least three services that the Debtor was required to provide that are directly on point:

(a) *Back- and Middle Office.* Assistance and advice with respect to back- and middle-office functions including, but not limited to . . . finance and accounting, payments, operation, book keeping, cash management . . . accounts payable . . .

(k) *Ancillary Services.* Assistance and advice on all things ancillary or incidental to the foregoing.

(l) *Other.* Assistance and advice relating to such other back- and middle-office services in connection with the day-to-day business of [NexPoint] as [NexPoint] and [the Debtor] may from time to time agree.

APP 107–109 (emphasis added).

34. The Shared Services Agreement also sets forth the standard of care that the Debtor was to provide to NexPoint in discharging the Debtor’s duties under the Shared Services Agreement:

the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

APP 115 § 6.01

35. Assistance and advice—again, *advice*—with respect to “payments” is expressly included. And, should there be any doubt, the Debtor’s own Chief Financial Officer at the time confirmed that it was “reasonable for NexPoint to rely on the debtors’ employees to inform NexPoint of an upcoming payment due on the \$30 million promissory note.” APP 473 at 22–APP 474 at 8. The question therefore is, assuming that Dondero instructed Waterhouse not to

make the payment on the Note, whether Waterhouse thereafter doing nothing to clarify and ensure that he correctly understood Dondero, or to advise Dondero of the potential consequences of non-payment, or to seek to dissuade Dondero from his instruction, comported with “the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”

36. This is appropriate for an expert to review because a lay juror is not likely to resolve these questions from personal experience or common sense. Thus, extending the expert discovery deadline is important for NexPoint to fully present its defense and for the jury to be able to discharge its duties in resolving the defense.

3. No Potential Prejudice to the Debtor

37. Granting the Motion would not work any prejudice on the Debtor. NexPoint filed its expert report on December 10, 2021, and only a short additional time would be needed for the Debtor to depose that expert and potentially retain a rebuttal expert. Trial of this Adversary Proceeding is not set and, on December 17, 2021, the Debtor filed its motion for summary judgment, the hearing on which will not be until March 8, 2022. The Bankruptcy Court will then provide a report and recommendation on that motion, subject to *de novo* review by the District Court, which will likely take weeks if not months to resolve. Thus, granting the Motion would not have delayed the ultimate trial of this Adversary Proceeding at all.

38. With respect to the Debtor’s argument that it will be prejudiced by potentially having to expend funds to retain a rebuttal expert, NexPoint’s first response is that, if the Debtor prevails on its claims under the Note, it will seek to recover its fees and costs from NexPoint. Second, and perhaps more importantly, having to incur costs for an expert in a \$24 million lawsuit,

where the Debtor has always known of NexPoint's affirmative defense and very likely knew of Waterhouse's testimony before (as there were two other employees, David Klos and Kristin Hendrix, who are still employees of the Debtor, who testified at deposition that Waterhouse told them of Dondero's alleged instruction at approximately the same time the instruction was allegedly given), is not legally cognizable prejudice any more than it would be in any case:

any additional costs incurred from an extension would not be unreasonable. Here, Plaintiffs seek an extension so they can offer an expert witness for their products liability claims. Defendants have been aware of these claims since this case's inception. Because expert witnesses are crucial for Plaintiffs' prima facie case, Defendants have known they would need to prepare rebuttal evidence since this case began on October 14, 2019. These facts do not present an instance in which a party adds an additional claim, or introduces an eleventh-hour witness, to foist additional litigation costs without warning.

Adams v. Medtronics Inc., 2021 U.S. Dist. LEXIS 47246 at *12 (E.D. Tex. 2021).

4. Availability of Continuance to Avoid Prejudice

39. As this Adversary Proceeding is not set for trial, as it will not be set for trial until it is certified as trial ready by the Bankruptcy Court, and as it will not be certified as trial ready until after the Debtor's motion for summary judgment is adjudicated, there is no need for a continuance and this factor is not relevant to the ultimate issue. As discussed above, granting the Motion would not cause any delay in the ultimate adjudication of this Adversary Proceeding.

C. THE BANKRUPTCY COURT CLEARLY ERRED IN ENTERING THE ORDER

40. As noted, NexPoint submits that the District Court can and should review the Motion and Order under Rule 54(b) *de novo* by considering the underlying evidence, arguments, and opposition. This is especially the case because the District Court will try this Adversary Proceeding to a jury, and the District Court should control what evidence is presented to the jury.

41. If, however, the District Court applies Rule 72(a), then NexPoint submits that the District Court should reconsider the Order and grant the Motion because the Bankruptcy Court's denial of the Motion was clearly erroneous.

42. In this respect, the Bankruptcy Court concluded that, because NexPoint had always asserted its affirmative defense that the Debtor caused the alleged default:

I do not think the sudden statement of Frank Waterhouse suddenly is a game-changer that creates some new need for an expert. So, therefore, looking at the factors, I don't think the explanation here to extend the deadlines has merit.

APP 890 at 19–23.

43. This was clearly erroneous. The only evidence submitted was that NexPoint did not learn of Waterhouse's testimony until he was deposed, and that NexPoint did not have a reasonable ability to learn of that testimony beforehand. No evidence to the contrary was presented. And, the Bankruptcy Court failed to take into account the Debtor's failure to fully answer NexPoint's interrogatory, which asked for any facts as to why the Debtor did not facilitate or make the payment on the Note.

44. The Bankruptcy Court also concluded that there was no importance to the amended schedule:

And I do not think an expert can testify about contractual duties and attempt to interpret its provisions. That is the job of the Court, and I think it is improper subject matter for an expert.

I don't buy into any notion that this is terribly unique territory or exotic. I mean, it was a contract. Shared services agreements are not all that unique, shall we say? It's not a device that is used solely in the investment advisor fund world. It's in the corporate world generally. Courts see these in all kinds of cases. So, again, I don't think contract interpretation needs an expert here or should have an expert here.

And just because experts are sometimes -- often, I should say -- appropriate in legal malpractice or medical malpractice or other kinds of tort cases where duties might be needing of elaboration, here, the contract spells out the duties, and I just don't think any of those cases argued are applicable.

APP 891 at 3–19.

45. Here, the Bankruptcy Court not only clearly erred; it erred as a matter of law. NexPoint’s expert was not being asked to interpret the contract or tell the jury what the contract says. Rather, he was only being asked to opine on whether the Debtor’s failure comported with the standard of care actually set forth in the contract:

the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

APP 115 § 6.01.

46. Opining on whether the Debtor acted with the care, skill, prudence, and diligence under the circumstances as a prudent person in a like situation would have is a question of fact. It is not a legal interpretation of a contract. Again, the Fifth Circuit holds that “[e]xpert testimony is generally required to prove the applicable standard of care.” *Quijano*, 325 F.3d at 567) (emphasis added); *Streber*, 221 F.3d at 724 (“Breach of the standard of care must generally be proven by expert testimony”). Clearly, therefore, as expert testimony on this issue is potentially required, it cannot invade the province of the Court to determine what the applicable standard of care is.

47. The Bankruptcy Court also found prejudice in denying the Motion:

Prejudice, I do think there is potential prejudice in allowing an extension of this deadline. It will be costly, add a layer of expense and delay to this litigation, when I don’t think it would be admissible at trial ultimately.

APP 891 at 20–23.

48. This finding is likewise clearly erroneous and erroneous as a matter of law. The Bankruptcy Court based its finding of prejudice on its view that the expert testimony may not be admissible. As noted above, this is wrong: *Dabuert* issues aside, expert testimony on whether a standard of care has been complied with is absolutely admissible and may be required. The Bankruptcy Court’s overall finding of prejudice cannot be separated from this wrong sub-finding.

And, on the issue of cost, as noted above the Debtor will have a claim for any increased fees and expenses if it prevails at trial and such increased fees and expenses—ordinary incidents of high-stakes litigation—are not by themselves legally cognizable prejudice any more than they are in any case.

IV. CONCLUSION

49. The District Court will conduct the jury trial in this case, and the District Court should control what evidence the jury will weigh. In the end, the trial here will be about the truth, the facts, and the equities. A scheduling order should not be used to prevent that result. Here, the delay is not the fault of NexPoint, since NexPoint did not know what Waterhouse would say until he was deposed. Any delay is the fault of the Debtor in not fully answering NexPoint's discovery. The expert is important because, if the jury believes Waterhouse, then NexPoint should have the ability to demonstrate that the Debtor nevertheless breached its duties to NexPoint in causing the alleged default on the Note; something on which expert testimony is certainly appropriate, if not required. And, there is no real prejudice to the Debtor, certainly not by way of any delay in the ultimate adjudication of this case. In the end, while schedules and scheduling orders are important, they should not be used to prejudice an otherwise viable issue or tactically benefit a litigant. NexPoint therefore prays that the District Court reverse the Order and grant the Motion.

RESPECTFULLY SUBMITTED this the 5th day of January, 2022.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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**ATTORNEYS FOR NEXPOINT ADVISORS,
L.P.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 5, 2022, a true and correct copy of the foregoing document, including any exhibit(s) thereto, was served on the following recipients via the Court's CM/ECF system:

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ATTORNEYS FOR NEXPOINT ADVISORS, L.P.

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Debtor.	§	Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adv. No. 21-03005-sgj
vs.	§	Civ. Act. No. 3:21-cv-00880-C
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
Defendants.	§	

**APPENDIX IN SUPPORT OF OBJECTION OF NEXPOINT
ADVISORS, L.P. TO ORDER DENYING MOTIONS TO EXTEND
EXPERT DISCLOSURE AND DISCOVERY DEADLINES**

APPENDIX

<u>Docket No.</u>	<u>Document</u>	<u>App. Page</u>
CA 10	District Court Order (adopting Bankruptcy Court's report and recommendation)	001
AP 63	Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty	003
AP 64	Defendant NexPoint Advisors, L.P.'s Answer to Amended Complaint	076
AP 86	Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines	089
AP 104	Highland's Objection to Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines	534
AP 105	Highland's Memorandum of Law in Support of Objection to Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines	538
AP 106	Declaration of John A. Morris in Support of Highland's Objection to Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines	561
AP 109	Memorandum Opinion and Order Denying Arbitration Request and Related Relief	774
AP 115	Reply of Defendant NexPoint Advisors, L.P. in Support of Motion to Extend Expert Disclosure and Discovery Deadlines	786
AP 120	Notice of Expert Report of Steven J. Pully	830
AP 124	Transcript of Hearing Held on December 13, 2021	856
AP 138	Order Denying Motions to Extend Expert Disclosure and Discovery Deadlines	894

U.S. Bankruptcy Court, Adversary Proceeding No. 21-03005 (“**AP**”)

U.S. District Court, Civil Action No. 3:21-cv-0880-C (“**CA**”)

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

In re:)
)
HIGHLAND CAPITAL MANAGEMENT, L.P.,) Case No. 19-34054-SGJ-11
)
Debtor(s).)

* * *

HIGHLAND CAPITAL MANAGEMENT, L.P.,)
)
Plaintiff(s),)
)
v.)
) Adversary No. 21-03005-SGJ
)
NEXPOINT ADVISORS, L.P.,)
)
Defendant(s).) Civil Action No. 3:21-CV-0880-C

ORDER

CAME BEFORE THIS COURT FOR CONSIDERATION the Report and Recommendation, signed by the Honorable Stacey G. C. Jernigan, United States Bankruptcy Judge, therein recommending that the District Court: (1) grant Defendant's Motion to Withdraw the Reference at such time as the Bankruptcy Court certifies that litigation is trial-ready; and (2) defer to the Bankruptcy Court the handling of all pretrial matters.¹

After due consideration and having conducted a *de novo* review, the Court finds that Defendant's limited objections should be **OVERRULED**. Furthermore, after reviewing the thorough and well-reasoned Report and Recommendation, the Court is of the opinion that the

¹ On July 22, 2021, Defendant Nexpoint Advisors, L.P. filed limited objections to the Report and Recommendation.

Report and Recommendation entered by the Bankruptcy Court should be **ADOPTED** as the findings and conclusions of this Court.

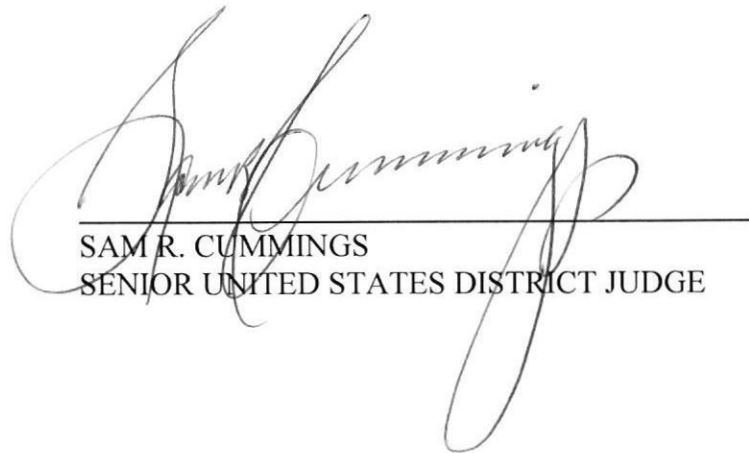
IT IS THEREFORE ORDERED that Defendant's Motion to Withdraw Reference shall be granted, but only at such time as the Bankruptcy Court certifies to this Court that the litigation is trial-ready.

IT IS FURTHER ORDERED that the Bankruptcy Court shall handle all pretrial matters, including discovery and the filing of reports and recommendations on dispositive motions, which shall in turn be considered by the undersigned Senior United States District Judge.

IT IS FURTHER ORDERED that this civil action be **STAYED** pending further Order of the Court.²

SO ORDERED.

Dated July 28, 2021.



SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

² The stay imposed in this civil action shall be lifted upon the filing of a subsequent report and recommendation or at such time as the Bankruptcy Court certifies to this Court that the litigation is trial-ready.

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	
Debtor.	§	Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	21-03005
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
Defendants.	§	

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.

**AMENDED COMPLAINT FOR (I) BREACH OF CONTRACT,
(II) TURNOVER OF PROPERTY, (III) FRAUDULENT TRANSFER, AND (IV)
BREACH OF FIDUCIARY DUTY**

Plaintiff, Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the “Debtor”) in the above captioned chapter 11 case (the “Bankruptcy Case”), and the plaintiff (the “Plaintiff”) in the above-captioned adversary proceeding (the “Adversary Proceeding”) by its undersigned counsel, as and for its amended complaint (the “Complaint”) against defendants NexPoint Advisors, L.P. (“NPA”), James Dondero (“Mr. Dondero”), Nancy Dondero (“Ms. Dondero”), and The Dugaboy Investment Trust (“Dugaboy”) and together with NPA, Mr. Dondero, and Ms. Dondero, the “Defendants”), alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT

1. The Debtor brings this action against Defendants in connection with NPA’s default under a promissory note executed by NPA in favor of the Debtor in the original principal amount of \$30,746,812.33, and payable in annual installments. NPA has failed to pay amounts when due under the Note (as defined below), the Note is in default, and the amounts due under the Note have been accelerated pursuant to the terms of the Note.

2. In paragraph 42 of NPA’s *First Amended Answer* [Docket No. 34-3], NPA contends that the Debtor orally agreed to relieve it of the obligations under the notes upon fulfillment of “conditions subsequent” (the “Alleged Agreement”). NPA further contends that the Alleged Agreement was entered into between James Dondero, acting on behalf of NPA, and his sister, Nancy Dondero, as representative of a majority of the Class A shareholders of the Plaintiff, including Dugaboy (the “Representative”), acting on behalf of the Debtor. At the time Mr.

Dondero entered into the Alleged Agreement on behalf of NPA, he controlled both NPA and the Debtor and was the lifetime beneficiary of Dugaboy.

3. Based on its books and records, discovery to date, and other facts, the Debtor believes that the Alleged Agreement is a fiction created after the commencement of this Adversary Proceeding for the purpose of avoiding or at least delaying paying the obligations due under the Note.

4. Nevertheless, the Debtor amends its Complaint to add certain claims and name additional parties who would be liable to the Debtor if the Alleged Agreement were determined to exist and be enforceable. Specifically, in addition to pursuing claims against NPA for breach of its obligations under the Note and for turnover, the Debtor adds alternative claims (a) against NPA for actual fraudulent transfer and aiding and abetting Dugaboy in its breach of fiduciary duty, (b) against Dugaboy for declaratory relief and for breach of fiduciary duty, and (c) against Nancy Dondero for aiding and abetting Dugaboy in the breach of his fiduciary duties.

5. As remedies, the Debtor seeks (a) damages from NPA in an amount equal to (i) the outstanding principal due under the Note (as defined below), plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses, as provided for in the Note), for NPA's breach of its obligations under the Note, (b) turnover by NPA to the Debtor of the foregoing amounts; (c) avoidance of the Alleged Agreement and the transfers thereunder and recovery of the funds transferred from the Plaintiff to, or for the benefit of, NPA pursuant to the Note; (d) declaratory relief, and (e) damages arising from the Defendants' breach of fiduciary duties or aiding and abetting thereof.

JURISDICTION AND VENUE

6. This adversary proceeding arises in and relates to the Debtor’s case pending before the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the “Court”) under chapter 11 of the Bankruptcy Code.

7. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

8. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b), and, pursuant to Rule 7008 of the Bankruptcy Rules, the Debtor consents to the entry of a final order by the Court in the event that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

9. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

THE PARTIES

10. The Debtor is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

11. Upon information and belief, NPA is a limited partnership with offices located in Dallas, Texas, and organized under the laws of the state of Delaware.

12. Upon information and belief, Mr. Dondero is an individual residing in Dallas, Texas. He is the co-founder of the Debtor and was the Debtor’s President and Chief Executive Officer until his resignation on January 9, 2020. At all relevant times, Mr. Dondero controlled NPA; Mr. Dondero also controlled the Debtor until January 9, 2020.

13. Upon information and belief, Dugaboy is (a) a limited partner of the Debtor, and (b) one of Mr. Dondero’s family investment trusts for which is he a lifetime beneficiary.

14. Upon information and belief, Nancy Dondero is an individual residing in the state of Florida and who is Mr. Dondero’s sister, and a trustee of Dugaboy.

CASE BACKGROUND

15. On October 16, 2019, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “Delaware Court”), Case No. 19-12239 (CSS) (the “Highland Bankruptcy Case”).

16. On October 29, 2019, the U.S. Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors (the “Committee”) with the following members: (a) Redeemer Committee of Highland Crusader Fund (“Redeemer”), (b) Meta-e Discovery, (c) UBS Securities LLC and UBS AG London Branch, and (d) Acis Capital Management, L.P. and Acis Capital Management GP LLC (collectively, “Acis”).

17. On June 25, 2021, the U.S. Trustee in this Court filed that certain *Notice of Amended Unsecured Creditors’ Committee* [Docket No. 2485] notifying the Court that Acis and Redeemer had resigned from the Committee.

18. On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].²

19. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

² All docket numbers refer to the main docket for the Debtor’s Case maintained by this Court.

STATEMENT OF FACTS

A. The NPA Note

20. NPA is the maker under a promissory note in favor of the Debtor.

21. Specifically, on May 31, 2017, NPA executed a promissory note in favor of the Debtor, as payee, in the original principal amount of \$30,746, 812.33 (the “Note”). A true and correct copy of the Note is attached hereto as Exhibit 1.

22. Section 2 of the Note provides: “Payment of Principal and Interest.

Principal and interest under this Note shall be due and payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the “Annual Installment”) until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the “Maturity Date”).

23. Section 3 of the Note provides:

Prepayment Allowed: Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

24. Section 4 of the Note provides:

Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of the Payee in exercising any right, power, or privilege hereunder shall operate as a waiver hereof.

25. Section 6 of the Note provides:

Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

B. NPA's Default Under the Note

26. NPA failed to make the payment due under the Note on December 31, 2020 in the amount of \$1,406,111.92.

27. By letter dated January 7, 2021, the Debtor made demand on NPA for immediate payment under the Note (the "Demand Letter"). A true and correct copy of the Demand Letter is attached hereto as **Exhibit 2**. The Demand Letter provides:

Because of Maker's failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$24,471,804.98; however, interest continues to accrue under the Note.

The Note is in default, and payment is due immediately.

Demand Letter (emphasis in the original).

28. On January 14, 2021, in an apparent attempt to cure its default, NPA paid the Debtor the \$1,406,111.92 that was due on December 31, 2020 (the "Partial Payment").

29. The Note does not contain a cure provision. Therefore, the Partial Payment did not cure NPA's default. Accordingly, on January 15, 2021, the Debtor sent NPA a follow-up letter to its Demand Letter (the "Second Demand Letter"), a true and correct copy of which is attached hereto as **Exhibit 3**, stating:

[T]he Partial Payment will be applied as payment against the amounts due under the Note in accordance with Section 3 thereof. **The Note remains in default, and all amounts due thereunder are due immediately.**

After adjusting for the Partial Payment and the continued accrual of interest, the amount due under the Note as of January 15, 2021, is \$23,071,195.03 (which amount does not include expenses incurred to date in collecting the Note).

Second Demand Letter (emphasis in original).

30. Despite the Debtor's demands, NPA did not pay the amount demanded by the Debtor on January 7, 2021, or at any time thereafter.

31. As of January 15, 2021, the total outstanding principal and accrued but unpaid interest due under the Note was \$23,071,195.03

32. Pursuant to Section 4 of the Note, the Note is in default, and is currently due and payable.

C. The Debtor Files the Original Complaint

33. On January 22, 2021, the Debtor filed the *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate* [Docket No. 1] (the "Original Complaint"). In the Original Complaint, the Debtor brought claims for (i) breach of contract for NPA's breach of its obligations under the Note and (ii) turnover by NPA for the outstanding amounts under the Note, plus all accrued and unpaid interest until the date of payment plus the Debtor's costs of collection and reasonable attorney's fees.

D. NPA's Affirmative Defenses

34. On March 1, 2021, NPA filed *Defendant's Original Answer* [Docket No. 6] (the "Original Answer"). In its Original Answer, NPA asserted three affirmative defenses: (i) the claims are barred because the Plaintiff caused NPA to default, (ii) the claims are barred because the Plaintiff caused NPA to delay in making payment, and (iii) waiver and estoppel. *See id.* ¶¶39-41.

35. On June 9, 2021, NPA filed *Defendant's First Amended Answer* [Docket No. 35-3] (the "Amended Answer"), that asserted a new affirmative defense; namely, that the

Debtor previously agreed that it would not collect on the Notes “upon fulfillment of conditions subsequent” (*i.e.*, the Alleged Agreement) *id.* ¶42.

36. According to NPA, the Alleged Agreement was orally entered into “sometime between December of the year each note was made and February of the following year.”

37. According to NPA, Mr. Dondero, acting on its behalf, entered into the Alleged Agreement with his sister, Nancy Dondero, acting as the Representative.

38. Mr. Dondero controlled both NPA and the Debtor at the time he entered into the Alleged Agreement on behalf of NPA.

39. Upon information and belief, the Debtor’s books and records do not reflect the Alleged Agreement.

E. Dugaboy Lacked Authority to Act on Behalf of the Debtor

40. Under section 4.2 of the *Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.* (the “Limited Partnership Agreement”), and attached hereto as **Exhibit 4**, Dugaboy was not authorized to enter into the Alleged Agreement on behalf of the Partnership, or otherwise bind the Partnership (as “Partnership” is defined in the Limited Partnership Agreement).

41. Section 4.2(b) of the Limited Partnership Agreement states:

Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership’s business, transact any business in the Partnership’s name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

Exhibit 4, § 4.2(b).

42. No provision in the Limited Partnership Agreement authorizes any of the Partnership’s limited partners to bind the Partnership.

43. Nancy Dondero also lacked authority to enter into the Alleged Agreement or to otherwise bind the Debtor

FIRST CLAIM FOR RELIEF
(Against NPA)

(For Breach of Contract)

44. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

45. The Note is a binding and enforceable contract.

46. NPA breached the Note by failing to pay all amounts due to the Debtor upon NPA's default and acceleration.

47. Pursuant to the Note, the Debtor is entitled to damages from NPA in an amount equal to (i) the aggregate outstanding principal due under the Note, plus (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses), for NPA's breach of its obligations under the Note.

48. As a direct and proximate cause of NPA's breach of the Note, the Debtor has suffered damages in the amount of at least \$23,071,195.03, as of January 15, 2021, plus an amount equal to all accrued buy unpaid interest from that date, plus the Debtor's cost of collection.

SECOND CLAIM FOR RELIEF
(Against NPA)

(Turnover by NPA Pursuant to 11 U.S.C. § 542(b))

49. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

50. NPA owes the Debtor an amount equal to (i) the aggregate outstanding principal due under the Note, plus (ii) all accrued and unpaid interest thereon until the date of

payment, plus (iii) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses), for NPA's breach of its obligations under the Note.

51. The Note is property of the Debtor's estate that is matured and payable upon default and acceleration.

52. NPA has not paid the amount due under the Note to the Debtor.

53. The Debtor has made demand for the turnover of the amount due under the Note.

54. As of the date of filing of this Complaint, NPA has not turned over the amount due under the Note.

55. The Debtor is entitled to the amount due under the Note.

THIRD CLAIM FOR RELIEF

(Against NPA)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 548(a)(1)(A) and 550)

56. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

57. The Debtor made the transfer pursuant to the Alleged Agreement within two years of the Petition Date.

58. Mr. Dondero entered into the Alleged Agreement on behalf of NPA with actual intent to hinder, delay, or defraud a present or future creditor, demonstrated by, *inter alia*:

- (a) The transfer was made to, or for the benefit of, NPA, an insider of the Debtor.
- (b) Mr. Dondero entered into the Alleged Agreement on behalf of NPA with his sister, Nancy Dondero.
- (c) Mr. Dondero did not inform the Debtor's CFO or outside auditors about the Alleged Agreement.

- (d) The Debtor's books and record do not reflect the Alleged Agreement.
- (e) The Alleged Agreement was not subject to negotiation.
- (f) The value of the consideration received by the Debtor for the transfer was not reasonably equivalent in value.

59. The pattern of conduct, series of transactions, and general chronology of events under inquiry in connection with the debt NPA incurred under the Note demonstrates a scheme of fraud.

60. Pursuant to 11 U.S.C. § 550, the Debtor is entitled to recover for the benefit of the Debtor's estates the transfer made pursuant to the Alleged Agreement from NPA.

61. Accordingly, the Debtor is entitled to a judgement: (i) avoiding the Alleged Agreement and the transfer made thereunder, and (ii) recovering from NPA an amount equal to all obligations remaining under the Note.

FOURTH CLAIM FOR RELIEF

(Against NPA)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. §§ 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1))

62. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

63. The Debtor made the transfers pursuant to the Alleged Agreement after, or within a reasonable time before, creditors' claims arose.

64. Mr. Dondero entered into the Alleged Agreement on behalf of NPA with actual intent to hinder, delay, or defraud a present or future creditor of the Debtor, demonstrated by, *inter alia*:

- (g) The transfer was made to, or for the benefit of, NPA, an insider of the Debtor.

- (h) Mr. Dondero entered into the Alleged Agreement on behalf of NPA with his sister, Nancy Dondero.
- (i) Mr. Dondero did not inform the Debtor's CFO or outside auditor's about the Alleged Agreement.
- (j) Upon information and belief, the Debtor's books and record do not reflect the Alleged Agreement.
- (k) The Alleged Agreement was not subject to negotiation.
- (l) The value of the consideration received by the Debtor for the transfer was not reasonably equivalent in value.

65. Pursuant to 11 U.S.C. § 550, the Debtor is entitled to recover for the benefit of the Debtor's estates the transfers made in exchange for the Alleged Agreement from NPA.

66. Accordingly, the Debtor is entitled to a judgement: (i) avoiding the Alleged Agreement and the transfer made thereunder, and (ii) recovering from NPA an amount equal to all obligations remaining under the Notes.

FIFTH CLAIM FOR RELIEF
(Against Dugaboy and Ms. Dondero)
(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

67. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

68. A bona fide, actual, present dispute exists between the Debtor, on the one hand, and Dugaboy and Ms. Dondero on the other hand, concerning whether Dugaboy and/or Ms. Dondero, acting as the Representative, were authorized to enter into the Alleged Agreement on the Debtor's behalf.

69. A judgment declaring the parties' respective rights and obligations will resolve their dispute.

70. Pursuant to Bankruptcy Rule 7001, the Debtor specifically seeks declarations that:

- (a) limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the Limited Partnership Agreement,
- (b) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) was authorized under the Limited Partnership Agreement to enter into the Alleged Agreement on behalf of the Partnership,
- (c) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) otherwise had any right or authority to enter into the Alleged Agreement on behalf of the Partnership, and
- (d) the Alleged Agreement is null and void.

SIXTH CLAIM FOR RELIEF
(Against Dugaboy and Ms. Dondero)
(Breach of Fiduciary Duty)

71. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

72. If Dugaboy, as a limited partner, or Ms. Dondero, as Representative, had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy and/or Ms. Dondero would owe the Debtor a fiduciary duty.

73. If Dugaboy or Ms. Dondero (as Representative) had the authority to enter into the Alleged Agreement on behalf of the Debtor, then Dugaboy and/or Ms. Dondero breached their fiduciary duty of care to the Debtor by entering into and authorizing the purported Alleged Agreement on behalf of the Debtor.

74. Accordingly, the Debtor is entitled to recover from Dugaboy and Ms. Dondero (a) actual damages that the Debtor suffered as a result of their breach of fiduciary duty, and (b) for punitive and exemplary damages.

SEVENTH CLAIM FOR RELIEF
(Against James Dondero and Nancy Dondero)
(Aiding and Abetting a Breach of Fiduciary Duty)

75. The Debtor repeats and re-alleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

76. James Dondero and Nancy Dondero (together, the “Donderos”) were aware that Dugaboy would have fiduciary duties to the Debtor if it acted to bind the Debtor.

77. The Donderos aided and abetted Dugaboy’s breach of its fiduciary duties to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.

78. The Donderos aided and abetted Dugaboy’s breach of its fiduciary duty to the Debtor by knowingly participating in the authorization of the purported Alleged Agreement.

79. Accordingly, the Donderos are jointly and severally liable (a) for the actual damages that the Debtor suffered as a result of aiding and abetting Dondero’s breaches of fiduciary duties, and (b) for punitive and exemplary damages

WHEREFORE, the Debtor prays for judgment as follows:

- (i) On its First Claim for Relief, damages in an amount to be determined at trial but includes (a) the outstanding principal due under the Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to

the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses);

(ii) On its Second Claim for Relief, ordering turnover by NPA to the Debtor of an amount equal to (a) the outstanding principal due under the Note, plus (b) all accrued and unpaid interest thereon until the date of payment, plus (c) an amount equal to the Debtor's costs of collection (including all court costs and reasonable attorneys' fees and expenses);

(iii) On its Third Claim for Relief, avoidance of the Alleged Agreement and the transfers thereunder pursuant to the Alleged Agreement arising from actual fraudulent transfer under section 548 of the Bankruptcy Code;

(iv) On its Fourth Claim for Relief, avoidance of the Alleged Agreement and the transfers thereunder pursuant to the Alleged Agreement of funds arising from actual fraudulent transfer under Tex. Bus. & C. Code § 24.005(a)(1);

(v) On its Fifth Claim for Relief, a declaration that: (a) limited partners, including but not limited to Dugaboy, have no right or authority to take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically provided in the Limited Partnership Agreement, (b) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) was authorized under the Limited Partnership Agreement to enter into the Alleged Agreement on behalf of the Partnership, (c) neither Dugaboy nor Ms. Dondero (whether individually or as Representative) otherwise had any right or authority to enter into the Alleged

Agreement on behalf of the Partnership, and (d) the Alleged Agreement is null and void;

(vi) On its Sixth Claim for Relief, actual damages from Dugaboy and Ms. Dondero, in an amount to be determined at trial, that Debtor suffered as a result of their breach of fiduciary duty, and for punitive and exemplary damages;

(vii) On its Seventh Claim for Relief, actual damages from the Donderos, jointly and severally, in an amount to be determined at trial, that Debtor suffered as a result of aiding and abetting Dugaboy's breaches of fiduciary duty, and for punitive and exemplary damages and

(iii) Such other and further relief as this Court deems just and proper.

Dated: As of July 13, 2021

PACHULSKI STANG ZIEHL & JONES LLP
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Ira D. Kharasch (CA Bar No. 109084)
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-and-

/s/ Zachery Z. Annable

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Counsel for Highland Capital Management, L.P.

EXHIBIT 1

PROMISSORY NOTE

\$30,746,812.33

May 31, 2017

THIS PROMISSORY NOTE (this "Note") is in substitution for and supersedes in their entirety each of those certain promissory notes described in Exhibit A hereto, from NexPoint Advisors, L.P., as Maker, and Highland Capital Management, L.P. as Payee (collectively, the "Prior Notes"), together with the aggregate outstanding principal and accrued and unpaid interest represented thereby.

FOR VALUE RECEIVED, NEXPOINT ADVISORS, L.P. ("Maker") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, L.P. ("Payee"), in legal and lawful tender of the United States of America, the principal sum of THIRTY MILLION, SEVEN HUNDRED FORTY SIX THOUSAND, EIGHT HUNDRED TWELVE AND 33/100 DOLLARS (\$30,746,812.33), together with interest, on the terms set forth below. All sums hereunder are payable to Payee at 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at the rate of six percent (6.00%) per annum from the date hereof until Maturity Date (hereinafter defined), compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable annually.

2. Payment of Principal and Interest. Principal and interest under this Note shall be payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the "Annual Installment") until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this Note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the "Maturity Date").

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same

shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

9. Prior Notes. The original of each of the Prior Notes superseded hereby shall be marked "VOID" by Payee.

MAKER:

NEXPOINT ADVISORS, L.P.

By: NexPoint Advisors GP, LLC, its general partner


By:  _____
Name:
Title:

EXHIBIT A

PRIOR NOTES

Loan Date	Initial Note Amount	Interest Rate	Principal and Interest Outstanding as of May 31, 2017
8/21/14	\$4,000,000	6.00%	\$4,616,739.73
10/1/14	\$6,000,000	6.00%	\$6,959,671.23
11/14/14	\$2,500,000	6.00%	\$2,881,780.82
1/29/15	\$3,100,000	6.00%	\$3,534,679.45
7/22/15	\$12,075,000	6.00%	\$12,753,941.10
	\$27,675,000		\$30,746,812.33

EXHIBIT 2

HIGHLAND CAPITAL MANAGEMENT, L.P.

January 7, 2021

NexPoint Advisors, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James Dondero

Re: Demand on Promissory Note

Dear Mr. Dondero,

On May 31, 2017, NexPoint Advisors, L.P, entered into that certain promissory note in the original principal amount of \$30,746,812.33 (the “Note”) in favor of Highland Capital Management, L.P. (“Payee”).

As set forth in Section 2 of the Note, accrued interest and principal on the Note is due and payable in thirty equal annual payments with each payment due on December 31 of each calendar year. Maker failed to make the payment due on December 31, 2020.

Because of Maker’s failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$24,471,804.98; however, interest continues to accrue under the Note.

The Note is in default, and payment is due immediately. Payments on the Note must be made in immediately available funds. Payee’s wire information is attached hereto as **Appendix A**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Note or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are expressly reserved. Interest, including default interest if applicable, on the Note will continue to accrue until the Note is paid in full. Any such interest will remain the obligation of Maker.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
Highland Capital Management, L.P.
Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
DC Sauter

Appendix A

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

EXHIBIT 3

HIGHLAND CAPITAL MANAGEMENT, L.P.

January 15, 2021

NexPoint Advisors, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James Dondero

Re: Partial Payment on Promissory Note

Dear Mr. Dondero,

On May 31, 2017, NexPoint Advisors, L.P. (“Maker”), entered into that certain promissory note in the original principal amount of \$30,746,812.33 (the “Note”) in favor of Highland Capital Management, L.P. (“Payee”). A copy of the Note is attached hereto as **Appendix A**.

On January 7, 2021, Payee notified you that because of Maker’s failure to make the payment due on December 31, 2020 (the “Default”), the Note was in default and that all principal, interest, and any other amounts due on the Note were immediately due and payable. The amount due and payable on the Note as of January 8, 2021, was \$24,471,804.98; however, interest continues to accrue under the Note.

On January 14, 2021, Payee received a wire from Maker in the amount of \$1,406,111.92 (the “Partial Payment”). To reiterate, the amount due under the Note as of January 8, 2021, was \$24,471,804.98. The Partial Payment will be applied as payment against the amounts due under the Note pursuant to Section 3 thereof. **The Note remains in default, and all amounts due thereunder are due immediately.**

After adjusting for the Partial Payment and the continued accrual of interest, the amount due under the Note as of January 15, 2021, is \$23,071,195.03 (which amount does not include expenses incurred to date in collecting the Note). Payment of such amount is due immediately. Payments on the Note must be made in immediately available funds. Payee’s wire information is attached hereto as **Appendix B**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Note or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are expressly reserved, including the right to recover Payee’s expenses incurred in collecting the Note. Interest, including default interest if applicable, on the Note will continue to accrue until the Note is paid in full. Any such interest will remain the obligation of Maker.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
Highland Capital Management, L.P.
Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
DC Sauter
A. Lee Hogewood III

Appendix A

PROMISSORY NOTE

\$30,746,812.33

May 31, 2017

THIS PROMISSORY NOTE (this “**Note**”) is in substitution for and supersedes in their entirety each of those certain promissory notes described in Exhibit A hereto, from NexPoint Advisors, L.P., as Maker, and Highland Capital Management, L.P. as Payee (collectively, the “**Prior Notes**”), together with the aggregate outstanding principal and accrued and unpaid interest represented thereby.

FOR VALUE RECEIVED, NEXPOINT ADVISORS, L.P. (“**Maker**”) promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, L.P. (“**Payee**”), in legal and lawful tender of the United States of America, the principal sum of THIRTY MILLION, SEVEN HUNDRED FORTY SIX THOUSAND, EIGHT HUNDRED TWELVE AND 33/100 DOLLARS (\$30,746,812.33), together with interest, on the terms set forth below. All sums hereunder are payable to Payee at 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at the rate of six percent (6.00%) per annum from the date hereof until Maturity Date (hereinafter defined), compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable annually.

2. Payment of Principal and Interest. Principal and interest under this Note shall be payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the “**Annual Installment**”) until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this Note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the “**Maturity Date**”).

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same

shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.


8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

9. Prior Notes. The original of each of the Prior Notes superseded hereby shall be marked "VOID" by Payee.

MAKER:

NEXPOINT ADVISORS, L.P.

By: NexPoint Advisors GP, LLC, its general partner

By:  _____
Name:
Title:

**EXHIBIT A
PRIOR NOTES**

Loan Date	Initial Note Amount	Interest Rate	Principal and Interest Outstanding as of May 31, 2017
8/21/14	\$4,000,000	6.00%	\$4,616,739.73
10/1/14	\$6,000,000	6.00%	\$6,959,671.23
11/14/14	\$2,500,000	6.00%	\$2,881,780.82
1/29/15	\$3,100,000	6.00%	\$3,534,679.45
7/22/15	\$12,075,000	6.00%	\$12,753,941.10
	\$27,675,000		\$30,746,812.33

Appendix B

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

EXHIBIT 4

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THE PARTNERSHIP INTERESTS REPRESENTED BY THIS LIMITED PARTNERSHIP AGREEMENT HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933 OR UNDER ANY STATE SECURITIES ACTS IN RELIANCE UPON EXEMPTIONS UNDER THOSE ACTS. THE SALE OR OTHER DISPOSITION OF THE PARTNERSHIP INTERESTS IS PROHIBITED UNLESS THAT SALE OR DISPOSITION IS MADE IN COMPLIANCE WITH ALL SUCH APPLICABLE ACTS. ADDITIONAL RESTRICTIONS ON TRANSFER OF THE PARTNERSHIP INTERESTS ARE SET FORTH IN THIS AGREEMENT.

**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

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**FOURTH AMENDED AND RESTATED
AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP is entered into on this 24th day of December, 2015, to be effective as of December 24, 2015, by and among Strand Advisors, Inc., a Delaware corporation (“*Strand*”), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner.

Certain terms used in this Agreement are defined in Article 2.

ARTICLE 1

GENERAL

1.1. Continuation. Subject to the provisions of this Agreement, the Partners hereby continue the Partnership as a limited partnership pursuant to the provisions of the Delaware Act. Except as expressly provided herein, the rights and obligations of the Partners and the administration and termination of the Partnership shall be governed by the Delaware Act.

1.2. Name. The name of the Partnership shall be, and the business of the Partnership shall be conducted under the name of Highland Capital Management, L.P. The General Partner, in its sole and unfettered discretion, may change the name of the Partnership at any time and from time to time and shall provide Limited Partners with written notice of such name change within twenty (20) days after such name change.

1.3. Purpose. The purpose and business of the Partnership shall be the conduct of any business or activity that may lawfully be conducted by a limited partnership organized pursuant to the Delaware Act. Any or all of the foregoing activities may be conducted directly by the Partnership or indirectly through another partnership, joint venture, or other arrangement.

1.4. Term. The Partnership was formed as a limited partnership on July 7, 1997, and shall continue until terminated pursuant to this Agreement.

1.5. Partnership Offices; Addresses of Partners.

(a) Partnership Offices. The registered office of the Partnership in the State of Delaware shall be 1013 Centre Road, Wilmington, Delaware 19805-1297, and its registered agent for service of process on the Partnership at that registered office shall be Corporation Service Company, or such other registered office or registered agent as the General Partner may from time to time designate. The principal office of the Partnership shall be 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other place as the General Partner may from time to time designate. The Partnership may maintain offices at such other place or places as the General Partner deems advisable.

(b) Addresses of Partners. The address of the General Partner is 300 Crescent Court, Suite 700, Dallas, Texas 75201. The address of each Limited Partner shall be the address of that Limited Partner appearing on the books and records of the Partnership. Each Limited Partner agrees to provide the General Partner with prompt written notice of any change in his/her/its address.

ARTICLE 2

DEFINITIONS

2.1. Definitions. The following definitions shall apply to the terms used in this Agreement, unless otherwise clearly indicated to the contrary in this Agreement:

“Additional Capital Contribution” has the meaning set forth in Section 3.1(b) of this Agreement.

“Adjusted Capital Account Deficit” means, with respect to any Partner, the deficit balance, if any, in the Capital Account of that Partner as of the end of the relevant Fiscal Year, or other relevant period, giving effect to all adjustments previously made thereto pursuant to Section 3.7 and further adjusted as follows: (i) credit to that Capital Account, any amounts which that Partner is obligated or deemed obligated to restore pursuant to any provision of this Agreement or pursuant to Treasury Regulations Section 1.704-1(b)(2)(ii)(c); (ii) debit to that Capital Account, the items described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6); and (iii) to the extent required under the Treasury Regulations, credit to that Capital Account (A) that Partner’s share of “minimum gain” and (B) that Partner’s share of “partner nonrecourse debt minimum gain.” (Each Partner’s share of the minimum gain and partner nonrecourse debt minimum gain shall be determined under Treasury Regulations Sections 1.704-2(g) and 1.704-2(i)(5), respectively.)

“Affiliate” means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term *“control”* means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting Securities, by contract or otherwise.

“Agreement” means this Fourth Amended and Restated Agreement of Limited Partnership, as it may be amended, supplemented, or restated from time to time.

“Business Day” means Monday through Friday of each week, except that a legal holiday recognized as such by the government of the United States or the State of Texas shall not be regarded as a Business Day.

“Capital Account” means the capital account maintained for a Partner pursuant to Section 3.7(a).

“Capital Contribution” means, with respect to any Partner, the amount of money or property contributed to the Partnership with respect to the interest in the Partnership held by that Person.

“Certificate of Limited Partnership” means the Certificate of Limited Partnership filed with the Secretary of State of Delaware by the General Partner, as that Certificate may be amended, supplemented or restated from time to time.

“Class A Limited Partners” means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.

“Class A Limited Partnership Interest” means a Partnership Interest held by a Partner in its capacity as a Class A Limited Partner.”

“**Class B Limited Partner**” means those Partners holding a Class B Limited Partnership Interest, as shown on Exhibit A.

“**Class B Limited Partnership Interest**” means a Partnership Interest held by a Partner in its capacity as a Class B Limited Partner.”

“**Class B NAV Ratio Trigger Period**” means any period during which the Class B Limited Partner’s aggregate capital contributions, including the original principal balance of the Contribution Note, and reduced by the aggregate amount of distributions to the Class B Limited Partner, exceed 75 percent of the product of the Class B Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class B NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class B NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class B NAV Ratio Trigger Period.

“**Class C Limited Partner**” means those Partners holding a Class C Limited Partnership Interest, as shown on Exhibit A.

“**Class C Limited Partnership Interest**” means a Partnership Interest held by a Partner in its capacity as a Class C Limited Partner.”

“**Class C NAV Ratio Trigger Period**” means any period during which an amount equal to \$93,000,000.00 reduced by the aggregate amount of distributions to the Class C Limited Partner after the Effective Date exceeds 75 percent of the product of the Class C Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class C NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class C NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class C NAV Ratio Trigger Period.

“**Code**” means the Internal Revenue Code of 1986, as amended and in effect from time to time.

“**Contribution Note**” means that certain Secured Promissory Note dated December 21, 2015 by and among Hunter Mountain Investment Trust, as maker, and the Partnership as Payee.

“**Default Loan**” has the meaning set forth in Section 3.1(c)(i).

“**Defaulting Partner**” has the meaning set forth in Section 3.1(c).

“**Delaware Act**” means the Delaware Revised Uniform Limited Partnership Act, Part IV, Title C, Chapter 17 of the Delaware Corporation Law Annotated, as it may be amended, supplemented or restated from time to time, and any successor to that Act.

“**Effective Date**” means the date first recited above.

“**Fiscal Year**” has the meaning set forth in Section 3.11(b).

“**Founding Partner Group**” means, all partners holding partnership interests in the Partnership immediately before the Effective Date.

“**General Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a General Partner pursuant to the terms of this Agreement; and (ii) has not ceased to be a General Partner pursuant to the terms of this Agreement.

“**Limited Partner**” means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a Limited Partner pursuant to the terms of this Agreement, and (ii) has not ceased to be a Limited Partner pursuant to the terms of this Agreement.

“**Liquidator**” has the meaning set forth in Section 5.3.

“**Losses**” means, for each Fiscal Year, the losses and deductions of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any expenditures described in Code Section 705(a)(2)(B).

“**Majority Interest**” means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.

“**NAV Ratio Trigger Period**” means a Class B NAV Ratio Trigger Period or a Class C NAV Ratio Trigger Period.

“**Net Increase in Working Capital Accounts**” means the excess of (i) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the end of the period being measured over (ii) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the beginning of the period being measured; provided, however, that amounts within each of the aforementioned categories shall be excluded from the calculation to the extent they are specifically identified as being derived from investing or financing activities. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership and appropriate adjustments may be made to the extent the Partnership adds new ledger accounts to its books and records that are current assets or current liabilities.

“**New Issues**” means Securities that are considered to be “new issues,” as defined in the Conduct Rules of the National Association of Securities Dealers, Inc.

“**Nonrecourse Deduction**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(1), as computed under Treasury Regulations Section 1.704-2(c).

“**Nonrecourse Liability**” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(3).

“**Operating Cash Flow**” means Total Revenue less Total Operating Expenses plus Depreciation & Amortization less Net Increase in Working Capital Accounts year over year. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership.

“*Partner*” means a General Partner or a Limited Partner.

“*Partner Nonrecourse Debt*” has the meaning set forth in Treasury Regulations Section 1.704-2(b)(4).

“*Partner Nonrecourse Deductions*” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(2).

“*Partner Nonrecourse Debt Minimum Gain*” has the meaning set forth in Treasury Regulations Section 1.704-2(i)(5).

“*Partnership*” means Highland Capital Management, L.P., the Delaware limited partnership established pursuant to this Agreement.

“*Partnership Capital*” means, as of any relevant date, the net book value of the Partnership’s assets.

“*Partnership Interest*” means the interest acquired by a Partner in the Partnership including, without limitation, that Partner’s right: (a) to an allocable share of the Profits, Losses, deductions, and credits of the Partnership; (b) to a distributive share of the assets of the Partnership; (c) if a Limited Partner, to vote on those matters described in this Agreement; and (d) if the General Partner, to manage and operate the Partnership.

“*Partnership Minimum Gain*” has the meaning set forth in Treasury Regulations Section 1.704-2(d).

“*Percentage Interest*” means the percentage set forth opposite each Partner’s name on Exhibit A as such Exhibit may be amended from time to time in accordance with this Agreement.

“*Person*” means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.

“*Priority Distributions*” has the meaning set forth in Section 3.9(b).

“*Profits*” means, for each Fiscal Year, the income and gains of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any income described in Code Section 705(a)(1)(B).

“*Profits Interest Partner*” means any Person who is issued a Partnership Interest that is treated as a “profits interest” for federal income tax purposes.

“*Purchase Notes*” means those certain Secured Promissory Notes of even date herewith by and among Hunter Mountain Investment Trust, as maker, and The Dugaboy Investment Trust, The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1, and The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #2, each as Payees of the respective Secured Promissory Notes.

“**Record Date**” means the date established by the General Partner for determining the identity of Limited Partners entitled to vote or give consent to Partnership action or entitled to exercise rights in respect of any other lawful action of Limited Partners.

“**Second Amended Buy-Sell and Redemption Agreement**” means that certain Second Amended and Restated Buy-Sell and Redemption Agreement, dated December 21, 2015, to be effective as of December 21, 2015 by and between the Partnership and its Partners, as may be amended, supplemented, or restated from time to time.

“**Securities**” means the following: (i) securities of any kind (including, without limitation, “securities” as that term is defined in Section 2(a)(1) of the Securities Act; (ii) commodities of any kind (as that term is defined by the U.S. Securities Laws and the rules and regulations promulgated thereunder); (iii) any contracts for future or forward delivery of any security, commodity or currency; (iv) any contracts based on any securities or group of securities, commodities or currencies; (v) any options on any contracts referred to in clauses (iii) or (iv); or (vi) any evidences of indebtedness (including participations in or assignments of bank loans or trade credit claims). The items set forth in clauses (i) through (vi) herein include, but are not limited to, capital stock, common stock, preferred stock, convertible securities, reorganization certificates, subscriptions, warrants, rights, options, puts, calls, bonds, mutual fund interests, debentures, notes, certificates of deposit, letters of credit, bankers acceptances, trust receipts and other securities of any corporation or other entity, whether readily marketable or not, rights and options, whether granted or written by the Partnership or by others, treasury bills, bonds and notes, any securities or obligations issued or guaranteed by the United States or any foreign country or any state or possession of the United States or any foreign country or any political subdivision or agency or instrumentality of any of the foregoing, and derivatives of any of the foregoing.

“**Securities Act**” means the Securities Act of 1933, as amended, and any successor to such statute.

“**Substitute Limited Partner**” has the meaning set forth in Section 4.6(a).

“**Transfer**” or derivations thereof, of a Partnership Interest means, as a noun, the transfer, sale, assignment, exchange, pledge, hypothecation or other disposition of a Partnership Interest, or any part thereof, directly or indirectly, and as a verb, voluntarily or involuntarily to transfer, sell, assign, exchange, pledge, hypothecate or otherwise dispose of.

“**Treasury Regulations**” means the Department of Treasury Regulations promulgated under the Code, as amended and in effect (including corresponding provisions of succeeding regulations).

2.2. Other Definitions. All terms used in this Agreement that are not defined in this Article 2 have the meanings contained elsewhere in this Agreement.

ARTICLE 3

FINANCIAL MATTERS

3.1. Capital Contributions.

(a) Initial Capital Contributions. The initial Capital Contribution of each Partner shall be set forth in the books and records of the Partnership.

(b) Additional Capital Contributions.

(i) The General Partner, in its reasonable discretion and for a *bona fide* business purpose, may request in writing that the Founding Partner Group make additional Capital Contributions in proportion to their Percentage Interests (each, an “*Additional Capital Contribution*”).

(ii) Any failure by a Partner to make an Additional Capital Contribution requested under Section 3.1(b)(i) on or before the date on which that Additional Capital Contribution was due shall result in the Partner being in default.

(c) Consequences to Defaulting Partners. In the event a Partner is in default under Section 3.1(b) (a “*Defaulting Partner*”), the Defaulting Partner, in its sole and unfettered discretion, may elect to take either one of the option set forth below.

(i) Default Loans. If the Defaulting Partner so elects, the General Partner shall make a loan to the Defaulting Partner in an amount equal to that Defaulting Partner’s additional capital contribution (a “*Default Loan*”). A Default Loan shall be deemed advanced on the date actually advanced. Default Loans shall earn interest on the outstanding principal amount thereof at a rate equal to the Applicable Federal Mid-Term Rate (determined by the Internal Revenue Service for the month in which the loan is deemed made) from the date actually advanced until the same is repaid in full. The term of any Default Loan shall be six (6) months, unless otherwise extended by the General Partner in its sole and unfettered discretion. If the General Partner makes a Default Loan, the Defaulting Partner shall not receive any distributions pursuant to Section 3.9(a) or Section 5.3 or any proceeds from the Transfer of all or any part of its Partnership Interest while the Default Loan remains unpaid. Instead, the Defaulting Partner’s share of distributions or such other proceeds shall (until all Default Loans and interest thereon shall have been repaid in full) first be paid to the General Partner. Such payments shall be applied first to the payment of interest on such Default Loans and then to the repayment of the principal amounts thereof, but shall be considered, for all other purposes of this Agreement, to have been distributed to the Defaulting Partner. The Defaulting Partner shall be liable for the reasonable fees and expenses incurred by the General Partner (including, without limitation, reasonable attorneys’ fees and disbursements) in connection with any enforcement or foreclosure upon any Default Loan and such costs shall, to the extent enforceable under applicable law, be added to the principal amount of the applicable Default Loan. In addition, at any time during the term of such Default Loan, the Defaulting Partner shall have the right to repay, in full, the Default Loan (including interest and any other charges). If the General Partner makes a Default Loan, the Defaulting Partner shall be deemed to have pledged to the General Partner and granted to the General Partner a continuing first priority security interest in, all of the Defaulting Partner’s Partnership Interest to secure the payment of the principal of, and interest on, such Default Loan in accordance with the provisions hereof, and for such purpose this Agreement shall constitute a security agreement. The Defaulting Partner shall promptly execute, acknowledge and deliver such financing statements, continuation statements or other documents and take such other actions as the General Partner shall request in writing in order to perfect or continue the perfection of such security interest; and, if the Defaulting Partner shall fail to do so within seven (7) days after the Defaulting Partner’s receipt of a notice making demand therefor, the General Partner is hereby appointed the attorney-in-fact of, and is hereby authorized on behalf of, the Defaulting Partner, to execute, acknowledge and deliver all such documents and take all such other actions as may be required to perfect such security interest. Such appointment and authorization are coupled with an interest and shall be irrevocable. The General Partner shall, prior to exercising any right or remedy (whether at law, in equity or pursuant to the terms hereof) available to it in connection with such security interest, provide to the Defaulting Partner a notice, in reasonable detail, of the right or remedy to be exercised and the intended timing of such exercise which shall not be less than five (5) days following the date of such notice.

(ii) Reduction of Percentage Interest. If the Defaulting Partner does not elect to obtain a Default Loan pursuant to Section 3.1(c)(i), the General Partner shall reduce the Defaulting Partner's Percentage Interest in accordance with the following formula:

The Defaulting Partner's new Percentage Interest shall equal the product of (1) the Defaulting Partner's current Percentage Interest, multiplied by (2) the quotient of (a) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), divided by (b) the sum of (i) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), plus (ii) the amount of the additional capital contribution that such Defaulting Partner failed to make when due.

To the extent any downward adjustment is made to the Percentage Interest of a Partner pursuant to this Section 3.1(c)(ii), any resulting benefit shall accrue to the Partners (other than the Defaulting Partner) in proportion to their respective Percentage Interests.

3.2. Allocations of Profits and Losses.

(a) Allocations of Profits. Except as provided in Sections 3.4, 3.5, and 3.6, Profits for any Fiscal Year will be allocated to the Partners as follows:

(i) First, to the Partners until cumulative Profits allocated under this Section 3.2(a)(i) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(iii) for all prior periods in the inverse order in which such Losses were allocated; and

(ii) Next, to the Partners until cumulative Profits allocated under this Section 3.2(a)(ii) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(ii) for all prior periods in the inverse order in which such Losses were allocated; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(b) Allocations of Losses. Except as provided in Sections 3.4, 3.5, and 3.6, Losses for any Fiscal Year will be will be allocated as follows:

(i) First, to the Partners until cumulative Losses allocated under this Section 3.2(b)(i) for all prior periods equal the cumulative Profits allocated to the Partners under Section 3.2(a)(iii) for all prior periods in the inverse order in which such Profits were allocated; and

(ii) Next, to the Partners in proportion to their respective positive Capital Account balances until the aggregate Capital Account balances of the Partners (excluding any negative Capital Account balances) equal zero; *provided, however*, losses shall first be allocated to reduce amounts that were last allocated to the Capital Accounts of the Partners; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(c) Limitation on Loss Allocations. If any allocation of Losses would cause a Limited Partner to have an Adjusted Capital Account Deficit, those Losses instead shall be allocated to the General Partner.

3.3. Allocations on Transfers. Taxable items of the Partnership attributable to a Partnership Interest that has been Transferred (including the simultaneous decrease in the Partnership Interest of existing Partners resulting from the admission of a new Partner) shall be allocated in accordance with Section 4.3(d).

3.4. Special Allocations. If the requisite stated conditions or facts are present, the following special allocations shall be made in the following order:

(a) Partnership Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3, if there is a net decrease in Partnership Minimum Gain during any taxable year or other period for which allocations are made, prior to any other allocation under this Agreement, each Partner shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in proportion to, and to the extent of, an amount equal to that Partner's share of the net decrease in Partnership Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(a) is intended to comply with the partnership minimum gain chargeback requirements of the Treasury Regulations and shall be subject to all exceptions provided therein.

(b) Partner Nonrecourse Debt Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3 (other than Section 3.4(a)), if there is a net decrease in Partner Nonrecourse Debt Minimum Gain with respect to a Partner Nonrecourse Debt during any taxable year or other period for which allocations are made, any Partner with a share of such Partner Nonrecourse Debt Minimum Gain as of the beginning of the year shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in an amount equal to that Partner's share of the net decrease in the Partner Nonrecourse Debt Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be so allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(b) is intended to comply with the partner nonrecourse debt minimum gain chargeback requirements of the Treasury Regulations, shall be interpreted consistently with the Treasury Regulations and shall be subject to all exceptions provided therein.

(c) Qualified Income Offset. If a Partner unexpectedly receives any adjustments, allocations or distributions described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (d)(5) or (d)(6), then items of Partnership income and gain shall be specially allocated to each such Partner in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the Adjusted Capital Account Deficit of the Partner as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(c) shall be made if and only to the extent that the Partner would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been tentatively made without considering this Section 3.4(c).

(d) Gross Income Allocation. If a Partner has a deficit Capital Account at the end of any Fiscal Year of the Partnership that exceeds the sum of (i) the amount the Partner is obligated to restore, and (ii) the amount the Partner is deemed to be obligated to restore pursuant to the penultimate sentences of Treasury Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5), then each such Partner shall be specially allocated items of income and gain of the Partnership in the amount of the excess as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(d) shall be made if and only to

the extent that the Partner would have a deficit Capital Account in excess of that sum after all other allocations provided for in this Article 3 have been tentatively made without considering Section 3.4(c) or 3.4(d).

(e) Nonrecourse Deductions. Nonrecourse Deductions for any taxable year or other period for which allocations are made shall be allocated among the Partners in accordance with their Percentage interests.

(f) Partner Nonrecourse Deductions. Notwithstanding anything to the contrary in this Agreement, any Partner Nonrecourse Deductions for any taxable year or other period for which allocations are made will be allocated to the Partner who bears the economic risk of loss with respect to the Partner Nonrecourse Debt to which the Partner Nonrecourse Deductions are attributable in accordance with Treasury Regulations Section 1.704-2(i).

(g) Section 754 Adjustments. To the extent an adjustment to the adjusted tax basis of any asset of the Partnership under Code Section 734(b) or Code Section 743(b) is required, pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m), to be taken into account in determining Capital Accounts, the amount of the adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis of the asset) and that gain or loss shall be specially allocated to the Partners in a manner consistent with the manner in which their Capital Accounts are required to be adjusted pursuant to that Section of the Treasury Regulations.

(h) Section 481 Adjustments. Any allocable items of income, gain, expense, deduction or credit required to be made by Section 481 of the Code as the result of the sale, transfer, exchange or issuance of a Partnership Interest will be specially allocated to the Partner receiving said Partnership Interest whether such items are positive or negative in amount.

3.5. Curative Allocations. The “*Basic Regulatory Allocations*” consist of (i) the allocations pursuant to Section 3.2(c), and (ii) the allocations pursuant to Sections 3.4. Notwithstanding any other provision of this Agreement, the Basic Regulatory Allocations shall be taken into account in allocating items of income, gain, loss and deduction among the Partners so that, to the extent possible, the net amount of the allocations of other items and the Basic Regulatory Allocations to each Partner shall be equal to the net amount that would have been allocated to each such Partner if the Basic Regulatory Allocations had not occurred. For purposes of applying the foregoing sentence, allocations pursuant to this Section 3.5 shall be made with respect to allocations pursuant to Section 3.4 (g) and (h) only to the extent that it is reasonably determined that those allocations will otherwise be inconsistent with the economic agreement among the Partners. To the extent that a special allocation under Section 3.4 is determined not to comply with applicable Treasury Regulations, then the Partners intend that the items shall be allocated in accordance with the Partners’ varying Percentage Interests throughout each tax year during which such items are recognized for tax purposes.

3.6. Code Section 704(c) Allocations. In accordance with Code Section 704(c) and the Treasury Regulations thereunder, income, gain, loss and deduction with respect to property contributed to the capital of the Partnership shall, solely for tax purposes, be allocated among the Partners so as to take account of any variation at the time of the contribution between the tax basis of the property to the Partnership and the fair market value of that property. Except as otherwise provided herein, any elections or other decisions relating to those allocations shall be made by the General Partner in any manner that reasonably reflects the purpose and intent of this Agreement. Allocations of income, gain, loss and deduction pursuant to this Section 3.6 are solely for purposes of federal, state and local taxes and shall not affect, or in any way be taken into account in computing, the Capital Account of any Partner or the share

of Profits, Losses, other tax items or distributions of any Partner pursuant to any provision of this Agreement.

3.7. Capital Accounts.

(a) Maintenance of Capital Accounts. The Partnership shall establish and maintain a separate capital account ("Capital Account") for each Partner in accordance with the rules of Treasury Regulations Section 1.704-1(b)(2)(iv), subject to and in accordance with the provisions set forth in this Section 3.7.

(i) The Capital Account balance of each Partner shall be credited (increased) by (A) the amount of cash contributed by that Partner to the capital of the Partnership, (B) the fair market value of property contributed by that Partner to the capital of the Partnership (net of liabilities secured by that contributed property that the Partnership assumes or takes subject to under Code Section 752), and (C) that Partner's allocable share of Profits and any items in the nature of income or gain which are specially allocated pursuant to Sections 3.4 and 3.5; and

(ii) The Capital Account balance of each Partner shall be debited (decreased) by (A) the amount of cash distributed to that Partner by the Partnership, (B) the fair market value of property distributed to that Partner by the Partnership (net of liabilities secured by that distributed property that such Partner assumes or takes subject to under Code Section 752), (C) that Partner's allocable share of expenditures of the Partnership described in Code Section 705(a)(2)(B), and (D) that Partner's allocable share of Losses and any items in the nature of expenses or losses which are specially allocated pursuant to Sections 3.2, 3.4 and 3.5.

The provisions of this Section 3.7 and the other provisions of this Agreement relating to the maintenance of Capital Accounts have been included in this Agreement to comply with Code Section 704(b) and the Treasury Regulations promulgated thereunder and will be interpreted and applied in a manner consistent with those provisions. The General Partner may modify the manner in which the Capital Accounts are maintained under this Section 3.7 in order to comply with those provisions, as well as upon the occurrence of events that might otherwise cause this Agreement not to comply with those provisions.

(b) Negative Capital Accounts. If any Partner has a deficit balance in its Capital Account, that Partner shall have no obligation to restore that negative balance or to make any Capital Contribution by reason thereof, and that negative balance shall not be considered an asset of the Partnership or of any Partner.

(c) Interest. No interest shall be paid by the Partnership on Capital Contributions or on balances in Capital Accounts.

(d) No Withdrawal. No Partner shall be entitled to withdraw any part of his/her/its Capital Contribution or his/her/its Capital Account or to receive any distribution from the Partnership, except as provided in Section 3.9 and Article 5.

(e) Loans From Partners. Loans by a Partner to the Partnership shall not be considered Capital Contributions.

(f) Revaluations. The Capital Accounts of the Partners shall not be "booked-up" or "booked-down" to their fair market values under Treasury Regulations Section 1.704(c)-1(b)(2)(iv)(f) or otherwise.

3.8. Distributive Share for Tax Purpose. All items of income, deduction, gain, loss or credit that are recognized for federal income tax purposes will be allocated among the Partners in accordance with the allocations of Profits and Losses hereunder as determined by the General Partner in its sole and unfettered discretion. Notwithstanding the foregoing, the General Partner may (i) as to each New Issue, specially allocate to the Partners who were allocated New Issue Profit from that New Issue any short-term capital gains realized during the Fiscal Year upon the disposition of such New Issue during that Fiscal Year, and (ii) specially allocate items of gain (or loss) to Partners who withdraw capital during any Fiscal Year in a manner designed to ensure that each withdrawing Partner is allocated gain (or loss) in an amount equal to the difference between that Partner's Capital Account balance (or portion thereof being withdrawn) at the time of the withdrawal and the tax basis for his/her/ its Partnership Interest at that time (or proportionate amount thereof); *provided, however*, that the General Partner may, without the consent of any other Partner, (a) alter the allocation of any item of taxable income, gain, loss, deduction or credit in any specific instance where the General Partner, in its sole and unfettered discretion, determines such alteration to be necessary or appropriate to avoid a materially inequitable result (*e.g.*, where the allocation would create an inappropriate tax liability); and/or (b) adopt whatever other method of allocating tax items as the General Partner determines is necessary or appropriate in order to be consistent with the spirit and intent of the Treasury Regulations under Code Sections 704(b) and 704(c).

3.9. Distributions.

(a) General. The General Partner may make such pro rata or non-pro rata distributions as it may determine in its sole and unfettered discretion, without being limited to current or accumulated income or gains, but no such distribution shall be made out of funds required to make current payments on Partnership indebtedness; provided, however, that the General Partner may not make non-pro rata distributions under this Section 3.9(a) during an NAV Ratio Trigger Period without the consent of the Class B Limited Partner (in the case of a Class B NAV Ratio Trigger Period) and/or the Class C Limited Partner (in the case of a Class C NAV Ratio Trigger Period); provided, further this provision should not be interpreted to limit in any way the General Partner's ability to make non-pro rata tax distributions under Section 3.9(c) and Section 3.9(f). The Partnership has entered into one or more credit facilities with financial institutions that may limit the amount and timing of distributions to the Partners. Thus, the Partners acknowledge that distributions from the Partnership may be limited. Any distributions made to the Class B Limited Partner or the Class C Limited Partner pursuant to Section 3.9(b) shall reduce distributions otherwise allocable to such Partners under this Section 3.9(a) until such aggregate reductions are equal to the aggregate distributions made to the Class B Partners and the Class C Partners under Section 3.9(b).

(b) Priority Distributions. Prior to the distribution of any amounts to Partners pursuant to Section 3.9(a), and notwithstanding any other provision in this Agreement to the contrary, the Partnership shall make the following distributions ("**Priority Distributions**") pro-rata among the Class B Limited Partner and the Class C Limited Partner in accordance with their relative Percentage Interests:

(i) No later than March 31st of each calendar year, commencing March 31, 2017, an amount equal to \$1,600,000.00;

(ii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to three percent (3%) of the Partnership's investment gain for the prior year, as reflected in the Partnership's books and records within ledger account number 90100 plus three percent (3%) of the gross realized investment gains for the prior year of Highland Select Equity Fund, as reflected in its books and records;

(iii) No later than March 31st of each year, commencing March 31, 2017, an amount equal to ten percent (10%) of the Partnership's Operating Cash Flow for the prior year; and

(iv) No later than December 24th of each year, commencing December 24, 2016, an amount equal to the aggregate annual principal and interest payments on the Purchase Notes for the then current year.

(c) Tax Distributions. The General Partner may, in its sole discretion, declare and make cash distributions pursuant hereto to the Partners to allow the federal and state income tax attributable to the Partnership's taxable income that is passed through the Partnership to the Partners to be paid by such Partners (a "**Tax Distribution**"). The General Partner may, in its discretion, make Tax Distributions to the Founding Partner Group without also making Tax Distributions to other Partners; provided, however, that if the General Partner makes Tax Distributions to the Founding Partner Group, Tax Distributions must also be made the Class B Limited Partner to the extent the Class B Limited Partner provides the Partnership with documentation showing it is subject to an entity-level federal income tax obligation. Notwithstanding anything else in this Agreement, the General Partner may declare and pay Tax Distributions even if such Tax Distributions cause the Partnership to be unable to make Priority Distributions under Section 3.9(b).

(d) Payments Not Deemed Distributions. Any amounts paid pursuant to Sections 4.1(e) or 4.1(h) shall not be deemed to be distributions for purposes of this Agreement.

(e) Withheld Amounts. Notwithstanding any other provision of this Section 3.9 to the contrary, each Partner hereby authorizes the Partnership to withhold and to pay over, or otherwise pay, any withholding or other taxes payable by the Partnership with respect to that Partner as a result of that Partner's participation in the Partnership. If and to the extent that the Partnership shall be required to withhold or pay any such taxes, that Partner shall be deemed for all purposes of this Agreement to have received a payment from the Partnership as of the time that withholding or tax is paid, which payment shall be deemed to be a distribution with respect to that Partner's Partnership Interest to the extent that the Partner (or any successor to that Partner's Partnership Interest) is then entitled to receive a distribution. To the extent that the aggregate of such payments to a Partner for any period exceeds the distributions to which that Partner is entitled for that period, the amount of such excess shall be considered a loan from the Partnership to that Partner. Such loan shall bear interest (which interest shall be treated as an item of income to the Partnership) at the "Applicable Federal Rate" (as defined in the Code), as determined hereunder from time to time, until discharged by that Partner by repayment, which may be made in the sole and unfettered discretion of the General Partner out of distributions to which that Partner would otherwise be subsequently entitled. Any withholdings authorized by this Section 3.9(d) shall be made at the maximum applicable statutory rate under the applicable tax law unless the General Partner shall have received an opinion of counsel or other evidence satisfactory to the General Partner to the effect that a lower rate is applicable, or that no withholding is applicable.

(f) Special Tax Distributions. The Partnership shall, upon request of such Founding Partner, make distributions to the Founding Partners (or loans, at the election of the General Partner) in an amount necessary for each of them to pay their respective federal income tax obligations incurred through the effective date of the Third Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., the predecessor to this Agreement.

(g) Tolling of Priority Distributions. In the event of a "Honis Trigger Event," as defined in the Second Amended Buy-Sell and Redemption Agreement, the Partnership shall not make any distributions, including priority distributions under Section 3.9(b), to the Class B Limited Partner or the Class C Limited Partner until such time as a replacement trust administrator, manager and general partner,

as applicable, acceptable to the Partnership in its sole discretion, as indicated by an affirmative vote of consent by a Majority Interest, shall be appointed to the Class B Limited Partner/Class C Limited Partner and any of its direct or indirect owners that have governing documents directly affected by a Honis Trigger Event.

3.10. Compensation and Reimbursement of General Partner.

(a) Compensation. The General Partner and any Affiliate of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements unless approved by a Majority Interest; provided, however, that no compensation above five million dollars per year may be approved, even by a Majority Interest, during a NAV Ratio Trigger Period.

(b) Reimbursement for Expenses. In addition to amounts paid under other Sections of this Agreement, the General Partner and its Affiliates shall be reimbursed for all expenses, disbursements, and advances incurred or made, and all fees, deposits, and other sums paid in connection with the organization and operation of the Partnership, the qualification of the Partnership to do business, and all related matters.

3.11. Books, Records, Accounting, and Reports.

(a) Records and Accounting. The General Partner shall keep or cause to be kept appropriate books and records with respect to the Partnership's business, which shall at all times be kept at the principal office of the Partnership or such other office as the General Partner may designate for such purpose. The books of the Partnership shall be maintained for financial reporting purposes on the accrual basis or on a cash basis, as the General Partner shall determine in its sole and unfettered discretion, in accordance with generally accepted accounting principles and applicable law. Upon reasonable request, the Class B Limited Partner or the Class C Limited Partner may inspect the books and records of the Partnership.

(b) Fiscal Year. The fiscal year of the Partnership shall be the calendar year unless otherwise determined by the General Partner in its sole and unfettered discretion.

(c) Other Information. The General Partner may release information concerning the operations of the Partnership to any financial institution or other Person that has loaned or may loan funds to the Partnership or the General Partner or any of its Affiliates, and may release such information to any other Person for reasons reasonably related to the business and operations of the Partnership or as required by law or regulation of any regulatory body.

(d) Distribution Reporting to Class B Limited Partner and Class C Limited Partner. Upon request, the Partnership shall provide the Class B Limited Partner and/or the Class C Limited Partner information on any non-pro rata distributions made under Section 3.9 to Partners other than the Partner requesting the information.

3.12. Tax Matters.

(a) Tax Returns. The General Partner shall arrange for the preparation and timely filing of all returns of Partnership income, gain, loss, deduction, credit and other items necessary for federal, state and local income tax purposes. The General Partner shall deliver to each Partner as copy of his/her/its IRS Form K-1 as soon as practicable after the end of the Fiscal Year, but in no event later than October 1. The classification, realization, and recognition of income, gain, loss, deduction, credit and

other items shall be on the cash or accrual method of accounting for federal income tax purposes, as the General Partner shall determine in its sole and unfettered discretion. The General Partner in its sole and unfettered discretion may pay state and local income taxes attributable to operations of the Partnership and treat such taxes as an expense of the Partnership.

(b) Tax Elections. Except as otherwise provided herein, the General Partner shall, in its sole and unfettered discretion, determine whether to make any available tax election.

(c) Tax Controversies. Subject to the provisions hereof, the General Partner is designated the Tax Matters Partner (as defined in Code Section 6231), and is authorized and required to represent the Partnership, at the Partnership's expense, in connection with all examinations of the Partnership's affairs by tax authorities, including resulting administrative and judicial proceedings, and to expend Partnership funds for professional services and costs associated therewith. Each Partner agrees to cooperate with the General Partner in connection with such proceedings.

(d) Taxation as a Partnership. No election shall be made by the Partnership or any Partner for the Partnership to be excluded from the application of any of the provisions of Subchapter K, Chapter 1 of Subtitle A of the Code or from any similar provisions of any state tax laws.

ARTICLE 4

RIGHTS AND OBLIGATIONS OF PARTNERS

4.1. Rights and Obligations of the General Partner. In addition to the rights and obligations set forth elsewhere in this Agreement, the General Partner shall have the following rights and obligations:

(a) Management. The General Partner shall conduct, direct, and exercise full control of over all activities of the Partnership. Except as otherwise expressly provided in this Agreement, all management powers over the business and affairs of the Partnership shall be exclusively vested in the General Partner, and Limited Partners shall have no right of control over the business and affairs of the Partnership. In addition to the powers now or hereafter granted to a general partner of a limited partnership under applicable law or that are granted to the General Partner under any provision of this Agreement, the General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation: (i) the determination of the activities in which the Partnership will participate; (ii) the performance of any and all acts necessary or appropriate to the operation of any business of the Partnership (including, without limitation, purchasing and selling any asset, any debt instruments, any equity interests, any commercial paper, any note receivables and any other obligations); (iii) the procuring and maintaining of such insurance as may be available in such amounts and covering such risks as are deemed appropriate by the General Partner; (iv) the acquisition, disposition, sale, mortgage, pledge, encumbrance, hypothecation, of exchange of any or all of the assets of the Partnership; (v) the execution and delivery on behalf of, and in the name of the Partnership, deeds, deeds of trust, notes, leases, subleases, mortgages, bills of sale and any and all other contracts or instruments necessary or incidental to the conduct of the Partnership's business; (vi) the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrence of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership, including, without limitation, the payment of compensation and reimbursement to the General Partner and its Affiliates pursuant to Section 3.10; (vii) the use of the assets of the Partnership (including, without limitation, cash on hand) for any Partnership purpose on any terms it sees fit, including, without limitation, the financing of operations of the Partnership, the lending of funds to other Persons, and the repayment of obligations

of the Partnership; (viii) the negotiation, execution, and performance of any contracts that it considers desirable, useful, or necessary to the conduct of the business or operations of the Partnership or the implementation of the General Partner's powers under this Agreement; (ix) the distribution of Partnership cash or other assets; (x) the selection, hiring and dismissal of employees, attorneys, accountants, consultants, contractors, agents and representatives and the determination of their compensation and other terms of employment or hiring; (xi) the formation of any further limited or general partnerships, joint ventures, or other relationships that it deems desirable and the contribution to such partnerships, ventures, or relationships of assets and properties of the Partnership; and (xii) the control of any matters affecting the rights and obligations of the Partnership, including, without limitation, the conduct of any litigation, the incurring of legal expenses, and the settlement of claims and suits.

(b) Certificate of Limited Partnership. The General Partner caused the Certificate of Limited Partnership of the Partnership to be filed with the Secretary of State of Delaware as required by the Delaware Act and shall cause to be filed such other certificates or documents (including, without limitation, copies, amendments, or restatements of this Agreement) as may be determined by the General Partner to be reasonable and necessary or appropriate for the formation, qualification, or registration and operation of a limited partnership (or a partnership in which Limited Partners have limited liability) in the State of Delaware and in any other state where the Partnership may elect to do business.

(c) Reliance by Third Parties. Notwithstanding any other provision of this Agreement to the contrary, no lender or purchaser or other Person, including any purchaser of property from the Partnership or any other Person dealing with the Partnership, shall be required to verify any representation by the General Partner as to its authority to encumber, sell, or otherwise use any assets or properties of the Partnership, and any such lender, purchaser, or other Person shall be entitled to rely exclusively on such representations and shall be entitled to deal with the General Partner as if it were the sole party in interest therein, both legally and beneficially. Each Limited Partner hereby waives any and all defenses or other remedies that may be available against any such lender, purchaser, or other Person to contest, negate, or disaffirm any action of the General Partner in connection with any such sale or financing. In no event shall any Person dealing with the General Partner or the General Partner's representative with respect to any business or property of the Partnership be obligated to ascertain that the terms of this Agreement have been complied with, and each such Person shall be entitled to rely on the assumptions that the Partnership has been duly formed and is validly in existence. In no event shall any such Person be obligated to inquire into the necessity or expedience of any act or action of the General Partner or the General Partner's representative, and every contract, agreement, deed, mortgage, security agreement, promissory note, or other instrument or document executed by the General Partner or the General Partner's representative with respect to any business or property of the Partnership shall be conclusive evidence in favor of any and every Person relying thereon or claiming thereunder that (i), at the time of the execution and delivery thereof, this Agreement was in full force and effect; (ii) such instrument or document was duly executed in accordance with the terms and provisions of this Agreement and is binding upon the Partnership; and (iii) the General Partner or the General Partner's representative was duly authorized and empowered to execute and deliver any and every such instrument or document for and on behalf of the Partnership.

(d) Partnership Funds. The funds of the Partnership shall be deposited in such account or accounts as are designated by the General Partner. The General Partner may, in its sole and unfettered discretion, deposit funds of the Partnership in a central disbursing account maintained by or in the name of the General Partner, the Partnership, or any other Person into which funds of the General Partner, the Partnership, or other Persons are also deposited; *provided, however,* at all times books of account are maintained that show the amount of funds of the Partnership on deposit in such account and interest accrued with respect to such funds as credited to the Partnership. The General Partner may use the funds of the Partnership as compensating balances for its benefit; *provided, however,* such funds do

not directly or indirectly secure, and are not otherwise at risk on account of, any indebtedness or other obligation of the General Partner or any director, officer, employee, agent, representative, or Affiliate thereof. Nothing in this Section 4.1(d) shall be deemed to prohibit or limit in any manner the right of the Partnership to lend funds to the General Partner or any Affiliate thereof pursuant to Section 4.1(e)(i). All withdrawals from or charges against such accounts shall be made by the General Partner or by its representatives. Funds of the Partnership may be invested as determined by the General Partner in accordance with the terms and provisions of this Agreement.

(e) Loans to or from General Partner; Contracts with Affiliates; Joint Ventures.

(i) The General Partner or any Affiliate of the General Partner may lend to the Partnership funds needed by the Partnership for such periods of time as the General Partner may determine; *provided, however*, the General Partner or its Affiliate may not charge the Partnership interest at a rate greater than the rate (including points or other financing charges or fees) that would be charged the Partnership (without reference to the General Partner's financial abilities or guaranties) by unrelated lenders on comparable loans. The Partnership shall reimburse the General Partner or its Affiliate, as the case may be, for any costs incurred by the General Partner or that Affiliate in connection with the borrowing of funds obtained by the General Partner or that Affiliate and loaned to the Partnership. The Partnership may loan funds to the General Partner and any member of the Founding Partner Group at the General Partner's sole and exclusive discretion.

(ii) The General Partner or any of its Affiliates may enter into an agreement with the Partnership to render services, including management services, for the Partnership. Any service rendered for the Partnership by the General Partner or any Affiliate thereof shall be on terms that are fair and reasonable to the Partnership.

(iii) The Partnership may Transfer any assets to joint ventures or other partnerships in which it is or thereby becomes a participant upon terms and subject to such conditions consistent with applicable law as the General Partner deems appropriate; provided, however, that the Partnership may not transfer any asset to the General Partner or one of its Affiliates during any NAV Ratio Trigger Period for consideration less than such asset's fair market value.

(f) Outside Activities' Conflicts of Interest. The General Partner or any Affiliate thereof and any director, officer, employee, agent, or representative of the General Partner or any Affiliate thereof shall be entitled to and may have business interests and engage in business activities in addition to those relating to the Partnership, including, without limitation, business interests and activities in direct competition with the Partnership. Neither the Partnership nor any of the Partners shall have any rights by virtue of this Agreement or the partnership relationship created hereby in any business ventures of the General Partner, any Affiliate thereof, or any director, officer, employee, agent, or representative of either the General Partner or any Affiliate thereof.

(g) Resolution of Conflicts of Interest. Unless otherwise expressly provided in this Agreement or any other agreement contemplated herein, whenever a conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership or any Limited Partner, on the other hand, any action taken by the General Partner, in the absence of bad faith by the General Partner, shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or under the Delaware Act or any other applicable law, rule, or regulation.

(h) Indemnification. The Partnership shall indemnify and hold harmless the General Partner and any director, officer, employee, agent, or representative of the General Partner (collectively,

the “*GP Party*”), against all liabilities, losses, and damages incurred by any of them by reason of any act performed or omitted to be performed in the name of or on behalf of the Partnership, or in connection with the Partnership’s business, including, without limitation, attorneys’ fees and any amounts expended in the settlement of any claims or liabilities, losses, or damages, to the fullest extent permitted by the Delaware Act; *provided, however*, the Partnership shall have no obligation to indemnify and hold harmless a GP Party for any action or inaction that constitutes gross negligence or willful or wanton misconduct. The Partnership, in the sole and unfettered discretion of the General Partner, may indemnify and hold harmless any Limited Partner, employee, agent, or representative of the Partnership, any Person who is or was serving at the request of the Partnership acting through the General Partner as a director, officer, partner, trustee, employee, agent, or representative of another corporation, partnership, joint venture, trust, or other enterprise, and any other Person to the extent determined by the General Partner in its sole and unfettered discretion, but in no event shall such indemnification exceed the indemnification permitted by the Delaware Act. Notwithstanding anything to the contrary in this Section 4.1(h) or elsewhere in this Agreement, no amendment to the Delaware Act after the date of this Agreement shall reduce or limit in any manner the indemnification provided for or permitted by this Section 4.1(h) unless such reduction or limitation is mandated by such amendment for limited partnerships formed prior to the enactment of such amendment. In no event shall Limited Partners be subject to personal liability by reason of the indemnification provisions of this Agreement.

(i) Liability of General Partner.

(i) Neither the General Partner nor its directors, officers, employees, agents, or representatives shall be liable to the Partnership or any Limited Partner for errors in judgment or for any acts or omissions that do not constitute gross negligence or willful or wanton misconduct.

(ii) The General Partner may exercise any of the powers granted to it by this Agreement and perform any of the duties imposed upon it hereunder either directly or by or through its directors, officers, employees, agents, or representatives, and the General Partner shall not be responsible for any misconduct or negligence on the part of any agent or representative appointed by the General Partner.

(j) Reliance by General Partner.

(i) The General Partner may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, bond, debenture, or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties.

(ii) The General Partner may consult with legal counsel, accountants, appraisers, management consultants, investment bankers, and other consultants and advisers selected by it, and any opinion of any such Person as to matters which the General Partner believes to be within such Person’s professional or expert competence shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by the General Partner hereunder in good faith and in accordance with such opinion.

(k) The General Partner may, from time to time, designate one or more Persons to be officers of the Partnership. No officer need be a Partner. Any officers so designated shall have such authority and perform such duties as the General Partner may, from time to time, delegate to them. The General Partner may assign titles to particular officers, including, without limitation, president, vice president, secretary, assistant secretary, treasurer and assistant treasurer. Each officer shall hold office until such Person’s successor shall be duly designated and shall qualify or until such Person’s death or

until such Person shall resign or shall have been removed in the manner hereinafter provided. Any number of offices may be held by the same Person. The salaries or other compensation, if any, of the officers and agents of the Partnership shall be fixed from time to time by the General Partner. Any officer may be removed as such, either with or without cause, by the General Partner whenever in the General Partner's judgment the best interests of the Partnership will be served thereby. Any vacancy occurring in any office of the Partnership may be filled by the General Partner.

4.2. Rights and Obligations of Limited Partners. In addition to the rights and obligations of Limited Partners set forth elsewhere in this Agreement, Limited Partners shall have the following rights and obligations:

(a) Limitation of Liability. Limited Partners shall have no liability under this Agreement except as provided herein or under the Delaware Act.

(b) Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

(c) Return of Capital. No Limited Partner shall be entitled to the withdrawal or return of its Capital Contribution except to the extent, if any, that distributions made pursuant to this Agreement or upon termination of the Partnership may be considered as such by law and then only to the extent provided for in this Agreement.

(d) Second Amended Buy-Sell and Redemption Agreement. Each Limited Partner shall comply with the terms and conditions of the Second Amended Buy-Sell and Redemption Agreement.

(e) Default on Priority Distributions. If the Partnership fails to timely pay Priority Distributions pursuant to Section 3.9(b), and the Partnership does not subsequently make such Priority Distribution within ninety days of its due date, the Class B Limited Partner or the Class C Limited Partner may require the Partnership to liquidate publicly traded securities held by the Partnership or Highland Select Equity Master Fund, L.P., a Delaware limited partnership controlled by the Partnership; provided, however, that the General Partner may in its sole discretion elect instead to liquidate other non-publicly traded securities owned by the Partnership in order to satisfy the Partnership's obligations under Section 3.9(b) and this Section 4.2(e). In either case, Affiliates of the General Partner shall have the right of first offer to purchase any securities liquidated under this Section 4.2(e).

4.3. Transfer of Partnership Interests.

(a) Transfer. No Partnership Interest shall be Transferred, in whole or in part, except in accordance with the terms and conditions set forth in this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement. Any Transfer or purported Transfer of any Partnership Interest not made in accordance with this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement shall be null and void. An alleged transferee shall have no right to require any information or account of the Partnership's transactions or to inspect the Partnership's books. The Partnership shall be entitled to treat the alleged transferor of a Partnership Interest as the absolute owner thereof in all respects, and shall incur no liability to any alleged transferee for distributions to the Partner owning that Partnership Interest of record or for allocations of Profits, Losses, deductions or credits or for transmittal of reports and notices required to be given to holders of Partnership Interests.

(b) Transfers by General Partner. The General Partner may Transfer all, but not less than all, of its Partnership Interest to any Person only with the approval of a Majority Interest; provided, however, that the General Partner may not Transfer its Partnership Interest during any NAV Ratio Trigger Period except to the extent such Transfers are for estate planning purposes or resulting from the death of the individual owner of the General Partner. Any Transfer by the General Partner of its Partnership Interest under this Section 4.3(b) to an Affiliate of the General Partner or any other Person shall not constitute a withdrawal of the General Partner under Section 4.5(a), Section 5.1(b), or any other provision of this Agreement. If any such Transfer is deemed to constitute a withdrawal under such provisions or otherwise and results in the dissolution of the Partnership under this Agreement or the laws of any jurisdiction to which the Partnership of this Agreement is subject, the Partners hereby unanimously consent to the reconstitution and continuation of the Partnership immediately following such dissolution, pursuant to Section 5.2.

(c) Transfers by Limited Partners. The Partnership Interest of a Limited Partner may not be Transferred without the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), and in accordance with the Second Amended Buy-Sell and Redemption Agreement.

(d) Distributions and Allocations in Respect of Transferred Partnership Interests. If any Partnership Interest is Transferred during any Fiscal Year in compliance with the provisions of Article 4 and the Second Amended Buy-Sell and Redemption Agreement, Profits, Losses, and all other items attributable to the transferred interest for that period shall be divided and allocated between the transferor and the transferee by taking into account their varying interests during the period in accordance with Code Section 706(d), using any conventions permitted by law and selected by the General Partner; provided that no allocations shall be made under this Section 4.3(d) that would affect any special allocations made under Section 3.4. All distributions declared on or before the date of that Transfer shall be made to the transferor. Solely for purposes of making such allocations and distributions, the Partnership shall recognize that Transfer not later than the end of the calendar month during which it is given notice of that Transfer; *provided, however*, if the Partnership does not receive a notice stating the date that Partnership Interest was Transferred and such other information as the General Partner may reasonably require within thirty (30) days after the end of the Fiscal Year during which the Transfer occurs, then all of such items shall be allocated, and all distributions shall be made, to the person who, according to the books and records of the Partnership, on the last day of the Fiscal Year during which the Transfer occurs, was the owner of the Partnership Interest. Neither the Partnership nor any Partner shall incur any liability for making allocations and distributions in accordance with the provisions of this Section 4.3(d), whether or not any Partner or the Partnership has knowledge of any Transfer of ownership of any Partnership Interest.

(e) Forfeiture of Partnership Interests Pursuant to the Contribution Note. In the event any Class B Limited Partnership Interests are forfeited in favor of the Partnership as a result of any default on the Contribution Note, the Capital Accounts and Percentage Interests associated with such Class B Limited Partnership Interests shall be allocated pro rata among the Class A Partners. The Priority Distributions in Section 3.9(b) made after the date of such forfeiture shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the Class B Limited Partnership Interest transferred pursuant to this Section 4.3(e) over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any forfeiture of such Class B Limited Partnership Interest.

(f) Transfers of Partnership Interests Pursuant to the Purchase Notes. Notwithstanding any other provision in this Agreement, the Partnership shall respect, and the General Partner hereby provides automatic consent for, any transfers (in whole or transfers of partial interests) of

the Class C Limited Partnership Interests, or a portion thereof, if such transfer occurs as a result of a default on the Purchase Notes. Upon the transfer of any Class C Limited Partnership Interest to any member of the Founding Partner Group (or their assigns), such Class C Limited Partnership Interest shall automatically convert to a Class A Partnership Interest. The Priority Distributions in Section 3.9(b) shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the transferred Class C Limited Partnership Interest over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any transfer of such Class C Limited Partnership Interest.

4.4. Issuances of Partnership Interests to New and Existing Partners.

(a) Issuance of Partnership Interests to New Limited Partners. The General Partner may admit one or more additional Persons as Limited Partners (“Additional Limited Partners”) to the Partnership at such times and upon such terms as it deems appropriate in its sole and unfettered discretion; provided, however, that the General Partner may only admit additional Persons as Limited Partners in relation to the issuance of equity incentives to key employees of the Partnership; provided, further that the General Partner may not issue such equity incentives to the extent they entitle the holders, in the aggregate, to a Percentage Interest in excess of twenty percent without the consent of the Class B Limited Partner and the Class C Limited Partner. All Class A Limited Partners, the Class B Limited Partner and the Class C Limited Partner shall be diluted proportionately by the issuance of such limited partnership interests. No Person may be admitted to the Partnership as a Limited Partner until he/she/it executes an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement.

(b) Issuance of an Additional Partnership Interest to an Existing Partner. The General Partner may issue an additional Partnership Interest to any existing Partner at such times and upon such terms as it deems appropriate in its sole and unfettered discretion. Upon the issuance of an additional Partnership Interest to an existing Partner, the Percentage Interests of the members of the Founding Partner Group shall be diluted proportionately. Any additional Partnership Interest shall be subject to all the terms and conditions of this Agreement and the Second Amended Buy-Sell and Redemption Agreement.

4.5. Withdrawal of General Partner

(a) Option. In the event of the withdrawal of the General Partner from the Partnership, the departing General Partner (the “*Departing Partner*”) shall, at the option of its successor (if any) exercisable prior to the effective date of the departure of that Departing Partner, promptly receive from its successor in exchange for its Partnership Interest as the General Partner, an amount in cash equal to its Capital Account balance, determined as of the effective date of its departure.

(b) Conversion. If the successor to a Departing Partner does not exercise the option described in Section 4.5(a), the Partnership Interest of the Departing Partner as the General Partner of the Partnership shall be converted into a Partnership Interest as a Limited Partner.

4.6. Admission of Substitute Limited Partners and Successor General Partner.

(a) Admission of Substitute Limited Partners. A transferee (which may be the heir or legatee of a Limited Partner) or assignee of a Limited Partner’s Partnership Interest shall be entitled to receive only the distributive share of the Partnership’s Profits, Losses, deductions, and credits attributable to that Partnership Interest. To become a substitute Limited Partner (a “*Substitute Limited Partner*”),

that transferee or assignee shall (1) obtain the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), (ii) comply with all the requirements of this Agreement and the Second Amended Buy-Sell and Redemption Agreement with respect to the Transfer of the Partnership Interest at issue, and (iii) execute an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement. Upon admission of a Substitute Limited Partner, that Limited Partner shall be subject to all of the restrictions applicable to, shall assume all of the obligations of, and shall attain the status of a Limited Partner under and pursuant to this Agreement with respect to the Partnership Interest held by that Limited Partner.

(b) Admission of Successor General Partner. A successor General Partner selected pursuant to Section 5.2 or the transferee of or successor to all of the Partnership Interest of the General Partner pursuant to Section 4.3(b) shall be admitted to the Partnership as the General Partner, effective as of the date of the withdrawal or removal of the predecessor General Partner or the date of Transfer of that predecessor's Partnership Interest.

(c) Action by General Partner. In connection with the admission of any substitute Limited Partner or successor General Partner or any additional Limited Partner, the General Partner shall have the authority to take all such actions as it deems necessary or advisable in connection therewith, including the amendment of Exhibit A and the execution and filing with appropriate authorities of any necessary documentation.

ARTICLE 5

DISSOLUTION AND WINDING UP

5.1. Dissolution. The Partnership shall be dissolved upon:

(a) The withdrawal, bankruptcy, or dissolution of the General Partner, or any other event that results in its ceasing to be the General Partner (other than by reason of a Transfer pursuant to Section 4.3(b));

(b) An election to dissolve the Partnership by the General Partner that is approved by the affirmative vote of a Majority Interest; *provided, however*, the General Partner may dissolve the Partnership without the approval of the Limited Partners in order to comply with Section 14 of the Second Amended Buy-Sell and Redemption Agreement; or

(c) Any other event that, under the Delaware Act, would cause its dissolution.

For purposes of this Section 5.1, the bankruptcy of the General Partner shall be deemed to have occurred when the General Partner: (i) makes a general assignment for the benefit of creditors; (ii) files a voluntary bankruptcy petition; (iii) becomes the subject of an order for relief or is declared insolvent in any federal or state bankruptcy or insolvency proceeding; (iv) files a petition or answer seeking a reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any law; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the General Partner in a proceeding of the type described in clauses (i) through (iv) of this paragraph; (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties; or (vii) one hundred twenty (120) days expire after the date of the commencement of a proceeding against the General Partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or

similar relief under any law if the proceeding has not been previously dismissed, or ninety (90) days expire after the date of the appointment, without the General Partner's consent or acquiescence, of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties if the appointment has not previously been vacated or stayed, or ninety (90) days expire after the date of expiration of a stay, if the appointment has not previously been vacated.

5.2. Continuation of the Partnership. Upon the occurrence of an event described in Section 5.1(a), the Partnership shall be deemed to be dissolved and reconstituted if a Majority Interest elect to continue the Partnership within ninety (90) days of that event. If no election to continue the Partnership is made within ninety (90) days of that event, the Partnership shall conduct only activities necessary to wind up its affairs. If an election to continue the Partnership is made upon the occurrence of an event described in Section 5.1(a), then:

(a) Within that ninety (90)-day period a successor General Partner shall be selected by a Majority Interest;

(b) The Partnership shall be deemed to be reconstituted and shall continue until the end of the term for which it is formed unless earlier dissolved in accordance with this Article 5;

(c) The interest of the former General Partner shall be converted to an interest as a Limited Partner; and

(d) All necessary steps shall be taken to amend or restate this Agreement and the Certificate of Limited Partnership, and the successor General Partner may for this purpose amend this Agreement and the Certificate of Limited Partnership, as appropriate, without the consent of any Partner.

5.3. Liquidation. Upon dissolution of the Partnership, unless the Partnership is continued under Section 5.2, the General Partner or, in the event the General Partner has been dissolved, becomes bankrupt (as defined in Section 5.1), or withdraws from the Partnership, a liquidator or liquidating committee selected by a Majority Interest, shall be the Liquidator. The Liquidator (if other than the General Partner) shall be entitled to receive such compensation for its services as may be approved by a Majority Interest. The Liquidator shall agree not to resign at any time without fifteen (15) days' prior written notice and (if other than the General Partner) may be removed at any time, with or without cause, by notice of removal approved by a Majority Interest. Upon dissolution, removal, or resignation of the Liquidator, a successor and substitute Liquidator (who shall have and succeed to all rights, powers, and duties of the original Liquidator) shall within thirty (30) days thereafter be selected by a Majority Interest. The right to appoint a successor or substitute Liquidator in the manner provided herein shall be recurring and continuing for so long as the functions and services of the Liquidator are authorized to continue under the provisions hereof, and every reference herein to the Liquidator shall be deemed to refer also to any such successor or substitute Liquidator appointed in the manner provided herein. Except as expressly provided in this Article 5, the Liquidator appointed in the manner provided herein shall have and may exercise, without further authorization or consent of any of the parties hereto, all of the powers conferred upon the General Partner under the terms of this Agreement (but subject to all of the applicable limitations, contractual and otherwise, upon the exercise of such powers) to the extent necessary or desirable in the good faith judgment of the Liquidator to carry out the duties and functions of the Liquidator hereunder for and during such period of time as shall be reasonably required in the good faith judgment of the Liquidator to complete the winding up and liquidation of the Partnership as provided herein. The Liquidator shall liquidate the assets of the Partnership and apply and distribute the proceeds of such liquidation in the following order of priority, unless otherwise required by mandatory provisions of applicable law:

(a) To the payment of the expenses of the terminating transactions including, without limitation, brokerage commission, legal fees, accounting fees and closing costs;

(b) To the payment of creditors of the Partnership, including Partners, in order of priority provided by law;

(c) To the Partners and assignees to the extent of, and in proportion to, the positive balances in their respective Capital Accounts as provided in Treasury Regulations Section 1.704-1(b)(2)(ii)(b)(2); *provided, however*, the Liquidator may place in escrow a reserve of cash or other assets of the Partnership for contingent liabilities in an amount determined by the Liquidator to be appropriate for such purposes; and

(d) To the Partners in proportion to their respective Percentage Interests.

5.4. Distribution in Kind. Notwithstanding the provisions of Section 5.3 that require the liquidation of the assets of the Partnership, but subject to the order of priorities set forth therein, if on dissolution of the Partnership the Liquidator determines that an immediate sale of part or all of the Partnership's assets would be impractical or would cause undue loss to the Partners and assignees, the Liquidator may defer for a reasonable time the liquidation of any assets except those necessary to satisfy liabilities of the Partnership (other than those to Partners) and/or may distribute to the Partners and assignees, in lieu of cash, as tenants in common and in accordance with the provisions of Section 5.3, undivided interests in such Partnership assets as the Liquidator deems not suitable for liquidation. Any such distributions in kind shall be subject to such conditions relating to the disposition and management of such properties as the Liquidator deems reasonable and equitable and to any joint operating agreements or other agreements governing the operation of such properties at such time. The Liquidator shall determine the fair market value of any property distributed in kind using such reasonable method of valuation as it may adopt.

5.5. Cancellation of Certificate of Limited Partnership. Upon the completion of the distribution of Partnership property as provided in Sections 5.3 and 5.4, the Partnership shall be terminated, and the Liquidator (or the General Partner and Limited Partners if necessary) shall cause the cancellation of the Certificate of Limited Partnership in the State of Delaware and of all qualifications and registrations of the Partnership as a foreign limited partnership in jurisdictions other **than** the State of Delaware and shall take such other actions as may be necessary to terminate the Partnership.

5.6. Return of Capital. The General Partner shall not be personally liable for the return of the Capital Contributions of Limited Partners, or any portion thereof, it being expressly understood that any such return shall be **made** solely from Partnership assets.

5.7. Waiver of Partition. Each Partner hereby waives any rights to partition of the Partnership property.

ARTICLE 6

GENERAL PROVISIONS

6.1. Amendments to Agreement. The General Partner may amend this Agreement without the consent of any Partner if the General Partner reasonably determines that such amendment is necessary and appropriate; *provided, however, any* action taken by the General Partner shall be subject to its fiduciary duties to the Limited Partners under the Delaware Act; provided further that any amendments

that adversely affect the Class B Limited Partner or the Class C Limited Partner may only be made with the consent of such Partner adversely affected.

6.2. Addresses and Notices. Any notice, demand, request, or report required or permitted to be given or made to a Partner under this Agreement shall be in writing and shall be deemed given or made when delivered in person or when sent by United States registered or certified mail to the Partner at his/her/its address as shown on the records of the Partnership, regardless of any claim of any Person who may have an interest in any Partnership Interest by reason of an assignment or otherwise.

6.3. Titles and Captions. All article and section titles and captions in the Agreement are for convenience only, shall not be deemed part of this Agreement, and in no way shall define, limit, extend, or describe the scope or intent of any provisions hereof. Except as specifically provided otherwise, references to “Articles,” “Sections” and “Exhibits” are to “Articles,” “Sections” and “Exhibits” of this Agreement. All Exhibits hereto are incorporated herein by reference.

6.4. Pronouns and Plurals. Whenever the context may require, any pronoun used in this Agreement shall include the corresponding masculine, feminine, or neuter forms, and the singular form of nouns, pronouns, and verbs shall include the plural and vice versa.

6.5. Further Action. The parties shall execute all documents, provide all information, and take or refrain from taking all actions as may be necessary or appropriate to achieve the purposes of this Agreement.

6.6. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their heirs, executors, administrators, successors, legal representatives, and permitted assigns.

6.7. Integration. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements and understandings pertaining thereto.

6.8. Creditors. None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditors of the Partnership.

6.9. Waiver. No failure by any party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute waiver of any such breach or any other covenant, duty, agreement, or condition.

6.10. Counterparts. This agreement may be executed in counterparts, all of which together shall constitute one agreement binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

6.11. Applicable Law. This Agreement shall be construed in accordance with and governed by the laws of the State of Delaware, without regard to the principles of conflicts of law.

6.12. Invalidity of Provisions. If any provision of this Agreement is declared or found to be illegal, unenforceable, or void, in whole or in part, then the parties shall be relieved of all obligations arising under that provision, but only to the extent that it is illegal, unenforceable, or void, it being the intent and agreement of the parties that this Agreement shall be deemed amended by modifying that provision to the extent necessary to make it legal and enforceable while preserving its intent or, if that is

not possible, by substituting therefor another provision that is legal and enforceable and achieves the same objectives.

6.13. General Partner Discretion. Whenever the General Partner may use its sole discretion, the General Partner may consider any items it deems relevant, including its own interest and that of its affiliates.

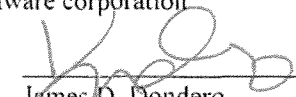
6.14. Mandatory Arbitration. In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that the Partnership or such applicable affiliate thereof may pursue a temporary restraining order and /or preliminary injunctive relief in connection with any confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and thereafter, require arbitration of all issues of final relief. The arbitration will be conducted by the American Arbitration Association, or another mutually agreeable arbitration service. A panel of three arbitrators will preside over the arbitration and will together deliberate, decide and issue the final award. The arbitrators shall be duly licensed to practice law in the state of Texas. The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each, each deposition to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admissions; (v) ten request for production (in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, including electronic documents); and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. The arbitrators shall be required to state in a written opinion all facts and conclusions of law relied upon to support any decision rendered. The arbitrators will not have the authority to render a decision that contains an outcome based on error of state or federal law or to fashion a cause of action or remedy not otherwise provided for under applicable state or federal law. Any dispute over whether the arbitrators have failed to comply with the foregoing will be resolved by summary judgment in a court of law. In all other respects, the arbitration process will be conducted in accordance with the American Arbitration Association's dispute resolution rules or other mutually agreeable arbitration services rules. All proceedings shall be conducted in Dallas, Texas or another mutually agreeable site. Each party shall bear its own attorneys fees, costs and expenses, including any costs of experts, witnesses and /or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement. Except as otherwise provided above, the parties hereby waive trial in a court of law or by jury. All other rights, remedies, statutes of limitation and defenses applicable to claims asserted in a court of law will apply in the arbitration.

*Remainder of Page intentionally Left Blank.
Signature Page Follows.*

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.


GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

By: 
James D. Dondero,
President

LIMITED PARTNERS:

THE DUGABOY INVESTMENT TRUST

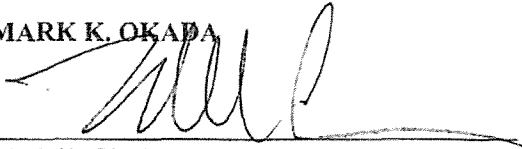
By: 
Name: Nancy M. Dondero
Its: Trustee

THE MARK AND PAMELA OKADA FAMILY TRUST - EXEMPT TRUST #1

By: _____
Name: Lawrence Tonomura
Its: Trustee

THE MARK AND PAMELA OKADA FAMILY TRUST - EXEMPT TRUST #2

By: _____
Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA

Mark K. Okada

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

STRAND ADVISORS, INC.,
a Delaware corporation

By: _____
James D. Dondero,
President

LIMITED PARTNERS:

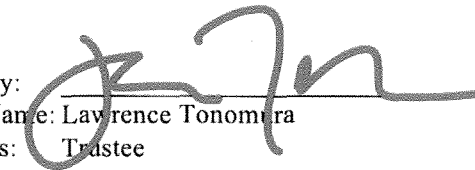
THE DUGABOY INVESTMENT TRUST

By: _____
Name: Nancy M. Dondero
Its: Trustee

THE MARK AND PAMELA OKADA FAMILY TRUST - EXEMPT TRUST #1

By:  _____
Name: Lawrence Tonomura
Its: Trustee

THE MARK AND PAMELA OKADA FAMILY TRUST - EXEMPT TRUST #2

By:  _____
Name: Lawrence Tonomura
Its: Trustee

MARK K. OKADA

Mark K. Okada

HUNTER MOUNTAIN INVESTMENT TRUST
By: Beacon Mountain LLC, Administrator

By: 
Name: John Honis
Its: President

*Signature Page to Fourth Amended and Restated
Agreement of Limited Partnership*

EXHIBIT A

<u>CLASS A PARTNERS</u>	<u>Percentage Interest</u>	
	<u>By Class</u>	<u>Effective %</u>
<u>GENERAL PARTNER:</u>		
Strand Advisors	0.5573%	0.2508%
<u>LIMITED PARTNERS:</u>		
The Dugaboy Investment Trust	74.4426%	0.1866%
Mark K. Okada	19.4268%	0.0487%
The Mark and Pamela Okada Family Trust - Exempt Trust #1	3.9013%	0.0098%
The Mark and Pamela Okada Family Trust - Exempt Trust #2	1.6720%	0.0042%
Total Class A Percentage Interest	100.0000%	0.500%
<u>CLASS B LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	55.0000%
<u>CLASS C LIMITED PARTNERS</u>		
Hunter Mountain Investment Trust	100.0000%	44.500%
<u>PROFIT AND LOSS AMONG CLASSES</u>		
Class A Partners	0.5000%	
Class B Partners	55.0000%	
Class C Partners	44.5000%	

EXHIBIT B

**ADDENDUM
TO THE
FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS ADDENDUM (this “Addendum”) to that certain Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., dated December 24, 2015, to be effective as of December 24, 2015, as amended from time to time (the “Agreement”), is made and entered into as of the ___ day of _____, 20__, by and between Strand Advisors, Inc., as the sole General Partner (the “General Partner”) of Highland Capital Management, L.P. (the “Partnership”) and _____ (“_____”) (except as otherwise provided herein, all capitalized terms used herein shall have the meanings set forth in the Agreement).

RECITALS:

WHEREAS, the General Partner, in its sole and unfettered discretion, and without the consent of any Limited Partner, has the authority under (i) Section 4.4 of the Agreement to admit Additional Limited Partners, (ii) Section 4.6 of the Agreement to admit Substitute Limited Partners and (iii) Section 6.1 of the Agreement to amend the Agreement;

WHEREAS, the General Partner desires to admit _____ as a Class ___ Limited Partner holding a ___% Percentage Interest in the Partnership as of the date hereof;

WHEREAS, _____ desires to become a Class ___ Limited Partner and be bound by the terms and conditions of the Agreement; and

WHEREAS, the General Partner desires to amend the Agreement to add _____ as a party thereto.

AGREEMENT:

RESOLVED, as a condition to receiving a Partnership Interest in the Partnership, _____ acknowledges and agrees that he/she/it (i) has received and read a copy of the Agreement, (ii) shall be bound by the terms and conditions of the Agreement; and (iii) shall promptly execute an addendum to the Second Amended Buy-Sell and Redemption Agreement; and be it

FURTHER RESOLVED, the General Partner hereby amends the Agreement to add _____ as a Limited Partner, and the General Partner shall attach this Addendum to the Agreement and make it a part thereof; and be it

FURTHER RESOLVED, this Addendum may be executed in any number of counterparts, all of which together shall constitute one Addendum binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

IN WITNESS WHEREOF, the undersigned have executed this Addendum as of the day and year above written.

GENERAL PARTNER:

STRAND ADVISORS, INC.

By: _____
Name: _____
Title: _____

NEW LIMITED PARTNER:

[_____]

AGREED AND ACCEPTED:

In consideration of the terms of this Addendum and the Agreement, in consideration of the Partnership's allowing the above signed Person to become a Limited Partner of the Partnership, and for other good and valuable consideration receipt of which is hereby acknowledged, the undersigned shall be bound by the terms and conditions of the Agreement as though a party thereto.

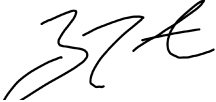
SPOUSE OF NEW LIMITED PARTNER:

[_____]

B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS Highland Capital Management, L.P.		DEFENDANTS NexPoint Advisors, L.P., James Dondero, Nancy Dondero, and The Dugaboy Investment Trust
ATTORNEYS (Firm Name, Address, and Telephone No.) Hayward PLLC 10501 N. Central Expressway, Suite 106 Dallas, Texas 75231 Tel.: (972) 755-7100		ATTORNEYS (If Known) Munsch Hardt Kopf & Harr, P.C. (for NexPoint); Stinson LLP (for Nancy Dondero); Heller, Draper, & Horn, L.L.C. (for The Dugaboy Investment Trust)
PARTY (Check One Box Only) <input checked="" type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee		PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Breach of Contract; Turnover Pursuant to 11 USC 542(b); Avoidance and Recovery of Actual Fraudulent Transfer under 11 USC 548(a)(1)(A) and 550; Avoidance and Recovery of Actual Fraudulent Transfer under 11 USC 544(b) and 550 and Tex. Bus. & C. Code 24.005(a)(1); Declaratory Relief; Breach of Fiduciary Duty; Aiding & Abetting Breach of Fiduciary Duty		
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)		
FRBP 7001(1) – Recovery of Money/Property <input checked="" type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input checked="" type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input checked="" type="checkbox"/> 14-Recovery of money/property - other FRBP 7001(2) – Validity, Priority or Extent of Lien <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property FRBP 7001(3) – Approval of Sale of Property <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) FRBP 7001(4) – Objection/Revocation of Discharge <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) FRBP 7001(5) – Revocation of Confirmation <input type="checkbox"/> 51-Revocation of confirmation FRBP 7001(6) – Dischargeability <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny (continued next column)		FRBP 7001(6) – Dischargeability (continued) <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other FRBP 7001(7) – Injunctive Relief <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other FRBP 7001(8) Subordination of Claim or Interest <input type="checkbox"/> 81-Subordination of claim or interest FRBP 7001(9) Declaratory Judgment <input checked="" type="checkbox"/> 91-Declaratory judgment FRBP 7001(10) Determination of Removed Action <input type="checkbox"/> 01-Determination of removed claim or cause Other <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input checked="" type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)
<input checked="" type="checkbox"/> Check if this case involves a substantive issue of state law		<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23
<input type="checkbox"/> Check if a jury trial is demanded in complaint		Demand \$ Damages in an amount to be determined at trial
Other Relief Sought Turnover of amounts due under note, avoidance of transfers to defendants, declaratory relief, punitive and exemplary damages, costs, attorneys' fees		

B1040 (FORM 1040) (12/15)

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR Highland Capital Management, L.P.		BANKRUPTCY CASE NO. 19-34054-sgj11
DISTRICT IN WHICH CASE IS PENDING Northern District of Texas		DIVISION OFFICE Dallas
NAME OF JUDGE Stacey G. C. Jernigan		
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING		DIVISION OFFICE
NAME OF JUDGE		
SIGNATURE OF ATTORNEY (OR PLAINTIFF) 		
DATE August 27, 2021		PRINT NAME OF ATTORNEY (OR PLAINTIFF) Zachery Z. Annable

INSTRUCTIONS

The filing of a bankruptcy case creates an “estate” under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor’s discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court’s Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff’s attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

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Counsel for Defendant NexPoint Advisors, L.P.

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03005-sgj
NEXPOINT ADVISORS, L.P., JAMES	§	
DONDERO, NANCY DONDERO, AND	§	
DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

**DEFENDANT NEXPOINT ADVISORS, L.P.’S
 ANSWER TO AMENDED COMPLAINT**

Defendant NexPoint Advisors, L.P. (“NexPoint”), a defendant in the above-styled and numbered adversary proceeding (the “Adversary Proceeding”) filed by Highland Capital Management, L.P. (the “Plaintiff”), hereby files this Answer (the “Answer”) responding to the *Amended Complaint for (I) Breach of Contract and (II) Turnover of Property (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty* [Adv. Dkt. 73] (the “Amended Complaint”). Where an allegation in the Amended Complaint is not expressly admitted in this Answer, it is denied.

PRELIMINARY STATEMENT

1. The first sentence of paragraph 1 of the Amended Complaint sets forth the Plaintiff's objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Defendant NexPoint admits that NPA's First Amended Answer speaks for itself. To the extent paragraph 2 contradicts the First Amended Answer, it is denied.

3. Defendant NexPoint denies the allegations in paragraph 3 of the Amended Complaint.

4. Paragraph 4 of the Amended Complaint sets forth the Plaintiff's objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied.

5. Paragraph 5 of the Amended Complaint contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

6. Defendant NexPoint admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Court to adjudicate this dispute. Any allegations in paragraph 6 not expressly admitted are denied.

7. Defendant NexPoint admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in paragraph 7 not expressly admitted are denied.

8. Defendant NexPoint denies the allegations contained in paragraph 8 of the Amended Complaint. Defendant NexPoint does not consent to any trial before, or final order entered by, the Bankruptcy Court. Defendant NexPoint demands a trial by jury of all issues so triable.

9. Defendant NexPoint admits the allegations in paragraph 9 of the Amended Complaint.

THE PARTIES

10. Defendant NexPoint admits the allegations in paragraph 10 of the Amended Complaint.

11. Defendant NexPoint admits the allegations in paragraph 11 of the Amended Complaint.

12. Defendant NexPoint admits the allegations in paragraph 12 of the Amended Complaint.

13. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 13 of the Amended Complaint and therefore denies the same.

14. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 14 of the Amended Complaint and therefore denies the same.

CASE BACKGROUND

15. Defendant NexPoint admits the allegations in paragraph 15 of the Amended Complaint.

16. Defendant NexPoint admits the allegations in paragraph 16 of the Amended Complaint.

17. Defendant NexPoint admits the allegations in paragraph 17 of the Amended Complaint.

18. Defendant NexPoint admits the allegations in paragraph 18 of the Amended Complaint.

19. Defendant NexPoint admits the allegations in paragraph 19 of the Amended Complaint.

STATEMENT OF FACTS

20. Defendant NexPoint admits that it has executed at least one promissory note under which the Debtor is a payee. Any allegations in paragraph 20 not expressly admitted are denied.

21. Defendant NexPoint admits the allegations in paragraph 21 of the Amended Complaint.

22. Defendant NexPoint denies paragraph 22 of the Complaint. The document speaks for itself and the quote set forth in paragraph 22 is not verbatim.

23. Defendant NexPoint admits the allegations in paragraph 23 of the Amended Complaint.

24. Defendant NexPoint denies paragraph 24 of the Complaint. The document speaks for itself and the quote set forth in paragraph 24 is not verbatim.

25. Defendant NexPoint admits the allegations in paragraph 25 of the Amended Complaint.

26. Defendant NexPoint admits that it did not make a payment under the Note on December 31, 2020. Defendant NexPoint denies that any payment was due under the Note on December 31, 2020. To the extent not expressly admitted, paragraph 26 of the Amended Complaint is denied.

27. Defendant NexPoint admits that Exhibit 2 to the Amended Complaint (the “Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 27 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 27 of the Amended Complaint is denied.

28. Defendant NexPoint admits that it paid the Debtor \$1,406,111.92 on January 14, 2021, but denies that any payment was due on December 31, 2020 or that this was an attempt to cure a default. To the extent not expressly admitted, paragraph 28 of the Amended Complaint is denied.

29. Defendant NexPoint admits that Exhibit 3 to the Amended Complaint (the “Second Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 29 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 29 of the Amended Complaint is denied.

30. To the extent paragraph 30 of the Amended Complaint asserts a legal conclusion, no response is necessary, and it is denied. The Defendant otherwise admits paragraph 30 of the Amended Complaint.

31. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 31 of the Amended Complaint and therefore denies the same.

32. Defendant NexPoint denies the allegations in paragraph 32 of the Amended Complaint.

33. Defendant NexPoint admits that the Debtor filed the Original Complaint in this action on January 22, 2021, as alleged in the first sentence of paragraph 33 of the Amended

Complaint. Defendant NexPoint denies it is liable for the relief requested in the Original Complaint. To the extent not expressly admitted, paragraph 33 of the Amended Complaint is denied.

34. Defendant NexPoint admits the allegations in paragraph 34 of the Amended Complaint.

35. Defendant NexPoint admits the allegations in paragraph 35 of the Amended Complaint.

36. Defendant NexPoint admits that NexPoint's First Amended Answer speaks for itself. To the extent paragraph 36 contradicts the First Amended Answer, it is denied.

37. Defendant NexPoint admits that NexPoint's First Amended Answer speaks for itself. To the extent paragraph 37 contradicts the First Amended Answer, it is denied.

38. Paragraph 38 of the Amended Complaint asserts a legal conclusion to which no answer is required. To the extent of any factual allegation, Defendant NexPoint admits that Mr. Dondero controlled NPA and denies that he controlled the Debtor at the time of the Alleged Agreement.

39. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 39 of the Amended Complaint and therefore denies the same.

40. Defendant NexPoint denies the allegations in paragraph 40 of the Amended Complaint.

41. Defendant NexPoint admits that Exhibit 4 to the Amended Complaint is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 41 of the Amended Complaint asserts a legal conclusion, no response is required, and

it is denied. To the extent not expressly admitted, paragraph 41 of the Amended Complaint is denied.

42. Paragraph 42 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

43. Paragraph 43 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

**FIRST CLAIM FOR RELIEF
(against NexPoint)
(for Breach of Contract)**

44. Paragraph 44 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

45. Paragraph 45 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

46. Paragraph 46 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

47. Paragraph 47 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

48. Paragraph 48 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

**SECOND CLAIM FOR RELIEF
(against NexPoint)
(Turnover by NexPoint Pursuant to 11 U.S.C. § 542(b))**

49. Paragraph 49 of the Amended Complaint is a sentence of incorporation that does not require a response and is therefore denied. All prior responses are incorporated herein by reference.

50. Paragraph 50 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

51. Paragraph 51 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

52. Paragraph 52 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

53. Paragraph 53 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. Defendant NexPoint admits that the Plaintiff transmitted the Demand Letter and the Second Demand Letter, and those documents speak for themselves.

54. Paragraph 54 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

55. Paragraph 55 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

THIRD CLAIM FOR RELIEF

(Against NexPoint)

(Avoidance and Recovery of Actual Fraudulent Transfer under 11 U.S.C. §§ 548(a)(1)(A) and 550)

56. Paragraph 56 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

57. Paragraph 57 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

58. Paragraph 58 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

59. Paragraph 59 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

60. Paragraph 60 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

61. Paragraph 61 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

FOURTH CLAIM FOR RELIEF

(Against NexPoint)

(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. § 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1))

62. Paragraph 62 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

63. Paragraph 63 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

64. Paragraph 64 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

65. Paragraph 65 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

66. Paragraph 66 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

FIFTH CLAIM FOR RELIEF

(Against Dugaboy Investment Trust and Nancy Dondero)

(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

67. Paragraph 67 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

68. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

69. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

70. Paragraph 70 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

SIXTH CLAIM FOR RELIEF
(Against Dugaboy Investment Trust and Nancy Dondero)
(Breach of Fiduciary Duty)

71. Paragraph 71 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

72. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

73. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

74. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

SEVENTH CLAIM FOR RELIEF
(Against James Dondero and Nancy Dondero)
(Aiding and Abetting a Breach of Fiduciary Duty)

75. Paragraph 75 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

76. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

77. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

78. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

79. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

Defendant NexPoint denies that the Plaintiff is entitled to the relief requested in the prayer, including as to parts (i), (ii), (iii), (iv), (v), (vi), (vii) and (iii) [sic].

AFFIRMATIVE DEFENSES

80. Pursuant to that certain Shared Services Agreement, the Plaintiff was responsible for making payments on behalf of the Defendant under the note. Any alleged default under the note was the result of the Plaintiff's own negligence, misconduct, breach of contract, etc.

81. Delay in the performance of a contract is excused when the party who seeks to enforce the contract caused the delay. It was therefore inappropriate for the Plaintiff to accelerate the note when the brief delay in payment was the Plaintiff's own fault.

82. Furthermore, the Plaintiff has waived the right to accelerate the note and /or the Plaintiff is estopped to enforce the alleged acceleration by accepting payment after the same.

83. Furthermore, the Plaintiff's claims are barred in whole or in part because, prior to any alleged breach or acceleration, the Plaintiff agreed that it would not collect on the note upon fulfilment of certain conditions subsequent. Specifically, sometime between December of the year in which each Note was made and February of the following year, Defendant Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of Defendant James Dondero's control. This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant NexPoint believes there may be testimony or email correspondence that discusses the

existence of this agreement that may be uncovered through discovery in this Adversary Proceeding.

84. Defendant NexPoint asserts that any fraudulent transfer claim is barred because NexPoint acted in good faith, without knowledge of any alleged avoidability, and because reasonably equivalent value was provided for any alleged transfer or obligation.

85. Defendant NexPoint asserts that any fraudulent transfer claim is barred because no transferor or transferee, or obligor or obligee, was insolvent.

86. To the extent of any avoidance, NexPoint asserts a lien under 11 U.S.C. § 548(c) to the extent that NexPoint gave value, and a similar preference lien under any applicable provision of the Texas Uniform Fraudulent Transfer Act.

JURY DEMAND

87. Defendant NexPoint demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

88. Defendant NexPoint does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant NexPoint respectfully requests that, following a trial on the merits, the Court enter a judgment that the Plaintiff take nothing on the Amended Complaint and provide Defendant NexPoint such other relief to which it is entitled.

RESPECTFULLY SUBMITTED this 1st day of September, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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COUNSEL FOR NEXPOINT ADVISORS, L.P.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Davor Rukavina

Davor Rukavina

Davor Rukavina
Julian P. Vasek
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ATTORNEYS FOR NEXPOINT ADVISORS, L.P.

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

<hr/>	
In re:	§
	§ Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
	§ Case No. 19-34054-sgj11
Debtor.	§
<hr/>	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
	§
Plaintiff,	§ Adversary Proceeding No.
	§
vs.	§ 21-03005-sgj
	§
NEXPOINT ADVISORS, L.P., JAMES	§
DONDERO, NANCY DONDERO, AND THE	§
DUGABOY INVESTMENT TRUST,	§
	§
Defendants.	§
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**MOTION OF DEFENDANT NEXPOINT ADVISORS, L.P. TO EXTEND
EXPERT DISCLOSURE AND DISCOVERY DEADLINES**

TO THE HONORABLE STACEY G.C. JERNIGAN, U.S. BANKRUPTCY JUDGE:

COMES NOW NexPoint Advisors, L.P. (“NexPoint”), one of the defendants in the above styled and numbered Adversary Proceeding initiated by Highland Capital Management, L.P. as the plaintiff (the “Debtor”), and files this its *Motion to Extend Expert Disclosure and Discovery Deadlines* (the “Motion”), respectfully stating as follows:

I. RELIEF REQUESTED

1. By this Motion, NexPoint requests that the Court extend the deadline, in its *Order Approving Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* [docket no. 70] (the “Scheduling Order”), for the designation of experts and service of expert reports, through December 13, 2021, with a corresponding extension of expert discovery. Specifically, NexPoint finds it appropriate and advisable to designate a testifying expert on the standards and duties of care under the parties’ Shared Services Agreement (defined below) with respect to Highland’s role in NexPoint’s alleged failure to make a December 21, 2020 payment on the Note (defined below); specifically, that Highland was responsible for ensuring that NexPoint made this payment. This request is necessitated by recent deposition testimony of key individuals on October 19 and 21, 2021, prior to which NexPoint did not know or reasonably believe that expert testimony on the duties of care would be advisable.

II. PROCEDURAL BACKGROUND

2. The Debtor initiated this Adversary Proceeding with the filing of its original complaint against NexPoint on January 22, 2021.

3. By this Adversary Proceeding, the Debtor seeks to collect on a promissory note issued by NexPoint to the Debtor on May 31, 2017 in the original principal amount of \$30,746,812.33 (the “Note”). The Note is a 30-year note and provides for an annual payment of principal and interest. After prior payments, the Debtor asserts that \$23,071,195.03 remains due and owing on the Note.

4. NexPoint has asserted various defenses and affirmative defenses to the Debtor’s allegations and causes of action. This Motion concerns one such affirmative defense only, to the effect that the Debtor, through its employees, caused the alleged underlying default.

5. On July 28, 2021, the District Court entered an order adopting this Court’s report and recommendation and ordering that the reference for this Adversary Proceeding will be withdrawn once this Court certifies this Adversary Proceeding as being trial ready. As part of the same, the District Court necessarily agreed and ordered that NexPoint has a right to a trial by jury of this Adversary Proceeding.

III. FACTS

6. This Motion is supported by the Declaration of Davor Rukavina, attached hereto as incorporated herein (the “Declaration”).

7. The Debtor alleges that the Note required NexPoint to make a payment of principal and interest on December 31, 2020, and that NexPoint failed to make this payment. Thus, in January, 2021, the Debtor sent notice that the Note had been accelerated, and the Debtor demanded full and immediate payment.

8. One of NexPoint’s affirmative defenses in this Adversary Proceeding concerns that certain *Amended and Restated Shared Services Agreement* (the “Shared Services Agreement”) between the Debtor and NexPoint dated January 1, 2018. The Agreement was in place as of December 31, 2020, although the Debtor terminated it later, in 2021. Under the Agreement, the Debtor provided various services to NexPoint, including so-called “back office” services, including treasury, accounting, and payables services. NexPoint has alleged that, pursuant to the Shared Services Agreement, the Debtor was responsible for ensuring that NexPoint made the allegedly required December 31, 2020 payment, although such payment would be made from NexPoint’s funds. Indeed, Waterhouse (defined below) testified that it was “reasonable for NexPoint to rely on the debtors’ employees to inform NexPoint of an upcoming payment due on the \$30 million promissory note.” See Declaration at Exhibit C, 337:22-338:8.

9. NexPoint asserts that the Debtor failed to do so and, therefore, caused the alleged default, which it now seeks to exploit, and that, but for the Debtor's negligence, the Note would remain in place. NexPoint has always asserted this as an affirmative defense. *See* Docket No. 6. NexPoint's defense, however, was based on its belief that the Debtor and its employees, including Waterhouse, did nothing to facilitate or ensure the payment, as opposed to a conscious decision not to make the payment.

10. On October 19, 2021, the Debtor deposed Frank Waterhouse ("Waterhouse"), as did NexPoint, in connection with this Adversary Proceeding. Waterhouse was the Debtor's chief financial officer in December, 2020, and either the treasurer or chief financial officer (either way an officer) of NexPoint in December, 2020. To be clear, Waterhouse was the Debtor's employee, although he provided services to NexPoint as well pursuant to the Shared Services Agreement. Among other things, at this deposition, Waterhouse testified that, in early December, 2020, James Dondero ("Dondero"), who at that time controlled NexPoint but did not control the Debtor, instructed Waterhouse not to cause NexPoint to pay any more funds to the Debtor, including, expressly on the Note.

11. This changed the potential facts as NexPoint understood them to be from ones where the Debtor simply failed utterly to facilitate the payment, as it has always done, to one where the Debtor intentionally, allegedly upon the instructions of Dondero, decided not to facilitate the payment. Assuming the Dondero instruction to be true, this raises the question of whether the Debtor thereafter had any affirmative duty with respect to the alleged instruction.

12. NexPoint did not know that Waterhouse would provide this testimony. NexPoint understood that Dondero instructed Waterhouse to make no further payments on the Shared Services Agreement, because Dondero believed that NexPoint had overpaid by millions of dollars

on the Shared Services Agreement. But NexPoint did not understand that Waterhouse would testify that Dondero instructed him also not to pay the Note.

13. If Dondero told Waterhouse in early December, 2020 not to pay on the Note, then the question becomes whether Waterhouse or the Debtor thereafter “put their heads in the sand” in violation of any affirmative duty or obligation they may have had regarding the matter, such as: to ask Dondero whether they correctly understood him; to ask Dondero whether he meant NexPoint and the Note; to inform Dondero of the potential consequences of a default by potentially accelerating a 30-year promissory note; or to try to dissuade him from his decision. After all, the Debtor was responsible to facilitate the payment, the Debtor had various duties under the Shared Services Agreement, and it was in the Debtor’s interest that NexPoint would default, thus creating a conflict of interest.

14. Accordingly, on October 19, 2021, when NexPoint deposed James Seery, NexPoint asked Mr. Seery about section 6.01 of the Shared Services Agreement, labeled “standard of care,” which provides that the Debtor and Waterhouse “shall discharge its duties under this Agreement with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with like aims.” Mr. Seery testified that he did not believe that this provision of the Shared Services Agreement obligated the Debtor or Waterhouse to do anything further after Dondero allegedly instructed Waterhouse not to pay on the Note.

15. At that time, NexPoint determined that it was appropriate, and would assist the finder of fact, to retain an expert on the “standard of care” provided for in the Shared Services Agreement. This is especially important because this will be a jury trial in the District Court. NexPoint did not believe that it would need to retain such an expert, and it had no reasonable grounds to suspect that it would need such an expert, prior to these depositions.

16. NexPoint moved as promptly as it could thereafter. NexPoint decided to retain an expert on October 22, 2021 and began searching for one on that day. NexPoint located a potential expert, Steven J. Pully, on October 26, 2021, and after conflicts were cleared and terms agreed to, Mr. Pully agreed to serve as NexPoint’s expert on October 28, 2021. NexPoint files this motion just one day later, and less than two weeks after Waterhouse’s deposition triggered the issue.

17. It goes without saying that neither Pully nor any reasonable expert can possibly review the issues, formulate an opinion, and prepare a report one day after they are retained. Among other things, Pully needs to review all underlying documents and deposition transcripts, some of which have yet to be returned by the court reporters. Accordingly, NexPoint believes that approximately six (6) weeks will be sufficient for Pully to prepare a report. NexPoint submits that the Debtor should have a period of time to then designate a potential rebuttal expert, and a period of time for expert discovery. Such a procedure would be fair for all involved and would constitute a minimal delay to what has already been a rapidly advanced case.

IV. ARGUMENT AND AUTHORITIES

18. It is appropriate for an expert to consider the issue of Waterhouse’s and the Debtor’s duties under the Shared Services Agreement—*i.e.*, “duties under this Agreement with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with like aims,”—as issues such as “prudent person” and “like capacity and familiar with like aims” are appropriate for expert analysis and will assist the finder of fact, especially a jury.

19. Rule 16(b) provides that a deadline in a scheduling order may be modified “for good cause,” although there is some uncertainty as to whether this standard applies only after a deadline has passed (which is not the case here). *See* Fed. R. Civ. P. 16(b)(4); *Marathon Fin. Ins.*

Inc. RRG v. Ford Motor Co., 591 F.3d 458, 470 (5th Cir. 2009) (“Federal Rule of Civil Procedure 16(b) governs amendment of pleadings after a scheduling order’s deadline to amend has expired”).

20. When the issue concerns an “untimely submission of expert reports,” the Fifth Circuit has specified the following for factors as guiding the decision: “(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice.” *S&W Enters. v. Southtrust Bank of Ala.*, 315 F.3d 533, 536 (5th Cir. 2003). Again, this test applies to a deadline which has already expired. Logically, therefore, a lesser standard should apply when a party seeks relief prior to the expiration of a deadline, as NexPoint does here.

21. Applying these or any factors:

- (i) this Adversary Proceeding is only some nine (9) months old and the parties have moved very quickly, with all discovery almost over;
- (ii) if this Motion is granted, all discovery in this Adversary Proceeding will have been completed by the end of 2021, still less than one (1) year after filing;
- (iii) the reason for the need to extend the deadline is the most logical reason that most frequently appears—that discovery has necessitated some previously unexpected action—which is one of the purposes of discovery;
- (iv) NexPoint’s failure to previously designate an expert was due solely to not having the benefit of Waterhouse’s and Seery’s recent deposition testimony, and is not the result of any delay or lack of diligence, as evidenced by the fact that NexPoint did already and timely designate two other experts on other issues (*i.e.* NexPoint did not sit on its responsibility to consider retaining experts);
- (v) the matter is important because the duties of care as specified in the Shared Services Agreement are terms of art necessitating an expert analysis, especially before a jury, and the matter goes to the heart of NexPoint’s affirmative defense, and is necessitated by Waterhouse’s testimony and not any prior action or inaction of NexPoint;
- (vi) there is no prejudice to the Debtor, which will have sufficient time to retain a rebuttal expert and take expert discovery (*i.e.* no witnesses or documents have been lost); and

- (vii) a continuance is easily available to avoid any prejudice to the Debtor—indeed, there is no need for a continuance even as the Adversary Proceeding has yet to be certified as trial ready and it is likely that the District Court will not schedule the Adversary Proceeding for trial for some time.

22. NexPoint submits that this Motion cannot come as a surprise to the Debtor. NexPoint has asserted its affirmative defense since the beginning. The only difference now is that, instead of a wholesale disregard of any duty to facilitate the Note payment, the issue has evolved to whether the Debtor or Waterhouse had any affirmative duty to act after the alleged instruction from Dondero. As it can be presumed that Waterhouse previously informed the Debtor or its counsel of this alleged instruction (as he apparently informed other employees at the Debtor), the Debtor likely knew what Waterhouse’s testimony would be well before NexPoint learned of that testimony. It is reasonable to conclude that the Debtor knew or should have known that the “standard of care” under the Shared Services Agreement would then become a material issue.

23. Accordingly, “good cause” to amend the Scheduling Order exists, if that higher standard even applies, and approving such amendment will not prejudice the Debtor and will instead serve the interests of justice.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, NexPoint respectfully requests that the Court enter an order: (i) granting this Motion; (ii) modifying the Scheduling Order to extend the deadline to designate experts and serve expert reports through December 13, 2021; (iii) modifying the Scheduling Order accordingly for the potential designation of rebuttal experts and service of rebuttal expert reports, and extending expert discovery; and (iv) granting NexPoint such other and further relief as may be proper.

RESPECTFULLY SUBMITTED this 29th day of October, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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**ATTORNEYS FOR NEXPOINT ADVISORS,
L.P.**

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that, on October 28, 2021, he conferred with counsel for the Debtor, John Morris, and the Debtor opposes the relief requested herein.

/s/ Davor Rukavina

Davor Rukavina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 29, 2021, a true and correct copy of the foregoing document, including the exhibit thereto, was served on the following recipients via the Court's CM/ECF system:

Zachery Z. Annable on behalf of Plaintiff Highland Capital Management, L.P.
zannable@haywardfirm.com

Bryan C. Assink on behalf of Defendant James Dondero
bryan.assink@bondsellis.com

Greta M. Brouphy on behalf of Defendant The Dugaboy Investment Trust
gbrouphy@hellerdraper.com, dhepting@hellerdraper.com; vgamble@hellerdraper.com

Leslie A. Collins on behalf of Defendant The Dugaboy Investment Trust
lcollins@hellerdraper.com

Deborah Rose Deitsch-Perez on behalf of Defendant James Dondero
deborah.deitschperez@stinson.com, patricia.tomasky@stinson.com; kinga.mccoy@stinson.com

Deborah Rose Deitsch-Perez on behalf of Defendant Nancy Dondero
deborah.deitschperez@stinson.com, patricia.tomasky@stinson.com; kinga.mccoy@stinson.com

Douglas S. Draper on behalf of Defendant The Dugaboy Investment Trust
ddraper@hellerdraper.com,
dhepting@hellerdraper.com; vgamble@hellerdraper.com; mlandis@hellerdraper.com; gbrouphy@hellerdraper.com

Melissa S. Hayward on behalf of Plaintiff Highland Capital Management, L.P.
MHayward@HaywardFirm.com, mholmes@HaywardFirm.com

Juliana Hoffman on behalf of Creditor Committee Official Committee of Unsecured Creditors
jhoffman@sidley.com, txefilingnotice@sidley.com; julianna-hoffman-8287@ecf.pacerpro.com

Paige Holden Montgomery on behalf of Creditor Committee Official Committee of Unsecured Creditors
pmontgomery@sidley.com, txefilingnotice@sidley.com; paige-montgomery-7756@ecf.pacerpro.com; crognas@sidley.com; ebromagen@sidley.com; efilingnotice@sidley.com

/s/ Davor Rukavina

Davor Rukavina

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

In re:	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
Debtor.	§	Case No. 19-34054-sgj 1
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	21-03005-sgj
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
Defendants.	§	

DECLARATION OF DAVOR RUKAVINA

STATE OF TEXAS

COUNTY OF DALLAS

I, Davor Rukavina, hereby state and testify to the following as being true and correct and under penalty of perjury pursuant to the laws of the United States of America:

1. My name is Davor Rukavina. I am over the age of 21, have never been convicted of a felony or crime of moral turpitude, and am otherwise competent to execute this Declaration.

2. I am an attorney duly licensed to practice law in the State of Texas. I am a shareholder at Munsch Hardt Kopf & Harr, P.C. I am the lead attorney for NexPoint Advisors, L.P. ("NexPoint"), one of the defendants in this Adversary Proceeding.

3. At issue in this Adversary Proceeding is a 30-year promissory note executed by NexPoint in the original principal amount of \$30,746,812.33 (the "Note"), although the Note had been paid down significantly by the time of the filing of this Adversary Proceeding.

4. Highland Capital Management, L.P. (the “Debtor”) alleges that the Note required NexPoint to make a payment of principal and interest on December 31, 2020, and that NexPoint failed to make this payment. Thus, in January, 2021, the Debtor sent notice that the Note had been accelerated and the Debtor demanded full and immediate payment.

5. The parties agreed by written stipulation that they would disclose experts and produce expert reports on or before October 29, 2021, and the Court’s scheduling order so requires. NexPoint requests an extension of this deadline. The following is the reason why.

6. One of NexPoint’s affirmative defenses in this Adversary Proceeding concerns that certain *Amended and Restated Shared Services Agreement* (the “Agreement”) between the Debtor and NexPoint dated January 1, 2018, a copy of which is attached hereto as Exhibit “A.” The Agreement was in place as of December 31, 2020, although the Debtor terminated it later in 2021. NexPoint alleges that, under the Agreement, the Debtor provided various services to NexPoint, including so-called “back office” services, including treasury, accounting, and payables services. NexPoint has alleged that, pursuant to the Agreement, the Debtor was responsible for ensuring that NexPoint made the allegedly required December 31, 2020 payment, although such payment would be made from NexPoint’s funds. NexPoint therefore asserts that the Debtor failed to do so and, therefore, caused the alleged default, which it now seeks to exploit, and that, but for the Debtor’s negligence, the Note would remain in place.

7. The foregoing has always been an affirmative defense of NexPoint in this Adversary Proceeding, including in its amended answer filed on September 1, 2021, a copy of which is attached hereto as Exhibit “B.”

8. On October 19, 2021, the Debtor deposed Frank Waterhouse (“Waterhouse”), as did I, in connection with this Adversary Proceeding. Waterhouse was the Debtor’s chief financial

officer in December, 2020, and either the treasurer or chief financial officer (either way an officer) of NexPoint in December, 2020.

9. Among other things, at this deposition, Waterhouse testified that, in early December, 2020, James Dondero ("Dondero"), who at that time controlled NexPoint but did not control the Debtor, instructed Waterhouse not to cause NexPoint to pay any more funds to the Debtor, including, expressly on the Note. A copy of this deposition transcript is attached as Exhibit "C."

10. This testimony was not expected by me or by NexPoint. I had understood that Dondero instructed Waterhouse to make no further payments on the Agreement, because Dondero believed that NexPoint had overpaid by millions of dollars on the Agreement and because that was what Dondero and Waterhouse had been discussing. I had not understood that Waterhouse would testify that Dondero instructed him to also not pay the Note specifically.

11. Prior to that deposition, I had never spoken to Waterhouse. Waterhouse presently serves as an officer of NexPoint; however, and unlike every other case I have been involved with, I have not been permitted to discuss with Waterhouse litigation matters. This is because Waterhouse is in litigation with the Debtor on other matters and has separate and independent counsel, Debra Dandeneau and Frances Smith, who would not permit me to speak directly to Waterhouse, which I understood to be a logical and appropriate instruction to protect their client. I did discuss with Ms. Dandeneau what Waterhouse may know about the litigation between the Debtor and my clients, but that primarily focused on defenses that another client of mine, Highland Capital Management Fund Advisors, L.P., has. And I did discuss with Ms. Dandeneau that Dondero told Waterhouse to not make payments, but I understood that to be limited to the Agreement and to not include the Note, since the topic under discussion (as it was told to me)

between Dondero and Waterhouse was the Agreement and overpayments on the Agreement, and not the Note.

12. In sum, prior to October 19, 2021, I did not know that Waterhouse would testify that Dondero told him to not pay on the Note, and I had no reasonable reason to suspect the same. My surprise is evident from the transcript of that deposition, where I asked Waterhouse multiple times whether he was sure that Dondero told him this—so much so that opposing counsel objected multiple times as “asked and answered,” and even objected as having been asked and answered “four time.” Exhibit “C” at 390-392.

13. Assuming that Waterhouse’s testimony on this issue will be accepted by a trier of fact, the question is whether, from NexPoint’s perspective, Waterhouse had no further duties to review, confirm, investigate, or to discuss the issue with Dondero. In that respect, section 6.01 of the Agreement, labeled “standard of care,” states that the Debtor and Waterhouse “shall discharge its duties under this Agreement with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”

14. I deposed Jim Seery on October 21, 2021, and asked him various questions about this provision of the Agreement. Mr. Seery testified to the effect that he did not believe that the Agreement obligated the Debtor or Waterhouse to do anything further after Dondero told Waterhouse to not pay the Note (again, assuming that this was true). I do not have a copy of Mr. Seer’s deposition yet.

15. With Mr. Seery testifying that he did not believe that the Agreement required the Debtor or Waterhouse to do anything further if Dondero in fact gave the instruction Waterhouse testified that he did, NexPoint concluded that it needed to retain an expert to review whether the “standard of care” specified in the Agreement compelled the Debtor or Waterhouse to do anything

further after Dondero gave the alleged instruction, such as checking with him to see if they understood him correctly, advising him of the potential serious consequences of a default, trying to dissuade him, or at least asking him once again prior to December 31, 2020 whether the payment should be made.

16. On October 22, 2021, I began searching for a potential expert. On October 26, 2021, I contacted Steven J. Pully about the potential engagement. After clearing conflicts and coming to an agreement, Mr. Pully agreed to the engagement on October 28, 2021. The engagement letter has yet to be finalized and executed, but I have every confidence that it will and the urgency of the matter necessitates this Declaration at this time. I have been extremely diligent in searching for an finding an expert once NexPoint determined that the retention of an expert was appropriate, which did not occur until the Seery deposition on October 21, 2021.

17. Even though NexPoint has retained Mr. Pully as of October 28, 2021, it is not possible for Mr. Pully to formulate an opinion and prepare a report by October 29, 2021. Among other things, various deposition transcripts of important witnesses have yet to be received and reviewed by Mr. Pully, and Mr. Pully has yet to review the underlying documents. Assuming no undue delays with respect to deposition transcripts, Mr. Pully should be able to prepare a report by December 13, 2021.

18. NexPoint therefore seeks an extension of the expert designation and report deadline through December 13, 2021, in order that justice may be done and not for delay or any improper purpose, NexPoint not having designated an expert before due solely to the lack of knowledge that Waterhouse would testify as he did on October 19, 2021 and that Mr. Seery would testify as to his view that the Agreement did not require Waterhouse to do anything thereafter.

I hereby swear under oath and penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.



DAVOR RUKAVINA

AMENDED AND RESTATED SHARED SERVICES AGREEMENT

This Amended and Restated Shared Services Agreement (as amended, modified, waived, supplemented or restated from time to time in accordance with the terms hereof, this “Agreement”), dated effective as of January 1, 2018, is entered into by and between NexPoint Advisors, L.P., a Delaware limited partnership, as the management company hereunder (in such capacity, the “Management Company”), and Highland Capital Management, L.P., a Delaware limited partnership (“Highland”), as the staff and services provider hereunder (in such capacity, the “Staff and Services Provider” and together with the Management Company, the “Parties”).

RECITALS

WHEREAS, the Staff and Services Provider is a registered investment adviser under the Investment Advisers Act of 1940, as amended (the “Advisers Act”);

WHEREAS, the Staff and Services Provider and the Management Company are engaged in the business of providing investment management services;

WHEREAS, the Parties entered into that certain Shared Services Agreement, dated effective as of January 1, 2013 (the “Original Agreement”);

WHEREAS, the Parties desire to amend and restate the Original Agreement and the Staff and Services Provider is hereby being retained to provide certain back- and middle-office services and administrative, infrastructure and other services to assist the Management Company in conducting its business, and the Staff and Services Provider is willing to make such services available to the Management Company, in each case, on the terms and conditions hereof;

WHEREAS, the Management Company may employ certain individuals to perform portfolio selection and asset management functions for the Management Company, and certain of these individuals may also be employed simultaneously by the Staff and Services Provider during their employment with the Management Company; and

WHEREAS, each Person employed by both the Management Company and the Staff and Services Provider as described above (each, a “Shared Employee”), if any, is and shall be identified on the books and records of each of the Management Company and the Staff and Services Provider (as amended, modified, supplemented or restated from time to time).

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree, and the Original Agreement is hereby amended, restated and replaced in its entirety as follows.

ARTICLE I

DEFINITIONS

Section 1.01 Certain Defined Terms. As used in this Agreement, the following terms shall have the following meanings:

“Affiliate” shall mean with respect to a Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the first Person. The term “control” means (i) the legal or beneficial ownership of securities representing a majority of the voting power of any person or (ii) the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether by contract or otherwise.

“Applicable Asset Criteria and Concentrations” means any applicable eligibility criteria, portfolio concentration limits and other similar criteria or limits which the Management Company instructs in writing to the Staff and Services Provider in respect of the Portfolio or one or more Accounts, as such criteria or limits may be modified, amended or supplemented from time to time in writing by the Management Company;

“Applicable Law” shall mean, with respect to any Person or property of such Person, any action, code, consent decree, constitution, decree, directive, enactment, finding, guideline, law, injunction, interpretation, judgment, order, ordinance, policy statement, proclamation, formal guidance, promulgation, regulation, requirement, rule, rule of law, rule of public policy, settlement agreement, statute, writ, or any particular section, part or provision thereof of any Governmental Authority to which the Person in question is subject or by which it or any of its property is bound.

“Client or Account” shall mean any fund, client or account advised by the Management Company, as applicable.

“Covered Person” shall mean the Staff and Services Provider, any of its Affiliates, and any of their respective managers, members, principals, partners, directors, officers, shareholders, employees and agents (but shall not include the Management Company, its subsidiaries or member(s) and any managers, members, principals, partners, directors, officers, shareholders, employees and agents of the Management Company or its subsidiaries or member(s) (in their capacity as such)).

“Governmental Authority” shall mean (i) any government or quasi-governmental authority or political subdivision thereof, whether national, state, county, municipal or regional, whether U.S. or non-U.S.; (ii) any agency, regulator, arbitrator, board, body, branch, bureau, commission, corporation, department, master, mediator, panel, referee, system or instrumentality of any such government, political subdivision or other government or quasi-government entity, whether non-U.S. or U.S.; and (iii) any court, whether U.S. or non-U.S.

“Indebtedness” shall mean: (a) all indebtedness for borrowed money and all other obligations, contingent or otherwise, with respect to surety bonds, guarantees of borrowed money, letters of credit and bankers’ acceptances whether or not matured, and hedges and other derivative contracts and financial instruments; (b) all obligations evidenced by notes, bonds, debentures, or similar instruments, or incurred under bank guaranty or letter of credit facilities or credit agreements; (c) all indebtedness created or arising under any conditional sale or other title retention agreement with respect to any property of the Management Company or any subsidiary; (d) all capital lease obligations; (e) all indebtedness guaranteed by such Person or any of its subsidiaries; and (f) all indebtedness guaranteed by such Person or any of its subsidiaries.

“Operating Guidelines” means any operating guidelines attached to any portfolio management agreement, investment management agreement or similar agreement entered into between the Management Company and a Client or Account.

“Portfolio” means the portfolio of securities and other assets, including without limitation, financial instruments, equity investments, collateral loan obligations, debt securities, preferred return notes and other similar obligations held directly or indirectly by, or on behalf of, Clients and Accounts from time to time;

“Securities Act” shall mean the Securities Act of 1933, as amended.

Section 1.02 Interpretation. The following rules apply to the use of defined terms and the interpretation of this Agreement: (i) the singular includes the plural and the plural includes the singular; (ii) “or” is not exclusive (unless preceded by “either”) and “include” and “including” are not limiting; (iii) unless the context otherwise requires, references to agreements shall be deemed to mean and include such agreements as the same may be amended, supplemented, waived and otherwise modified from time to time; (iv) a reference to a law includes any amendment or modification to such law and any rules or regulations issued thereunder or any law enacted in substitution or replacement therefor; (v) a reference to a Person includes its successors and assigns; (vi) a reference to a Section without further reference is to the relevant Section of this Agreement; (vii) the headings of the Sections and subsections are for convenience and shall not affect the meaning of this Agreement; (viii) “writing”, “written” and comparable terms refer to printing, typing, lithography and other shall mean of reproducing words in a visible form (including telefacsimile and electronic mail); (ix) “hereof”, “herein”, “hereunder” and comparable terms refer to the entire instrument in which such terms are used and not to any particular article, section or other subdivision thereof or attachment thereto; and (x) references to any gender include any other gender, masculine, feminine or neuter, as the context requires.

ARTICLE II

SERVICES

Section 2.01 General Authority. 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 if 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 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.

Section 2.02 Provision of Services. Without limiting the generality of Section 2.01 and subject to Section 2.04 (Applicable Asset Criteria and Concentrations) below, the Staff and Services Provider hereby agrees, from the date hereof, to provide the following back- and middle-office services and administrative, infrastructure and other services to the Management Company.

(a) *Back- and Middle-Office*: Assistance and advice with respect to back- and middle-office functions including, but not limited to, investment research, trade desk services,

including trade execution and settlement, finance and accounting, payments, operations, book keeping, cash management, cash forecasting, accounts payable, accounts receivable, expense reimbursement, vendor management, and information technology (including, without limitation, general support and maintenance (OMS, development, support), telecom (cellphones, telephones and broadband) and WSO);

(b) *Legal/Compliance/Risk Analysis.* Assistance and advice with respect to legal issues, litigation support, management of outside counsel, compliance support and implementation and general risk analysis;

(c) *Tax.* Assistance and advice with respect to tax audit support, tax planning and tax preparation and filing.

(d) *Management of Clients and Accounts.* Assistance and advice with respect to (i) the adherence to Operating Guidelines by the Management Company, and (ii) performing any obligations of the Management Company under or in connection with any back- and middle-office function set forth in any portfolio management agreement, investment management agreement or similar agreement in effect between the Management Company and any Client or Account from time to time.

(e) *Valuation.* Advice relating to the appointment of suitable third parties to provide valuations on assets comprising the Portfolio and including, but not limited to, such valuations required to facilitate the preparation of financial statements by the Management Company or the provision of valuations in connection with, or preparation of reports otherwise relating to, a Client or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity;

(f) *Execution and Documentation.* Assistance relating to the negotiation of the terms of, and the execution and delivery by the Management Company of, any and all documents which the Management Company considers to be necessary in connection with the acquisition and disposition of an asset in the Portfolio by the Management Company or a Client or Account managed by the Management Company, transactions involving the Management Company or a Client or Account managed by the Management Company, and any other rights and obligations of the Management Company or a Client or Account managed by the Management Company;

(g) *Marketing.* Provide access to marketing team representatives to assist with the marketing of the Management Company and any specified Clients or Accounts managed by the Management Company conditional on the Management Company's agreement that any incentive compensation related to such marketing shall be borne by the Management Company;

(h) *Reporting.* Assistance relating to any reporting the Management Company is required to make in relation to the Portfolio or any Client or Account, including reports relating to (i) credit facility reporting and purchases, sales, liquidations, acquisitions, disposals, substitutions and exchanges of assets in the Portfolio, (ii) the requirements of an applicable regulator, or (iii) other type of reporting which the Management Company and Staff and Services Provider may agree from time to time;

(i) *Administrative Services.* The provision of office space, information technology services and equipment, infrastructure, rent and parking and other related services requested or utilized by the Management Company from time to time;

(j) *Shared Employees.* To the extent applicable, the provision of Shared Employees and such additional human capital as may be mutually agreed by the Management Company and the Staff and Services Provider in accordance with the provisions of Section 2.03 hereof;

(k) *Ancillary Services.* Assistance and advice on all things ancillary or incidental to the foregoing; and

(l) *Other.* Assistance and advice relating to such other back- and middle-office services in connection with the day-to-day business of the Management Company as the Management Company and the Staff and Services Provider may from time to time agree.

For the avoidance of doubt, none of the services contemplated hereunder shall constitute investment advisory services, and the Staff & Services Provider shall not provide any advice to the Management Company or perform any duties on behalf of the Management Company, other than the back- and middle-office services contemplated herein, with respect to (a) the general management of the Management Company, its business or activities, (b) the initiation or structuring of any Client or Account or similar securitization, (c) the substantive investment management decisions with respect to any Client or Account or any related collateral obligations or securitization, (d) the actual selection of any collateral obligation or assets by the Management Company, (e) binding recommendations as to any disposal of or amendment to any Collateral Obligation or (f) any similar functions.

Section 2.03 Shared Employees.

(a) The Staff and Services Provider hereby agrees and consents that each Shared Employee, if any, shall be employed by the Management Company, and the Management Company hereby agrees and consents that each Shared Employee shall be employed by the Staff and Services Provider. Except as may otherwise separately be agreed in writing between the applicable Shared Employee and the Management Company and/or the Staff and Services Provider, in each of their discretion, each Shared Employee is an at-will employee and no guaranteed employment or other employment arrangement is agreed or implied by this Agreement with respect to any Shared Employee, and for avoidance of doubt this Agreement shall not amend, limit, constrain or modify in any way the employment arrangements as between any Shared Employee and the Staff and Services Provider or as between any Shared Employee and the Management Company, it being understood that the Management Company may enter into a short-form employment agreement with any Shared Employee memorializing such Shared Employee's status as an employee of the Management Company. To the extent applicable, the Staff and Services Provider shall ensure that the Management Company has sufficient access to the Shared Employees so that the Shared Employees spend adequate time to provide the services required hereunder. The Staff and Services Provider may also employ the services of persons other than the Specified Persons as it deems fit in its sole discretion

(b) Notwithstanding that the Shared Employees, if any, shall be employed by both the Staff and Services Provider and the Management Company, the Parties acknowledge and agree that any and all salary and benefits of each Shared Employee shall be paid exclusively by the Staff and Services Provider and shall not be paid or borne by the Management Company and no additional amounts in connection therewith shall be due from the Management Company to the Staff and Services Provider.

(c) To the extent that a Shared Employee participates in the rendering of services to the Management Company's clients, the Shared Employee shall be subject to the oversight and control of the Management Company and such services shall be provided by the Shared Employee exclusively in his or her capacity as a "supervised person" of, or "person associated with", the Management Company (as such terms are defined in Sections 202(a)(25) and 202(a)(17), respectively, of the Advisers Act).

(d) Each Party may continue to oversee, supervise and manage the services of each Shared Employee in order to (1) ensure compliance with the Party's compliance policies and procedures, (2) ensure compliance with regulations applicable to the Party and (3) protect the interests of the Party and its clients; *provided* that Staff and Services Provider shall (A) cooperate with the Management Company's supervisory efforts and (B) make periodic reports to the Management Company regarding the adherence of Shared Employees to Applicable Law, including but not limited to the 1940 Act, the Advisers Act and the United States Commodity Exchange Act of 1936, as amended, in performing the services hereunder.

(e) Where a Shared Employee provides services hereunder through both Parties, the Parties shall cooperate to ensure that all such services are performed consistently with Applicable Law and relevant compliance controls and procedures designed to prevent, among other things, breaches in information security or the communication of confidential, proprietary or material non-public information.

(f) The Staff and Services Provider shall ensure that each Shared Employee has any registrations, qualifications and/or licenses necessary to provide the services hereunder.

(g) The Parties will cooperate to ensure that information about the Shared Employees is adequately and appropriately disclosed to clients, investors (and potential investors), investment banks operating as initial purchaser or placement agent with respect to any Client or Account, and regulators, as applicable. To facilitate such disclosure, the Staff and Services Provider agrees to provide, or cause to be provided, to the Management Company such information as is deemed by the Management Company to be necessary or appropriate with respect to the Staff and Services Provider and the Shared Employees (including, but not limited to, biographical information about each Shared Employee).

(h) The Parties shall cooperate to ensure that, when so required, each has adopted a Code of Ethics meeting the requirements of the Advisers Act ("Code of Ethics") that is consistent with applicable law and which is substantially similar to the other Party's Code of Ethics.

(i) The Staff and Services Provider shall make reasonably available for use by the Management Company, including through Shared Employees providing services pursuant to this Agreement, any relevant intellectual property and systems necessary for the provision of the services hereunder.

(j) The Staff and Services Provider shall require that each Shared Employee:

(i) certify that he or she is subject to, and has been provided with, a copy of each Party's Code of Ethics and will make such reports, and seek prior clearance for such actions and activities, as may be required under the Codes of Ethics;

(ii) be subject to the supervision and oversight of each Party's officers and directors, including without limitation its Chief Compliance Officer ("CCO"), which CCO may be the same Person, with respect to the services provided to that Party or its clients;

(iii) provide services hereunder and take actions hereunder only as approved by the Management Company;

(iv) provide any information requested by a Party, as necessary to comply with applicable disclosure or regulatory obligations;

(v) to the extent authorized to transact on behalf of the Management Company or a Client or Account, take reasonable steps to ensure that any such transaction is consistent with any policies and procedures that may be established by the Parties and all Applicable Asset Criteria and Concentrations; and

(vi) act, at all times, in a manner consistent with the fiduciary duties and standard of care owed by the Management Company to its members and direct or indirect investors or to a Client or Account as well as clients of Staff and Services Provider by seeking to ensure that, among other things, information about any investment advisory or trading activity applicable to a particular client or group of clients is not used to benefit the Shared Employee, any Party or any other client or group of clients in contravention of such fiduciary duties or standard of care.

(k) Unless specifically authorized to do so, or appointed as an officer or authorized person of the Management Company with such authority, no Shared Employee may contract on behalf or in the name of the Management Company, acting as principal.

Section 2.04 Applicable Asset Criteria and Concentrations. The Management Company will promptly inform the Staff and Services Provider in writing of any Applicable Asset Criteria and Concentrations to which it agrees from time to time and the Staff and Services Provider shall take such Applicable Asset Criteria and Concentrations into account when providing assistance and advice in accordance with Section 2.02 above and any other assistance or advice provided in accordance with this Agreement.

Section 2.05 Compliance with Management Company Policies and Procedures. The Management Company will from time to time provide the Staff and Services Provider and the

Shared Employees, if any, with any policy and procedure documentation which it establishes internally and to which it is bound to adhere in conducting its business pursuant to regulation, contract or otherwise. Subject to any other limitations in this Agreement, the Staff and Services Provider will use reasonable efforts to ensure any services it and the Shared Employees provide pursuant to this Agreement complies with or takes account of such internal policies and procedures.

Section 2.06 Authority. The Staff and Services Provider's scope of assistance and advice hereunder is limited to the services specifically provided for in this Agreement. The Staff and Services Provider shall not assume or be deemed to assume any rights or obligations of the Management Company under any other document or agreement to which the Management Company is a party. Notwithstanding any other express or implied provision to the contrary in this Agreement, the activities of the Staff and Services Provider pursuant to this Agreement shall be subject to the overall policies of the Management Company, as notified to the Staff and Services Provider from time to time. The Staff and Services Provider shall not have any duties or obligations to the Management Company unless those duties and obligations are specifically provided for in this Agreement (or in any amendment, modification or novation hereto or hereof to which the Staff and Services Provider is a party).

Section 2.07 Third Parties.

(a) The Staff and Services Provider may employ third parties, including its affiliates, to render advice, provide assistance and to perform any of its duties under this Agreement; *provided* that notwithstanding the employment of third parties for any such purpose, the Staff and Services Provider shall not be relieved of any of its obligations or liabilities under this Agreement.

(b) In providing services hereunder, the Staff and Services Provider may rely in good faith upon and will incur no liability for relying upon advice of nationally recognized counsel (which may be counsel for the Management Company, a Client or Account or any Affiliate of the foregoing), accountants or other advisers as the Staff and Services Provider determines, in its sole discretion, is reasonably appropriate in connection with the services provided by the Staff and Services Provider under this Agreement.

Section 2.08 Management Company to Cooperate with the Staff and Services Provider. In furtherance of the Staff and Services Provider's obligations under this Agreement the Management Company shall cooperate with, provide to, and fully inform the Staff and Services Provider of, any and all documents and information the Staff and Services Provider reasonably requires to perform its obligations under this Agreement.

Section 2.09 Power of Attorney. If the Management Company considers it necessary for the provision by the Staff and Services Provider of the assistance and advice under this Agreement (after consultation with the Staff and Services Provider), it may appoint the Staff and Services Provider as its true and lawful agent and attorney, with full power and authority in its name to sign, execute, certify, swear to, acknowledge, deliver, file, receive and record any and all documents that the Staff and Services Provider reasonably deems appropriate or necessary in connection with the execution and settlement of acquisitions of assets as directed by the Management Company

and the Staff and Services Provider’s powers and duties hereunder (which for the avoidance of doubt shall in no way involve the discretion and/or authority of the Management Company with respect to investments). Any such power shall be revocable in the sole discretion of the Management Company.

ARTICLE III

CONSIDERATION AND EXPENSES

Section 3.01 Consideration. As compensation for its performance of its obligations as Staff and Services Provider under this Agreement, the Staff and Services Provider will be entitled to receive a flat fee of \$168,000 per month (the “Staff and Services Fee”), payable monthly in advance on the first business day of each month.

Section 3.02 Costs and Expenses. Each party shall bear its own expenses; *provided* that the Management Company shall reimburse the Staff and Services Provider for any and all costs and expenses that may be borne properly by the Management Company.

Section 3.03 Deferral. Notwithstanding anything to the contrary contained herein, if on any date the Management Company determines that it would not have sufficient funds available to it to make a payment of Indebtedness, it shall have the right to defer any all and amounts payable to the Staff and Services Provider pursuant to this Agreement, including any fees and expenses; *provided* that the Management Company shall promptly pay all such amounts on the first date thereafter that sufficient amounts exist to make payment thereof.

ARTICLE IV

REPRESENTATIONS AND COVENANTS

Section 4.01 Representations. Each of the Parties hereto represents and warrants that:

(a) It has full power and authority to execute and deliver, and to perform its obligations under, this Agreement;

(b) this Agreement has been duly authorized, executed and delivered by it and constitutes its valid and binding, obligation, enforceable in accordance with its terms except as the enforceability hereof may be subject to (i) bankruptcy, insolvency, reorganization moratorium, receivership, conservatorship or other similar laws now or hereafter in effect relating to creditors’ rights and (ii) general principles of equity (regardless of whether such enforcement is considered in a proceeding, in equity or at law);

(c) no consent, approval, authorization or order of or declaration or filing with any Governmental Authority is required for the execution of this Agreement or the performance by it of its duties hereunder, except such as have been duly made or obtained; and

(d) neither the execution and delivery of this Agreement nor the fulfillment of the terms hereof conflicts with or results in a breach or violation of any of the terms or provisions of, or constitutes a default under, (i) its constituting and organizational documents; or (ii) the terms

of any material indenture, contract, lease, mortgage, deed of trust, note, agreement or other evidence of indebtedness or other material agreement, obligation, condition, covenant or instrument to which it is a party or by which it is bound.

ARTICLE V

COVENANTS

Section 5.01 Compliance: Advisory Restrictions.

(a) The Staff and Services Provider shall reasonably cooperate with the Management Company in connection with the Management Company's compliance with its policies and procedures relating to oversight of the Staff and Services Provider. Specifically, the Staff and Services Provider agrees that it will provide the Management Company with reasonable access to information relating to the performance of Staff and Services Provider's obligations under this Agreement.

(b) This Agreement is not intended to and shall not constitute an assignment, pledge or transfer of any portfolio management agreement or any part thereof. It is the express intention of the parties hereto that this Agreement and all services performed hereunder comply in all respects with all (a) applicable contractual provisions and restrictions contained in each portfolio management agreement, investment management agreement or similar agreement and each document contemplated thereby; and (b) Applicable Laws (collectively, the "Advisory Restrictions"). If any provision of this Agreement is determined to be in violation of any Advisory Restriction, then the services to be provided under this Agreement shall automatically be limited without action by any person or entity, reduced or modified to the extent necessary and appropriate to be enforceable to the maximum extent permitted by such Advisory Restriction.

Section 5.02 Records: Confidentiality.

The Staff and Services Provider shall maintain or cause to be maintained appropriate books of account and records relating to its services performed hereunder, and such books of account and records shall be accessible for inspection by representatives of the Management Company and its accountants and other agents at any time during normal business hours and upon not less than three (3) Business Days' prior notice; *provided* that the Staff and Services Provider shall not be obligated to provide access to any non-public information if it in good faith determines that the disclosure of such information would violate any applicable law, regulation or contractual arrangement.

The Staff and Services Provider shall follow its customary procedures to keep confidential any and all information obtained in connection with the services rendered hereunder that is either (a) of a type that would ordinarily be considered proprietary or confidential, such as information concerning the composition of assets, rates of return, credit quality, structure or ownership of securities, or (b) designated as confidential obtained in connection with the services rendered by the Staff and Services Provider hereunder and shall not disclose any such information to non-affiliated third parties, except (i) with the prior written consent of the Management Company, (ii) such information as a rating agency shall reasonably request in connection with its

rating of notes issued by a CLO or supplying credit estimates on any obligation included in the Portfolio, (iii) in connection with establishing trading or investment accounts or otherwise in connection with effecting transactions on behalf of the Management Company or any Client or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity, (iv) as required by (A) Applicable Law or (B) the rules or regulations of any self-regulating organization, body or official having jurisdiction over the Staff and Services Provider or any of its Affiliates, (v) to its professional advisors (including, without limitation, legal, tax and accounting advisors), (vi) such information as shall have been publicly disclosed other than in known violation of this Agreement or shall have been obtained by the Staff and Services Provider on a non-confidential basis, (vii) such information as is necessary or appropriate to disclose so that the Staff and Services Provider may perform its duties hereunder, (viii) as expressly permitted in the final offering memorandum or any definitive transaction documents relating to any Client or Account, (ix) information relating to performance of the Portfolio as may be used by the Staff and Services Provider in the ordinary course of its business or (xx) such information as is routinely disclosed to the trustee, custodian or collateral administrator of any Client or Account in connection with such trustee's, custodian's or collateral administrator's performance of its obligations under the transaction documents related to such Client or Account. Notwithstanding the foregoing, it is agreed that the Staff and Services Provider may disclose without the consent of any Person (1) that it is serving as staff and services provider to the Management Company, (2) the nature, aggregate principal amount and overall performance of the Portfolio, (3) the amount of earnings on the Portfolio, (4) such other information about the Management Company, the Portfolio and the Clients or Accounts as is customarily disclosed by staff and services providers to management vehicles similar to the Management Company, and (5) the United States federal income tax treatment and United States federal income tax structure of the transactions contemplated by this Agreement and the related documents and all materials of any kind (including opinions and other tax analyses) that are provided to them relating to such United States federal income tax treatment and United States income tax structure. This authorization to disclose the U.S. tax treatment and tax structure does not permit disclosure of information identifying the Staff and Services Provider, the Clients or Accounts or any other party to the transactions contemplated by this Agreement (except to the extent such information is relevant to U.S. tax structure or tax treatment of such transactions).

ARTICLE VI

EXCULPATION AND INDEMNIFICATION

Section 6.01. Standard of Care. Except as otherwise expressly provided herein, each Covered Person shall discharge its duties under this Agreement with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. To the extent not inconsistent with the foregoing, each Covered Person shall follow its customary standards, policies and procedures in performing its duties hereunder. No Covered Person shall deal with the income or assets of the Management Company in such Covered Person's own interest or for its own account. Each Covered Person in its respective sole and absolute discretion may separately engage or invest in any other business ventures, including those that may be in competition with the Management Company, and the Management Company will not have any rights in or to such ventures or the income or profits derived therefrom.

Section 6.02 Exculpation. To the fullest extent permitted by law, no Covered Person will be liable to the Management Company, any Member, or any shareholder, partner or member thereof, for (i) any acts or omissions by such Covered Person arising out of or in connection with the conduct of the business of the Management Company or its General Partner, or any investment made or held by the Management Company or its General Partner, unless it is determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, to be the result of gross negligence or to constitute fraud or willful misconduct (as interpreted under the laws of the State of Delaware) (each, a “Disabling Conduct”) on the part of such Covered Person, (ii) any act or omission of any Investor, (iii) any mistake, gross negligence, misconduct or bad faith of any employee, broker, administrator or other agent or representative of such Covered Person, *provided* that such employee, broker, administrator or agent was selected, engaged or retained by or on behalf of such Covered Person with reasonable care, or (iv) any consequential (including loss of profit), indirect, special or punitive damages. To the extent that, at law or in equity, any Covered Person has duties (including fiduciary duties) and liabilities relating thereto to the Management Company or any Member, no Covered Person acting under this Agreement shall be liable to the Management Company or to any such Member for its good-faith reliance on the provisions of this Agreement. The exculpations set forth in this Section 6.02 shall exculpate any Covered Person regardless of such Covered Person’s sole, comparative, joint, concurrent, or subsequent negligence.

To the fullest extent permitted by law, no Covered Person shall have any personal liability to the Management Company or any Member solely by reason of any change in U.S. federal, state or local or foreign income tax laws, or in interpretations thereof, as they apply to the Management Company or the Members, whether the change occurs through legislative, judicial or administrative action.

Any Covered Person in its sole and absolute discretion may consult legal counsel, accountants or other advisers selected by it, and any act or omission taken, or made in good faith by such Person on behalf of the Management Company or in furtherance of the business of the Management Company in good-faith reliance on and in accordance with the advice of such counsel, accountants or other advisers shall be full justification for the act or omission, and to the fullest extent permitted by applicable law, no Covered Person shall be liable to the Management Company or any Member in so acting or omitting to act if such counsel, accountants or other advisers were selected, engaged or retained with reasonable care.

Section 6.03 Indemnification by the Management Company. The Management Company shall and hereby does, to the fullest extent permitted by applicable law, indemnify and hold harmless any Covered Person from and against any and all claims, causes of action (including, but not limited to, strict liability, negligence, statutory violation, regulatory violation, breach of contract, and all other torts and claims arising under common law), demands, liabilities, costs, expenses, damages, losses, suits, proceedings, judgments, assessments, actions and other liabilities, whether judicial, administrative, investigative or otherwise, of whatever nature, known or unknown, liquidated or unliquidated (“Claims”), that may accrue to or be incurred by any Covered Person, or in which any Covered Person may become involved, as a party or otherwise, or with which any Covered Person may be threatened, relating to or arising out of the investment or other activities of the Management Company or its General Partner, or activities undertaken in connection with the Management Company or its General Partner, or otherwise relating to or

arising out of this Agreement, including amounts paid in satisfaction of judgments, in compromise or as fines or penalties, and attorneys' fees and expenses incurred in connection with the preparation for or defense or disposition of any investigation, action, suit, arbitration or other proceeding (a "Proceeding"), whether civil or criminal (all of such Claims, amounts and expenses referred to therein are referred to collectively as "Damages"), except to the extent that it shall have been determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, that such Damages arose primarily from Disabling Conduct of such Covered Person. The termination of any Proceeding by settlement, judgment, order, conviction or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that any Damages relating to such settlement, judgment, order, conviction or plea of nolo contendere or its equivalent or otherwise relating to such Proceeding arose primarily from Disabling Conduct of any Covered Persons. Any Covered Person shall be indemnified under the terms of this Section 6.03 regardless of such Covered Person's sole, comparative, joint, concurrent, or subsequent negligence.

Expenses (including attorneys' fees) incurred by a Covered Person in defense or settlement of any Claim that may be subject to a right of indemnification hereunder shall be advanced by the Management Company prior to the final disposition thereof upon receipt of a written undertaking by or on behalf of the Covered Person to repay the amount advanced to the extent that it shall be determined ultimately by a court of competent jurisdiction that the Covered Person is not entitled to be indemnified hereunder. The right of any Covered Persons to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Covered Person may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Covered Person's successors, assigns and legal representatives. Any judgments against the Management Company and/or any Covered Persons in respect of which such Covered Person is entitled to indemnification shall first be satisfied from the assets of the Management Company, including Drawdowns, before such Covered Person is responsible therefor.

Notwithstanding any provision of this Agreement to the contrary, the provisions of this Section 6.03 shall not be construed so as to provide for the indemnification of any Covered Person for any liability (including liability under Federal securities laws which, under certain circumstances, impose liability even on persons that act in good faith), to the extent (but only to the extent) that such indemnification would be in violation of applicable law, but shall be construed so as to effectuate the provisions of this Section 6.03 to the fullest extent permitted by law.

Section 6.04 Other Sources of Recovery etc. The indemnification rights set forth in Section 6.03 are in addition to, and shall not exclude, limit or otherwise adversely affect, any other indemnification or similar rights to which any Covered Person may be entitled. If and to the extent that other sources of recovery (including proceeds of any applicable policies of insurance or indemnification from any Person in which any of the Clients or Accounts has an investment) are available to any Covered Person, such Covered Person shall use reasonable efforts to obtain recovery from such other sources before the Company shall be required to make any payment in respect of its indemnification obligations hereunder; *provided* that, if such other recovery is not available without delay, the Covered Person shall be entitled to such payment by the Management Company and the Management Company shall be entitled to reimbursement out of such other recovery when and if obtained.

Section 6.05 Rights of Heirs, Successors and Assigns. The indemnification rights provided by Section 6.03 shall inure to the benefit of the heirs, executors, administrators, successors and assigns of each Covered Person.

Section 6.06 Reliance. A Covered Person shall incur no liability to the Management Company or any Member in acting upon any signature or writing reasonably believed by him, her or it to be genuine, and may rely in good faith on a certificate signed by an officer of any Person in order to ascertain any fact with respect to such Person or within such Person's knowledge. Each Covered Person may act directly or through his, her or its agents or attorneys.

ARTICLE VII

TERMINATION

Section 7.01 Termination. Either Party may terminate this Agreement at any time upon at least thirty (30) days' written notice to the other.

ARTICLE VIII

MISCELLANEOUS

Section 8.01 Amendments. This Agreement may not be amended or modified except by an instrument in writing signed by each Party.

Section 8.02 Assignment and Delegation.

(a) Neither Party may assign, pledge, grant or otherwise encumber or transfer all or any part of its rights or responsibilities under this Agreement, in whole or in part, except (i) as provided in clauses (b) and (c) of this Section 8.02, without the prior written consent of the other Party and (ii) in accordance with Applicable Law.

(b) Except as otherwise provided in this Section 8.02, the Staff and Services Provider may not assign its rights or responsibilities under this Agreement unless (i) the Management Company consents in writing thereto and (ii) such assignment is made in accordance with Applicable Law.

(c) The Staff and Services Provider may, without satisfying any of the conditions of Section 8.02(a) other than clause (ii) thereof, (1) assign any of its rights or obligations under this Agreement to an Affiliate; *provided* that such Affiliate (i) has demonstrated ability, whether as an entity or by its principals and employees, to professionally and competently perform duties similar to those imposed upon the Staff and Services Provider pursuant to this Agreement and (ii) has the legal right and capacity to act as Staff and Services Provider under this Agreement, or (2) enter into (or have its parent enter into) any consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all of its assets to, another entity; *provided* that, at the time of such consolidation, merger, amalgamation or transfer the resulting, surviving or transferee entity assumes all the obligations of the Staff and Services Provider under this Agreement generally (whether by operation of law or by contract) and the other entity is a continuation of the Staff and Services Provider in another corporate or similar form and has

substantially the same staff; *provided further* that the Staff and Services Provider shall deliver ten (10) Business Days' prior notice to the Management Company of any assignment or combination made pursuant to this sentence. Upon the execution and delivery of any such assignment by the assignee, the Staff and Services Provider will be released from further obligations pursuant to this Agreement except to the extent expressly provided herein.

Section 8.03 Non-Recourse; Non-Petition.

(a) The Staff and Services Provider agrees that the payment of all amounts to which it is entitled pursuant to this Agreement shall be payable by the Management Company only to the extent of assets held in the Portfolio.

(b) Notwithstanding anything to the contrary contained herein, the liability of the Management Company to the Staff and Services Provider hereunder is limited in recourse to the Portfolio, and if the proceeds of the Portfolio following the liquidation thereof are insufficient to meet the obligations of the Management Company hereunder in full, the Management Company shall have no further liability in respect of any such outstanding obligations, and such obligations and all claims of the Staff and Services Provider or any other Person against the Management Company hereunder shall thereupon extinguish and not thereafter revive. The Staff and Services Provider accepts that the obligations of the Management Company hereunder are the corporate obligations of the Management Company and are not the obligations of any employee, member, officer, director or administrator of the Management Company and no action may be taken against any such Person in relation to the obligations of the Management Company hereunder.

(c) Notwithstanding anything to the contrary contained herein, any Staff and Services Provider agrees not to institute against, or join any other Person in instituting against, the Management Company any bankruptcy, reorganization, arrangement, insolvency, moratorium or liquidation proceedings, or other proceedings under United States federal or state bankruptcy laws, or similar laws until at least one year and one day (or, if longer, the then applicable preference period plus one day) after the payment in full all amounts payable in respect of any Indebtedness incurred to finance any portion of the Portfolio; *provided* that nothing in this provision shall preclude, or be deemed to stop, the Staff and Services Provider from taking any action prior to the expiration of the aforementioned one year and one day period (or, if longer, the applicable preference period then in effect plus one day) in (i) any case or proceeding voluntarily filed or commenced by the Management Company, or (ii) any involuntary insolvency proceeding filed or commenced against the Management Company by a Person other than the Staff and Services Provider.

(d) The Management Company hereby acknowledges and agrees that the Staff and Services Provider's obligations hereunder shall be solely the corporate obligations of the Staff and Services Provider, and are not the obligations of any employee, member, officer, director or administrator of the Staff and Services Provider and no action may be taken against any such Person in relation to the obligations of the Staff and Services Provider hereunder.

(e) The provisions of this Section 8.03 shall survive termination of this Agreement for any reason whatsoever.

Section 8.04 Governing Law.

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Texas. The Parties unconditionally and irrevocably consent to the exclusive jurisdiction of the courts located in the State of Texas and waive any objection with respect thereto, for the purpose of any action, suit or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby.

(b) The Parties irrevocably agree for the benefit of each other that the courts of the State of Texas and the United States District Court located in the Northern District of Texas in Dallas are to have exclusive jurisdiction to settle any disputes (whether contractual or non-contractual) which may arise out of or in connection with this Agreement and that accordingly any action arising out of or in connection therewith (together referred to as "Proceedings") may be brought in such courts. The Parties irrevocably submit to the jurisdiction of such courts and waive any objection which they may have now or hereafter to the laying of the venue of any Proceedings in any such court and any claim that any Proceedings have been brought in an inconvenient forum and further irrevocably agree that a judgment in any Proceedings brought in such courts shall be conclusive and binding upon the Parties and may be enforced in the courts of any other jurisdiction.

Section 8.05 WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHTS IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS AGREEMENT. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT IT HAS RECEIVED FULL AND SUFFICIENT CONSIDERATION FOR THIS PROVISION AND THAT THIS PROVISION IS A MATERIAL INDUCEMENT FOR ITS ENTERING INTO THIS AGREEMENT.

Section 8.06 Severability. The provisions of this Agreement are independent of and severable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties.

Section 8.07 No Waiver. The performance of any condition or obligation imposed upon any Party may be waived only upon the written consent of the Parties. Such waiver shall be limited to the terms thereof and shall not constitute a waiver of any other condition or obligation of the other Party. Any failure by any Party to enforce any provision shall not constitute a waiver of that or any other provision or this Agreement.

Section 8.08 Counterparts. This Agreement may be executed in any number of counterparts by facsimile or other written or electronic form of communication, each of which shall be deemed to be an original as against any Party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the Parties reflected hereon as the signatories.

Section 8.09 Third Party Beneficiaries. This Agreement is for the sole benefit of the Parties hereto and their permitted assigns and nothing herein express or implied shall give or be construed to give to any Person, other than the Parties hereto and such permitted assigns, any legal or equitable rights hereunder. For avoidance of doubt, this Agreement is not for the benefit or and is not enforceable by any Shared Employee, Client or Account or any investor (directly or indirectly) in the Management Company.

Section 8.10 No Partnership or Joint Venture. Nothing set forth in this Agreement shall constitute, or be construed to create, an employment relationship, a partnership or a joint venture between the Parties. Except as expressly provided herein or in any other written agreement between the Parties, no Party has any authority, express or implied, to bind or to incur liabilities on behalf of, or in the name of, any other Party.

Section 8.11 Independent Contractor. Notwithstanding anything to the contrary, the Staff and Services Provider shall be deemed to be an independent contractor and, except as expressly provided or authorized herein, shall have no authority to act for or represent the Management Company or any Client or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity in any manner or otherwise be deemed an agent of the Management Company or any Client or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity.

Section 8.12 Written Disclosure Statement. The Management Company acknowledges receipt of Part 2 of the Staff and Services Provider's Form ADV, as required by Rule 204-3 under the Advisers Act, on or before the date of execution of this Agreement.

Section 8.13 Headings. The descriptive headings contained in this Agreement are for convenience of reference only and shall not affect in any way the meaning or interpretation of this Agreement.

Section 8.14 Entire Agreement. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and supersedes all prior agreements and undertakings, both written and oral, between the Parties with respect to such subject matter.

Section 8.15 Notices. Any notice or demand to any Party to be given, made or served for any purposes under this Agreement shall be given, made or served by sending the same by overnight mail or email transmission or by delivering it by hand as follows:

- (a) If to the Management Company:

NexPoint Advisors, L.P.
200 Crescent Court
Suite 700
Dallas, TX 75201

(b) If to the Staff and Services Provider:

Highland Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

or to such other address or email address as shall have been notified to the other Parties.

[The remainder of this page intentionally left blank.]

IN WITNESS WHEREOF, each Party has caused this Agreement to be executed as of the date hereof by its duly authorized representative.


NEXPOINT ADVISORS, L.P.

By: NexPoint Advisors GP, LLC, its
General Partner

By: 
Name: Frank Waterhouse
Title: Treasurer

**HIGHLAND CAPITAL
MANAGEMENT, L.P.**

By: Strand Advisors, Inc., its General
Partner

By: 
Name: Frank Waterhouse
Title: Treasurer

Davor Rukavina, Esq.
 Texas Bar No. 24030781
 Julian P. Vasek, Esq.
 Texas Bar No. 24070790
 MUNSCH HARDT KOPF & HARR, P.C.
 500 N. Akard Street, Suite 3800
 Dallas, Texas 75202-2790
 Telephone: (214) 855-7500
 Facsimile: (214) 978-4375

Counsel for Defendant NexPoint Advisors, L.P.

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

In re:	§	Case No. 19-34054-SGJ-11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor.	§	
<hr style="border: 1px solid black;"/>		
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
	§	
v.	§	
	§	Adversary No.: 21-03005-sgj
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND DUGABOY INVESTMENT TRUST,	§ § § § § § § §	
Defendants.	§	

**DEFENDANT NEXPOINT ADVISORS, L.P.’S
 ANSWER TO AMENDED COMPLAINT**

Defendant NexPoint Advisors, L.P. (“NexPoint”), a defendant in the above-styled and numbered adversary proceeding (the “Adversary Proceeding”) filed by Highland Capital Management, L.P. (the “Plaintiff”), hereby files this Answer (the “Answer”) responding to the *Amended Complaint for (I) Breach of Contract and (II) Turnover of Property (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty* [Adv. Dkt. 73] (the “Amended Complaint”). Where an allegation in the Amended Complaint is not expressly admitted in this Answer, it is denied.

Exhibit B

PRELIMINARY STATEMENT

1. The first sentence of paragraph 1 of the Amended Complaint sets forth the Plaintiff's objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied. The second sentence contains a legal conclusion that does not require a response. To the extent it contains factual allegations, they are denied.

2. Defendant NexPoint admits that NPA's First Amended Answer speaks for itself. To the extent paragraph 2 contradicts the First Amended Answer, it is denied.

3. Defendant NexPoint denies the allegations in paragraph 3 of the Amended Complaint.

4. Paragraph 4 of the Amended Complaint sets forth the Plaintiff's objective in bringing the Amended Complaint and does not require a response. To the extent it contains factual allegations, they are denied.

5. Paragraph 5 of the Amended Complaint contains a summary of the relief the Plaintiff seeks and does not require a response. To the extent it contains factual allegations, they are denied.

JURISDICTION AND VENUE

6. Defendant NexPoint admits that this Adversary Proceeding relates to the Plaintiff's bankruptcy case but denies any implication that this fact confers Constitutional authority on the Bankruptcy Court to adjudicate this dispute. Any allegations in paragraph 6 not expressly admitted are denied.

7. Defendant NexPoint admits that the Court has statutory (but not Constitutional) jurisdiction to hear this Adversary Proceeding. Any allegations in paragraph 7 not expressly admitted are denied.

8. Defendant NexPoint denies the allegations contained in paragraph 8 of the Amended Complaint. Defendant NexPoint does not consent to any trial before, or final order entered by, the Bankruptcy Court. Defendant NexPoint demands a trial by jury of all issues so triable.

9. Defendant NexPoint admits the allegations in paragraph 9 of the Amended Complaint.

THE PARTIES

10. Defendant NexPoint admits the allegations in paragraph 10 of the Amended Complaint.

11. Defendant NexPoint admits the allegations in paragraph 11 of the Amended Complaint.

12. Defendant NexPoint admits the allegations in paragraph 12 of the Amended Complaint.

13. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 13 of the Amended Complaint and therefore denies the same.

14. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 14 of the Amended Complaint and therefore denies the same.

CASE BACKGROUND

15. Defendant NexPoint admits the allegations in paragraph 15 of the Amended Complaint.

16. Defendant NexPoint admits the allegations in paragraph 16 of the Amended Complaint.

17. Defendant NexPoint admits the allegations in paragraph 17 of the Amended Complaint.

18. Defendant NexPoint admits the allegations in paragraph 18 of the Amended Complaint.

19. Defendant NexPoint admits the allegations in paragraph 19 of the Amended Complaint.

STATEMENT OF FACTS

20. Defendant NexPoint admits that it has executed at least one promissory note under which the Debtor is a payee. Any allegations in paragraph 20 not expressly admitted are denied.

21. Defendant NexPoint admits the allegations in paragraph 21 of the Amended Complaint.

22. Defendant NexPoint denies paragraph 22 of the Complaint. The document speaks for itself and the quote set forth in paragraph 22 is not verbatim.

23. Defendant NexPoint admits the allegations in paragraph 23 of the Amended Complaint.

24. Defendant NexPoint denies paragraph 24 of the Complaint. The document speaks for itself and the quote set forth in paragraph 24 is not verbatim.

25. Defendant NexPoint admits the allegations in paragraph 25 of the Amended Complaint.

26. Defendant NexPoint admits that it did not make a payment under the Note on December 31, 2020. Defendant NexPoint denies that any payment was due under the Note on December 31, 2020. To the extent not expressly admitted, paragraph 26 of the Amended Complaint is denied.

27. Defendant NexPoint admits that Exhibit 2 to the Amended Complaint (the “Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 27 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 27 of the Amended Complaint is denied.

28. Defendant NexPoint admits that it paid the Debtor \$1,406,111.92 on January 14, 2021, but denies that any payment was due on December 31, 2020 or that this was an attempt to cure a default. To the extent not expressly admitted, paragraph 28 of the Amended Complaint is denied.

29. Defendant NexPoint admits that Exhibit 3 to the Amended Complaint (the “Second Demand Letter”) is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 29 of the Amended Complaint asserts a legal conclusion, no response is required, and it is denied. To the extent not expressly admitted, paragraph 29 of the Amended Complaint is denied.

30. To the extent paragraph 30 of the Amended Complaint asserts a legal conclusion, no response is necessary, and it is denied. The Defendant otherwise admits paragraph 30 of the Amended Complaint.

31. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 31 of the Amended Complaint and therefore denies the same.

32. Defendant NexPoint denies the allegations in paragraph 32 of the Amended Complaint.

33. Defendant NexPoint admits that the Debtor filed the Original Complaint in this action on January 22, 2021, as alleged in the first sentence of paragraph 33 of the Amended

Complaint. Defendant NexPoint denies it is liable for the relief requested in the Original Complaint. To the extent not expressly admitted, paragraph 33 of the Amended Complaint is denied.

34. Defendant NexPoint admits the allegations in paragraph 34 of the Amended Complaint.

35. Defendant NexPoint admits the allegations in paragraph 35 of the Amended Complaint.

36. Defendant NexPoint admits that NexPoint's First Amended Answer speaks for itself. To the extent paragraph 36 contradicts the First Amended Answer, it is denied.

37. Defendant NexPoint admits that NexPoint's First Amended Answer speaks for itself. To the extent paragraph 37 contradicts the First Amended Answer, it is denied.

38. Paragraph 38 of the Amended Complaint asserts a legal conclusion to which no answer is required. To the extent of any factual allegation, Defendant NexPoint admits that Mr. Dondero controlled NPA and denies that he controlled the Debtor at the time of the Alleged Agreement.

39. Defendant NexPoint lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 39 of the Amended Complaint and therefore denies the same.

40. Defendant NexPoint denies the allegations in paragraph 40 of the Amended Complaint.

41. Defendant NexPoint admits that Exhibit 4 to the Amended Complaint is a true and correct copy of what it purports to be and that the document speaks for itself. To the extent paragraph 41 of the Amended Complaint asserts a legal conclusion, no response is required, and

it is denied. To the extent not expressly admitted, paragraph 41 of the Amended Complaint is denied.

42. Paragraph 42 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

43. Paragraph 43 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

**FIRST CLAIM FOR RELIEF
(against NexPoint)
(for Breach of Contract)**

44. Paragraph 44 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

45. Paragraph 45 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

46. Paragraph 46 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

47. Paragraph 47 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

48. Paragraph 48 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

**SECOND CLAIM FOR RELIEF
(against NexPoint)
(Turnover by NexPoint Pursuant to 11 U.S.C. § 542(b))**

49. Paragraph 49 of the Amended Complaint is a sentence of incorporation that does not require a response and is therefore denied. All prior responses are incorporated herein by reference.

50. Paragraph 50 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

51. Paragraph 51 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

52. Paragraph 52 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

53. Paragraph 53 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. Defendant NexPoint admits that the Plaintiff transmitted the Demand Letter and the Second Demand Letter, and those documents speak for themselves.

54. Paragraph 54 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

55. Paragraph 55 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

THIRD CLAIM FOR RELIEF
(Against NexPoint)
(Avoidance and Recovery of Actual Fraudulent Transfer under 11 U.S.C. §§ 548(a)(1)(A) and 550)

56. Paragraph 56 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

57. Paragraph 57 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

58. Paragraph 58 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

59. Paragraph 59 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

60. Paragraph 60 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

61. Paragraph 61 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

FOURTH CLAIM FOR RELIEF
(Against NexPoint)
(Avoidance and Recovery of Actual Fraudulent Transfer Under 11 U.S.C. § 544(b) and 550, and Tex. Bus. & C. Code § 24.005(a)(1))

62. Paragraph 62 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

63. Paragraph 63 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

64. Paragraph 64 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

65. Paragraph 65 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

66. Paragraph 66 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied. To the extent of any factual allegation, it is denied.

FIFTH CLAIM FOR RELIEF
(Against Dugaboy Investment Trust and Nancy Dondero)
(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

67. Paragraph 67 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

68. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

69. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

70. Paragraph 70 of the Amended Complaint states a legal conclusion that does not require a response and is therefore denied.

SIXTH CLAIM FOR RELIEF
(Against Dugaboy Investment Trust and Nancy Dondero)
(Breach of Fiduciary Duty)

71. Paragraph 71 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

72. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

73. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

74. This claim is only asserted against Defendants Dugaboy Investment Trust and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

SEVENTH CLAIM FOR RELIEF
(Against James Dondero and Nancy Dondero)
(Aiding and Abetting a Breach of Fiduciary Duty)

75. Paragraph 75 of the Amended Complaint is a sentence of incorporation that does not require a response. All prior responses are incorporated herein by reference.

76. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

77. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

78. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

79. This claim is only asserted against Defendants James Dondero and Nancy Dondero. Therefore, Defendant NexPoint is not required to respond to this claim.

Defendant NexPoint denies that the Plaintiff is entitled to the relief requested in the prayer, including as to parts (i), (ii), (iii), (iv), (v), (vi), (vii) and (iii) [sic].

AFFIRMATIVE DEFENSES

80. Pursuant to that certain Shared Services Agreement, the Plaintiff was responsible for making payments on behalf of the Defendant under the note. Any alleged default under the note was the result of the Plaintiff's own negligence, misconduct, breach of contract, etc.

81. Delay in the performance of a contract is excused when the party who seeks to enforce the contract caused the delay. It was therefore inappropriate for the Plaintiff to accelerate the note when the brief delay in payment was the Plaintiff's own fault.

82. Furthermore, the Plaintiff has waived the right to accelerate the note and /or the Plaintiff is estopped to enforce the alleged acceleration by accepting payment after the same.

83. Furthermore, the Plaintiff's claims are barred in whole or in part because, prior to any alleged breach or acceleration, the Plaintiff agreed that it would not collect on the note upon fulfilment of certain conditions subsequent. Specifically, sometime between December of the year in which each Note was made and February of the following year, Defendant Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of Defendant James Dondero's control. This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant NexPoint believes there may be testimony or email correspondence that discusses the

existence of this agreement that may be uncovered through discovery in this Adversary Proceeding.

84. Defendant NexPoint asserts that any fraudulent transfer claim is barred because NexPoint acted in good faith, without knowledge of any alleged avoidability, and because reasonably equivalent value was provided for any alleged transfer or obligation.

85. Defendant NexPoint asserts that any fraudulent transfer claim is barred because no transferor or transferee, or obligor or obligee, was insolvent.

86. To the extent of any avoidance, NexPoint asserts a lien under 11 U.S.C. § 548(c) to the extent that NexPoint gave value, and a similar preference lien under any applicable provision of the Texas Uniform Fraudulent Transfer Act.

JURY DEMAND

87. Defendant NexPoint demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Rule 9015 of the Federal Rules of Bankruptcy Procedure.

88. Defendant NexPoint does not consent to the Bankruptcy Court conducting a jury trial and therefore demands a jury trial in the District Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant NexPoint respectfully requests that, following a trial on the merits, the Court enter a judgment that the Plaintiff take nothing on the Amended Complaint and provide Defendant NexPoint such other relief to which it is entitled.

RESPECTFULLY SUBMITTED this 1st day of September, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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COUNSEL FOR NEXPOINT ADVISORS, L.P.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Davor Rukavina

Davor Rukavina

1 WATERHOUSE - 10-19-21
2 IN THE UNITED STATES BANKRUPTCY COURT
3 FOR THE NORTHERN DISTRICT OF TEXAS
4 DALLAS DIVISION

5 IN RE:

6 HIGHLAND CAPITAL Chapter 11
7 MANAGEMENT, L.P., CASE NO.
8 19-34054-SGI11

9 Debtor.

10 HIGHLAND CAPITAL MANAGEMENT, L.P.,

11 Plaintiff,

12 vs. Adversary
13 Proceeding No.
14 21-03000-SGI

15 HIGHLAND CAPITAL MANAGEMENT
16 FUND ADVISORS, L.P.; NEXPOINT
17 ADVISORS, L.P.; HIGHLAND
18 INCOME FUND; NEXPOINT
19 STRATEGIC OPPORTUNITIES FUND;
20 NEXPOINT CAPITAL, INC.; and
21 CLO HOLDCO, LTD.,

22 Defendants.

23 REMOTE VIDEOTAPED DEPOSITION OF

24 FRANK WATERHOUSE

25 October 19, 2021

26 Reported by: Susan S. Klinger, RMR-CRR, CSR

27 Job No: 201195

1 WATERHOUSE - 10-19-21

2

3

4 October 19, 2021

5 9:30 a.m.

6

7

8

9 Remote Deposition of FRANK WATERHOUSE,

10 held before Susan S. Klinger, a Registered

11 Merit Reporter and Certified Realtime Reporter

12 of the State of Texas.

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22

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24

25

1 WATERHOUSE - 10-19-21

2 A P P E A R A N C E S:

3 (All appearances via Zoom.)

4 Attorneys for the Reorganized Highland Capital
5 Management:

6 John Morris, Esq.

7 Hayley Winograd, Esq.

8 PACHULSKI STANG ZIEHL & JONES

9 780 Third Avenue

10 New York, New York 10017

11 Attorneys for the Witness:

12 Debra Dandeneau, Esq.

13 Michelle Hartmann, Esq.

14 BAKER MCKENZIE

15 1900 North Pearl Street

16 Dallas, Texas 75201

17 Attorneys for NexPoint Advisors, LP and
18 Highland Capital Management Fund Advisors,

19 L.P.:

20 Davor Rukavina, Esq.

21 An Nguyen, Esq.

22 MUNSCH HARDT KOPF & HARDD

23 500 North Akard Street

24 Dallas, Texas 75201-6659

25

1 WATERHOUSE - 10-19-21

2 Attorneys for Jim Dondero, Nancy Dondero, HCRA,
3 and HCMS:

4 Deborah Deitsch-Perez, Esq.

5 Michael Aigen, Esq.

6 STINSON

7 3102 Oak Lawn Avenue

8 Dallas, Texas 75219

9

10 Attorneys for Dugaboy Investment Trust:

11 Warren Horn, Esq.

12 HELLER, DRAPER & HORN

13 650 Poydras Street

14 New Orleans, Louisiana 70130

15

16 Attorneys for Marc Kirschner as the trustee for
17 the litigation SunTrust:

18 Deborah Newman, Esq.

19 QUINN EMANUEL URQUHART & SULLIVAN

20 51 Madison Avenue

21 New York, New York 10010

22

23 Also Present:

24 Ms. La Asia Canty

25

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2 P R O C E E D I N G S

3 VIDEOGRAPHER: Good morning,
4 Counselors. My name is Scott Hatch. I'm a
5 certified legal videographer in association
6 with TSG Reporting, Inc.

7 Due to the severity of COVID-19 and
8 following the practice of social
9 distancing, I will not be in the same room
10 with the witness. Instead, I will record
11 this videotaped deposition remotely. The
12 reporter, Susan Klinger, also will not be
13 in the same room and will swear the witness
14 remotely.

15 Do all parties stipulate to the
16 validity of this video recording and remote
17 swearing, and that it will be admissible in
18 the courtroom as if it had been taken
19 following Rule 30 of the Federal Rules of
20 Civil Procedures and the state's rules
21 where this case is pending?

22 MR. HORN: Yes.

23 MS. DANDENEAU: Yes.

24 MR. MORRIS: Yes. John Morris. I
25 would just try to do a negative notice

1 WATERHOUSE - 10-19-21
2 here, as we did yesterday. If anybody has
3 a problem with what was just stated, can
4 you state your objection now?

5 Okay. No response, so everybody
6 accepts the stipulation and the instruction
7 that was just given.

8 VIDEOGRAPHER: Thank you. This is
9 the start of media labeled Number 1 of the
10 video recorded deposition of Frank
11 Waterhouse In Re: Highland Capital
12 Management, L.P., in the United States
13 Bankruptcy Court for the Northern District
14 of Texas, Dallas Division, Case Number
15 21-03000-SGI.

16 This deposition is being held via
17 video conference with participants
18 appearing remotely due to COVID-19
19 restrictions on Tuesday, October 19th, 2021
20 at approximately 9:32 a.m. My name is
21 Scott Hatch, legal video specialist with
22 TSG Reporting, Inc. headquartered at 228
23 East 45th Street, New York, New York. The
24 court reporter is Susan Klinger in
25 association with TSG Reporting.

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2 Counsel, please introduce
3 yourselves.

4 MR. MORRIS: John Morris, Pachulski
5 Stang Ziehl & Jones for the reorganized
6 Highland Capital Management, L.P., the
7 plaintiff in these actions.

8 MS. DANDENEAU: Deborah Dandeneau
9 from Baker McKenzie. My partner, Michelle
10 Hartmann, is also in the room with me,
11 representing Frank Waterhouse individually.

12 MS. DEITSCH-PEREZ: Deborah
13 Deitsch-Perez from Stinson, LLP,
14 representing Jim Dondero, Nancy Dondero,
15 HCRA, and HCMS.

16 MR. HORN: Warren Horn with Heller,
17 Draper & Horn in New Orleans representing
18 Dugaboy Investment Trust.

19 MR. RUKAVINA: Davor Rukavina with
20 Munsch Hardt Kopf & Harr in Dallas
21 representing NexPoint Advisors, LP and
22 Highland Capital Management Fund Advisors,
23 L.P.

24 MR. AIGEN: Michael Aigen from
25 Stinson, and I represent the same parties

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2 as Deborah Deitsch-Perez.

3 MS. NEWMAN: This is Deborah Newman
4 from Quinn Emanuel. We represent the
5 litigation -- Marc Kirschner as the trustee
6 for the litigation SunTrust.

7 MR. MORRIS: I think that is
8 everybody.

9 VIDEOGRAPHER: Thank you. Will the
10 court reporter please swear in the witness.

11 FRANK WATERHOUSE,
12 having been first duly sworn, testified as
13 follows:

14 EXAMINATION

15 BY MR. MORRIS:

16 Q. Please state your name for the
17 record.

18 A. My name is Frank Waterhouse.

19 Q. Good morning, Mr. Waterhouse. I'm
20 John Morris, as you know, from Pachulski Stang
21 Ziehl & Jones. You understand that my firm and
22 I represent Highland Capital Management, L.P. ;
23 is that right?

24 A. Yes.

25 Q. Okay. And do you understand that

1 WATERHOUSE - 10-19-21

2 we're here today for your deposition in your
3 individual capacity?

4 A. Yes.

5 Q. Did you review and -- did you
6 receive and review a subpoena that Highland
7 Capital Management, L.P., served upon you?

8 A. Yes.

9 Q. You have been deposed before; right?

10 A. Yes.

11 Q. How many times have you been
12 deposed?

13 A. About three or four times.

14 Q. Okay. And I defended you in one
15 deposition; isn't that right?

16 A. That is correct.

17 Q. So the general ground rules for this
18 deposition are largely the same as the
19 depositions you have given before. And that is
20 I will ask you a series of questions, and it is
21 important that you allow me to finish my
22 question before you begin your answer; is that
23 fair?

24 A. Yes.

25 Q. And it is important that I allow you

1 WATERHOUSE - 10-19-21

2 to finish your answers before I begin a
3 question, but if I fail to do that, will you
4 let me know?

5 A. I can certainly do that.

6 Q. Okay. Do you understand that this
7 deposition is being videotaped?

8 A. Yes.

9 Q. You understand that I may seek to
10 use portions of the videotape in a court of
11 law?

12 A. I did not know that, until you just
13 said that.

14 Q. Okay. And you are aware of that now
15 before the deposition begins substantively; is
16 that right?

17 A. Yes.

18 Q. So unlike I think the other
19 depositions that you have given, this one is
20 being given remotely. So that presents some
21 unique challenges, at least as compared to a
22 deposition that is taken in-person.

23 From time to time we're going to put
24 documents up on the screen, Mr. Waterhouse.
25 And it is important that I give you the

1 WATERHOUSE - 10-19-21

2 opportunity to review any portion of the
3 document that you think you need in order to
4 fully and completely answer the question.

5 So I would ask you to let me know if
6 there is a portion of a document that you need
7 to see in order to fully and completely answer
8 the question. Can you do that for me?

9 A. Yes.

10 MS. DANDENEAU: Mr. Morris, I would
11 just note that we do have hard copies of
12 the documents that you sent, so if you can
13 just refer to the exhibit number as
14 reflected in the documents that you sent,
15 Mr. Waterhouse will be able to look at the
16 hard copies of those documents.

17 MR. MORRIS: I appreciate that,
18 and -- and I will encourage him to do so.
19 There will be other documents that we did
20 not send to you that we'll be using today
21 though.

22 Q. Okay. With that as background, if
23 there is anything that I ask you, sir, that you
24 don't understand, will you let me know?

25 A. Yes.

1 WATERHOUSE - 10-19-21

2 Q. Okay. Are you currently employed?

3 A. Yes.

4 Q. By whom?

5 A. The Skyview Group.

6 Q. When did you become employed by the
7 Skyview Group?

8 A. I believe March 1st of 2021.

9 Q. Do you have a title at Skyview?

10 A. Yes.

11 Q. What is your title?

12 A. My title is chief financial officer.

13 Q. Do you report to anybody in your
14 role as CFO?

15 A. I don't, no.

16 Q. No. Is there a president or a CEO
17 of Skyview?

18 A. Yes.

19 Q. Who is that?

20 A. That is Scott Ellington.

21 Q. But you don't report to
22 Mr. Ellington; is that right?

23 A. I don't think so.

24 Q. Does Skyview Group --

25 MS. DANDENEAU: Excuse me, we --

1 WATERHOUSE - 10-19-21

2 A. I -- I -- I might. I just -- I
3 don't recall.

4 Q. Okay. Does Skyview Group provide
5 any services to any entity directly or
6 indirectly owned or controlled by Jim Dondero?

7 A. Yes.

8 Q. Can you name -- is that pursuant to
9 written contracts?

10 A. Yes.

11 Q. And do you know how many contracts
12 exist?

13 A. Approximately six or so.

14 Q. And is the Skyview Group made up of
15 individuals who were formerly employees of
16 Highland Capital Management, L.P.?

17 A. No.

18 Q. Do you know how many -- how many --
19 how many employees does Skyview have?

20 A. Approximately 35.

21 Q. And can you tell me how many of
22 those 35 are former officers, directors, or
23 employees of Highland Capital Management, L.P.?

24 A. I don't know the exact number.

25 Q. Is it more than 20?

1 WATERHOUSE - 10-19-21

2 A. Yes.

3 Q. Is it more than 30?

4 A. I don't know.

5 Q. Can you tell me what portion of
6 Skyview -- Skyview's revenue is derived from
7 entities that are directly or indirectly owned
8 or controlled by Jim Dondero?

9 MS. DANDENEAU: Mr. Morris, I mean,
10 you called Mr. Waterhouse here individually
11 for purposes of his testimony in connection
12 with the noticed litigation. I have given
13 you some leeway to ask him some background
14 information about Skyview Group, but this
15 is not a substitute for a deposition in
16 connection with any other pending disputes
17 that exist. And -- and we agreed to accept
18 the subpoena on the basis of he -- this is
19 testimony that he is giving in connection
20 with the noticed litigation.

21 I really think that you are now
22 going a little bit far afield from the
23 purpose of this deposition.

24 MR. MORRIS: Okay. It is -- I'm not
25 intending to use these -- the answers to

1 WATERHOUSE - 10-19-21

2 these questions for any purpose other than
3 this litigation. I think you understand
4 fully why I'm asking the questions, and I
5 just have a couple more, if you will bear
6 with me.

7 MS. DANDENEAU: Okay.

8 MS. DEITSCH-PEREZ: Can we have an
9 agreement that an objection by one is an
10 objection for any other party here?

11 MR. MORRIS: Sure. I would -- I
12 would encourage that, sure.

13 MS. DEITSCH-PEREZ: Thank you.

14 MR. MORRIS: It can't be sustained
15 or overruled more than one time, so...

16 Q. Mr. Waterhouse, can you answer my
17 question, please.

18 MS. DANDENEAU: Do you want to
19 repeat it, Mr. Morris, for his benefit?

20 MR. MORRIS: Sure.

21 Q. Can you -- can you tell me the
22 approximate portion of Skyview's revenue that
23 is derived from entities that are directly or
24 indirectly owned or controlled by Mr. Dondero?

25 A. I don't know the exact number.

1 WATERHOUSE - 10-19-21

2 Q. Is it more than 75 percent?

3 A. Yes.

4 Q. Is it more than 90 percent?

5 A. I don't know.

6 Q. Okay. Can I refer to Highland

7 Capital Management, L.P., as Highland?

8 A. Yes.

9 Q. All right. And you previously
10 served as Highland's CFO; correct?

11 A. Yes.

12 Q. When did you join Highland?

13 A. I don't recall the exact date.

14 Q. Can you tell me what year?

15 A. 2006.

16 Q. When did you -- in what year did you
17 become Highland's CFO?

18 A. I don't recall the exact date.

19 Q. I'm not asking you for the exact
20 date. I'm asking you if you recall the year in
21 which you were appointed CFO.

22 A. I don't recall the exact year.

23 Q. Can you tell me which years it is
24 possible that you were appointed to CFO of
25 Highland?

1 WATERHOUSE - 10-19-21

2 A. 2011 or 2012.

3 Q. Did you serve as Highland's CFO on a
4 continuous basis from in or around 2011 or 2012
5 until early 2021?

6 A. Yes.

7 Q. During that entire time you reported
8 directly to Jim Dondero; correct?

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

10 Q. Is there anybody else you reported
11 to -- withdrawn.

12 Did you report to Mr. Dondero for
13 some portion of the time that you served as
14 CFO?

15 A. Yes.

16 Q. Is there a portion of time that you
17 don't recall who you reported to?

18 A. Yes.

19 Q. What portion of time do you have in
20 your mind when you can't recall who you
21 reported to?

22 A. From the 2011 to -- for
23 approximately a year or two.

24 Q. Okay. So is it fair to say that you
25 reported to Mr. Dondero in your capacity as CFO

1 WATERHOUSE - 10-19-21

2 from at least 2014 until the time you left
3 Highland?

4 MS. DANDENEAU: Objection to form.

5 A. I don't want to speculate the exact
6 or what year that changed or -- so I would like
7 to stick with my testimony.

8 Q. Can you recall when you began
9 reporting to Mr. Dondero?

10 A. I don't recall.

11 Q. Can you -- can you give me an
12 estimate of what year you think you might have
13 began reporting to Mr. Dondero?

14 A. I will go back to my prior
15 testimony.

16 Q. Okay. There is no -- you have no
17 ability to tell me when you began reporting to
18 Mr. Dondero.

19 Do I have that right?

20 MS. DANDENEAU: Objection to form.

21 A. I don't recall.

22 Q. Okay. Do you recall who you might
23 have reported to before you began reporting to
24 Mr. Dondero?

25 A. Yes.

1 WATERHOUSE - 10-19-21

2 Q. Who might you have reported to in
3 your capacity as CFO before you started
4 reporting to Mr. Dondero?

5 A. That would have been Patrick Boyce.

6 Q. Are you aware that Highland filed
7 for bankruptcy on October 19th, 2019?

8 A. Yes.

9 Q. And we refer to that as the petition
10 date?

11 A. Yes.

12 Q. Okay. Do you hold any professional
13 licenses, sir?

14 A. Yes.

15 Q. Can you tell me what professional
16 licenses you hold?

17 A. I'm a certified public accountant.

18 Q. Okay. Anything else?

19 A. No.

20 Q. Do you have any other professional
21 licenses or certificates?

22 A. When you say "professional license,"
23 that is not education?

24 Q. Tell me -- sure. Anything other
25 than a driver's license.

1 WATERHOUSE - 10-19-21

2 Do you have any other license or
3 certificate or certification?

4 A. Are you asking, like, where I went
5 to school and the --

6 Q. I am not. I am not. I didn't say
7 education. I didn't ask about degrees.

8 Do you know what a license is?

9 A. Well, yeah, I mean, a license is
10 something you get after you receive a certain
11 level of proficiency.

12 Q. Do you have any licenses or
13 certifications other than your CPA?

14 MS. DANDENEAU: Objection, form.

15 I assume you mean professional
16 licenses, Mr. Morris; correct?

17 Q. Can you answer my question, sir?

18 A. Mr. Morris, I'm thinking. I
19 don't -- I don't think I have any others.

20 Q. Are you familiar with an entity
21 called Highland Capital Management Fund
22 Advisors?

23 A. Yes.

24 Q. Were you ever -- can we refer to
25 that entity as HCMFA?

1 WATERHOUSE - 10-19-21

2 A. Yes.

3 Q. Were you ever employed by HCMFA?

4 A. Not that I recall.

5 Q. Were you ever -- did you ever hold
6 the title of an officer or director of HCMFA?

7 A. Yes.

8 Q. What title did you hold?

9 A. Treasurer.

10 Q. When did you become the treasurer of
11 HCMFA?

12 A. I don't recall.

13 Q. Can you tell me the year?

14 A. I don't -- I don't know the year.

15 Q. Can you approximate the year in
16 which you became the treasurer of HCMFA?

17 A. I don't know.

18 Q. Can you tell me if it was before or
19 after 2016?

20 A. I don't recall.

21 Q. Are you still the -- do you know if
22 you're still the treasurer of HCMFA today?

23 A. Today, I am the acting treasurer for
24 HCMFA.

25 Q. Is there a distinction between

1 WATERHOUSE - 10-19-21

2 treasurer and acting treasurer?

3 A. I said "acting treasurer" as I am an
4 employee of Skyview, as you previously
5 stated -- or asked.

6 Q. But you are the treasurer of HCMFA
7 today; correct?

8 A. I am -- I am the acting treasurer
9 for HCMFA.

10 Q. How did you become the treasurer of
11 HCMFA?

12 A. Are you asking how I became the
13 treasurer of HCMFA today?

14 Q. How did you become appointed to
15 serve as the treasurer of HCMFA?

16 A. Well, in -- in -- in what time
17 capacity?

18 Q. The first time that you were
19 appointed.

20 A. First time. I believe I was asked
21 to serve as treasurer for HCMFA the first time.

22 Q. By who? Who asked you to do that?

23 A. I don't recall.

24 Q. Is there anything that would refresh
25 your recollection as to who appointed you as

1 WATERHOUSE - 10-19-21

2 the treasurer of CF- -- HCMFA for the first
3 time?

4 A. I don't -- I mean, there would be
5 some documents, some legal documents. I don't
6 know where those are.

7 Q. How many times have you been
8 appointed the treasurer of HCMFA?

9 A. I don't know.

10 Q. Was it more than once?

11 A. I don't know.

12 Q. Can you tell me any period of time
13 since 2016 that you did not hold the title of
14 treasurer of HCMFA?

15 MS. DANDENEAU: Objection to form.

16 A. I don't recall.

17 Q. What are your duties and
18 responsibilities as the treasurer of HCMFA?

19 A. My duties are to do the best job
20 that I can as the -- as an accountant and
21 finance guy.

22 Q. What specific duties and
23 responsibilities do you have as the treasurer
24 of HCMFA?

25 A. My duties are to do the best job

1 WATERHOUSE - 10-19-21

2 that I can as the accounting and finance person
3 for HCMFA.

4 Q. As the accounting and finance person
5 for HCMFA, do you have any particular areas of
6 responsibility?

7 A. Yeah, it is to manage the accounting
8 and finance function for HCMFA.

9 Q. Would that include -- do you have
10 responsibility for overseeing HCMFA's annual
11 audit?

12 A. Can I please elaborate on my prior
13 question?

14 Q. Of course. You -- you are giving
15 answers. I'm asking questions.

16 A. Okay. Yes, so the -- it -- like I
17 said, it is to manage the accounting finance
18 aspect, but I am, as we discussed, the
19 treasurer. That is -- being treasurer is what
20 gives me that -- that management function.

21 Q. Does anybody report to you in your
22 capacity as treasurer of HCMFA?

23 A. I don't believe so.

24 Q. Does HCMFA have a chief financial
25 officer?

1 WATERHOUSE - 10-19-21

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

3 Q. You don't know?

4 You're the treasurer of HCMFA but
5 you don't know if HCMFA has a chief financial
6 officer.

7 Do I have that right?

8 A. That's right.

9 Q. Okay. Have you heard of a company
10 called NexPoint Advisors?

11 A. Yes.

12 Q. We will refer to that as NexPoint.
13 Okay?

14 A. Okay.

15 Q. Were you ever employed by NexPoint?

16 A. I don't recall.

17 Q. Did you ever hold any title with
18 respect to the entity known as NexPoint?

19 A. Yes.

20 Q. What titles have you held in
21 relation to NexPoint?

22 A. Treasurer. I think it was only
23 treasurer.

24 Q. Can you tell me the approximate year
25 you became the treasurer of NexPoint?

1 WATERHOUSE - 10-19-21

2 A. I don't know.

3 Q. Are you still the treasurer of
4 NexPoint today?

5 A. I am the acting treasurer for
6 NexPoint.

7 Q. When did your title change from
8 treasurer to acting treasurer?

9 A. I don't know.

10 Q. Did your duties and responsibilities
11 change at all when your title was changed from
12 treasurer to acting treasurer?

13 A. I don't -- I don't believe so.

14 Q. Why did --

15 A. I still manage the finance and
16 accounting function for NexPoint.

17 Q. Why did your title change from
18 treasurer to acting treasurer?

19 A. I don't -- I'm using the term
20 "acting treasurer" as I'm a Skyview employee.
21 I don't -- I don't know -- again, I am a -- as
22 I am the Skyview employee.

23 Q. Okay.

24 A. And we -- we provide officer
25 services.

1 WATERHOUSE - 10-19-21

2 Q. And you serve as an officer of
3 HCMFA; correct?

4 A. I think we went over that with my
5 testimony. Yes, I'm the acting treasurer for
6 HCMFA.

7 Q. And you are an officer of NexPoint;
8 correct?

9 A. I think -- I am the acting treasurer
10 for NexPoint Advisors.

11 Q. And -- and who appointed you acting
12 treasurer of NexPoint Advisors?

13 A. I don't recall specifically.

14 Q. Do you have any recollection of who
15 might have appointed you the treasurer of
16 NexPoint?

17 A. I mean, it -- it -- I don't recall
18 exactly who it was.

19 Q. Who were the possibilities?

20 MS. DEITSCH-PEREZ: Object to the
21 form.

22 Q. You can answer.

23 A. Someone in the legal group for
24 NexPoint. The other officers as well.

25 Q. Have you heard of a company called

1 WATERHOUSE - 10-19-21

2 Highland Capital Management Services, Inc.?

3 A. Yes.

4 Q. We will refer to that as HCMS.

5 Okay?

6 A. HCMS. Okay.

7 Q. Were you ever employed by HCMS?

8 A. No.

9 Q. Have you ever held any titles in
10 relation to HCMF -- I apologize -- HCMS?

11 A. Yes.

12 Q. What titles have you held in
13 relation to HCMS?

14 A. Treasurer and acting treasurer.

15 Q. When did you first become treasurer
16 or acting treasurer of HCMS?

17 A. I don't recall the exact dates.

18 Q. Can you recall -- can you
19 approximate the year that you became the
20 treasurer of HCMS?

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

22 Q. Are you still the treasurer of HCMS
23 today?

24 A. I am the acting treasurer for HCMS.

25 Q. And are your duties and

1 WATERHOUSE - 10-19-21

2 responsibilities as the acting treasurer for
3 HCMS and the acting treasurer for NexPoint the
4 same as your duties and responsibilities in
5 your role as the acting treasurer of HCMFA?

6 A. More or less.

7 Q. Have you ever heard of a company
8 called HCRE Partners, LLC?

9 A. Yes.

10 Q. And do you understand that that
11 entity is now known today as NexPoint Real
12 Estate Partners?

13 A. I did not know that.

14 Q. All right. Can we refer to HCRE
15 Partners as HCRE?

16 MS. DANDENEAU: Objection to form.

17 Did you mean NexPoint Real Estate
18 Partners, Mr. Morris?

19 MR. MORRIS: No.

20 MS. DANDENEAU: Oh.

21 MR. MORRIS: He said he wasn't
22 familiar that it was succeeded by that
23 entity. So --

24 MS. DANDENEAU: Okay.

25 MR. MORRIS: -- let's go with what

1 WATERHOUSE - 10-19-21

2 the witness knows.

3 Q. You're familiar with an entity
4 called HCRE Partners, LLC; correct?

5 A. Yes.

6 Q. Okay. So that is the entity that we
7 will refer to as HCRE. If you're aware of any
8 successor, that is great. If not, let's just
9 define it as such.

10 Have you ever been employed by HCRE
11 or any entity that you know to have succeeded
12 HCRE?

13 A. No.

14 Q. Did you ever serve as an officer or
15 director of HCRE or any successor?

16 A. Not that I recall.

17 Q. Okay. Can we refer to NexPoint and
18 HCMFA as the advisors?

19 A. Yes.

20 Q. In general, the advisors provided
21 investment advisory services to certain retail
22 funds; correct?

23 A. Yes.

24 Q. And we will refer to the retail
25 funds that are served by the advisors

1 WATERHOUSE - 10-19-21

2 collectively as the retail funds; is that okay?

3 A. Okay.

4 Q. Each of the retail funds is governed
5 by a board; correct?

6 A. Yes.

7 Q. And do you know the people who serve
8 on the boards of the retail funds?

9 MS. DANDENEAU: Objection to form.

10 A. I don't know all of them.

11 Q. Do you know whether the same people
12 serve on the board of each of the retail funds
13 as we've defined that term?

14 A. Which -- so when you say "retail
15 funds" -- again, I want to be -- what retail
16 funds are you referring to, because there are
17 -- there are several distinctions?

18 What retail funds are you using when
19 you refer to them?

20 Q. That is why -- that is why I tried
21 to define the terms. So let me do it again.

22 Retail funds for the purposes of
23 this deposition means any retail fund to which
24 either of the advisors provides advisory
25 services. Okay?

1 WATERHOUSE - 10-19-21

2 A. Okay.

3 Q. Okay. So do you know whether the
4 same people serve on the board of each of the
5 retail funds?

6 A. I don't know.

7 Q. Were you ever employed by any of the
8 retail funds?

9 A. No.

10 Q. No?

11 A. No.

12 Q. Okay. Do you have any title with
13 respect to any of the retail funds?

14 A. Yes.

15 Q. What titles do you hold --
16 withdrawn.

17 Do you have the same titles with
18 respect to all of the retail funds or do
19 they -- or just something else?

20 MS. DANDENEAU: Objection to form.

21 Q. Withdrawn.

22 Do you have the same title with
23 respect to each of the retail funds?

24 A. No.

25 Q. Tell me which title you have with

1 WATERHOUSE - 10-19-21

2 respect to each retail fund.

3 Actually, let's do it a different
4 way. I withdraw the question.

5 Can you give me one title you have
6 in relation to any retail fund?

7 A. Yes.

8 Q. What title -- what title can you
9 give me?

10 A. Principal executive officer.

11 Q. Do you serve as principal executive
12 officer for each of the retail funds?

13 A. No.

14 Q. Can you identify for me the retail
15 funds in which you serve as the principal
16 executive officer?

17 A. Yes. Highland Funds 1, Highland
18 Funds 2, Highland Income Fund, Highland Global
19 Allocation Fund.

20 Q. I'm sorry, you said "Global
21 Allocation Fund"?

22 A. Yes.

23 VIDEOGRAPHER: Excuse me,

24 Mr. Morris. This is the videographer. I'm
25 concerned about the lighting in the

1 WATERHOUSE - 10-19-21

2 witness' camera.

3 Do you want to go off the record and
4 make some adjustments?

5 MR. MORRIS: Sure, but just for this
6 purpose. I don't want to take a break. We
7 just started.

8 MS. DANDENEAU: Yeah, that is fine.
9 That is fine. We're going to put you on
10 mute.

11 MR. MORRIS: All right.

12 MS. DANDENEAU: I'm going to try to
13 open up some of the shades.

14 VIDEOGRAPHER: We're going off the
15 record at 10:08 a.m.

16 (Recess taken 10:08 a.m. to 10:11 a.m.)

17 VIDEOGRAPHER: We are back on the
18 record at 10:11 a.m.

19 Q. Mr. Waterhouse, when did you become
20 the principal executive officer of the four
21 retail funds that you just identified?

22 A. I don't recall.

23 Q. Do you recall the approximate year
24 that you became the principal executive officer
25 of the four funds?

1 WATERHOUSE - 10-19-21

2 A. 2021.

3 Q. Did you ever hold any title with
4 respect to any of the four funds you have just
5 identified other than principal executive
6 officer?

7 A. I don't recall.

8 Q. Is it possible that you held a
9 position or a title with the four funds you
10 just identified prior to 2021?

11 A. Yes.

12 Q. But you don't recall if you did or
13 not; do I have that right?

14 A. No. You -- I thought you asked, did
15 I hold other titles.

16 Q. Did you hold any title at the four
17 retail funds for which you now serve as
18 principal executive officer at any time prior
19 to 2021?

20 A. Yes.

21 Q. What titles did you hold?

22 A. I don't recall all the titles.

23 Q. Do you recall any of the titles?

24 A. Yes.

25 Q. What titles do you recall holding at

1 WATERHOUSE - 10-19-21

2 those four retail funds before 2021?

3 A. Principal executive officer.

4 Q. Were you the principal executive
5 officer of the four retail funds that you have
6 identified?

7 A. Sorry, could you repeat the
8 question?

9 Q. Were you the principal executive
10 officer for each of the four retail funds that
11 you have identified?

12 A. Yes.

13 Q. When did you become the principal
14 executive -- withdrawn.

15 Can you give me the approximate year
16 that you became the principal executive officer
17 for each of the four retail funds you've
18 identified?

19 A. I don't recall.

20 Q. What are your duties and
21 responsibilities as the principal executive
22 officer of these four retail funds?

23 A. It is to manage the finance and
24 accounting positions.

25 Q. So at the same time you serve as the

1 WATERHOUSE - 10-19-21

2 treasurer of the advisors, you also serve as
3 the principal executive officer of these four
4 retail funds; correct?

5 A. Yes.

6 Q. Did you ever hold any title with
7 respect to any other retail fund?

8 A. Not that I recall.

9 Q. During the period that you served as
10 Highland's CFO, from time to time Highland
11 loaned money to certain of its officers and
12 employees; correct?

13 A. Yes.

14 Q. During the period that you served as
15 Highland's CFO, from time to time Highland
16 loaned money to certain --

17 A. Let me -- let me retract that,
18 sorry, that -- you asked during the time I was
19 CFO, Highland loaned moneys to employees. I
20 don't -- I don't recall that during my tenure
21 of CFO.

22 Q. You have no recollection during the
23 time that you were the CFO of Highland of
24 Highland ever loaning any money to any officer
25 or director of Highland?

1 WATERHOUSE - 10-19-21

2 A. I don't recall during my tenure of
3 Highland or my -- as CFO of Highland -- yeah,
4 if there are any loans as CFO of Highland.

5 Q. I'm just talking about officers and
6 employees right now. You have no recollection
7 of Highland ever making a loan to any of its
8 officers or employees during the time that you
9 served as CFO. Do I have that right?

10 MS. DANDENEAU: Objection to form.

11 A. So I thought you were saying
12 officers and employees as CFO, right, so there
13 were -- I mean, okay, yes.

14 Q. I would ask you to listen carefully
15 to my question. If I -- if I'm not clear, let
16 me know, but I'm really trying to be as clear
17 as I can.

18 A. I'm listening as carefully as I can,
19 and you are asking very specific questions in a
20 timeline. And I'm trying to answer your
21 questions as specifically as I can, and I
22 apologize if -- if I'm going back. I am -- you
23 are asking very specific questions. Thank you.

24 Q. During the period that you served as
25 Highland's CFO, from time to time Highland

1 WATERHOUSE - 10-19-21

2 loaned money to certain corporate affiliates;
3 correct?

4 MS. DANDENEAU: Objection to form.

5 A. What are corporate affiliates?

6 Q. How about the ones that are in
7 Highland's audited financial statements under
8 the section entitled Loans to Affiliates. Why
9 don't we start with those. Do you have any
10 understanding of what the phrase "affiliates"
11 means?

12 MS. DANDENEAU: Objection to form.

13 A. I understand what affiliates are,
14 yet affiliates can have different meanings in
15 different contexts, so...

16 Q. Why don't you -- why don't you tell
17 me what your understanding of the term
18 "affiliate" is in relation to Highland Capital
19 Management, L.P.

20 A. Is that a -- it depends on the
21 context.

22 Q. How about the context of making
23 loans?

24 MS. DANDENEAU: Objection to form.

25 A. I didn't make the determination of

1 WATERHOUSE - 10-19-21
2 who an affiliate was or is at the time those --
3 I didn't -- that wasn't my job to make a
4 determination of who an affiliate is.

5 Q. All right. So as the CFO of
6 Highland, do you have any ability right now to
7 tell me which companies that were directly or
8 indirectly owned and/or controlled by
9 Mr. Dondero in whole or in part received loans
10 from Highland Capital Management, L.P.?

11 MS. DANDENEAU: Objection to form.

12 MS. DEITSCH-PEREZ: Objection, form.

13 A. Yes.

14 Q. Okay. Identify every entity that
15 you can think of that was directly or
16 indirectly owned and/or controlled by
17 Mr. Dondero in whole or in part that received a
18 loan from Highland Capital Management, L.P.

19 MR. RUKAVINA: Objection, legal
20 conclusion.

21 A. NexPoint Advisors, Highland Capital
22 Management Fund Advisors, HCM Services,
23 Dugaboy. Sorry, I don't think -- Dugaboy
24 doesn't fit that definition. You said owned
25 and controlled. I don't think that that

1 WATERHOUSE - 10-19-21

2 definition --

3 Q. I said owned and/or controlled.

4 A. I don't -- again, I'm not -- I'm not
5 the legal expert. I don't think it controls --
6 he controls Dugaboy, so again, I'm not the
7 legal person.

8 Q. I'm not asking you for a legal
9 conclusion, sir. I'm asking you for your
10 knowledge, okay, as the CFO -- the former CFO
11 of Highland Capital Management, other than
12 NexPoint, HCMFA, and HCMF -- HCMS, can you
13 think of any other entities that were owned
14 and/or controlled directly or indirectly in
15 whole or in part by Jim Dondero who received a
16 loan from Highland Capital Management, L.P.?

17 MS. DANDENEAU: Objection to form.

18 A. HCRE.

19 Q. Any others?

20 A. That is -- that is all I can think
21 of.

22 Q. And you're aware that from time to
23 time while you were the CFO, Highland loaned
24 money to Jim Dondero; correct?

25 A. Yes.

1 WATERHOUSE - 10-19-21

2 Q. Okay. Can we refer to the four
3 entities that you just named and Mr. Dondero as
4 the affiliates?

5 A. So that would be Jim Dondero,
6 NexPoint Advisors, Highland Capital Management
7 Fund Advisors, and HCRE.

8 Q. And HCMS?

9 A. And HCMS, okay.

10 Q. And can we refer to the loans that
11 were given to each of those affiliates as the
12 affiliate loans?

13 A. Yes.

14 Q. And is it fair to say that each of
15 the affiliates were the borrowers under the
16 affiliate loans as we're defining the term?

17 MR. RUKAVINA: Objection, legal
18 conclusion.

19 A. The borrowers are whoever were on
20 the notes. I don't -- I don't know. I'm not
21 the legal person.

22 Q. But you --

23 A. I don't know.

24 Q. You do know, as Highland's former
25 CFO, that each of the affiliates that you have

1 WATERHOUSE - 10-19-21
2 identified tendered notes to Highland; correct?

3 MR. RUKAVINA: Hey, John, will you
4 just give me a running objection to legal
5 conclusion to HCM --

6 MR. MORRIS: No. No, if you want to
7 object --

8 MR. RUKAVINA: I will object every
9 time. Object to legal conclusion.

10 MR. MORRIS: That is fine.

11 A. Sorry, can you repeat the question?

12 Q. Are you aware that each of the --
13 that each of the affiliates, as we have defined
14 the term, gave to Highland a promissory note in
15 exchange for the loans?

16 MR. RUKAVINA: Objection to the
17 extent that calls for a legal conclusion.

18 A. I don't.

19 Q. No, you don't know that?

20 A. No, they didn't -- you said they
21 exchanged a promissory note for a loan. I
22 don't -- I don't understand that question, so I
23 said no.

24 Q. At the time of the bankruptcy
25 filing, did Highland have in its possession

1 WATERHOUSE - 10-19-21

2 promissory notes that were signed by each of
3 the affiliates?

4 A. Yes.

5 Q. To the best of your knowledge,
6 during the time that you served as Highland's
7 CFO, did Highland disclose to its outside
8 auditors all of the loans that were made to
9 affiliates?

10 MR. RUKAVINA: Objection, that calls
11 for a legal conclusion.

12 MS. DEITSCH-PEREZ: I also couldn't
13 hear you, John, because there was some
14 garbling on -- on the -- on the call.

15 MR. MORRIS: Folks, I've got to tell
16 you this is not going well, and I'm
17 reserving my right --

18 MS. DANDENEAU: John, it was just
19 the end of that question. It was just the
20 end of that question. I couldn't hear it
21 either. Sorry, if you could repeat it,
22 please.

23 MR. MORRIS: That is less than an
24 hour into this, but folks are trying to run
25 out the clock, and so I'm just going to

1 WATERHOUSE - 10-19-21

2 state that now.

3 MS. DANDENEAU: You know, and,
4 Mr. Morris, I really object to that. I
5 mean --

6 MR. MORRIS: Okay.

7 MS. DANDENEAU: -- Mr. Waterhouse
8 just told you he's trying to listen to your
9 questions and answer them carefully, and
10 you have no basis for saying that.

11 MR. MORRIS: Okay.

12 MS. DANDENEAU: This does not --
13 this is not an experienced witness, so he's
14 trying to do the best he can.

15 Q. Mr. Waterhouse, during the time that
16 you served as Highland's CFO, did Highland
17 disclose to its outside auditors all of the
18 loans that it made to each of the affiliates
19 that you have identified?

20 MR. RUKAVINA: Objection, legal
21 conclusion.

22 A. Yes.

23 Q. To the best of your knowledge, while
24 you were Highland's CFO, were all of the
25 affiliate loans described in Highland's audited

1 WATERHOUSE - 10-19-21

2 financial statements?

3 MR. RUKAVINA: Objection, legal
4 conclusion.

5 A. When an audit was performed, any
6 loans that were made by Highland to the
7 affiliates were disclosed to auditors.

8 Q. Are you aware of any loan that was
9 made to any affiliate that was not disclosed to
10 the auditors?

11 A. I'm not aware.

12 Q. To the best of your knowledge, did
13 each of the affiliates who were --
14 (inaudible) -- loaned from Highland execute a
15 promissory note in connection with that loan?

16 MR. RUKAVINA: Objection, legal
17 conclusion.

18 A. Sorry, you -- halfway through the
19 question it got muffled.

20 Can you repeat that again?

21 Q. To the best of your knowledge, did
22 every affiliate execute a promissory note in
23 connection with each loan that it obtained from
24 Highland?

25 MR. RUKAVINA: Objection, legal

1 WATERHOUSE - 10-19-21

2 conclusion.

3 A. Yes.

4 Q. You are not aware of any loan that
5 any affiliate ever obtained from Highland where
6 the affiliate did not give a promissory note in
7 return; is that fair?

8 A. Yes, I'm not aware.

9 Q. And to the best of your knowledge,
10 did Highland loan to each affiliate an amount
11 of money equal to the principal amount of each
12 promissory note?

13 MR. RUKAVINA: Objection, legal
14 conclusion.

15 A. Yes.

16 Q. During the time that you served as
17 CFO, did Highland ever loan money to
18 Mark Okada?

19 A. I -- I don't recall.

20 Q. Did you ever see any promissory
21 notes executed by Mark Okada?

22 A. I don't recall.

23 Q. Do you know if Highland ever forgave
24 any loan that it ever made to Mr. Okada?

25 A. I don't recall.

1 WATERHOUSE - 10-19-21

2 Q. Do you recall if Mr. Okada paid back
3 all principal and interest due and owing under
4 any loan he obtained from Highland?

5 MS. DEITSCH-PEREZ: Objection to
6 form.

7 MS. DANDENEAU: Objection to form.

8 A. I don't recall.

9 Q. Do you recall whether -- during your
10 time as CFO, whether Highland ever loaned money
11 to Jim Dondero?

12 A. Yes.

13 Q. To the best of your knowledge, did
14 Mr. Dondero sign and deliver to Highland a
15 promissory note in connection with each loan
16 that he obtained from Highland?

17 A. If you are referring to the
18 promissory notes that, you know, part of
19 Highland's records, yes.

20 Q. Okay. You're not aware of any loan
21 that Mr. Dondero took from Highland that wasn't
22 backed up by -- by a promissory note with a
23 face -- with a principal amount equal to the
24 amount of the loan; correct?

25 A. Am I aware that Jim Dondero took a

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2 loan?

3 Q. Without giving a -- let me ask a
4 better question. I'm sorry, Mr. Waterhouse.

5 Are you aware of any loan that
6 Mr. Dondero obtained from Highland where he
7 didn't give a promissory note in return?

8 A. I'm not aware.

9 Q. During the time that you served as
10 Highland's CFO, did Highland ever forgive any
11 loans, in whole or in part, that it made to
12 Mr. Dondero?

13 A. Not that I'm aware.

14 Q. At the time that you served as
15 Highland's CFO, did Highland ever forgive any
16 loan, in whole or in part, that it made to any
17 affiliate as we've defined the term today?

18 A. Not that I'm aware.

19 Q. During the time that you served as
20 Highland's CFO, did Highland ever forgive, in
21 whole or in part, any loan that it ever made to
22 any officer or employee?

23 A. Highland forgave loans to officers
24 and employees. It may not have been at the
25 time when my title was CFO.

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2 Q. Okay. And so I appreciate the
3 distinction.

4 Is it fair to say that, to the best
5 of your knowledge, Highland did not forgive a
6 loan that it made to an officer or employee
7 after 2013?

8 MS. DANDENEAU: Objection to form.

9 A. I don't recall.

10 Q. To the best of your knowledge, did
11 Highland disclose to its auditors every
12 instance where it forgave, in whole or in part,
13 a loan that it had made to one of its officers
14 or employees?

15 A. No.

16 Q. Can you think of -- can you -- can
17 you identify any loan to an officer or employee
18 that was forgiven by Highland, in whole or in
19 part, that was not disclosed to Highland's
20 outside auditors?

21 A. Look, I don't recall all of the
22 loans and the loan forgiveness. I just know as
23 part of the audit process there is a
24 materiality concept.

25 So if there were loans to employees

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2 that were of -- you know, that were deemed
3 immaterial, those items may not have been
4 disclosed by the team to the auditors.

5 Q. I appreciate that.

6 Do you have an understanding as to
7 what the level of materiality was?

8 A. I don't recall.

9 Q. As the CFO of Highland, to the best
10 of your knowledge, did Highland disclose to its
11 outside auditors every loan that was forgiven,
12 in whole or in part, that was material as that
13 term was defined by the outside auditors?

14 A. Yes.

15 Q. And do you recall where -- do you
16 recall where the definition of materiality can
17 be found for -- for this particular purpose?

18 MS. DANDENEAU: Objection to form.

19 A. No. You -- I don't determine
20 materiality.

21 Q. Okay. I'm just asking you if you
22 can help me understand where it is, but I think
23 we will find it in a few minutes.

24 You are aware that Highland has
25 commenced lawsuits against each of the

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2 affiliates, as we've defined the term, to
3 collect under certain promissory notes; is that
4 right?

5 A. Yes.

6 Q. And are you familiar with the notes
7 that are issue -- at issue in the lawsuits?

8 MS. DANDENEAU: Objection to form.

9 A. Generally familiar.

10 Q. Can we refer to the lawsuits that
11 Highland has commenced against the affiliates
12 collectively as the lawsuits?

13 A. Yes. And, again, the affiliates are
14 NexPoint, HCMFA, HCMS, and HCRE.

15 Q. And Mr. Dondero?

16 A. Okay. See, that is a new -- and now
17 Mr. Dondero is included in your affiliate
18 definition.

19 Q. I just --

20 A. I thought affiliates -- I thought
21 affiliates were just the four prior entities,
22 so I just want to be clear.

23 Q. I appreciate that. So let's --
24 let's keep them separate and let's refer to the
25 four corporate entities as the affiliates, and

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2 Mr. Dondero we will call Mr. Dondero. Okay?

3 A. Okay. Thank you. As you can see,
4 Mr. Morris, there is a lot of entities -- a lot
5 here. I just want to be clear.

6 Q. Okay. Now, the affiliates of
7 Mr. Dondero signed promissory notes that are
8 not subject to the lawsuit.

9 Do you understand that?

10 MS. DANDENEAU: Objection to form.

11 A. The affiliates and Mr. Dondero
12 signed --

13 Q. You know what? I will skip it.
14 That is okay. Okay.

15 From time to time while you were
16 Highland's CFO, payments were applied against
17 principal and interests that were due under the
18 notes that were tendered by the affiliates and
19 Mr. Dondero; correct?

20 MR. RUKAVINA: Objection to the
21 extent that calls for a legal conclusion.

22 A. Yes.

23 Q. Did Highland have a process where --
24 whereby payments would be applied against
25 principal and interest against the notes that

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2 were given by the affiliates and Mr. Dondero?

3 A. Yes.

4 Q. Can you describe the process for me?

5 A. The process, payment should be
6 applied as laid out in the -- in the promissory
7 note.

8 Q. From time to time were payments made
9 that were not required under the promissory
10 notes?

11 MS. DANDENEAU: Objection to form.

12 A. Yes.

13 Q. Who was responsible for deciding
14 when and how much the payments would be made
15 with respect to each of the notes that were
16 issued by the affiliates and Mr. Dondero?

17 A. Who was responsible for deciding how
18 much was paid prior to the due date?

19 Q. Yes.

20 A. I don't know.

21 Q. Did you approve of each payment that
22 was made against principal and interest on the
23 notes that were given by the affiliates and
24 Mr. Dondero?

25 MS. DANDENEAU: Objection to form.

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2 A. Did I approve the payments? I
3 approve -- I approve -- if there was cash -- if
4 there was cash being repaid on a note payment,
5 yes, I approved in the general sense of being
6 made aware of the payment and the amount.

7 Q. And are you the person who
8 authorized Highland's employees to effectuate
9 those payments?

10 A. Yes.

11 Q. When you gave the instruction to
12 effectuate the payment, did you obtain
13 Mr. Dondero's prior approval?

14 A. I mean, it -- I mean, it -- it
15 depends.

16 Q. Can you think of any instance where
17 you directed Highland's employees to make a
18 payment of principal or interest against any
19 note that was tendered by an affiliate or
20 Mr. Dondero that Mr. Dondero did not approve of
21 in advance?

22 A. I can't recall specifically.

23 Q. Can you identify -- withdrawn.

24 Did Mr. Dondero ever tell you that a
25 payment that was made against principal and

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2 interest due under one of the notes that was
3 tendered by an affiliate or himself should not
4 have been made?

5 A. Yes.

6 Q. Can you identify the payment for me?

7 A. It would be for -- for NexPoint
8 Advisors.

9 Q. Okay. And when did Mr. Dondero tell
10 you that a payment that you had initiated on
11 behalf of NexPoint should not have been made?

12 A. I wasn't initiating payment. It was
13 in the context of the -- I think you used this
14 term, "the advisors," so NexPoint Advisors and
15 Highland Capital Management Fund Advisors had
16 overpaid on certain agreements with Highland
17 Capital Management, L.P. And as a part of that
18 process, the advisors -- what I was told at the
19 time were in talks and negotiations and
20 discussions with Highland Capital Management,
21 L.P., on offsets in relation to those
22 overpayments.

23 Q. When did this conversation take
24 place?

25 MS. DANDENEAU: Objection to form.

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2 A. I don't recall specifically.

3 Q. Do you recall what year it was?

4 A. Yes.

5 Q. What year did the conversation with
6 Mr. Dondero take place that you just described?

7 A. 2020.

8 Q. Okay. Do you remember if it was
9 December 2020?

10 A. It -- it -- I don't -- I don't
11 recall what month specifically, but it would
12 have been November or December.

13 Q. And we're talking here about a
14 payment of principal and/or interest that was
15 due -- withdrawn.

16 We're talking here about a payment
17 of principal and interest that was applied
18 against NexPoint's note; correct?

19 MS. DANDENEAU: Objection to form.

20 A. I don't recall what that payment
21 consisted of.

22 Q. Is it possible that the payment you
23 have in mind related to the shared services
24 agreement?

25 MS. DANDENEAU: Objection to form.

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2 A. No.

3 Q. Are you certain that the payment --
4 that the payment that you have in mind related
5 to the promissory note that NexPoint issued in
6 favor of Highland?

7 MS. DANDENEAU: Objection to form.

8 A. Yes.

9 Q. Okay. Other than that one payment,
10 can you identify any other instance where
11 Mr. Dondero told you that a payment should not
12 have been applied against principal and
13 interest under any promissory note tendered by
14 any affiliate or Mr. Dondero?

15 MS. DANDENEAU: Objection to form.

16 MS. DEITSCH-PEREZ: Objection to
17 form.

18 A. Not that I recall.

19 Q. Thank you very much.

20 Do you know if Mr. Dondero approved
21 in advance of each loan made to each affiliate
22 and himself during the time that you were the
23 CFO?

24 MS. DEITSCH-PEREZ: Object to the
25 form.

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2 A. Yes, generally.

3 Q. Can you identify any loan that was
4 ever made to an affiliate or to Mr. Dondero
5 that Mr. Dondero did not approve of in advance?

6 A. Other than the ones that are in
7 dispute, I'm not aware.

8 Q. Do you believe that Mr. Dondero did
9 not approve of each of the loans that are in
10 dispute in advance of the time that the loan
11 was made?

12 MS. DANDENEAU: Objection to form.

13 A. Given what is in the dispute, you
14 know, and -- and -- and the way things might --
15 yeah, I mean...

16 Q. I am not asking about the dispute,
17 and it was probably my mistake to follow you
18 there.

19 Were you aware of every loan made by
20 Highland to each of its affiliates and
21 Mr. Dondero while you were the CFO at the time
22 each loan was made?

23 A. Was I aware of every loan, yes.

24 Q. Okay. And if you put yourself back
25 in time, do you recall that any of the loans

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2 that were made to one of the affiliates or
3 Mr. Dondero during the time that you were the
4 CFO was made without Mr. Dondero's prior
5 knowledge and approval?

6 A. Not that I recall.

7 Q. Thank you. In fact, do you -- as
8 the CFO, would you have allowed Highland to
9 loan money to an affiliate or to Mr. Dondero
10 without obtaining Mr. Dondero's prior approval?

11 MS. DANDENEAU: Objection to form.

12 A. I can't -- there was so many times
13 over the years, I can't speak for every single
14 one, but generally, yes, I -- I spoke to him.

15 Q. You -- you never -- you never --
16 withdrawn. I will just take that.

17 Can you recall any payment that was
18 ever made against principal and interest on a
19 note that was issued in favor of Highland by an
20 affiliate or Mr. Dondero that you personally
21 did not know about in advance?

22 A. There are so many through the years,
23 I don't -- I don't -- I don't recall every
24 single one.

25 Q. Okay. Can you identify any payment

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2 that was made against principal and interest on
3 any note tendered by any affiliate or
4 Mr. Dondero that you didn't know about in
5 advance?

6 A. I don't recall.

7 Q. Other than Mr. Dondero -- withdrawn.

8 Did anybody at Highland have the
9 authority to make a payment against principal
10 and interest due under a loan given to the
11 affiliates and Mr. Dondero without your
12 knowledge and approval?

13 MS. DANDENEAU: Objection to form.

14 A. Sorry, there was -- to make a
15 payment on an affiliate loan, what you are
16 saying would it require my knowledge and
17 approval, yes.

18 Q. Okay. I appreciate that. Thank
19 you.

20 Did anybody at Highland have the
21 authority, to the best of your knowledge, to
22 effectuate a loan to an affiliate without
23 Mr. Dondero's prior knowledge and approval?

24 MS. DANDENEAU: Objection to form.

25 A. I can't speak for all, but

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2 generally, yes.

3 Q. Did you personally communicate with
4 Mr. Dondero to let him know each time a payment
5 of principal or interest was being made against
6 any note that was tendered by an affiliate or
7 Mr. Dondero to Highland?

8 A. I don't -- are you saying, did I let
9 Mr. Dondero know if a payment was made on any
10 affiliate or loan to Mr. Dondero? I mean,
11 not -- not every -- no.

12 Q. Let me ask it this way: Did you
13 have a practice of informing Mr. Dondero when
14 payments were made against principal and
15 interest on any note that was tendered by an
16 affiliate or Mr. Dondero?

17 MS. DEITSCH-PEREZ: Objection to
18 form.

19 MS. DANDENEAU: Objection to form.

20 A. No, I did not.

21 Q. Did Mr. Dondero ever tell you that a
22 payment of principal or interest had been made
23 against a note that was tendered by an
24 affiliate or himself that he had been unaware
25 of?

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2 A. Not that I recall.

3 Q. Are you aware that Mr. Dondero and
4 the affiliates -- withdrawn.

5 Are you aware that Mr. Dondero
6 NexPoint, HCRE, and HCMS all contend that they
7 do not have to pay on any of the notes they
8 issued because they are subject to an oral
9 agreement between Mr. Dondero and Nancy
10 Dondero, in her capacity as the trustee of the
11 Dugaboy Investment Trust?

12 MS. DANDENEAU: Objection to form.

13 A. I didn't -- I didn't -- I didn't
14 know that it was all notes.

15 Q. Okay. Are you -- did you ever learn
16 that there was an oral agreement between Jim
17 Dondero and Nancy Dondero pertaining to any
18 notes issued by any affiliate or Mr. Dondero?

19 MS. DEITSCH-PEREZ: Object to the
20 form.

21 A. Yes.

22 Q. Do you have any understanding as to
23 the terms of that agreement?

24 A. Yes.

25 Q. What is your understanding of the

1 WATERHOUSE - 10-19-21

2 terms of the agreement?

3 A. That there were certain milestones
4 that had to be reached.

5 Q. Do you have any understanding of the
6 terms of the agreement between Mr. Dondero and
7 Nancy Dondero concerning any of the notes
8 issued by the affiliates or Mr. Dondero other
9 than that there have to be milestones reached?

10 MS. DEITSCH-PEREZ: Object to the
11 form.

12 A. There are milestones, I found out
13 yesterday, or there was some --

14 MS. DANDENEAU: Okay. I'm just
15 going to object to the extent that you
16 learned anything in conversations with
17 counsel, please don't reveal -- that is
18 privileged, and don't reveal any privileged
19 communications.

20 THE WITNESS: Okay.

21 A. So I'm not aware of anything else.

22 Q. Do you know what the milestones
23 were?

24 MS. DANDENEAU: Objection to form.

25 A. I don't.

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2 Q. Do you know anything about -- do you
3 know what promissory notes the agreement
4 covered?

5 A. I don't.

6 Q. Do you know if -- if Jim and Nancy
7 Dondero entered into one agreement or more than
8 one agreement?

9 MS. DEITSCH-PEREZ: Object to the
10 form.

11 A. I don't know.

12 Q. Do you know if the agreement is in
13 writing?

14 A. I don't know.

15 Q. How did you learn of the existence
16 of the agreement?

17 MS. DANDENEAU: Objection to form.

18 Again --

19 A. I don't -- I don't recall who told
20 me.

21 Q. You have no recollection of who told
22 you about this agreement between Jim and Nancy
23 Dondero?

24 MS. DEITSCH-PEREZ: Object to the
25 form.

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2 A. I don't recall.

3 Q. Do you recall how you learned of the
4 agreement?

5 Was it in a meeting? Was it in a
6 phone call? Was it in an email?

7 A. I don't recall.

8 Q. Do you recall when you learned of
9 the agreement?

10 A. Not specifically.

11 Q. Do you recall what year you learned
12 of the agreement?

13 A. In -- look, I mean, there are so
14 many notes. I may be getting -- I believe it
15 was 2020.

16 Q. All right. I'm not asking about
17 notes, sir. I'm asking about the agreement
18 that you testified you knew about between Jim
19 and Don- -- Nancy Dondero. Okay.

20 Do you understand my question now?
21 Should I ask my question again?

22 A. Yeah, sure. Go ahead.

23 Q. I'm going to use the word
24 "agreement" to refer to the agreement that
25 Mr. Dondero and Nancy Dondero entered into

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2 where you understood that certain milestones
3 had to be reached. Okay?

4 A. Uh-huh.

5 MS. DANDENEAU: Objection.

6 MS. DEITSCH-PEREZ: Object to the
7 form.

8 MR. MORRIS: Just defining a term,
9 what is the objection.

10 MS. DEITSCH-PEREZ: The objection --

11 MR. MORRIS: I will move on. I will
12 move on.

13 MS. DEITSCH-PEREZ: John --

14 Q. Sir, are you okay with that
15 definition of agreement?

16 A. Okay.

17 Q. Okay. So you don't recall who --
18 who informed you of the existence of the
19 agreement; is that right?

20 A. I don't recall.

21 Q. You don't recall who told you the
22 terms of the agreement.

23 Do I have that right?

24 A. Correct.

25 Q. And you don't recall if you learned

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2 about the agreement in a meeting, through an
3 email, or through a phone call.

4 Do I have that right?

5 A. I don't recall.

6 Q. Can you tell me when you learned of
7 the agreement?

8 A. I don't -- I don't -- I don't
9 remember specifically.

10 Q. Can you tell me if you learned of
11 the agreement before or after the petition
12 date?

13 A. It would have been -- it would have
14 been after.

15 Q. Can you tell me if you learned of
16 the agreement before or after January 9th,
17 2020?

18 A. It would have been after.

19 Q. Can you tell me if you learned of
20 the agreement before or after you left Highland
21 Capital Management in February of 2021?

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

23 Q. It is possible that you learned of
24 it while you were a Highland employee.

25 Do I have that right?

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2 A. I don't remember the -- I mean, it
3 was sometime in 2021. I don't remember when.

4 Q. All right. So to the best of your
5 recollection, it was in 2021 but you don't
6 recall if it was before or after you ceased to
7 be a Highland employee.

8 Do I have that right?

9 A. Yeah, I mean, it was -- it was
10 likely after I was -- after I left Highland
11 because, if I put myself back into the last
12 days of -- of 2021, it was -- you know, the
13 communications with Mr. Dondero were -- were --
14 were -- there weren't as many communications
15 because of the circumstances.

16 Q. And so based on that you believe
17 that it is most likely that you learned of this
18 agreement sometime after you left Highland
19 employment?

20 A. I wouldn't use the term "most
21 likely." I don't recall specifically. I don't
22 recall.

23 Q. Do you recall ever telling Jim Seery
24 about this agreement?

25 A. No, I don't -- I didn't tell

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2 Jim Seery.

3 Q. Did you tell anybody at DSI about
4 this agreement?

5 A. No.

6 Q. Did you tell any of Highland's
7 independent directors about this agreement?

8 A. No.

9 Q. Did you tell anybody at Pachulski
10 Stang Ziehl & Jones about this agreement?

11 A. No.

12 Q. Did you tell any employee of
13 Highland about this agreement?

14 A. No.

15 MS. DANDENEAU: Mr. Morris, it has
16 been an hour and a half. Is this a good
17 time for a break?

18 MR. MORRIS: Sure.

19 Q. Mr. Waterhouse, I will just remind
20 you that during the break please don't speak
21 with anybody about the deposition, the
22 substance of your testimony or anything else
23 concerning the deposition. Okay?

24 A. Yes.

25 MR. MORRIS: So it is 11:02. We're

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2 at 11:02 your time. Let's come back, I
3 guess, at 15 -- at 11:15 your time.

4 VIDEOGRAPHER: We're going off the
5 record at 11:02 a.m.

6 (Recess taken 11:02 a.m. to 11:20 a.m.)

7 VIDEOGRAPHER: We are back on the
8 record at 11:20 a.m.

9 Q. Mr. Waterhouse, did you speak with
10 anybody during the break about this deposition?

11 A. No.

12 MS. DANDENEAU: Other than -- other
13 than his counsel.

14 Q. Did you speak to your counsel about
15 the substance of your deposition today?

16 A. No, I didn't bring it up.

17 Q. I didn't ask you if you brought it
18 up. I asked you if you had any conversation
19 with your lawyer about the substance of your
20 deposition.

21 MS. DANDENEAU: Yes, he did.

22 Q. Can you tell me what the -- you
23 discussed?

24 MS. DANDENEAU: No, I object to
25 that. He's not going to answer. That is a

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2 privileged conversation.

3 MR. MORRIS: So I just want to make
4 sure that I understand. During the break
5 you spoke with your client about the
6 substance of this deposition; is that
7 right?

8 MS. DANDENEAU: Yes, John.

9 MR. MORRIS: And you refuse -- you
10 refuse to let your client tell me what was
11 discussed; is that right?

12 MS. DANDENEAU: That's correct.

13 MR. MORRIS: You know, I had given
14 the instruction prior to the break not to
15 speak with counsel. I would have
16 appreciated --

17 MS. DANDENEAU: No, you didn't --
18 actually, that is not true, Mr. Morris.
19 You said not to speak with anyone. We
20 never have interpreted that to mean
21 conversations with counsel. That's never
22 been -- I have never, ever heard that
23 instruction.

24 MR. MORRIS: Okay. We will -- we
25 will -- we will deal with it when and if we

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2 have to.

3 Q. Mr. Waterhouse, after learning about
4 the agreement, did you ask anybody if the
5 agreement was reflected in a writing?

6 MS. DANDENEAU: Objection to form.

7 A. No.

8 Q. Did you ask anybody if the terms of
9 the agreement were memorialized anywhere?

10 MS. DANDENEAU: Objection to form.

11 MR. MORRIS: What is the --

12 A. No.

13 MS. DANDENEAU: Well, because you
14 keep talking about this agreement and I --
15 I -- I think, Mr. Morris, that is really
16 not clear what you mean by "the agreement."
17 And maybe you can just go back and restate
18 what that is.

19 MR. MORRIS: Okay. Your client has
20 agreed with me twice on the definition, but
21 I will try one more time.

22 Q. Mr. Waterhouse, do you understand
23 that when I use the term "agreement," I'm
24 referring to the agreement between Jim and
25 Nancy Dondero concerning certain promissory

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2 notes where you learned that one of the terms
3 of the agreement was milestones reached?

4 A. Okay.

5 Q. And did you understand that that was
6 the -- the agreement that we were referring to
7 every time we used the word "agreement" in this
8 deposition?

9 A. I don't know anything about this
10 agreement. So, look, I do -- it -- I don't
11 know whether --

12 Q. Let's -- let's try this again.

13 A. Yeah. Look, I don't know what this
14 agreement relates.

15 MS. DEITSCH-PEREZ: John, John --

16 Q. Let me try --

17 MS. DEITSCH-PEREZ: John, please let
18 the witness finish.

19 MR. MORRIS: Please stop. Please
20 stop. Please stop talking.

21 MS. DEITSCH-PEREZ: No, you stop.

22 Let the witness --

23 MR. MORRIS: Stop talking.

24 MS. DEITSCH-PEREZ: -- finish -- you
25 interrupted him.

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2 MR. MORRIS: You know what, you
3 guys, this is really wrong. It is really,
4 really wrong. Okay?

5 I had the witness agree not once,
6 but twice to the definition of agreement.
7 Okay? I'm going to try and do it a third
8 time.

9 MS. DANDENEAU: No, but, please,
10 John, really --

11 MR. MORRIS: No, please stop
12 talking. Please. It is my deposition.
13 Object to questions.

14 MS. DANDENEAU: No, but also you
15 instructed him that -- that if you were
16 going -- if you were interrupting him, that
17 he should remind you that you're
18 interrupting him and -- and --

19 MR. MORRIS: Let him do that. Let
20 him do that.

21 MS. DANDENEAU: Okay. Well, you --

22 MR. MORRIS: Please stop talking.

23 A. Okay. I don't know any of the
24 details of these agreements. I don't know
25 anything about them. I heard -- someone -- I

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2 don't know who, I don't know when, as you
3 asked, sometime in '21, someone told me about
4 this -- or I don't honestly know -- I don't
5 even recall exactly how I was made aware of
6 this, but I was. I don't know -- I don't know
7 any of these details, and I'm getting -- again,
8 there is, you know, I -- I -- I had a passing
9 conversation with -- with Jim at some point
10 on -- on some -- on the executive comp, and I'm
11 getting confused of what is what, because
12 again, I don't know any of these details.

13 Q. Okay. Let me try again,
14 Mr. Waterhouse, and I apologize.

15 Are you aware of any agreement
16 between Jim Dondero and Nancy Dondero
17 concerning any promissory note that was given
18 to Highland by any affiliate or Mr. Dondero?

19 MS. DEITSCH-PEREZ: Object to the
20 form.

21 A. I've heard of an agreement. That
22 is -- that is -- I mean, if you are using aware
23 as heard, sure.

24 Q. And you understand that one of the
25 terms of the agreement is that it was based on

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2 milestones that had to be reached; is that
3 right?

4 MS. DANDENEAU: Objection to form.

5 A. That was one of the words that was
6 used when I heard about it, yes.

7 Q. And when you heard about this
8 agreement that had a term in it concerning
9 milestones reached, did you ask the person who
10 was telling you about the agreement whether or
11 not it was in writing?

12 A. I did not.

13 Q. Did you ask any questions at all?

14 MS. DANDENEAU: Objection to form.

15 A. Not that I recall.

16 Q. But do you understand that going
17 forward, we're going to refer to the agreement
18 as the agreement that you just described that
19 you were --

20 MS. DANDENEAU: Object to the form.

21 A. Yes.

22 Q. Okay. You don't have any personal
23 knowledge concerning the terms of the
24 agreement; correct?

25 MS. DEITSCH-PEREZ: Object to the

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2 form.

3 Q. You can answer.

4 A. I don't -- I heard about the
5 agreement. I don't know anything -- I heard
6 there was an agreement. That is -- again, as I
7 testified before -- I said before, heard about
8 it, don't know the details. I believe it was
9 sometime this year.

10 Q. Do you have any personal knowledge
11 about the terms of the agreement, sir?

12 MS. DANDENEAU: Objection to form.

13 A. Other than what I have previously
14 discussed, I don't -- I don't know.

15 Q. Did -- did Mr. Dondero tell you
16 about the existence of the agreement?

17 A. I don't recall.

18 Q. Do you recall the source of your
19 information when you learned about the
20 agreement?

21 A. No, I don't -- I don't recall. I
22 don't remember. I just -- I heard about it
23 generally. I don't remember -- I don't
24 remember who, how, if, how. I don't remember.

25 Q. You know, Mr. Waterhouse, I just

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2 want to be clear that I never would have asked
3 you to appear at this deposition if your name
4 hadn't been included in responses to discovery
5 as to somebody with knowledge about the -- who
6 was told about the existence of the agreement.

7 That is what prompted me do this,
8 and I really do feel compelled to tell you that
9 I otherwise would never have called you as a
10 witness. So I regret that you're being put
11 through this today. I had no intention of
12 burdening you or taking your time, but that is
13 the reason that we issued the subpoena is
14 because certain of the defendants identified
15 you as somebody --

16 MS. DEITSCH-PEREZ: Mr. Morris, you
17 are here to ask questions, not to have --

18 MR. MORRIS: I feel badly for the
19 guy. I really do.

20 MS. DEITSCH-PEREZ: I'm sure you do.

21 MR. MORRIS: I do. Stop.

22 MS. DEITSCH-PEREZ: You stop.

23 MR. MORRIS: I'm allowed.

24 MS. DEITSCH-PEREZ: No, you're not
25 allowed to have a chat with the witness.

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2 Q. Okay. Well, I hope that you
3 appreciate what I'm saying here,
4 Mr. Waterhouse.

5 MS. DANDENEAU: All right. Let's go
6 ahead and ask questions, and again, you're
7 entitled to probe his -- his knowledge
8 of -- whatever knowledge he has about
9 this -- this agreement and --

10 MR. MORRIS: That is what I'm doing.

11 MS. DANDENEAU: -- he will answer
12 the questions to the best that he can.

13 MR. MORRIS: That is what I'm doing.

14 Q. Mr. Waterhouse, I take it you do not
15 know which promissory notes issued by which
16 affiliates or Mr. Dondero are the subject of
17 this agreement; do I have that right?

18 A. Yes, I don't -- I don't know.

19 Q. Do you know of any way to determine
20 which promissory notes issued by the affiliates
21 and Mr. Dondero are the subject of this
22 agreement other than asking Jim or Nancy
23 Dondero?

24 MS. DANDENEAU: Objection to form.

25 A. I don't know.

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2 Q. Did you ever make --

3 A. I don't know anything about these
4 agreements.

5 Q. Did you ever make any effort to
6 determine which promissory notes are subject to
7 this agreement?

8 A. No.

9 Q. Did you ever ask anybody which
10 promissory notes are subject to this agreement?

11 A. No.

12 Q. Do you know if there is a list
13 anywhere of the promissory notes that are
14 subject to this agreement?

15 A. I'm not aware.

16 Q. Have you ever seen the terms of the
17 agreement written down anywhere?

18 A. No.

19 Q. Have you ever asked anybody whether
20 the terms of the agreement were written down
21 anywhere?

22 A. I have not.

23 Q. Did learning about the agreement
24 cause you to do anything in response?

25 MS. DANDENEAU: Objection to form.

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2 A. No.

3 Q. Did anybody ever describe to you the
4 nature of the milestones that you referred to
5 earlier?

6 A. No, I don't -- I don't have any
7 details of this.

8 Q. That is fine.

9 PricewaterhouseCoopers served as
10 Highland's outside auditors prior to the
11 petition date; correct?

12 A. Yes.

13 Q. You refer to PricewaterhouseCoopers
14 as PwC?

15 A. Yes.

16 Q. PricewaterhouseCoopers audited
17 Highland's financial statements on an annual
18 basis; correct?

19 A. During my -- during my time as -- as
20 CFO, yes, PricewaterhouseCoopers was the
21 auditor.

22 Q. Do you know why Highland had its
23 annual financial statements audited each year?

24 A. Generally.

25 Q. Tell me your general understanding

1 WATERHOUSE - 10-19-21

2 as to the reason why Highland had its annual
3 financial statements audited each year.

4 A. From -- from time to time, they were
5 used -- or asked for, as part of diligence or
6 transactions or -- or things of that nature.

7 Q. And were they given to third parties
8 for purposes of diligence or transactions from
9 time to time?

10 A. As far as I'm aware, yes.

11 Q. And was it your understanding as the
12 CFO that the third parties who received the
13 financial statements in diligence or
14 transactions was going to rely on those?

15 MS. DANDENEAU: Objection to form.

16 A. I don't know -- I don't know gen --
17 I don't know specifically what they were going
18 to rely on. You know, we would get requests
19 for audited financial statements. I don't know
20 what they were relying on.

21 Q. And --

22 A. You would have to ask them.

23 Q. Did you personally play a role in
24 PwC's annual audit and the conduct of the
25 audit?

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2 MS. DANDENEAU: Objection to form.

3 A. During my tenure as CFO, I played a
4 very minimal role.

5 Q. What was the minimal role that you
6 played?

7 A. You know, again, it was -- it was to
8 check in with the team, to make sure that, you
9 know, audit -- the deadlines were being hit,
10 information was being presented to the auditors
11 in a -- in a timely fashion, but, you know,
12 other than that, it was a very capable team
13 that are still current employees of Highland
14 and, you know, they -- they conducted 99
15 percent of -- look, I don't want to give
16 percentages. I mean, this is -- but I -- I --
17 I played a minimal role towards the end.

18 Before during my earlier years as
19 CFO, I did more, and then as time went on, I
20 did less in it.

21 Q. Okay. Was there a person at
22 Highland who was responsible for overseeing
23 Highland's participation in PwC's audit during
24 the time that you were the CFO?

25 A. Yeah. I mean, there was -- there

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2 was a -- there was a point -- it varies. It
3 varies by year, in function, in time and, you
4 know, depending on the request, but yes, I
5 mean, there is -- there is -- there is
6 generally a point person of communication.

7 Q. And who was the point person from
8 2016 until the time you left Highland?

9 A. I don't -- I don't know
10 specifically, but it would have been, you
11 know -- you know, someone on the corporate
12 accounting team.

13 Q. And was there a head of the
14 corporate accounting team?

15 A. Yes, so -- yes.

16 Q. Who was the head of corporate
17 accounting for the five years prior to the time
18 you left Highland?

19 A. I don't -- if you're asking from
20 2016 on, I don't -- it was Dave Klos, but,
21 again, there was -- there was changes to the
22 team and the reporting structure. I don't
23 remember exactly when that happened during --
24 you know, over the last -- since 2016.

25 Q. Did the folks who participated and

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2 ran the audit all report to you, directly or
3 indirectly?

4 A. Yes.

5 Q. And did you have any responsibility
6 for making sure that the audit report was
7 accurate before it was finalized?

8 A. Yeah. I mean, you know, that --
9 that is -- my responsibility to the auditors
10 was -- again, is -- and the CFO is to -- we are
11 providing accurate financial statements; right?

12 And -- and -- and as part of any
13 audit, we disclose all relevant information as
14 part of any audit.

15 Q. Okay. And as the CFO, did you take
16 steps to make sure that the audit report was
17 accurate?

18 A. I mean, I would say in a general
19 sense, yes. But, again, I mean, I had a
20 very -- I had a very capable and competent
21 team. I wasn't managing them.

22 You know, part of what I do is I let
23 the team -- I want managers to grow. I want
24 managers to have rope. And that is -- you
25 know, I'm not a stand-behind-you type of guy.

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2 If you -- if you talk to my team members, I'm
3 not micromanaging people. I want people to
4 learn and grow in their function so they can go
5 on and do bigger and better things with their
6 careers.

7 And so, yes, generally I was
8 responsible for it, but I wanted the team to
9 learn and grow and be responsible for the bulk
10 of the audit.

11 Q. Did you personally review each audit
12 report before it was finalized to satisfy
13 yourself that it was accurate?

14 A. I don't -- I don't recall, you know,
15 for every single -- we're talking 2016, there
16 would have been three years, 2016 to '17, '18.
17 I don't -- we're -- we're going back
18 five years-plus. I don't -- you know, I don't
19 recall.

20 Q. Did you have a practice that you
21 employed to make sure that you were satisfied
22 that Highland's audit reports were true and
23 accurate to the best of your knowledge?

24 A. I mean, our -- the practice was set
25 up with our -- the -- the practice to put

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2 together accurate audited or accurate financial
3 statements is to your control environment.

4 So, you know, the -- so the practice
5 was to maintain a stable control environment
6 which then the output is -- is accurate
7 financial statements.

8 So -- so, you know, if I was
9 comfortable that the control environment was
10 operating, then, you know, that would dictate
11 how I would -- you know, what I might or might
12 not do in a given year.

13 Q. Okay. Do you recall ever being
14 uncomfortable with the control environment
15 during the period that you served as CFO?

16 A. Yeah. I mean, look, yes, there are
17 times -- you know, nothing is perfect. So
18 there were -- there were times when, yes, you
19 know -- there are times I learned I was
20 uncomfortable with the control environment, and
21 that is part of the management of the process
22 and having, you know -- and -- and working
23 through whatever obstacles present themselves.

24 Q. Okay. Were you ever uncomfortable
25 with the control process as it related to

1 WATERHOUSE - 10-19-21

2 reporting and disclosures of loans to
3 affiliates and Mr. Dondero?

4 MS. DANDENEAU: Objection to form.

5 A. I don't -- I don't recall --

6 Q. So you don't recall --

7 A. -- the --

8 MS. DANDENEAU: Mr. Morris --

9 A. I don't recall being uncomfortable.

10 But, again, we're going back several years. I
11 don't -- you know, the practice in an audit is
12 to disclose all information to the auditors.

13 And I don't -- I don't recall.

14 Q. As part of the process of the audit,
15 did you sign what is sometimes referred to as a
16 management representation letter?

17 A. Yes.

18 MR. MORRIS: Can we put up on the
19 screen a document that we have premarked as
20 Exhibit 33.

21 (Exhibit 33 marked.)

22 MS. DANDENEAU: Mr. Morris, that is
23 not in the binder; correct?

24 MR. MORRIS: Correct.

25 Q. So you will see, Mr. Waterhouse,

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2 this is a letter dated June 3rd. And if we
3 could go to the signature page.

4 And do you see that you and
5 Mr. Dondero signed this document?

6 A. Yes.

7 Q. That is your signature; right?

8 A. Yes.

9 MR. MORRIS: Okay. Can you go back
10 to the top.

11 MS. DANDENEAU: Mr. Morris, can you
12 have somebody post this in the chat so that
13 we have can have a copy of this, please.

14 MR. MORRIS: Yeah, sure. Asia, can
15 you do that, please.

16 Q. Okay. Do you see at the bottom of
17 the second paragraph there is a reference to
18 materiality?

19 A. Yes.

20 Q. Okay. It says, Materiality used for
21 purposes of these representations is
22 \$1.7 million.

23 Do you see that?

24 A. I do.

25 Q. And did PwC set that level of

1 WATERHOUSE - 10-19-21

2 materiality?

3 A. Yes.

4 Q. And for purposes of the audit, did
5 PwC set the level of materiality each year?

6 A. Yes.

7 Q. Did that number change over time?

8 A. I'm not aware of what materiality is
9 every single year, so -- but, you know, this
10 number would likely fluctuate.

11 Q. Okay. I'm going to go back to a
12 question I asked you earlier today. And that
13 is in connection -- this letter is issued in
14 connection with the audit for the period ending
15 12/31/2018; correct?

16 A. Yes.

17 Q. Okay. And is it fair to say that if
18 any -- actually, withdrawn. I'm going to take
19 it outside of this.

20 If Highland ever forgave the loan to
21 any affiliate or any of its officers or
22 employees, in whole or in part, to the best of
23 your knowledge, would that forgiveness have
24 been disclosed in the audited financial
25 statements if it exceeded the level of

1 WATERHOUSE - 10-19-21

2 materiality that PwC established?

3 MS. DANDENEAU: Objection to form.

4 A. So, again, during my tenure as CFO,
5 and -- Highland -- it was -- it is required to
6 disclose any affiliate loans that are in excess
7 of materiality.

8 Now, the forgiveness of those loans
9 may or may not -- I mean, since materiality
10 fluctuates every year, a -- you know, if a loan
11 was forgiven, it may or may not, you know --
12 and, look, I would want to consult the guidance
13 around this.

14 It is not something we do -- you
15 know, it is not -- you know, GAAP can be and
16 disclosures can be very specialized so, again,
17 we want to consult the guidance. But we would
18 see if and what would need to be disclosed if
19 it were deemed immaterial.

20 Q. Did you and Mr. Dondero sign
21 management representation letters of this type
22 in each year in which you served as Highland's
23 CFO?

24 A. I -- I -- I will speak for myself.
25 I signed them. There may have been others that

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2 signed as well. I don't -- I don't recall.

3 Q. But to the best of your knowledge,
4 you, personally, signed a management
5 representation letter in connection with
6 Highland's audit each year that you served as
7 the CFO; correct?

8 A. I would say generally speaking,
9 Mr. Morris. I don't recall for every single
10 year, you know, generally, but I would want to
11 refer to all the rep letters and see who signed
12 them.

13 Q. Do you recall Highland having its
14 financial statements audited in any year during
15 the period that you were a CFO where you didn't
16 sign the management representation letter?

17 A. I don't recall. But, John, we're
18 going back five, six, seven, eight, nine,
19 decade. I don't -- I don't remember.

20 Q. I don't want to go back that many
21 decades, but I'm just asking you if you recall
22 that there was you didn't sign it?

23 A. I -- I -- I don't, but my memory
24 is -- again, I -- I -- I can't tell you what I
25 did in 2012. I mean, I think generally, yes,

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2 but I don't -- I don't know for sure, and I
3 would want to rely on the document.

4 Q. Let me ask the question a little bit
5 differently then.

6 Do you have any reason to believe
7 that Highland had its annual financial audit
8 and you did not sign a management
9 representation letter in connection with that
10 audit?

11 MS. DANDENEAU: Objection to form.

12 A. I don't believe it would, but,
13 again, I would want to -- I don't recall and I
14 would want to confirm it to -- to make, you
15 know, an affirmative -- to give an affirmative
16 answer.

17 Q. Do you know whether PwC required
18 management to sign management representation
19 letters?

20 MS. DANDENEAU: Objection to form.

21 A. Yes. I mean, it -- management
22 representation letters are signed by
23 management.

24 Q. Okay. And do you know -- do you
25 have any understanding as to why PwC requires

1 WATERHOUSE - 10-19-21

2 management to sign management representation
3 letters?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. I don't know why PwC's -- what PwC's
7 specific practice is. I know generally what
8 management representation letters are.

9 Q. Okay. Do you personally -- I'm not
10 asking about PwC. I'm asking for you -- I'm
11 asking about you, do you have an understanding
12 as to why the auditor asks for management
13 representation letters?

14 A. Okay. So you're asking me in my
15 personal capacity, yes, I have a general
16 understanding of why.

17 Q. Can you give me the general
18 understanding that you have as to why
19 management representation letters are required?

20 A. They are -- they are required to --
21 they are -- they are one of the items required
22 in an audit to help verify completeness.

23 Q. Do you have any -- any other
24 understanding as to why management
25 representation letters are required?

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2 A. That is -- that is -- other than
3 what I said, it is -- it is -- it is required
4 so -- to ensure that the -- you know, there
5 is -- there is completeness in what is being
6 audited.

7 Q. Did you -- did you have a practice
8 whereby you and Mr. Dondero conferred about the
9 management representation letters before you
10 signed them?

11 A. No.

12 Q. Did you have a practice --
13 withdrawn.

14 Do you see just the next sentence
15 after the materiality, there is a sentence that
16 states: We confirm, to the best of our
17 knowledge and belief, as of June 3rd, 2019, the
18 date of your report, the following
19 representations made to you during your audit.

20 Do you see that sentence?

21 A. Yes.

22 Q. Okay. Did you understand when you
23 signed this letter that you were confirming the
24 representations that followed?

25 A. When I signed this management

1 WATERHOUSE - 10-19-21

2 letter -- representation letter, yes.

3 Q. Okay. Did you discuss this letter
4 with Mr. Dondero before you signed it?

5 A. I don't recall.

6 Q. Do you recall if Mr. Dondero asked
7 you any questions before he signed the letter?

8 A. I don't recall.

9 Q. Do you recall if you asked
10 Mr. Dondero any questions before you signed
11 this letter?

12 A. I don't recall.

13 Q. Is it fair to say that Mr. Dondero
14 did not disclose to you the existence of the
15 agreement that we have -- as we've defined that
16 term prior to the time you signed this letter?

17 MS. DANDENEAU: Objection to form.

18 A. I don't think I understand the
19 question. So, again, you are saying, did
20 Mr. Dondero not disclose to me the existence of
21 this letter?

22 Q. No, I apologize.

23 Did Mr. Dondero disclose to you the
24 existence of the agreement prior to the time
25 you signed this letter on June 3rd, 2019?

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2 A. The agreement -- the agreement that
3 we talked about earlier?

4 Q. Correct.

5 A. Look, as I said earlier, the first
6 time I heard of this agreement was sometime
7 this year.

8 Q. Okay. Can we turn -- let's just
9 look at a couple of items on the list. If we
10 can go to page 33416. Do you see in Number 35
11 it talks about the proper recording or
12 disclosure in the financial statements of ND
13 relationships and transactions with related
14 parties.

15 Do you see that?

16 A. I do.

17 Q. As the CFO, do you have any
18 understanding as to whether Dugaboy is a
19 related party?

20 A. I don't recall.

21 Q. Do you know whether any of the
22 affiliates are related parties?

23 A. If -- if it was NexPoint, HCMFA,
24 HCMS, HCRE, yeah, if -- if that is the
25 affiliate definition, and there. In ASC 850 --

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2 again, I mean, I haven't looked at ASC 850 in
3 quite some time, but, you know, if -- if there
4 is a control language, you know, ASC 850, would
5 that -- that section in GAAP would -- would
6 pick up and define what are related parties.

7 So, you know, like I said, if -- one
8 of the four entities I just described, if -- if
9 they are in that control definition of ASC 850,
10 they would be picked up in 35D.

11 Q. Do you -- do you have any reason to
12 believe that they would be picked up in that
13 definition, based on your knowledge and
14 experience?

15 A. I -- I believe that entities
16 controlled under GAAP are -- are affiliates.

17 Q. Okay. Would Mr. Dondero also
18 qualify as a related party for purposes of
19 Section 35D, to the best of your knowledge?

20 A. Yeah, I don't -- I don't know. I
21 would think -- I would have to read the code
22 section to see if someone personally -- is it
23 talking about related parties. So, look, if
24 your own in control, yeah, I mean, I would have
25 to read the section.

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2 Q. To the best of your knowledge, was
3 the existence of the agreement ever disclosed
4 to PwC?

5 A. I'm not -- I'm not aware.

6 Q. Do you recall if the agreement was
7 ever disclosed in Highland's audited financial
8 statements?

9 A. I don't -- I don't remember if it
10 was in every Highland's audited financial
11 statements during my tenure. We would have to
12 read the financial statements to see what was
13 disclosed, but I'm not -- I mean, as I sit here
14 today, I'm not aware.

15 Q. That is all I'm asking for.

16 A. I'm not aware.

17 Q. Can we go to the next page, please,
18 and look at 36. 36 says, we have disclosed to
19 you the identity of the partnership's related
20 party relationships and all the related party
21 relationships and transactions of which we are
22 aware.

23 Do you see that?

24 A. Yes.

25 Q. To the best of your knowledge, as of

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2 June 3rd, 2019, did Highland disclose to PwC
3 the identity of the partnership's related
4 parties and all the related party relationships
5 and transactions of which it was aware?

6 A. I mean, I can speak for myself as
7 signer of this representation letter. I
8 disclosed what -- what, you know, what --
9 what -- what I knew. Sorry, look, yes, so I --
10 I disclosed what I knew.

11 Q. Okay. Can we go to page 419. Do
12 you see at the end there is a reference to
13 events that occurred since the end of the
14 fiscal year and the date of the letter?

15 A. Yes.

16 Q. And were you aware of that -- of
17 that provision of the management representation
18 letter before you signed the document?

19 A. Yes.

20 Q. Do you have an understanding as to
21 why PwC asked for that confirmation of that
22 particular part of the management
23 representation letter?

24 A. It is -- it is -- it is just -- it
25 is a typical audit request.

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2 Q. And do you understand -- do you have
3 an understanding that PwC wanted to know that
4 as of the date of the audit whether any
5 material changes had occurred since the end of
6 the fiscal year, using the definition of
7 materiality that is in this particular
8 management representation letter?

9 A. It -- it is -- it is -- it is a --
10 it is as described. It is just a poorly worded
11 question, so it is hard for me to say yes.

12 Q. If I asked you this, I apologize,
13 but did you ever learn when the agreement was
14 entered into?

15 A. I don't -- I don't -- like I said
16 before, I don't know or have any details of the
17 agreement.

18 Q. Okay. Did you ever ask anybody when
19 the agreement was entered into?

20 A. I did not.

21 Q. Let's look at the audited financial
22 statements. We will put up on the screen a
23 document that has been premarked as Exhibit 34.

24 (Exhibit 34 marked.)

25 MS. DANDENEAU: And again, if Ms. La

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2 Canty could please put that in the chat
3 room, that would be great.

4 MR. MORRIS: I will assure you we
5 will put every document in the chat room.

6 Q. Now, I'm just going to ask you
7 questions that are related to the provisions of
8 this report that concern the affiliate loans,
9 but again, Mr. Waterhouse, if there is any part
10 of the document that you need to see or that
11 you think you might need to see in order to
12 refresh your recollection to answer any of my
13 questions, will you let me know that?

14 A. Yes.

15 Q. Because this is a pretty lengthy
16 document, but do you see that the cover page
17 here is the Highland consolidated financial
18 statements for the period ending December 31st,
19 2018?

20 A. Yes.

21 Q. If we can go to -- I think it is the
22 next one, looking for PwC's signature line.

23 MS. CANTY: I'm sorry, John, did you
24 say something?

25 MR. MORRIS: Yes, can we turn the

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2 page. I think it is 215. Yes, stop right
3 there, just above -- I'm sorry, I want to
4 see just the date of the report.

5 Q. Okay. Do you see at the bottom of
6 that page there, Mr. Waterhouse,
7 PricewaterhouseCoopers has signed this audit
8 report?

9 A. Yes, I see their signature.

10 Q. Okay. And it is the dated same day
11 as your management representation letter; is
12 that right?

13 A. It is -- yes, it is the same day.

14 Q. Was that the practice to sign the
15 management representation letter on the same
16 day that the audit report was signed?

17 A. Yes, that is typical in every audit.

18 Q. Can we just scroll down to the
19 balance sheet on the next page.

20 Do you see that there is a line
21 there that says, Notes and Other Amounts Due
22 from Affiliates?

23 A. Yes.

24 Q. Does that line, to the best of your
25 knowledge, include the amounts that were due

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2 under the affiliate under the notes signed by
3 the affiliates and Mr. Dondero?

4 MR. RUKAVINA: Objection to the
5 extent that calls for a legal conclusion.

6 A. I mean, I would want to see the
7 detail and the build to this \$173,398,000, but,
8 yes, I mean, if -- if -- given what we
9 discussed before, you know, it -- it should
10 capture that.

11 Q. And -- and while you were the CFO of
12 Highland, were all notes held by Highland that
13 were issued by an affiliate or Mr. Dondero
14 carried as assets on Highland's balance sheets?

15 MS. DANDENEAU: Objection to form.

16 MS. DEITSCH-PEREZ: Object to form.

17 A. I don't -- I don't know how else
18 they would be carried.

19 Q. Okay. Can you think of any -- are
20 you aware of any promissory note issued by an
21 affiliate or Mr. Dondero that was not carried
22 on Highland's audited financial balance sheets?

23 A. I'm -- I'm -- I'm not aware.

24 Q. Okay. Are you aware of any category
25 of asset on Highland's balance sheet in which

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2 any of the promissory notes issued by an
3 affiliate or Mr. Dondero would have been
4 included?

5 MS. DANDENEAU: Objection to form.

6 A. Sorry, am I aware of any asset of an
7 affiliate being included --

8 Q. That -- let me -- let me try again.

9 Do you see there is a number of
10 different assets that are described on this
11 balance sheet?

12 A. Yes.

13 Q. One of the assets that is described
14 is Notes and Other Amounts Due from Affiliates;
15 right?

16 A. Yes.

17 Q. And it is reasonable to conclude
18 that the notes from the affiliates and
19 Mr. Dondero are included in that line item;
20 right?

21 A. Yes, based on this description.
22 Again, I would want to see a build of this to
23 100 percent confirm, but based on the
24 description, the asset description, it is -- it
25 is likely.

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2 Now, does that mean absolute? I
3 don't know.

4 Q. Do you have any reason to believe
5 that the promissory notes would have been
6 carried on the balance sheet in a category
7 other than Notes and Other Amounts Due from
8 Affiliates?

9 A. If they were deemed -- no. If they
10 were deemed an affiliate, you know, under GAAP,
11 they should be carried in that line.
12 Otherwise, it would go into another line.

13 Q. Okay. And do you see the total
14 asset base as of December 31st, 2018, was
15 approximately \$1.04 billion?

16 A. Yes.

17 Q. Is my math correct that the Notes
18 and Other Amounts Due from Affiliates
19 constituted approximately 17 percent of
20 Highland's assets as of the end of 2018?

21 A. Well, so how are you defining
22 Highland?

23 Q. Highland Capital Management, L.P.,
24 the entity that this audit is subject to -- or
25 the subject of.

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2 A. On a consolidated or unconsolidated
3 basis?

4 Q. I'm looking at the balance sheet.
5 It is a consolidated balance sheet. Okay?

6 Does the Notes and Other Amounts Due
7 from Affiliates constitute approximately
8 17 percent of the total assets of Highland
9 Capital Management, L.P., on a consolidated
10 basis?

11 MS. DANDENEAU: Objection to form.

12 A. I don't have a calculator in front
13 of me but I will take your math, if you are
14 taking the 173 divided by the billion.

15 Q. Okay.

16 A. If that is accurate, yes. But,
17 again, on a consolidated basis.

18 Q. And on an unconsolidated basis the
19 percentage would be higher; correct?

20 A. I -- no. I don't know.

21 Q. Well, okay. That is fair.

22 MR. MORRIS: Can we turn to
23 page 241, please.

24 Q. Do you see that this is a section of
25 the audit report that is entitled Notes and

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2 Other Amounts Due from Affiliates?

3 A. Sorry, I can't see the -- the --

4 Q. It is at the top.

5 A. Notes and Other Amounts Due from

6 Affiliates, yes, I see that. I don't -- I

7 don't have a page number, but I'm on a page

8 that says at the top: Notes and Other Amounts

9 Due from Affiliates.

10 Q. Okay. And that is the same title of

11 the line item on the balance sheet that we just

12 looked at; right? Notes and Other Amounts Due

13 from Affiliates?

14 A. Yes.

15 Q. And is it your understanding, based

16 on your experience and knowledge as the CFO,

17 that this is the section of the narrative that

18 ties into the line item that we just looked at?

19 A. Yes.

20 Q. And is this section of the audit

21 report intended to describe and disclose all of

22 the material facts concerning the Notes and

23 Other Amounts Due from Affiliates?

24 MS. DANDENEAU: Objection, form.

25 A. This -- these notes -- these notes

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2 of the financial statements are -- the purpose
3 is to disclose any material items in relation
4 to that balance sheet line item.

5 Q. Okay. And all of the information,
6 to the best of your knowledge, that is set
7 forth in this section of the audit report was
8 provided by Highland; correct?

9 A. Yes, it would have been provided by
10 the corporate accounting team.

11 Q. Okay. And the corporate accounting
12 team, did that team report to you in the
13 organizational structure?

14 A. Yes.

15 Q. And did you have any concerns about
16 the controls that were in place to make sure
17 that the information provided with respect to
18 Notes and Other Amounts Due from Affiliates was
19 accurate and complete?

20 MS. DANDENEAU: Objection to form.

21 A. Not that I recall.

22 Q. Okay. Do you recall ever being
23 concerned that any portion of the Notes and
24 Other Amounts Due from Affiliates in any audit
25 report was inaccurate, incomplete, or not

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2 reliable?

3 A. I didn't -- I had concerns about,
4 you know, like I talked about before, of there
5 were -- there were potentially issues in the
6 control environment. But as far as it relates
7 to the audited financial statements, any -- the
8 team would work with the auditors to disclose
9 all -- all notes in Highland's possession.

10 And any -- any notes that were
11 deemed material by the auditor, right, these
12 were disclosed in these -- in this section, you
13 know, in -- in the notes to the consolidated
14 financial statements as you presented.

15 Q. Do you recall ever having a
16 conversation with anybody at any time
17 concerning the accuracy of the section of audit
18 reports that relates to Notes and Other Amounts
19 Due from Affiliates?

20 MS. DANDENEAU: Objection to form.

21 A. You know, as -- as -- I didn't have
22 direct conversations with
23 PricewaterhouseCoopers as I had, you know --
24 I -- I had the team that managed this.

25 Again, I wasn't anywhere chose to

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2 being the point person of this audit. And I
3 can't recall, you know, when -- you know, I
4 don't even know if I was ever the point person
5 during my tenure as CFO.

6 I don't know if PwC had any concerns
7 when they were performing those audit
8 procedures. They may have and they may have --
9 and it may not have been communicated to me. I
10 don't know.

11 MR. MORRIS: All right. I move to
12 strike.

13 Q. And I'm going to ask you to listen
14 carefully to my question.

15 Did you -- do you recall ever having
16 a conversation with anybody at any time
17 concerning the accuracy of the reporting
18 provided in the audited financial statement on
19 the topic of Notes and Other Amounts Due?

20 MS. DANDENEAU: Objection to form.

21 A. I don't recall for this, but that
22 doesn't mean that it didn't exist.

23 Q. Okay. But you have no reason to
24 believe, as you sit here right now, that you
25 ever discussed with anybody concerns over the

1 WATERHOUSE - 10-19-21
2 accuracy of the section of the audit reports
3 called Notes and Other Amounts Due from
4 Affiliates; correct?

5 MS. DANDENEAU: Object to the form.

6 MS. DEITSCH-PEREZ: Objection to
7 form.

8 A. I don't recall having any
9 conversations. But, again, I mean, this is --
10 this is two years ago.

11 Q. I'm just asking for your
12 recollection, sir.

13 A. Yes.

14 Q. If you don't recall, this will --

15 A. Yeah.

16 Q. (Overspeak) -- if you don't
17 recall --

18 A. Yeah, I don't -- I don't recall.

19 Q. Do you know who was responsible for
20 drafting the audit report?

21 A. Are you asking the actual Highland
22 employee responsible? I mean, it was
23 Highland's responsibility, so, I mean, that
24 is --

25 Q. Right.

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2 A. -- Highland's responsibility.

3 Highland's responsibility.

4 Q. Who, at Highland, was responsible
5 for drafting this section of the audit report?

6 A. I -- I don't know the answer to
7 that. Again, there was a team who worked on
8 this. And I don't know, you know, whether it
9 was the staff or the manager.

10 Again, this is where I let the teams
11 manage. And, you know, there may be a
12 corporate accountant who worked on this. I
13 just -- you know, I wasn't part of that process
14 to give that person experience. I don't know.

15 Q. Do you recall having any
16 communications with anybody at any time
17 concerning this section of the report?

18 A. Yeah, I don't recall.

19 Q. Do you recall whether you ever told
20 anybody at any time that any aspect of this
21 section of the report was inaccurate or
22 incomplete?

23 A. I don't recall.

24 Q. As you sit here today, do you have
25 any reason to believe that this section of the

1 WATERHOUSE - 10-19-21
2 audit report is incomplete or inaccurate in any
3 way?

4 And I'm happy to give you a moment
5 to -- to look at it, if you would like.

6 MS. DANDENEAU: Objection to form.

7 MS. DEITSCH-PEREZ: Same.

8 A. I mean, I would have to look at -- I
9 would have to look at the bill to the note
10 schedule to make sure I know you presented me
11 with materiality, but again, there might be a
12 note as of 12/31/18 that somehow was -- was
13 under materiality not disclosed. I don't -- I
14 don't know. I would need more information.

15 Q. Okay. But without more information,
16 you have no reason to believe anything this
17 section is inaccurate; correct?

18 MS. DANDENEAU: Objection to form.

19 A. I don't. I mean, you know, this was
20 part of the audit.

21 Q. Thank you. Now, you will see if we
22 could scroll just a little bit more that each
23 of the first five paragraphs concerns
24 specifically the four affiliates that we've
25 been discussing and Mr. Dondero.

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2 MR. MORRIS: If we could go the
3 other way, La Asia. We don't need Okada.
4 We're going to have to thread the needle.
5 Okay. Good, perfect.

6 Q. Do you see those five paragraphs
7 certain the four affiliates and Mr. Dondero as
8 we've been referring to today?

9 A. Yes.

10 Q. Okay. And do you see at the end of
11 every paragraph it states, quote: A fair value
12 of a partnership's outstanding notes receivable
13 approximates the carrying value of the notes
14 receivable?

15 A. Yes, I see that.

16 Q. Do you have an understanding of what
17 that means?

18 A. Yes.

19 Q. What is your understanding of that
20 sentence?

21 A. It is the -- again, the -- the fair
22 value, right, which is -- which is what the --
23 what Highland could sell that asset for. This
24 statement is comparing the fair value of the
25 notes to the carrying value, so the carrying

1 WATERHOUSE - 10-19-21
2 value is the line item that you showed me
3 earlier that is in Notes and Other Amounts Due
4 from Affiliates.

5 Q. Okay. Is another way to say this is
6 that the fair market value of the notes equals
7 the principal amount and -- withdrawn.

8 Is the fair way to interpret this
9 that the fair market value of the notes equals
10 all remaining unpaid principal and interest due
11 under the notes?

12 MS. DANDENEAU: Object to the form.

13 MS. DEITSCH-PEREZ: Objection, form.

14 A. I don't know the answer to that,
15 because I don't recall where -- where any --
16 where -- in what line item was the interest
17 component reported.

18 Q. All right. Well, if we look in this
19 audit report, you will see in the middle of the
20 first paragraph, for example, it states that as
21 of December 31st, 2018, total interest and
22 principal due on outstanding promissory notes
23 was approximately \$5.3 million.

24 Do you see that?

25 A. I do.

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2 Q. Is that the carrying value or the
3 fair value?

4 A. That would be the carrying value --

5 Q. And is the last --

6 A. -- in my opinion.

7 Q. Okay. And it is in your opinion as
8 the chief financial officer of Highland during
9 the period of time that you described; right?
10 It is an educated opinion?

11 A. I'm reading this at face value. I'm
12 taking that as that is carrying value.

13 Q. Okay. And does the last sentence
14 say that the carrying value is roughly
15 approximate to the fair market value?

16 MS. DANDENEAU: Objection to form.

17 MS. DEITSCH-PEREZ: Objection, form.

18 A. Again, this note to the financial
19 statement is specific to notes and other
20 amounts due from affiliates.

21 Q. Correct.

22 A. If the interest component is
23 reported elsewhere on the balance sheet, you
24 know, it -- it -- it could be off. Again, I
25 don't have the detail. I don't know, but yes,

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2 look, I mean, if you -- I mean, if you are
3 saying the 5.3 million is in the notes and
4 other amounts due from affiliates, then the
5 last statement is saying the fair value
6 approximates 5.3 million. That is what that
7 last sentence is saying.

8 Q. Do you see in the middle of the
9 first paragraph -- not in the middle, the next
10 to last sentence there is a statement that the
11 partnership will not demand payment on amounts
12 that exceed HCMFA's excess cash availability
13 prior to May 31st, 2021.

14 Do you see that?

15 A. I do.

16 Q. Do you know when Highland agreed not
17 to demand payment as described in that
18 sentence?

19 A. I don't know specifically.

20 Q. Do you know why Highland agreed not
21 to demand payment on HCMFA's notes until May
22 2021?

23 A. Yes.

24 Q. Why was that decision made?

25 A. You know, well, it -- it -- that

1 WATERHOUSE - 10-19-21
2 decision was made as to not put HCMFA into a
3 position where it didn't have sufficient assets
4 to pay for the demand note.

5 Q. And at the time the agreement was
6 entered into, pursuant to which the partnership
7 wouldn't demand payment, did HCMFA have
8 insufficient assets to satisfy the notes if a
9 demand had been made?

10 MS. DANDENEAU: Objection to form.

11 A. I don't have HCMFA's financial
12 statements in front of me as of 12/31/18.

13 Q. Was there a concern that HCMFA would
14 be unable to satisfy its demands under the
15 notes if demand was made?

16 MS. DANDENEAU: Objection to form.

17 A. Well, there is -- I don't recall --
18 I mean, there is something, right, in place to
19 basically not demand payment until May 31, 2021
20 as detailed here.

21 Q. And who made the decision to enter
22 into -- who made the decision on behalf of
23 Highland not to demand payment until May 31st,
24 2021?

25 A. I'm trying to remember. I don't

1 WATERHOUSE - 10-19-21
2 remember exactly -- I don't remember if it was
3 myself or -- or Jim Dondero who -- who -- there
4 was -- there was something signed, from what I
5 recall, that -- that -- that backed up this
6 line item in the -- in the notes I'm -- look,
7 I'm, I'm --

8 Q. We will get to that.

9 A. You --

10 Q. I'm just --

11 A. You have -- I mean --

12 Q. We're going to give that to you.

13 I'm going to give that to you.

14 A. You -- you -- you have all the
15 documents. I don't have the documents, and
16 that is what makes it so hard. I don't have
17 any documents to prepare for this deposition;
18 right? You have all -- I don't -- I don't -- I
19 don't remember, but, you know, again, it would
20 probably be myself or Jim.

21 Q. Do you know if Highland received
22 anything in return for its agreement not to
23 make a demand for two years?

24 A. I don't -- I don't think it referred
25 anything.

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2 Q. And did you and Mr. Dondero discuss
3 HCMFA's ability to satisfy the notes if a
4 demand was made at the time this agreement was
5 entered into?

6 MS. DANDENEAU: Objection to form.

7 A. I don't -- I don't -- I don't recall
8 having a specific conversation, if I did, or --
9 or David Klos.

10 Q. Okay. I'm just asking if you recall
11 any conversations that you had.

12 A. I don't recall.

13 Q. Okay. Do you know why Highland
14 loaned the money to HCMFA that is the subject
15 of the notes described in this paragraph?

16 A. I don't remember specifically why
17 5.3 million was loaned. I mean, I -- it would
18 have to be put in the context.

19 Q. Do you have any recollection at all
20 as to why Highland ever loaned any money to
21 HCMFA?

22 A. Yes.

23 MS. DANDENEAU: Objection to form.

24 Q. What do you remember about that?

25 A. There was a Highland Global

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2 Allocation Fund, which was a -- a fund managed
3 by Highland Capital Management Fund Advisors.
4 There was a -- we -- I'm just telling you,
5 there was -- there was -- there was a -- a
6 ultimately a NAV error found in this fund while
7 it was an open-ended fund and, you know, there
8 were amounts owed by the advisor in -- in
9 relation to that NAV error.

10 There were also, for the same fund,
11 that same fund was ongoing an
12 open-end-to-close-end conversion, and as part
13 of that proposal, shareholders who voted for
14 the conversion received compensation from the
15 advisor.

16 Q. All right. Now, the events that
17 you're describing occurred in the spring of
18 2019; right?

19 A. These started back -- I think, I
20 mean --

21 Q. I apologize.

22 A. -- that -- I mean, the answer to
23 that is no.

24 Q. I apologize, the loans that were
25 made in connection with the events that you're

1 WATERHOUSE - 10-19-21

2 describing occurred in May 2019; right?

3 MR. RUKAVINA: Objection to the
4 extent that calls for a legal conclusion.

5 A. I don't recall specifically what
6 amounts of money were moved when, for what
7 purpose.

8 Q. Okay. Fair enough. Going to the
9 next paragraph, do you recall that NexPoint
10 Advisors had obtained a number of loans from
11 Highland, and they rolled up those loans into
12 one note in approximately 2017?

13 A. This is for NexPoint Advisors?

14 Q. Yes.

15 A. I -- I mean, I don't -- I don't
16 recall the NexPoint Advisors loan being a
17 roll-up loan, but --

18 Q. Do you know why?

19 A. But, look, if you have documents
20 that show -- I mean, look, I just don't recall.

21 Q. Okay. That is fair. Do you know
22 why -- do you have any recollection as to why
23 Highland loaned money to NexPoint?

24 A. Yes.

25 Q. Why did High -- why do you recall --

1 WATERHOUSE - 10-19-21

2 what is the reason you recall Highland lending
3 money to NexPoint?

4 A. I mean, I was just -- I just -- I
5 just recall. I mean, I just -- I don't
6 remember why.

7 Q. I understand. And I'm asking you if
8 you recall --

9 A. Oh, why -- I thought you say --
10 NexPoint Advisors was launching a fund which
11 is -- I believe that the legal name is NexPoint
12 Capital, Inc. And it -- it provided a
13 co-invest into that fund.

14 And, from what I remember, the --
15 the -- that NexPoint borrowed money from
16 Highland at the time to make that co-invest.

17 Q. So this was an investment that
18 NexPoint was required to make; is that right?

19 MS. DANDENEAU: Objection to form.

20 A. I don't know if it was required to
21 make, I don't recall that, or if it just made
22 it.

23 Q. Okay. But your recollection is that
24 NexPoint made an investment and they borrowed
25 money from Highland to finance the investment.

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2 Do I have that right?

3 A. Yes.

4 Q. How about HCRE? Do you know why
5 HCRE borrowed money from Highland?

6 A. I don't remember specifically.

7 Q. Do you remember generally?

8 A. Generally, yeah -- I mean, yes.

9 Q. Can you tell me your general
10 recollection as to why Highland loaned money to
11 HCRE?

12 A. For -- for -- for investment
13 purposes.

14 Q. So HCRE made the investment and it
15 obtained a loan, or loans, from Highland in
16 order to finance that investment or those
17 investments.

18 Do I have that right?

19 A. I mean, I -- you know, generally.

20 Q. Okay. How about Highland Management
21 Services, Inc.?

22 Do you have any recollection as to
23 why HCMS borrowed money from Highland?

24 A. Generally.

25 Q. What is your general recollection as

1 WATERHOUSE - 10-19-21

2 to why HCMS borrowed money from Highland?

3 A. For -- for investment purposes.

4 Q. So it is the same thing, HCMS wanted
5 to make investments and it borrowed money from
6 Highland in order to finance those investments;
7 is that right?

8 A. I mean, yes, generally. I mean, I
9 can't -- I don't -- on the services, there --
10 there are several loans in these schedules.
11 You know, I can't remember why every single one
12 of these were made, but I would say, yeah, I
13 mean, generally.

14 Q. Okay. I appreciate that.

15 MR. MORRIS: Let's go to the page
16 with Bates No. 251. La Asia, are you
17 there?

18 MS. CANTY: Sorry, John. It went
19 out for a minute. Can you say that again.
20 I don't know what is going on.

21 MR. MORRIS: The page with Bates
22 No. 251, can we go to that.

23 MS. CANTY: Yes, sorry.

24 MR. MORRIS: Keep going to the
25 bottom. Yeah, there you go.

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2 Q. Do you see, Mr. Waterhouse, that
3 there is a section there called Subsequent
4 Events?

5 A. I do.

6 Q. And does this relate to the last
7 sentence above the signature line on the
8 management representation letter that we talked
9 about earlier where you made the representation
10 that you disclosed subsequent events?

11 A. I mean, it relates to it, but not in
12 its entirety.

13 Q. Okay.

14 MR. MORRIS: If we can scroll up to
15 capture the entirety of this section right
16 here.

17 Q. And what do you mean by that, sir?

18 MR. MORRIS: Yeah, right there.

19 Perfect.

20 A. There are -- there are different
21 subsequent events in -- under GAAP. So there
22 are -- and -- and -- so what we see in the
23 notes to the financial statements are one type
24 of subevent.

25 Q. Okay. And -- and would the type of

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2 subsequent event relating to affiliate loans be
3 captured in this section if they were -- if
4 they were made after the end of the fiscal year
5 and prior to the issuance of the audit report?

6 A. Yes, if they were deemed material or
7 disclosable.

8 Q. Okay. I appreciate that.

9 Do you see the next to the last
10 entry there? It says, Over the course of 2019
11 through the report date, HCMFA issued
12 promissory notes to the partnership in the
13 aggregate amount of \$7.4 million?

14 A. Yes.

15 Q. And does that refresh your
16 recollection that those are the notes that
17 related to the NAV error that you mentioned
18 earlier?

19 A. I don't -- I don't remember the
20 exact. Again, there are -- I mentioned two
21 line items; right?

22 Q. Yes.

23 A. I mean, it was the GAAP conversion
24 process plus the -- the NAV error. I don't
25 have the details. I don't recall specifically

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2 if -- you know, what -- if that 7.4 million was
3 solely attributable to the NAV error.

4 Q. Okay. But there is no question that
5 Highland told PricewaterhouseCoopers that over
6 the course of 2019 HCMFA issued promissory
7 notes to the partnership in the aggregate
8 amount of \$7.4 million; correct?

9 A. In the course of the audit, we would
10 have produced all promissory notes in our
11 possession, including the ones that are
12 detailed here.

13 Q. Do you recall that you signed the
14 two promissory notes that are referenced in
15 that provision?

16 MS. DANDENEAU: Objection to form.

17 A. I didn't recall initially but I've
18 been reminded.

19 Q. Okay. And -- and do you recall that
20 those notes are dated May 2nd and May 3rd,
21 2019?

22 A. Yes.

23 Q. So that was just a month before the
24 audit was completed; correct?

25 A. Yes. I think we had a June 3rd

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2 date, right, if -- if my memory serves me
3 right.

4 Q. Yes, I will represent to you that
5 your memory is accurate in that regard.

6 Did anybody ever instruct you as the
7 CFO to correct this statement that we're
8 looking at in subsequent events?

9 A. So let me understand. You're saying
10 when I was CFO at Highland Capital did anyone
11 ever ask me to correct the -- over the course
12 of 2019 through the report date HCMFA issued
13 promissory notes, this statement?

14 Q. Right.

15 A. Not that I'm aware.

16 Q. While you were the CFO of Highland,
17 did anybody ever tell you that that sentence
18 was wrong?

19 A. Not that I'm aware.

20 Q. Highland -- withdrawn.

21 HCMFA disclosed these notes in its
22 own audited financial statements; right?

23 MR. RUKAVINA: Objection, form.

24 A. I assume that these would be
25 material -- if these are material financial

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2 statements, yes, they -- they -- they should be
3 and they were likely disclosed.

4 Q. Now, there is no statement
5 concerning the 2019 notes about the forbearance
6 that we looked at in the affiliated note
7 section of the report; right?

8 MS. DANDENEAU: Objection to form.

9 Q. I'll withdraw. That was bad.

10 Do you recall when we were looking
11 at the paragraph concerning HCMFA earlier it
12 had that disclosure about the agreement whereby
13 Highland wouldn't ask for demand on the -- on
14 the HCMFA notes?

15 A. Yes.

16 Q. That forbearance disclosure is not
17 made with respect to the 2019 notes; right?

18 A. Not -- look, not that I can recall,
19 unless -- unless it was done at a subsequent
20 day.

21 Q. Right. And it is not in the
22 subsequent event section that we're looking at
23 right now where the 2019 notes are described;
24 right?

25 A. Right. But this is through

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2 June 3rd. It could have been done on June 4th.

3 I don't -- I don't -- I don't recall.

4 Q. Okay.

5 MR. MORRIS: Can we put up on the
6 screen the HCMFA audit report. And while
7 we're --

8 MS. DANDENEAU: What exhibit is
9 this?

10 MR. MORRIS: La Asia, what number is
11 that?

12 MS. CANTY: 45.

13 MR. MORRIS: So this will be marked
14 as Exhibit 45.

15 (Exhibit 45 marked.)

16 MS. CANTY: Yeah, and I will put it
17 in the chat.

18 MS. DANDENEAU: Thank you.

19 Q. Okay. All right. Do you see that
20 this is the consolidated financial statements
21 for HCMFA for the period ending 12/31/18?

22 A. Yes.

23 Q. As the treasurer of HCMFA at the
24 time, did you have to sign a management
25 representation letter similar to the one that

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2 we looked at earlier for Highland?

3 A. I would imagine I would have been
4 asked to. I don't recall if I did.

5 Q. Do you recall ever being asked by an
6 auditor to sign a management representation
7 letter and then not doing it?

8 A. No.

9 MR. MORRIS: Can we just scroll down
10 again. I just want to see the date of the
11 document.

12 A. I mean, let me -- you know, there
13 are different versions to management
14 representation letters I will qualify.

15 Yes, there are certain -- from time
16 to time auditors can make representations
17 that -- in the rep letter that is being
18 proposed that are inaccurate or out of scope or
19 things like that and they've asked for
20 signature.

21 In that context, yes. I mean, you
22 know -- I mean, if I have been asked to sign
23 and make those representations and those
24 representations are invalid, yes, I would not,
25 I mean, I -- I wouldn't sign that.

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2 Q. Okay. PricewaterhouseCoopers served
3 as HCMFA's outside auditors as well; correct?

4 A. Yes.

5 Q. Do you see that this audit report is
6 signed on June 3rd, 2019, just like the
7 Highland audit report?

8 A. That is correct.

9 Q. And did the process of -- of
10 preparing HCMFA's audit report, was that the
11 same process that Highland followed when it did
12 its audit report at this time?

13 A. I mean, it is a different entity.
14 There are different assets. You know, it --
15 it -- it is -- as you saw, Highland's
16 financials are on a consolidated basis. This
17 is different, so it is under the same control
18 environment and team.

19 Q. Okay. I appreciate that. So the
20 same control environment and team participated
21 in the preparation of the audit for Highland
22 and for HCMFA at around the same time; correct?

23 A. Yes.

24 MR. MORRIS: Can we go to page 17 of
25 the report. I don't have the Bates number.

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2 Q. Okay. Do you see that just like
3 Highland's audited financial report, HCMFA's
4 audited financial report also has a section
5 related to subsequent events?

6 A. Yes.

7 Q. And am I reading this correctly that
8 just as Highland had done, HCMFA disclosed in
9 its audited financial report a subsequent event
10 that related to the issuance of promissory
11 notes to Highland in the aggregate amount of
12 \$7.4 million in 2019?

13 A. That is what I see in the report.

14 Q. And you were the treasurer of HCMFA
15 at the time; right?

16 A. Yes, to the best of my knowledge.

17 Q. And did anybody ever tell you prior
18 to the time of the issuance of this audit
19 report that that sentence relating to HCMFA's
20 2019 notes was inaccurate or wrong in any way?

21 A. Not that I recall.

22 Q. As you sit here right now, has
23 anybody ever told you that that sentence is
24 inaccurate or wrong in any way?

25 A. Not that I recall.

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2 Q. I apologize if I asked you this
3 already, but has anybody ever told you at any
4 time that you are not authorized to sign the
5 promissory notes that are the subject of the
6 sentence we're looking at?

7 A. Not that I recall.

8 Q. Did anybody ever tell you at any
9 time that you had made a mistake when you
10 signed the promissory notes that are the
11 subject of this sentence?

12 A. Say that again. Did anyone ever say
13 that I made a mistake?

14 Q. Let me ask the question again.
15 Did anybody ever tell you at any
16 time that you made a mistake when you signed
17 the two promissory notes in Highland's favor on
18 behalf of HCMFA in 2019?

19 A. Not that I recall.

20 MR. MORRIS: Let's just look at the
21 promissory notes quickly. Can we please
22 put up Document Number 1, and so this is in
23 the pile that y'all have. We'll just go
24 for a few more minutes and we can take our
25 lunch break.

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2 Q. All right. So I don't know if you
3 have seen this before, sir. Do you see that
4 this is a complaint against HCMFA?

5 A. Yes, I am looking at it on the
6 screen.

7 Q. Okay. And have you ever seen this
8 document before?

9 A. I went through some of these
10 documents with my counsel here yesterday.

11 MR. MORRIS: All right. Can we go
12 to Exhibit 1 of this document.

13 Q. Do you see Exhibit 1 is a
14 \$2.4 million promissory note back in 2019?

15 A. Yeah, I found it in the book. Yes,
16 I have it here in front of me.

17 Q. And this is a demand note, right, if
18 you look at Paragraph 2?

19 A. Yes.

20 Q. And this is a note where the maker
21 is HCMFA, and Highland is the payee; right?

22 A. Yes.

23 MR. MORRIS: And if we can scroll
24 down, can we just see Mr. Waterhouse's
25 signature.

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2 Q. Is that your signature, sir?

3 A. Yes, it is.

4 Q. And did you sign this document on or
5 around May 2nd, 2019?

6 A. I don't recall specifically signing
7 this, but this is my signature.

8 Q. Okay. And do you recall that
9 Highland transferred \$2.4 million to HCMFA at
10 or around the time you signed this document?

11 A. I don't recall specifically. I
12 would want to, as I sit here today, go back and
13 confirm that, but again, presumably that --
14 that -- that did happen.

15 Q. You wouldn't have signed this
16 document if you didn't believe that HCMFA
17 either received or was going to receive
18 \$2.4 million from Highland; is that fair?

19 A. I mean, it -- if -- if -- if there
20 wasn't a transfer of value, yeah, I mean, you
21 know, I would have no reason to -- to sign a
22 note.

23 Q. And -- and Highland wouldn't have
24 given this note to PricewaterhouseCoopers if --
25 withdrawn.

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2 HCMFA wouldn't have given this note
3 to PricewaterhouseCoopers if it hadn't received
4 the principal value of -- of the note in the
5 form of a loan; correct?

6 MR. RUKAVINA: Objection, legal
7 conclusion, speculation and form.

8 A. Again, we -- what we provided to PwC
9 were, as part of the audit, any promissory
10 notes executed and outstanding. You know, as a
11 part of the audit, they, you know, they -- they
12 have copies of all the bank statements,
13 things -- things of that sort.

14 MR. MORRIS: Okay. Can we go to
15 Exhibit 2.

16 (Exhibit 2 marked.)

17 Q. Do you see that this is a promissory
18 note dated May 3rd, 2019 in the amount of
19 \$5 million?

20 A. Yes.

21 Q. Do you believe this is also a demand
22 note if you look at Paragraph 2?

23 A. Yes.

24 Q. And do you see that HCMFA is the
25 maker, and Highland is the payee?

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2 A. Yes.

3 Q. And if we go to the bottom, can we
4 just confirm that that is your signature?

5 A. Yes.

6 Q. And together these notes are the
7 notes that are referred to both in Highland and
8 HCMFA's audited financial reports in the
9 subsequent event sections; correct?

10 MS. DANDENEAU: Objection to form.

11 A. They -- they -- they totaled
12 \$7.4 million, so presumably, yes.

13 Q. Okay. And you were authorized to
14 sign these two notes; correct?

15 MR. RUKAVINA: Objection, legal
16 conclusion.

17 A. Yeah. I mean, I'm -- I was the
18 officer of -- of HCMFA. You know, I -- I'm not
19 the legal expert on -- on what that -- what
20 that confers to me or what it doesn't. I mean,
21 that is my signature on the notes.

22 Q. And you believed you were authorized
23 to sign the notes; is that fair?

24 A. I signed a lot of documents in my
25 capacity, just because it is operational in

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2 nature. So, you know, to me this was just
3 another document, to be perfectly honest.

4 Q. Sir, would you have signed
5 promissory notes with the principal amount of
6 \$7.4 million if you didn't believe you were
7 authorized to do so?

8 MS. DANDENEAU: Objection to form.

9 Q. Are you frozen?

10 A. No. I'm just -- you know, it is --
11 you know, again, I typically don't sign
12 promissory notes, and I don't recall why I
13 signed these, but -- you know, but I did.

14 Q. All right. So listen carefully to
15 my question. Would you have ever signed
16 promissory notes with a face amount of
17 \$7.4 million without believing that you were
18 authorized to do so?

19 A. No. I mean, I'm -- I'm putting my
20 signature on there, so no.

21 Q. Okay. And would you have signed two
22 promissory notes obligating HCMFA to pay
23 Highland \$7.4 million without Mr. Dondero's
24 prior knowledge and approval?

25 MS. DEITSCH-PEREZ: Object to the

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2 form.

3 A. You know, from -- from what I recall
4 around these notes, you know, I don't recall
5 specifically Mr. -- Mr. Dondero saying to -- to
6 make this a loan.

7 So my conversation with Mr. Dondero
8 around the culmination of the NAV error as
9 related to TerreStar which was a -- a -- I
10 think it was a year and a half process. I
11 don't know, it was a multi-month process, very
12 laborious, very difficult.

13 When we got to the end, I had a
14 conversation with Mr. Dondero on where to, you
15 know, basically get the funds to reimburse the
16 fund, and I recall him saying, get the money
17 from Highland.

18 Q. And so he told you to get the money
19 from Highland; is that right?

20 A. That is what I recall -- in my
21 conversation with him, that is -- that is what
22 I can recall.

23 Q. Do you know who drafted these notes?

24 A. I don't.

25 Q. Did you ask somebody to draft the

1 WATERHOUSE - 10-19-21

2 notes?

3 A. I didn't ask -- I don't specifically
4 ask people to draft notes really. I mean,
5 again, you know, the legal group at Highland is
6 responsible and has always been responsible for
7 drafting promissory notes.

8 Q. So based on your -- based on the
9 practice, you believe that somebody from the
10 Highland's legal department would have drafted
11 these notes. Do I have that right?

12 MS. DEITSCH-PEREZ: Object to the
13 form. John, I also asked you for the Word
14 versions of these notes so we could look at
15 the properties, and you have not provided
16 them. Are you intending to?

17 MR. MORRIS: No.

18 Q. Can you answer my question, sir?

19 A. Again, I --

20 MS. DANDENEAU: Do you want him to
21 repeat it?

22 A. Yeah, why don't you repeat it?

23 Q. Sure. Mr. Waterhouse, based on the
24 practice that you have described in your
25 understanding, do you believe that these notes

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2 would have been drafted by somebody in the
3 legal department?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. Yes.

7 Q. Okay. And do you know who would
8 have instructed -- do you have any knowledge as
9 to who would have instructed the legal
10 department to draft these notes?

11 MS. DEITSCH-PEREZ: Object to the
12 form.

13 A. It was whoever was working -- I
14 mean, it was likely someone on the team. I
15 mean, I don't remember exactly on every note or
16 every document, but, again, a lot of these
17 things of this nature -- they're operational in
18 nature -- were handled by the team.

19 The team knows to -- I mean, we
20 don't draft documents. We're not lawyers.
21 We're not attorneys. It is not what I do or
22 accountants do.

23 So they are always instructed to go
24 and -- and go to the legal team to get
25 documents like this drafted. Also, when you go

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2 to the legal team, the -- you know, we always
3 loop in compliance. And compliance -- when you
4 go to the legal team, compliance is part of
5 legal team. They're made aware of -- of -- of
6 these types of transactions.

7 Q. And do you believe that you had
8 the -- withdrawn.

9 Did you ever tell Mr. Dondero --
10 (inaudible) -- did you see those?

11 A. Sorry.

12 MS. DEITSCH-PEREZ: I did not hear
13 the end of that question.

14 Q. Did you ever tell Mr. Dondero that
15 you signed these two notes?

16 A. I don't recall ever -- no, I don't
17 recall having a conversation with him.

18 Q. Did you ever discuss these two notes
19 with him at any time?

20 A. The conversation, I recall, was what
21 I described earlier. And that is the only time
22 I recall ever discussing this.

23 Q. Okay. But the corporate accounting
24 group had a copy of this -- of these two notes.
25 And pursuant to the audit process, the

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2 corporate accounting group gave the two notes
3 to PricewaterhouseCoopers in connection with
4 the audit; correct?

5 MS. DANDENEAU: Objection to form.

6 A. Yes. I mean, that is -- yeah, I
7 mean, they -- unless the legal team can also
8 retain copies of items like this. I mean, I
9 don't know everything that they would retain as
10 well.

11 The legal team would also, if they
12 had documents as part of audits, turn that over
13 to the auditors as well. So it could have been
14 the corporate accounting team. It could be
15 someone on the legal team.

16 Q. All right. So you didn't -- you
17 didn't draft this note; right?

18 A. I -- I -- I did not.

19 Q. But somebody at Highland did; is
20 that fair?

21 MS. DEITSCH-PEREZ: Object to the
22 form.

23 A. I don't know. I mean, we can go to
24 the legal team. I don't -- I'm not sitting
25 behind someone in legal. Maybe they went to

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2 outside counsel. I have no idea.

3 Q. Did you have any reason to believe
4 you weren't authorized to sign this note,
5 either of these two notes?

6 A. I think I have already answered that
7 question.

8 Q. Okay. You didn't give these notes
9 to PricewaterhouseCoopers; correct?

10 MS. DANDENEAU: Objection to form.

11 A. I don't recall giving these to
12 PricewaterhouseCoopers.

13 Q. And in the practice that you have
14 described, somebody in the corporate accounting
15 group would have given these two notes to
16 PricewaterhouseCoopers; correct?

17 MS. DANDENEAU: Objection to form.

18 A. I think I've answered that. I said
19 either the corporate accounting team or maybe
20 the legal team.

21 MR. MORRIS: Okay. Why don't we
22 take our lunch break here.

23 VIDEOGRAPHER: We're going off the
24 record at 1:04 p.m.

25 (Recess taken 1:04 p.m. to 1:49 p.m.)

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2 VIDEOGRAPHER: We are back on the
3 record at 1:49 p.m.

4 Q. Mr. Waterhouse, did you speak with
5 anybody during the break about the substance of
6 this deposition?

7 A. I spoke to -- to Deb and Michelle.

8 Q. About the substance of the
9 deposition?

10 A. Yes.

11 Q. Can you tell me what you talked
12 about?

13 MS. DANDENEAU: No. We object on
14 the basis of privilege.

15 Q. Okay. You are going to follow your
16 counsel's objection here?

17 A. Yes.

18 Q. Okay.

19 MR. MORRIS: Can we put up on the
20 screen Exhibit 35.

21 (Exhibit 35 marked.)

22 Q. Are you able to see that document,
23 sir?

24 A. Yes.

25 Q. Have you ever seen an incumbency

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2 certificate before?

3 A. I have.

4 Q. Do you have a general understanding
5 of what an incumbency certificate is?

6 A. I have a general understanding.

7 Q. What is your general understanding?

8 A. You know, those -- my general
9 understanding is that the incumbency
10 certificate basically lists folks that can --
11 are like authorized signers.

12 Q. Okay. And do you see that this is
13 an incumbency certificate for Highland Capital
14 Management Fund Advisors, L.P.?

15 A. Yes.

16 Q. Okay. And if we could scroll down
17 just a little bit, do you see that it's dated
18 effective as of April 11th, 2019?

19 A. Yes, I see that.

20 Q. Okay. And is that your signature in
21 the middle of the signature block?

22 A. Yes, it is.

23 Q. And by signing it, did you accept
24 appointment as the treasurer of HCMFA effective
25 as of April 11th, 2019?

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2 A. Again, I'm not the legal -- I don't
3 know if this makes me the treasurer or the
4 appointment. I don't know -- I don't know
5 that, so I don't -- I don't know if that
6 document -- again, I think -- again, I'm not
7 the legal expert. I think isn't there --
8 aren't there other legal documents that detail
9 who the officers are that could be incorporated
10 or things like that? Again, I don't want to
11 play armchair attorney here.

12 Q. I'm not asking you for a legal
13 conclusion. I'm asking you for your knowledge
14 and understanding. When you signed this
15 document, did you understand that you were
16 accepting an appointment as the treasurer of
17 HCMFA?

18 MS. DANDENEAU: Objection to form.

19 MS. DEITSCH-PEREZ: Objection, form.

20 A. Again, I don't think this -- that
21 wasn't my understanding. I don't think this
22 makes -- this document makes me the treasurer.

23 Q. What do you think this document --
24 why did you sign this document?

25 MS. DEITSCH-PEREZ: Objection to

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2 form.

3 MR. MORRIS: You're objecting to the
4 form of the question when I asked him why
5 did you sign the document? What is the
6 basis for the objection?

7 MS. DEITSCH-PEREZ: Because, John, I
8 think that it does call for a legal
9 conclusion other than -- with him saying
10 because somebody told me to sign this
11 document. But if you want to go there,
12 that is fine.

13 MR. MORRIS: Okay.

14 MS. DANDENEAU: I don't think --
15 he's already said he's not a lawyer.

16 MR. MORRIS: I'll allow the witness
17 to answer this question.

18 Q. Why did you sign this document, sir?

19 A. I mean, our -- our legal group would
20 bring by these incumbency certificates from
21 time to time. I have no idea why they're being
22 updated, and I was asked to sign.

23 Q. Did you ask anybody, what is this
24 document?

25 A. No.

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2 Q. Did anybody tell you why they needed
3 you to sign the document?

4 A. Not that I can recall.

5 Q. You testified earlier that you
6 understood that you served as the acting
7 treasurer for HCMFA; correct?

8 A. Yes.

9 Q. How did you become the acting
10 treasurer of HCMFA?

11 MS. DANDENEAU: Objection to form.

12 A. I don't -- I don't know the legal --
13 I don't know the legal mechanic of how I became
14 the acting treasurer.

15 Q. I'm not asking for the legal
16 mechanic. I'm asking you as the person who
17 is --

18 MS. DANDENEAU: John, you said --

19 MR. MORRIS: Stop.

20 MS. DANDENEAU: -- how did you
21 become the treasurer. That is --

22 MR. MORRIS: Please stop.

23 MS. DANDENEAU: That is a legal
24 question.

25 MR. MORRIS: I am not asking any

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2 legal questions, to be clear. I'm asking

3 for this witness' understanding as to how

4 he became the acting treasurer of HCMFA.

5 If he doesn't know, he can say he doesn't

6 know, but this legal stuff is nonsense, and

7 I really object to it.

8 Q. Sir, I'm asking you a very simple

9 question.

10 MS. DANDENEAU: Argumentative.

11 Q. You testified -- you testified that

12 you became the acting treasurer of HCM --

13 HCMFA; correct?

14 A. Yes.

15 Q. How did that happen?

16 MS. DANDENEAU: Again, object to

17 form.

18 MR. MORRIS: I can't wait to do this

19 in a courtroom. Good God.

20 Q. Go ahead, sir.

21 A. I don't know the exact process of

22 how that happened.

23 Q. Do you have any idea whether signing

24 this document was part of the process?

25 MR. MORRIS: You know what --

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2 MS. DANDENEAU: Objection.

3 MR. MORRIS: -- withdrawn. You guys
4 want to do this, I can't wait. I can't
5 wait. This is the craziest stuff ever.

6 MS. DANDENEAU: John, he said he's
7 not a lawyer, and you are asking him for a
8 legal conclusion, and he says he doesn't
9 know, and you persist.

10 MR. MORRIS: Okay.

11 MS. DANDENEAU: So you can ask these
12 questions --

13 MR. MORRIS: Did anyone -- please
14 stop talking.

15 MS. DANDENEAU: -- at another
16 point -- no, no, no, I'm entitled to talk,
17 too; right? If you're going to make these
18 accusations as if we're trying to stonewall
19 you, this is not the witness to ask that
20 question.

21 MR. MORRIS: I can't -- I can't
22 wait -- I can't wait to do this in a
23 courtroom. I will just leave it at that.

24 MS. DANDENEAU: That's right, I'm
25 sure you can't.

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2 Q. Did anyone ever tell you, sir, that
3 even though you were the acting treasurer of
4 HCMFA, that you were not authorized to sign the
5 two promissory notes that we looked at before
6 lunch?

7 A. I'm not sure I understand the
8 question. I wasn't -- I mean, I'm -- I'm the
9 current acting treasurer.

10 Q. Did anybody ever tell you at any
11 time that even though you were the acting
12 treasurer of HCMFA, that you were not
13 authorized to sign the two promissory notes
14 that we looked at before lunch?

15 MS. DANDENEAU: Objection to form.

16 A. Not that I recall.

17 Q. Did anybody ever tell you at any
18 time that you were not authorized to sign the
19 two promissory notes that we looked at before
20 lunch?

21 A. Not that I recall.

22 Q. Did anybody ever tell you at any
23 time that you should not have signed the two
24 promissory notes that we looked at before
25 lunch?

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2 A. Not that I recall.

3 Q. Did you ever tell anybody at any
4 time that you weren't authorized to sign the
5 two promissory notes that we looked at before
6 lunch?

7 A. Not that I recall.

8 Q. Did you ever tell anybody at any
9 time that you made a mistake when you signed
10 the two promissory notes that we looked at
11 before lunch?

12 A. Not that I recall.

13 Q. As you sit here right now, do you
14 have any reason to believe that you were not
15 authorized to sign the two documents that we
16 looked at before lunch?

17 MS. DANDENEAU: Objection to form.

18 A. If -- if this is the -- the valid
19 incumbency certificate, I mean, this does --
20 this does detail who the signers are.

21 Q. Okay. And looking at that document,
22 does that give you comfort that you were
23 authorized to sign the two promissory notes
24 that we looked at before lunch?

25 MS. DEITSCH-PEREZ: Object to the

1 WATERHOUSE - 10-19-21

2 form.

3 MS. DANDENEAU: Objection, form.

4 A. Yes.

5 Q. As of October 20th -- withdrawn.

6 I'm trying to take your mind back to
7 a year ago, October 2020. Do you recall at
8 that time that the boards of the retail funds
9 were making inquiries about obligations that
10 were owed by the advisors to Highland in
11 connection with their 15(c) review?

12 MS. DANDENEAU: Objection to form.

13 A. I don't -- I don't recall.

14 Q. As of October 2020, you had no
15 reason to believe you weren't authorized to
16 sign the two promissory notes that we just
17 looked at; correct?

18 MS. DANDENEAU: Objection, form.

19 MS. DEITSCH-PEREZ: Objection to
20 form.

21 A. I didn't think about it in October
22 of 2020, but I mean --

23 Q. Did you have any reason to believe
24 at that time that you weren't authorized to
25 sign the two notes that we just looked at?

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2 A. Not that I'm aware, no.

3 Q. Did you have any reason to believe a
4 year ago that you made a mistake when you
5 signed those two notes?

6 A. Not that I'm aware.

7 Q. A year ago you believed that HCMFA
8 owed Highland the unpaid principal amounts that
9 were due under those two notes; correct?

10 A. They're -- they're promissory notes
11 that were -- as you presented, that were --
12 that were executed. Whether they're valid or
13 if there's other reasons, I didn't -- I don't
14 know.

15 Q. I'm not asking you whether they're
16 valid or not. I'm asking you for your state of
17 mind. A year ago you believed that HCMFA
18 was -- was obligated to pay the unpaid
19 principal amount under the two notes that you
20 signed; correct?

21 A. Yeah, I'm -- I'm -- yes.

22 Q. Thank you. Are you aware -- you're
23 aware that -- that in 2017, NexPoint issued a
24 note in favor of Highland in the approximate
25 amount of \$30 million; correct?

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2 A. I'm -- I'm -- I'm generally aware.

3 Q. Okay. And are you generally aware
4 that from time to time, after the note was
5 issued by NexPoint, that moneys were applied to
6 principal and interest that were due under the
7 NexPoint note?

8 A. Yes, I'm generally aware.

9 Q. Okay. And did anybody ever tell you
10 that the payments that were made against the
11 NexPoint notes were made by mistake?

12 A. Yes.

13 Q. And is it the one payment that we
14 talked about earlier today?

15 A. We talked about a lot of things
16 today. What payment are we talking about?

17 Q. Okay. Who told you that any payment
18 made against the NexPoint note was made by
19 mistake?

20 A. D.C. Sauter.

21 Q. When did Mr. Sauter tell you that?

22 A. I don't -- I don't remember
23 specifically.

24 Q. Do you remember what payments --

25 A. Sometime -- sometime this year.

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2 Q. Sometime in 2021?

3 A. Yes.

4 Q. Do you remember what payment he was
5 referring to?

6 A. It was the -- the payment made in
7 January of 2021 or -- yeah, January of -- of
8 this -- January of 2021.

9 Q. Okay. So did anybody ever tell you
10 at any time that any payment that was made
11 against principal --

12 A. And -- and -- and -- hold on, and it
13 may have been other -- again, it may have been
14 that payment or -- or there may have been what
15 he was explaining, a misapplication of prior
16 payments as well.

17 Q. Can you -- can you give me any
18 specificity -- withdrawn.

19 Withdrawn. Can you tell me
20 everything that Mr. Sauter told you about --
21 about errors in relation to payments made
22 against principal and interest due under the
23 NexPoint note?

24 MS. DANDENEAU: Can I just --

25 MR. RUKAVINA: Hold on. Hold on.

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2 I'm going to object here, and I'm going to
3 instruct the witness not to answer
4 depending on the discussion that you had --
5 Mr. Waterhouse, I'm the lawyer for
6 NexPoint, and as everyone here knows, D.C.
7 Sauter is in-house counsel.

8 So if you and Mr. Sauter were having
9 a factual discussion and him preparing his
10 affidavit, et cetera, then go ahead and
11 answer that. But if you were having a
12 discussion as to our legal strategy in this
13 lawsuit, or anything having to do with
14 that, then do not answer that.

15 And if you need to talk to either
16 your counsel or me about that, then we need
17 to have that discussion now.

18 A. Okay. Yeah, I don't -- I don't
19 really know how to make that distinction, so
20 maybe I need to talk to counsel before I
21 answer, or if I can answer.

22 Q. Let me just ask you this question:
23 Did -- did you have any conversation with
24 Mr. Sauter about any payment of principal and
25 interest prior to the time that you left

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2 Highland's employment, or did it happen after
3 you left Highland's employment?

4 A. I don't -- I don't recall if -- I
5 don't recall. I mean, it was sometime in 2021.
6 I don't remember if it was before or after I
7 was let go from Highland.

8 Q. Okay. So -- so nobody told you
9 prior to 2021 that any error or mistake was
10 made in the application of payments against
11 principal and interest due on the NexPoint
12 note. Do I have that right?

13 A. Yeah, I don't -- I don't recall this
14 being in 2020.

15 Q. Okay. And it didn't happen in 2019;
16 correct?

17 A. I don't recall that happened.

18 Q. And it didn't happen in 2018;
19 correct?

20 A. I don't -- I don't recall that
21 happening.

22 Q. And it didn't happen in 2017;
23 correct?

24 A. I don't recall.

25 Q. But -- but you believe the

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2 conversation took place in 2021. You just
3 don't remember if it was before or after you
4 left Highland's employment. Do I have that
5 right?

6 A. It was sometime this year. I
7 don't -- I don't remember.

8 Q. Okay. Did you report this
9 conversation to Mr. Seery at any point?

10 A. I don't believe so.

11 Q. Did you report this conversation to
12 anybody at DSI at any time?

13 A. I don't recall.

14 Q. Do you have -- you don't have a
15 recollection of ever doing that; correct?

16 A. Yeah, that's right. I don't recall
17 doing that.

18 Q. Do you recall telling anybody at
19 Pachulski Stang about the conversation you
20 recall with Mr. Sauter?

21 A. No, I don't -- I don't recall.

22 Q. Did you tell any of the independent
23 board members about your conversation with
24 Mr. Sauter?

25 A. I don't recall.

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2 Q. Did you tell any of the employees at
3 Highland before you left Highland's employment
4 about this call that you had with Mr. Sauter?

5 MS. DANDENEAU: Objection to form.

6 A. No, I don't -- no, I don't recall.

7 Q. NexPoint -- to the best of your
8 knowledge, did NexPoint ever file a proof of
9 claim against Highland to try to recover moneys
10 that were mistakenly paid against the principal
11 and interest due under the note?

12 A. Okay. Hold on. You are saying did
13 NexPoint Advisors file a proof of claim to
14 Highland for errors related to payments under
15 the NexPoint note to Highland?

16 Q. Correct.

17 A. I'm -- I'm -- I'm not -- I'm not
18 aware.

19 Q. Are you aware --

20 A. I'm not the legal person here, I
21 don't know.

22 Q. I'm just asking for your knowledge,
23 sir.

24 A. Yeah, I don't know. I'm not aware.

25 Q. Are you aware of any claim of any

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2 kind that NexPoint has ever made to try to
3 recover the amounts that it contends were -- or
4 that Mr. Sauter contend were mistakenly applied
5 against principal and interest due under the
6 NexPoint note?

7 A. I'm not aware.

8 MS. DANDENEAU: Objection to form.

9 Q. Okay. The advisors' agreements with
10 the retail funds are subject to annual renewal;
11 correct?

12 A. Yes.

13 Q. And do you participate in the
14 renewal process each year?

15 A. Yes.

16 Q. What role do you play in the renewal
17 process?

18 A. I'm -- I'm asked by the retail board
19 to walk-through the advisors financials.

20 Q. And do you do that in the context of
21 a board meeting?

22 A. Yes, it is -- yes, it is typically
23 done in a board meeting.

24 Q. And do you recall the time --
25 does -- does the renewal process happen around

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2 the same time each year?

3 A. Yes, it is -- it is around the same
4 time every year.

5 Q. And what -- what time period of the
6 year does the renewal process occur?

7 A. Approximately the September
8 timeframe.

9 Q. During that process, in your
10 experience, does the board typically conduct
11 its own diligence and ask for information?

12 A. Does the board ask for lots of -- I
13 mean, just -- I mean, lots of information as a
14 part of that -- that -- as part of that board
15 meeting and that process.

16 Q. Okay. And do you recall that the
17 process in 2020 spilled into October?

18 A. Yes. Yes.

19 Q. Okay. And as part of the process in
20 2020, the retail board asked -- asked what are
21 referred to as 15(c) questions; right?

22 A. I guess I don't want to be -- they
23 asked 15(c) -- are you saying they asked 15(c)
24 questions and this is why it went into October
25 or --

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2 Q. No, I apologize.

3 Do you have an understanding of
4 what -- of what 15(c) refers to in the context
5 of the annual renewal process?

6 A. Yes, generally.

7 Q. All right. What is your general
8 understanding of the term "15(c)" in the
9 context of the annual renewal process?

10 A. I -- I think 15(c) is the section
11 that -- that -- you know, that -- that the
12 board has to evaluate every year, the retail
13 board. They have to, you know, go through,
14 evaluate, and go through that approval process
15 on a yearly basis.

16 Q. Okay.

17 MR. MORRIS: Can we put up on the
18 screen Exhibit 36, please.

19 (Exhibit 36 marked.)

20 MR. MORRIS: I guess let's just
21 start at the bottom so Mr. Waterhouse can
22 see what is here.

23 Q. You see this begins with an email
24 from Blank Rome to a number of people.

25 MR. MORRIS: And if we can scroll

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2 up -- keep going just a little bit.

3 Q. You will see that there is an email
4 from Lauren Thedford to Thomas Surgent and
5 others where she reports that she was attaching
6 and reproducing below additional 15(c)
7 follow-up questions from the board.

8 Do you see that?

9 A. Yes.

10 Q. And do you see Question No. 2 asks
11 whether there are any material outstanding
12 amounts currently payable or due in the future
13 (e.g., notes) to HCMLP by HCMFA or NexPoint
14 Advisors or any other affiliate that provides
15 services to the funds?

16 Do you see that?

17 A. Yes.

18 Q. And -- and did you -- do you recall
19 that in -- in October of 2020 the retail boards
20 were asking for that information?

21 A. I don't recall it, but there --
22 they're obviously asking in this email.

23 Q. Okay.

24 MR. MORRIS: Can we scroll up a
25 little bit, please.

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2 Q. And then do you see that
3 Ms. Thedford includes you on the email string
4 on Tuesday, October 6th, at 5:52?

5 A. Yes.

6 Q. And she asks you and Dave Klos and
7 Kristin Hendrix for advice on that particular
8 Request No. 2 that I have just read; right?

9 A. Yes.

10 Q. Okay. Can you tell me who
11 Ms. Thedford is?

12 A. She was an attorney that was in the
13 legal group.

14 Q. At Highland Capital Management,
15 L.P.?

16 A. I'm -- I'm -- I'm -- I don't
17 remember if she was an employee of Highland or
18 any of the advisors.

19 Q. Okay. Do you know if she served as
20 the corporate secretary for both HCMFA and
21 NexPoint?

22 A. Yes.

23 Q. And -- okay.

24 Do you know whether Ms. Thedford
25 held any positions in relation to the retail

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2 funds as we defined that term?

3 A. Yes.

4 Q. What is your understanding of the
5 positions that Ms. Thedford held at the retail
6 funds?

7 A. I -- I recall her being an officer.
8 I don't recall her title.

9 Q. Okay. Is she still an officer at
10 any of the retail funds today?

11 A. No.

12 Q. Do you know when she ceased to be an
13 officer of the retail funds?

14 A. Approximately.

15 Q. And when did she approximately cease
16 to be an officer of the retail funds?

17 A. It was in -- it was in early of
18 2021.

19 Q. Okay. Do you know when she became
20 an officer of the retail funds?

21 A. I don't recall.

22 Q. To the best of your recollection,
23 was she an officer of the retail funds in
24 October of 2020?

25 A. I believe so.

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2 Q. Okay. Do you know what title she
3 held in her capacity as an officer, if any?

4 A. I told you I don't remember.

5 Q. Okay. So she sends this email to
6 you at 5:52 p.m. on October 6th.

7 And if we can scroll up to the
8 response, you responded a minute later with a
9 one-word answer: Yes.

10 Do you see that?

11 A. Yes.

12 Q. And -- and yes is -- yes was in
13 response to the retail board's Question No. 2,
14 right, whether there are any material
15 outstanding amounts currently payable or due in
16 the future?

17 A. Yes.

18 MR. MORRIS: And can we scroll up to
19 see what happened next.

20 Q. So Ms. Thedford writes back to you a
21 few minutes later and she asks whether you
22 could provide the amounts.

23 Do you see that?

24 A. Yes.

25 Q. And then you respond further and you

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2 refer her to the balance sheet that was
3 provided to the board as part of the 15(c)
4 materials.

5 Do you see that?

6 A. Yes.

7 Q. And -- and did the advisors provide
8 to the board certain balance sheets in 2020 in
9 connection with the 15(c) review?

10 A. Yes, they did.

11 Q. Okay. And were the amounts that
12 were outstanding or that were to be due in the
13 future by the advisors to Highland included in
14 the liability section of the balance sheet that
15 was given to the retail board?

16 A. Yes. Notes would be reflected as
17 liabilities.

18 Q. Okay. And --

19 A. If I'm understanding your question
20 correctly.

21 Q. You are. And -- and -- and those
22 liabilities you -- you were -- you believed
23 were responsive to the retail board's question;
24 correct?

25 A. Yes.

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2 Q. Okay. And then if we can scroll up,
3 you see Ms. Thedford responds to you
4 nine minutes later with a draft response.

5 Do you see that?

6 A. Yes.

7 Q. And she says that she is taking from
8 the 6/30 financials certain information about
9 amounts that were due to HCMLP and affiliates
10 as of June 30th, 2020.

11 Do you see that?

12 A. I do.

13 Q. Okay. And did you believe, as the
14 treasurer of NexPoint and HCMFA and as the CFO
15 of Highland, that the information that
16 Ms. Thedford obtained from the 6/30 financials
17 was accurate and responsive in relation to the
18 retail fund board's question?

19 A. I just want to make sure I
20 understand the question.

21 Are you saying that the financial
22 information provided to the retail board as
23 part of the 15(c) process, which included
24 financial statements as of June 30th of 2021,
25 did I feel like those were responsive to their

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2 questions?

3 Q. Yes.

4 A. Yes.

5 Q. Thank you.

6 MS. DEITSCH-PEREZ: John, it is not
7 in the chat yet. Can you just make sure it
8 gets put in there.

9 MR. MORRIS: Sure.

10 MS. CANTY: I put it in there. I
11 think maybe I just sent it directly, so let
12 me make sure it says to everyone. But I
13 did put it in there. I will try again.

14 MR. MORRIS: Thank you, La Asia.

15 MS. DANDENEAU: What number is it.

16 MR. MORRIS: What, the Bates number?

17 MS. DEITSCH-PEREZ: No, the --
18 this -- yeah, 36 is not in the chat.

19 MR. MORRIS: Okay. We'll get it.

20 MS. DANDENEAU: I think that
21 Ms. Canty just sent it to me originally.
22 Sorry.

23 MR. MORRIS: Okay. We will get it
24 there.

25 MS. CANTY: Okay. It is there now

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2 for everyone.

3 MS. DEITSCH-PEREZ: Got it. Thank

4 you.

5 Q. Do you recall if the proposed

6 response that Ms. Thedford crafted was

7 delivered to the retail board with the -- with

8 the yellow dates having been completed?

9 A. I don't know.

10 MR. MORRIS: Davor, I'm going to ask

11 that the advisors and -- the advisors of

12 both HCMFA and NexPoint produce to me any

13 report that was given to the retail board

14 concerning the promissory notes at issue,

15 including the obligations under the notes.

16 Q. Do you know -- do you know if

17 ultimately NexPoint informed the retail board

18 in response to its question that NexPoint owed

19 Highland approximately 23 or \$24 million?

20 MS. DANDENEAU: Objection to the

21 form.

22 A. Sorry, are you asking, did NexPoint

23 tell the retail board that it owed Highland?

24 Q. Let me ask a better question,

25 Mr. Waterhouse.

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2 Did -- do you know if anybody ever
3 answered the retail board's question that was
4 Number 2?

5 A. I don't -- I can't say for sure.

6 Q. Okay. Do you recall -- I think you
7 testified earlier that you walked through the
8 advisors' financials with the retail board;
9 correct?

10 A. Yes.

11 Q. And as part of that process, did you
12 disclose to the retail board the obligations
13 that NexPoint and HCMFA had to Highland under
14 promissory notes?

15 A. The retail board, as I stated
16 earlier, receives financial information,
17 balance sheet, income statement information
18 from the advisors. That information is
19 provided to the retail board in connection with
20 the 15(c) process.

21 So any notes between the advisors
22 and the Highland would be -- anything would be
23 detailed in those financial statements.

24 Q. Do you recall in 2020 ever speaking
25 with the retail board about the advisors'

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2 obligations under the notes to Highland?

3 MS. DANDENEAU: Objection to form.

4 MS. DEITSCH-PEREZ: Object to the

5 form.

6 A. I don't recall specifically.

7 Q. Do you have any general recollection
8 of discussing with the retail board the
9 advisors' obligations to Highland under the
10 notes that they issued?

11 MS. DANDENEAU: Object to the form.

12 MS. DEITSCH-PEREZ: Object to the

13 form.

14 A. I just recall generally just -- it
15 is just -- I present the financial statements,
16 and if they have questions, I answer their
17 questions and walk them through.

18 I don't recall what they asked. I
19 don't recall where the discussion went. I
20 don't recall anything of that nature.

21 Q. Okay. Do you know if anybody on
22 behalf of HCMF -- HCMFA ever told the retail
23 board that HCMFA had no obligations under the
24 two 2019 notes that you signed? Withdrawn.

25 Do you know whether anybody on

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2 behalf of HCMFA ever told the retail boards
3 that you weren't authorized to sign either of
4 the two 2019 notes?

5 MS. DANDENEAU: Objection to form.

6 A. I'm not aware.

7 Q. Are you aware of anybody on behalf
8 of HCMFA ever telling the retail boards that
9 your execution of the two 2019 notes was a
10 mistake?

11 MS. DANDENEAU: Objection to form.

12 A. I'm not aware.

13 Q. Are you aware of anybody on behalf
14 of HCMFA ever telling the retail boards that
15 HCMFA did not have to pay the amounts reflected
16 in the two notes that you signed in 2019?

17 A. I'm not aware.

18 Q. Do you know whether anybody ever
19 told the retail boards -- withdrawn.

20 Do you know whether anybody ever
21 told the retail boards that Highland has
22 commenced a lawsuit to recover on the two notes
23 that you signed in 2019?

24 A. I'm not aware.

25 Q. Are you aware of anybody informing

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2 the retail boards that Highland has sued to
3 recover on the NexPoint note?

4 A. I'm not aware.

5 Q. Do you know whether anybody ever
6 told the retail board that Highland had
7 declared a default with respect to the two
8 HCMFA notes that you signed in 2019?

9 A. I'm not aware.

10 Q. Are you aware of anybody ever
11 informing the retail boards that Highland had
12 declared a default under the NexPoint note?

13 A. I'm not aware.

14 Q. Are you aware of anybody telling the
15 retail board that Highland made a demand for
16 payment under the 2019 notes that you signed on
17 behalf of HCMFA?

18 A. I'm not aware.

19 Q. Let's -- let's see if there is a
20 response to Ms. Thedford's email, if we can
21 scroll up.

22 Do you see you responded to
23 Ms. Thedford five minutes after she provided
24 the draft response to you?

25 A. Yes.

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2 Q. Okay. And do you see that Dustin
3 Norris is copied on this email?

4 A. Yes, he is.

5 Q. Great. Do you know whether
6 Mr. Norris held any positions at either of the
7 advisors as of October 6, 2020?

8 A. I will go back to -- I'm not the
9 legal expert of what appoints you or how or
10 why, but you did see Dustin's name on the
11 incumbency certificate that you produced
12 earlier.

13 Q. Do you know what his title was in
14 October of 2020?

15 MS. DANDENEAU: Objection to form.

16 A. I don't -- I don't recall.

17 Q. Was he -- did he have a title with
18 each of the advisors, to the best of your
19 recollection?

20 A. I don't recall.

21 Q. Do you know why he is included on
22 this email string?

23 A. I didn't add Dustin. It looks like
24 Lauren did. I don't know why she added him or
25 not. You would have to ask her.

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2 Q. Does Mr. Norris play a role in
3 formulating the advisors' responses to the
4 questions asked by the retail board in
5 connection with the 15(c) annual review?

6 MS. DANDENEAU: Objection to form.

7 A. He -- Dustin Norris is there in the
8 board meetings. But -- so he has a role, yes.

9 Q. Okay. And does Mr. Norris hold any
10 positions, to the best of your knowledge, in
11 relation to any of the retail funds?

12 A. I don't -- I don't believe he does.

13 Q. How about Mr. Post, do you know
14 whether Mr. Post holds any position in either
15 of the advisors?

16 A. I mean, he -- he -- yes.

17 Q. What is your understanding of the
18 positions that Mr. Post holds in relation to
19 the advisors?

20 MS. DANDENEAU: Objection to form.

21 A. He is an employee of NexPoint
22 Advisors. He is also the chief compliance
23 officer for -- for NexPoint.

24 Q. Who is the chief compliance officer
25 for HCMFA, if you know?

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2 MS. DANDENEAU: Objection to form.

3 A. That would be Jason as well.

4 Q. Okay. Now, looking at your
5 response, you noted initially that nothing was
6 owed under shared services. Do I have that
7 right in substance?

8 A. Yeah. I think I'm being responsive
9 to Lauren's question here, whether any of the
10 shared service invoices are outstanding.

11 Q. Right.

12 A. Yes.

13 Q. And that is because -- and that is
14 because the retail the retail board has asked
15 for the disclosure of all material obligations
16 that were owed to HCMLP either then or in the
17 future; isn't that right?

18 MS. DANDENEAU: Objection to form.

19 Q. We can go back down and look.

20 A. Look, I don't know if that's a
21 material item, I mean, again, but sure.

22 Q. Okay. But there were no shared
23 services outstanding; correct?

24 MS. DANDENEAU: Objection to form.

25 A. That is what this email seems to

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2 indicate.

3 Q. And you wouldn't have written it if
4 you didn't believe it to be true at the time;
5 correct?

6 A. Correct.

7 Q. And when you referred to shared
8 services outstanding, what you meant there was
9 that neither NexPoint nor HCMFA owed Highland
10 any money under the shared services agreements
11 that they had with Highland as of October 6th,
12 2020; right?

13 A. I don't know if it is as of October
14 6, 2020 or if it was from -- like through the
15 financials -- through the date of the
16 financials as of June 30.

17 Q. Okay. And then you noted that
18 HCMA -- the HCMFA note is a demand note; right?

19 A. Yes.

20 Q. And then you referred Ms. Thedford
21 to Kristin Hendrix for the term of the NexPoint
22 note. Do I have that right?

23 A. Yes.

24 Q. And then you refer to that agreement
25 that is referenced in the 2018 audited

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2 financials about Highland's agreement not to
3 make demand upon HCMFA until May 2021; correct?

4 A. Correct.

5 Q. And then -- and then the next thing
6 you write is that the attorneys think that BK
7 doesn't change that, but don't know for sure at
8 the end of the day.

9 Do you see that sentence?

10 A. Yes.

11 Q. Which attorneys were you referring
12 to?

13 A. I don't remember.

14 Q. Did you have a conversation with
15 attorneys concerning whether the bankruptcy
16 would change or alter in any way the agreement
17 not to make a demand under the HCMFA note?

18 A. Look, yeah, I mean, I don't
19 specifically remember, but generally, I mean,
20 it is in this email. I don't -- I don't -- I
21 don't -- I don't remember who I talked to or,
22 you know, was it inside counsel, outside
23 counsel, but obviously I talked to somebody.

24 Q. Do you have any recollection --

25 A. Well, I don't even know if it's --

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2 actually, it may not even have been me. I say
3 the attorneys in, you know, a lot of -- like I
4 talked about the team.

5 It could have been someone on the
6 team, like, hey, we need to run this down, and
7 maybe they talked to attorneys again and
8 relayed that information to me.

9 So I really don't know if I spoke or
10 someone else did or -- or, I mean, and maybe it
11 wasn't even from corporate accounting. Maybe
12 it was, you know, other -- I'm kind of
13 summarizing, you know, again, so I don't really
14 know -- I can't really say for sure. I don't
15 remember how I came about of this knowledge.

16 Q. I appreciate your efforts,
17 Mr. Waterhouse, but I will just tell you that
18 if I ask a question and you don't know the
19 answer or you don't recall, I'm happy to accept
20 that. I don't -- I don't want you to
21 speculate, so I want to be clear about that.
22 So I appreciate it.

23 Let me just ask you simply: Do you
24 know what attorneys -- can you identify any of
25 the attorneys who thought that the bankruptcy

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2 process didn't change the agreement?

3 A. I don't recall.

4 Q. Okay. Perfect.

5 And then let's look at the last
6 sentence. It says, quote: The response should
7 include, as I covered in the board meeting,
8 that both entities have the full faith and
9 backing from Jim Dondero, and to my knowledge
10 that hasn't changed.

11 Do you see that?

12 A. Yes.

13 Q. Okay. Prior to October 6th, 2020,
14 had you told the retail board that HCMFA and
15 NexPoint have the full faith and backing from
16 Jim Dondero?

17 A. Yes.

18 Q. Do you remember in the context in
19 which you told the retail board that?

20 A. I mean, generally, yes.

21 Q. Tell me what you recall.

22 A. So we were walking through the
23 financials from the advisors; right? So as I
24 described to you, you have got HCMFA and NPA.
25 And these -- the financials, you know, show

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2 they have liabilities on them that exceed
3 assets.

4 So the retail board has asked, okay,
5 you know, how -- you know, if -- if these
6 liabilities come due or they're payable, you
7 know, how does that come about?

8 And, you know, the response is,
9 well, the advisors have the -- the full faith
10 and backing from -- from Jim Dondero.

11 Q. And how did you know that the
12 advisors had the full faith and backing from
13 Jim Dondero? What was the basis for that
14 statement that you made to the retail board?

15 A. I talked to Jim about it at some
16 point in the past.

17 Q. And did you tell Mr. Dondero that
18 you were going to inform the retail board that
19 the advisors had his full faith and backing
20 before you actually told that to the retail
21 board?

22 A. I don't recall having that
23 conversation.

24 Q. Do you recall if you ever informed
25 Mr. Dondero that you had disclosed or told the

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2 retail board that the advisors had the full
3 faith and backing of Mr. -- Mr. Dondero?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. I don't recall discussing that with
7 him at the time.

8 Q. When you told this to the board, was
9 Mr. Dondero participating in the discussion?

10 A. Not that I recall.

11 Q. Withdrawn. Was it not -- withdrawn.

12 Do you recall whether -- when you
13 covered this issue with the board, was that in
14 a -- a Zoom call or a Webex call? Was it a
15 telephone call? Was it in-person? Like where
16 were you physically in relation to the board?

17 A. I believe I was at home.

18 Q. Okay. Can you identify every person
19 that you recall who was present for this
20 disclosure other than -- other than the board
21 members themselves?

22 MS. DEITSCH-PEREZ: Object to the
23 form.

24 A. I don't recall everyone on the call.

25 Q. Can you identify anybody who was on

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2 the call?

3 A. Other than the board members?

4 Q. Yes.

5 A. Lauren Thedford. I mean, there
6 are -- there are many -- my section is just one
7 of many sections that are just -- you know, as
8 you can appreciate, this is a long board
9 meeting.

10 I can't recall specifically, really
11 even generally, or who was on when this was
12 discussed. But Lauren was typically on for the
13 entire time.

14 Q. I apologize if I asked you this, but
15 do either of Mr. Norris or Mr. Post hold any
16 positions relative to the retail funds?

17 A. I think you asked me this already,
18 John.

19 Q. Okay. I just don't recall. Can you
20 just refresh my recollection if I did, in fact,
21 ask you the question?

22 A. I don't believe -- if we can go
23 back. I don't believe Mr. Norris has a title
24 at the retail funds. Mr. -- and Mr. Post is
25 the CCO of the advisor, the advisors.

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2 Q. Okay. Do you know if either of them
3 have a position with the retail board -- with
4 the retail funds?

5 A. I don't believe Mr. Norris has a
6 position with the retail funds.

7 Q. All right. What about Mr. Post?

8 A. Mr. Post is the CCO of the advisors.

9 Q. Okay. Does he hold any position --

10 A. I don't believe so.

11 Q. -- with the retail funds?

12 A. I don't believe so.

13 Q. Okay.

14 A. I don't know if being the CCO for
15 the advisor conveys something for the retail
16 funds. Again, I am not -- that is the legal
17 compliance part of it. I don't know.

18 Q. Why did you tell the retail board
19 that the advisors have the full faith and
20 backing from Mr. Dondero?

21 MS. DANDENEAU: Objection to form.

22 A. It is -- it is -- it is what has
23 been discussed with them prior.

24 Q. And were you -- were you trying to
25 give them comfort that even though the

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2 liabilities exceeded the assets that the
3 advisors would still be able to meet their
4 obligations as they become due?

5 MS. DANDENEAU: Objection to form.

6 MS. DEITSCH-PEREZ: Object form.

7 A. I -- I can't -- I don't remember
8 specifically the conversation, but generally --
9 you know, generally, yes. And that is why --
10 but, you know, again, in this email saying, you
11 know, I am sure I qualified it with the retail
12 board, you know, as I said I like -- you know,
13 to my knowledge, that hasn't changed. But,
14 again, generally -- generally that is what I
15 remember.

16 Q. Okay. Do you recall if in the
17 advisors' response to the retail board's
18 question if the response included any statement
19 concerning Mr. Dondero and -- and the full
20 faith and backing that he was giving to the
21 advisors?

22 MS. DEITSCH-PEREZ: Object to the
23 form.

24 A. I don't -- I don't remember
25 specifically what was provided.

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2 Q. Okay.

3 A. And I don't really -- I don't really
4 remember generally either.

5 Q. Okay.

6 MR. MORRIS: So -- so, again, I'm
7 just going to ask Mr. Rukavina if your
8 clients can produce as soon as possible the
9 15(c) response, the written response that
10 the advisors made, if any, to the board's
11 Question No. 2.

12 I'm not looking for the whole
13 response, but I certainly want the response
14 to Question No. 2.

15 Q. Do you have a general understanding
16 as to the amount by which -- withdrawn.

17 Did -- did the assets of --
18 withdrawn.

19 Did the liabilities of HCMFA exceed
20 its assets in 2020?

21 MS. DANDENEAU: Objection to form.

22 MS. DEITSCH-PEREZ: Objection, form.

23 A. I believe I have already answered
24 that question earlier, I think. I believe I
25 said yes.

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2 Q. Okay. And did the liabilities of
3 NexPoint exceed its assets in 2020?

4 MS. DEITSCH-PEREZ: Objection to
5 form.

6 A. I don't believe so.

7 Q. Okay. So -- so it was only one of
8 the two advisors who had liabilities that
9 exceeded the value of the assets.

10 Do I have that right?

11 MS. DEITSCH-PEREZ: Objection to
12 form.

13 MS. DANDENEAU: Form.

14 A. Yes.

15 Q. And do you know, ballpark, the
16 amount by which the value of HCMFA's
17 liabilities exceeded their assets in 2020?

18 MS. DANDENEAU: Objection to form.

19 A. I don't -- I don't recall.

20 MR. MORRIS: I had specifically
21 requested in discovery the audited
22 financial reports for both advisors and
23 NexPoint. I think I may have gotten one
24 for NexPoint but I'm still waiting for the
25 balance. And I'm going to renew my request

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2 for those documents too.

3 Q. Let's go to the next exhibit, which
4 is Number 10. So I think it is in your stack,
5 Mr. Waterhouse.

6 MR. MORRIS: And we can take the one
7 down from the screen and put up Number 10
8 for everybody.

9 (Exhibit 10 marked.)

10 Q. And I don't know if you have ever
11 seen this before, but I'm really putting it up
12 on the screen for purposes of turning to the
13 very last page of the document.

14 So this is a document that we have
15 been -- that we premarked as Exhibit 10. And
16 we're turning to the last page of the document,
17 which is a document that was filed in the
18 adversary proceeding 21-3004. And -- no, I
19 apologize, I think we -- right there. Perfect.

20 And it is page 31 of 31.

21 MR. MORRIS: I think there may have
22 been some something erroneously stapled to
23 the hard copy that I gave you folks, but
24 I'm looking for page 31 of 31 in the
25 document that begins with the first page of

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2 Exhibit 10.

3 Q. Do you have that, Mr. Waterhouse?

4 A. I don't have it yet. I'm looking.

5 Q. All right. If you look at the top
6 right-hand corner, you will see it says page
7 hopefully something of 31?

8 A. Yes, I've got it now.

9 Q. Okay. You have got 31 of 31. You
10 can take a moment to read that, if you would
11 like.

12 A. (Reviewing document.) Okay.

13 Q. Have you ever seen this before?

14 A. I don't know if I have seen this
15 specific document, but, you know, I've --
16 I'm -- I'm aware of it.

17 Q. And is this the document that you
18 had in mind when you sent that email to
19 Ms. Thedford that we just looked at where you
20 said that Highland had agreed not to make a
21 demand upon HCMFA until May 2021?

22 A. Honestly, I don't -- it wasn't this
23 document. I mean, it's something like this,
24 yes. I mean, yes.

25 Q. Well --

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2 A. It is something like this, but I
3 don't think it was this specific document.

4 Q. Well, but this document does say in
5 the last sentence that Highland agreed not to
6 seek -- not to demand payment from HCMFA prior
7 to May 31, 2021; right?

8 A. Yes.

9 Q. And are you aware of any other
10 document that was ever created pursuant to
11 which Highland agreed not to demand payment on
12 amounts owed by HCMFA before May 31, 2021?

13 A. Hold on. Are you asking, am I aware
14 of a document that by HCMFA that basically says
15 otherwise?

16 Q. No. Let me try again.

17 Are you aware of any other document
18 pursuant to which -- pursuant to which Highland
19 agreed not to make a demand on HCMFA until May
20 31st, 2021?

21 A. I'm -- I think there was something
22 in connection with -- with the -- with the
23 audit that basically says the same thing.

24 Q. Okay. And do you think that the
25 audit is referring to this particular document?

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2 A. I don't know.

3 Q. All right. This document is dated
4 April 15, 2019. Do you see that?

5 A. I do.

6 Q. And do you remember that the audit
7 was completed on June 3rd, 2019?

8 A. Yes.

9 Q. And do you recall that the audited
10 financials -- and I'm happy to pull them up if
11 you would like, but do you recall that the
12 audited financials included a reference to the
13 agreement pursuant to which Highland agreed not
14 to make a demand until May 31st, 2021?

15 A. Yes, I remember.

16 Q. And as part of the process, would
17 you have expected the corporate accounting team
18 to have provided a copy of this document to
19 PwC?

20 MS. DANDENEAU: Objection to form.

21 A. Yes, I would have expected something
22 like this, or again, you know, some document
23 that basically states -- states the deferral
24 till May 31 of 2020.

25 Q. Okay.

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2 A. May 31 of 2021, excuse me.

3 Q. And this document states the
4 deferral that you just described; correct?

5 A. It does.

6 Q. And this document states the
7 deferral that was described in the audited
8 financial statements that we looked at before;
9 correct?

10 A. It does.

11 MR. MORRIS: Okay. Can we scroll
12 down just a little bit to see who signed on
13 behalf of the acknowledgment there.

14 Q. Okay. So Mr. Dondero signed this
15 document on behalf of both HCMFA and Highland;
16 do you see that?

17 A. I do.

18 Q. Okay. Did you discuss this document
19 or the -- withdrawn.

20 Did you discuss the concept of the
21 deferral with Mr. Dondero in the spring of
22 2019?

23 A. I think I testified I don't recall.

24 Q. Okay. Do you know whose idea it was
25 to issue the acknowledgment in this form?

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2 A. I don't recall.

3 MR. MORRIS: Can we scroll back up
4 to the document, please.

5 Q. Do you see in the beginning it says,
6 reference is made to certain outstanding
7 amounts loaned from Highland to HCMFA for
8 funding ongoing operations.

9 Do you see that?

10 A. Yes.

11 Q. And were you aware as the CFO of
12 Highland and as the treasurer of HCMFA that as
13 of April 15, 2019, Highland had made certain
14 loans to HCMFA to fund HCMFA's ongoing
15 operations?

16 A. Yes.

17 Q. And were you aware that those loans
18 were payable on demand and remained outstanding
19 as of December 31st, 2018?

20 A. Yes.

21 Q. And were you aware that those
22 amounts were payable on demand, and they
23 remained outstanding as of April 15, 2019?

24 MS. DEITSCH-PEREZ: Object to the
25 form.

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2 A. Well, this -- this document dated
3 April 15, 2019 says they have been deferred to
4 May 31, 2021.

5 Q. Right. But I'm just sticking to the
6 first paragraph where they refer to the
7 outstanding amounts. And in the end it says
8 the -- it remained outstanding on December
9 31st, 2018, and I think you told me that you
10 understood that, and then I'm just trying to
11 capture the last piece of it.

12 Did you understand that there were
13 amounts outstanding from the loan that Highland
14 made to HCMFA to fund ongoing operations as of
15 April 15th, 2019?

16 A. Yes.

17 Q. Thank you. Let's look at the next
18 sentence. HCMFA expects that it may be unable
19 to repay such amounts should they become due
20 for the period commencing today and continuing
21 through May 31st, 2021.

22 Do you see that?

23 MS. DANDENEAU: Objection to form.

24 A. I do.

25 Q. As the CFO -- withdrawn.

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2 As the treasurer of HCMFA, did you
3 believe that -- do you believe that statement
4 was true and accurate at the time it was
5 rendered?

6 A. I mean, it -- it -- the answer to
7 that is I really didn't have any -- I didn't
8 have an opinion really.

9 Q. Did you do anything to educate
10 yourself in April of 2019 on the issue of
11 whether HCMFA could repay the amounts that it
12 owed to Highland should they become due?

13 A. I don't believe so.

14 Q. Did you at any time form any
15 opinions as to HCMFA's ability to repay all
16 amounts due to Highland should they become due?

17 A. Not really. I guess I don't...

18 Q. Well, you told the retail board that
19 HCMFA's liabilities exceeded their assets in
20 2020; correct?

21 A. Yes.

22 Q. Based on the work that you did to
23 prepare for the retail board, did you form any
24 view as to whether HCMFA would be unable to
25 repay the amounts that it owed to Highland

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2 should they become due?

3 MS. DANDENEAU: Objection to form.

4 A. I mean, I -- when you look at that,
5 to answer you, completely, you know, again,
6 if -- the response I gave the retail board was,
7 you know, the -- the advice -- HCMFA advisors
8 have the -- have the full faith and backing of
9 Jim Dondero. So I didn't form an opinion of
10 whether the advisor could pay it or not.

11 Q. Did you form any view as to whether
12 the advisors could repay the amounts that it
13 owed to Highland should they become due without
14 the full faith and backing of Mr. Dondero?

15 MS. DANDENEAU: Objection to form.

16 MS. DEITSCH-PEREZ: Form.

17 A. I mean, if you -- if you -- if you
18 take that last statement out, I mean, it would
19 be difficult for HCMFA to pay back demand notes
20 at that time.

21 Q. And it was precisely for that reason
22 that you told the retail board that -- that the
23 retail -- that the advisors had the full faith
24 and backing of Mr. Dondero; correct?

25 MS. DANDENEAU: Objection to form.

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2 A. I mean, yes, as the mouthpiece, I
3 was relaying information.

4 Q. Okay. And you relayed that
5 information with the knowledge and approval of
6 Mr. Dondero; correct?

7 MS. DEITSCH-PEREZ: Object to the
8 form.

9 A. As I stated in the email, I don't
10 believe, and I think I testified I don't
11 believe I had conversations with Mr. Dondero at
12 the time of that board meeting.

13 Q. Did you tell the retail board that
14 the advisors had the full faith and backing of
15 Mr. Dondero without Mr. Dondero's prior
16 approval?

17 A. Yeah, I -- I -- yes, I'm -- like I
18 said, I think I testified earlier, I'm sure I
19 qualified it as well.

20 Q. What do you mean by that?

21 MS. DANDENEAU: Objection to form.

22 A. Again -- again, like I said in the
23 email, it has the full faith and backing of Jim
24 Dondero unless that has changed.

25 Q. Actually that is not what you said,

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2 so let's put the email back up.

3 A. It is -- it is -- it is in the
4 email.

5 Q. Let's put the email back up. You
6 didn't say unless it has changed. You said you
7 believe it hasn't changed; right?

8 A. Okay. And to my knowledge that
9 hasn't changed, that is what it says.

10 Q. That's right.

11 A. But, again, I mean, that is -- I
12 don't know everything. And I'm not in every
13 conversation. I'm not -- to presume that I am,
14 is -- and you have to put myself -- as you
15 started this out, Mr. Morris, I was at home in
16 October of 2020 with COVID -- or, you know,
17 under these COVID times that we described is
18 very difficult.

19 We have all been working at home for
20 really the first time ever, undergoing
21 processes, procedures, control environments
22 that have been untested, and there is poor
23 communication.

24 So I am relaying, as I'm telling you
25 now, what is in the email. And unless

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2 something has changed -- to my knowledge, it
3 hasn't changed, but it could have changed.

4 Q. When you say that the advisors have
5 the full faith and backing from Mr. Dondero,
6 did you intend to convey that, to the extent
7 the advisors were unable to satisfy their
8 obligations as they become due, Mr. Dondero
9 would do it for them?

10 MS. DANDENEAU: Object to the form.

11 MS. DEITSCH-PEREZ: Object to the
12 form.

13 And, John, we have given you a lot
14 of leeway here but this does not seem
15 relevant to this case. You seem sort of
16 taking a complete sort of diversion into
17 the allegations and the complaint just
18 filed on Friday, and so I would ask you to
19 move on because --

20 MR. MORRIS: And I will tell you --
21 I will tell you that I have never read that
22 complaint cover-to-cover. I have nothing
23 to do with the prosecution of those claims.
24 And this issue that we're talking about
25 right now is related solely to the

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2 promissory notes that your clients refuse
3 to pay.

4 So I'm going to continue to ask my
5 questions, and I would ask the court
6 reporter to read back my last question.

7 (Record read.)

8 MS. DEITSCH-PEREZ: And then I
9 believe there were objections to form.

10 Q. You can answer the question.

11 A. Yes.

12 Q. Thank you very much, sir.

13 MR. MORRIS: Can we go back to the
14 other document, please?

15 Q. Mr. Waterhouse, do you know if this
16 document was ever shared with the retail board?

17 A. I don't recall.

18 Q. Did you ever share it with the
19 retail board?

20 A. I don't recall.

21 Q. Did you ever tell the retail board
22 about the substance of this document?

23 A. I don't recall.

24 Q. Did you ever tell the retail board
25 that Highland had agreed not to make a demand

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2 against HCMFA until May 2021?

3 A. I don't recall.

4 Q. Do you know whether anybody on
5 behalf of the advisors ever informed the retail
6 board that Highland had agreed on April 15,
7 2019, not to make a demand against HCMFA under
8 the promissory notes?

9 A. I don't recall.

10 Q. Did you instruct Ms. Thedford or
11 anybody else responding to the retail board's
12 15(c) inquiry to disclose this document?

13 A. Did I instruct Ms. Thedford or
14 anyone else to -- to -- to produce this, to
15 disclose this document? Is that what you -- I
16 just want to make sure.

17 Q. Uh-huh.

18 A. Yeah, I don't -- I don't recall.

19 Q. Did you instruct anybody to inform
20 the retail board, in response to their question
21 as part of the 15(c) process, to -- to tell the
22 retail board about Highland's agreement not to
23 make a demand until 2021?

24 MS. DANDENEAU: Objection to form.

25 A. I don't recall.

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2 Q. Did you ever inform PwC that HCMFA's
3 liabilities exceeded its assets?

4 MS. DANDENEAU: Object to the form.

5 A. I don't -- I don't think I told
6 them. I mean, they -- they audited the
7 financial statements.

8 Q. Did -- do you know if anybody on
9 behalf of Highland ever informed
10 PricewaterhouseCoopers that HCMFA may be unable
11 to repay amounts owing to Highland, should they
12 become due?

13 MS. DANDENEAU: Objection to form.

14 A. Yes. Again, I think I testified
15 earlier that -- that this was communicated to
16 the auditors.

17 Q. Ideally --

18 A. I don't know who exactly did that.
19 I don't recall doing it, but, yeah, it was --
20 it was communicated. And that is why -- I
21 mean, there is a disclosure in the financial
22 statements; right?

23 Q. There is, and that disclosure
24 relates to the last sentence of this document;
25 correct?

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2 A. Yes.

3 Q. Do you recall looking in the
4 document and seeing anything that was disclosed
5 with respect to the sentence above that?

6 A. No.

7 Q. Do you know whether anybody on
8 behalf of Highland ever informed
9 PricewaterhouseCoopers that HCMFA expects that
10 it may be unable to repay amounts due and owing
11 to Highland should they become due?

12 MS. DEITSCH-PEREZ: Object to the
13 form. I think that is the third time.

14 A. I don't recall. Again, as I said,
15 we -- all of this was given to the auditors.

16 Q. Do you know if Highland received
17 anything of value in exchange for its agreement
18 not to demand payment on amounts owed by HCMFA
19 prior to May 31st, 2021?

20 MS. DEITSCH-PEREZ: Object to the
21 form. That is the second time.

22 MS. DANDENEAU: Object to the form.

23 A. I have answered this question.

24 MR. RUKAVINA: Hold on. Object to
25 legal conclusion. Go ahead.

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2 A. I have answered this question
3 before.

4 Q. And the answer was no?

5 A. I'm not aware.

6 Q. Now, this acknowledgment can't
7 possibly apply to the two notes that you signed
8 on behalf of HCMFA because those notes were
9 signed on May 2nd and May 3rd, 2019; is that
10 right?

11 MS. DANDENEAU: Objection to form.

12 A. Unless there is a drafting error.

13 Q. Okay. Are you aware of a drafting
14 error?

15 A. I'm not aware. I didn't -- I wasn't
16 part of -- I didn't sign this note or this
17 acknowledgment. I didn't draft it.

18 Q. But you do see it is dated April 15,
19 2019; right?

20 A. Yes.

21 Q. And this was a document that was
22 actually included by the advisors in a pleading
23 they filed with the Court; right?

24 MR. RUKAVINA: Well, I don't know
25 that so I object to form.

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2 Q. Okay. Let's go to the first page of
3 the document and just confirm that.

4 MR. AIGEN: Mr. Morris, I just note
5 that you already said there was some error
6 with the document that is listed as
7 exhibit --

8 MR. MORRIS: No. No, no, no.

9 MS. DEITSCH-PEREZ: Oh, okay.

10 MR. MORRIS: What I said is that
11 there is a few pages that were mistakenly
12 stapled to the end of the document.

13 MS. DEITSCH-PEREZ: Okay.

14 MR. MORRIS: There is no problem
15 with this document.

16 MS. DEITSCH-PEREZ: And just so
17 we're clear that the document -- the pages
18 that start with defendant's amended answer
19 are not intended to be part of this
20 document?

21 MR. MORRIS: That's correct.

22 MS. DEITSCH-PEREZ: And that the --
23 but it is your representation that the rest
24 of the document is -- is -- is correct
25 because we don't -- we don't have any way

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2 of verifying that, we're just --

3 MR. MORRIS: You do, actually. You
4 could just go to Docket No. 21-3004.

5 MS. DEITSCH-PEREZ: If you want to
6 stop this deposition so we can go and pull
7 that document up, we're happy to do it. So
8 I am just asking you for your
9 representation.

10 MR. MORRIS: Sure. I gave that.

11 MS. DEITSCH-PEREZ: Okay.

12 Q. So do you see that this is a
13 document that was actually filed with the Court
14 by Highland Capital Management Fund Advisors?

15 A. No. I get with the first page in
16 the section. Maybe I'm looking at the wrong
17 thing. It says, Highland Capital Management.

18 Q. Don't worry about it. Don't worry
19 about it.

20 A. Maybe I went back -- okay.

21 MR. MORRIS: All right. Can we put
22 up on the screen Exhibit 2.

23 (Exhibit 2 marked.)

24 MR. MORRIS: I think it is
25 Exhibit 1.

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2 MS. DANDENEAU: I'm sorry, John, did
3 you say Exhibit 2 or Exhibit 1?

4 MR. MORRIS: It is Exhibit 2 in the
5 binders so it is premarked Exhibit 2. And
6 now I'm asking -- right there -- going to
7 Exhibit 1 to the document that was marked
8 as Exhibit 2.

9 MS. DANDENEAU: Got it. In the
10 binder there is no --

11 MS. DEITSCH-PEREZ: There is no
12 Exhibit 1.

13 MR. MORRIS: All right. So look at
14 the one on the screen.

15 Q. Do you see, Mr. Waterhouse, that
16 this is a promissory note dated May 31st, 2017,
17 in the approximate amount of \$30.7 million?

18 A. Yes.

19 Q. And do you see that the maker of the
20 note is NexPoint?

21 A. Yes.

22 Q. And that Highland is the payee; is
23 that right?

24 A. Yes.

25 Q. Okay. And do you see in Paragraph 2

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2 this is an annual installment note?

3 A. Can you scroll down.

4 Q. Sure.

5 MR. MORRIS: Can we scroll down --

6 yeah, there you go.

7 A. Right there, yeah. Yes.

8 MR. MORRIS: And can we scroll down

9 to the signature line.

10 Q. And do you recognize that as

11 Mr. Dondero's signature?

12 A. Yes.

13 Q. And is this the promissory note that

14 we talked about earlier where NexPoint had made

15 certain payments in the aggregate amount of

16 about 6 to \$7 million against principal and

17 interest?

18 A. I don't recall discussing the

19 aggregate principal amounts of 6 to \$7 million,

20 but -- so I don't -- I don't recall that prior

21 discussion with those amounts.

22 Q. All right. Let's take a look.

23 NexPoint always included this promissory note

24 as a liability on its audited financial

25 statements; right?

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2 A. Yes.

3 Q. And NexPoint had its financial
4 statements audited; isn't that correct?

5 A. Yes.

6 Q. And was the process of NexPoint's
7 audit similar to the process you described
8 earlier for Highland and HCMFA?

9 A. Yes, it is similar.

10 Q. Okay.

11 MR. MORRIS: Can we put up
12 NexPoint's audited financials and let
13 everybody know what exhibit number it is,
14 La Asia?

15 MS. CANTY: It is going to be
16 Exhibit 46.

17 (Exhibit 46 marked.)

18 Q. And do you see, sir, that we've put
19 up NexPoint Advisors' consolidated financial
20 statements and supplemental information for the
21 period ending December 31st, 2019?

22 A. Yes.

23 Q. Did you participate in the process
24 whereby these audited financial statements were
25 issued?

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2 A. I didn't participate directly, as
3 I've described before, about the -- the team
4 performing the audit.

5 Q. Do you recall when the audit of
6 NexPoint's financial statements for the period
7 ending December 31st, 2019 was completed?

8 A. Yes.

9 Q. And when do you recall it being
10 completed?

11 A. In January of 2021.

12 Q. Do you know why the 2019 audit
13 report wasn't completed until January of 2021?

14 A. Yes.

15 Q. Why was the NexPoint audit report
16 for the period ending 12/31/19 not completed
17 until January 2021?

18 A. Because we had to deal with working
19 from home from -- with COVID, and on top of all
20 of our daily responsibilities and job duties
21 at -- at providing -- at Highland providing
22 services to NexPoint, we had to do all of this
23 extra work for a bankruptcy that was filed in
24 October of 2019.

25 MR. MORRIS: Can we go to the

1 WATERHOUSE - 10-19-21

2 balance sheet on page 3? Okay. Stop right
3 there.

4 Q. Do you see under the liabilities
5 section, the last item is note payable to
6 affiliate?

7 A. Yes.

8 Q. And is that the note that we just
9 looked at?

10 MS. DANDENEAU: Objection to form.

11 Q. Withdrawn.

12 Is that the approximately
13 \$30 million note that we just looked at that
14 was dated from 2017?

15 MS. DANDENEAU: Objection to form.

16 A. I believe no.

17 Q. Okay. You're not aware of any other
18 note that was outstanding from NexPoint to
19 Highland as of the end of the year 2019, other
20 than that one \$30 million note; right?

21 A. I don't recall.

22 Q. And as of the end of 2019, the
23 principal amount that was due on the note was
24 approximately \$23 million; right?

25 MS. DEITSCH-PEREZ: Object to the

1 WATERHOUSE - 10-19-21

2 form.

3 A. Approximately.

4 Q. And does that refresh your

5 recollection that between the time the note was
6 executed and the end of 2019, that NexPoint had
7 paid down approximately \$7 million?

8 A. Yes. If we are just doing the math,
9 yes.

10 Q. Okay. Did NexPoint complete its
11 audit from 2020?

12 A. Sorry, you kind of broke up. Do
13 NexPoint complete?

14 Q. The audit of its financial
15 statements for the period ending December 31st,
16 2020?

17 A. No.

18 Q. No, it's not complete?

19 A. No, it is not complete.

20 Q. Did HCMFA complete its audit for the
21 year ending December 31st, 2020?

22 A. No.

23 MR. MORRIS: Can we go to page 15,
24 please, the paragraph at the bottom.

25 Q. Do you see that NexPoint has

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2 included under notes payable to Highland a
3 reference to the amounts that were outstanding
4 as of the year-end 2019 under the note that we
5 looked at just a moment ago?

6 A. Yes. Are you talking about the
7 second paragraph?

8 Q. I'm actually talking about first
9 paragraph. Do you understand that the first
10 paragraph is a reference to the 2017 note, and
11 the amounts that were -- the principal amount
12 that was outstanding as of the end of 2019?

13 MS. DANDENEAU: Objection to form.
14 John, do you mean the first paragraph of
15 that page?

16 MR. MORRIS: No, the first paragraph
17 under notes payable to Highland.

18 A. Yeah, I see the paragraph, and
19 again, this is what I answered earlier. I
20 believe so, just because I don't -- again, this
21 is a number in a balance sheet, and without
22 matching it up and seeing the detail with the
23 schedule like I kind of talked about for
24 Highland's financial statements, it is a little
25 bit more difficult to tie everything in

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2 perfectly together.

3 Q. Okay. But you're not aware of any
4 note that was outstanding at the end of 2019
5 from NexPoint to Highland other than whatever
6 principal was still due and owing under the
7 \$30 million note issued in 2017; correct?

8 A. Well, it -- I don't -- there is
9 reference in the second paragraph. I don't --
10 I don't -- I don't recall what that is
11 referring to, so I don't -- I don't know.

12 Q. Well, if you listen carefully to my
13 question, right, I'm asking about notes that
14 were outstanding at the end of 2019, and if we
15 look at the paragraph you just referred to, it
16 says that during the year there were new notes
17 issued totaling \$1.5 million, but by the end of
18 the year, no principal or interest was
19 outstanding on the notes.

20 Do you see that?

21 A. Oh, I do, yes.

22 Q. So does that refresh your
23 recollection that there were no notes
24 outstanding from NexPoint to Highland other
25 than the principal remaining under the original

1 WATERHOUSE - 10-19-21

2 \$30 million 2017 note that we looked at a
3 moment ago?

4 A. Well, we're at the bottom of the
5 page. Is there anything on page 16?

6 Q. That is a fair question, sure. That
7 is it.

8 A. Okay. So it appears that that is
9 the only note that is detailed in the notes in
10 the financial statement.

11 Q. And you don't have any memory of any
12 other note other than the 2017 note, right,
13 being outstanding as of the end of the year?

14 A. I deal with thousands of
15 transactions every year. I don't really have a
16 very specific memory for what exactly was
17 outstanding.

18 MR. MORRIS: Why don't we take a
19 break now. We've been going for a little
20 while. It's 3:26. Let's come back at
21 3:40.

22 VIDEOGRAPHER: We're going off the
23 record at 3:26 p.m.

24 (Recess taken 3:26 p.m. to 3:39 p.m.)

25 VIDEOGRAPHER: We are going back on

1 WATERHOUSE - 10-19-21

2 the record at 3:39 p.m.

3 Q. All right. Mr. Waterhouse, we -- I
4 don't think we have a lot more here.

5 To the best of your knowledge and
6 recollection, were all affiliate loans and all
7 loans made to Mr. Dondero recorded on
8 Highland's books and records as assets of
9 Highland?

10 MS. DANDENEAU: Object to the form,
11 asked and answered.

12 A. To my knowledge, yes.

13 Q. Okay. Can you recall any loan to
14 any affiliate or Mr. Dondero that was not
15 recorded on Highland's books and records as an
16 asset?

17 A. Like during my time as CFO? I don't
18 recall.

19 Q. How about after the time that you
20 were CFO? Did you recall that there was a loan
21 by Highland to an affiliate or to Mr. Dondero
22 that hadn't been previously recorded on
23 Highland's books as an asset?

24 MS. DANDENEAU: Objection to form.

25 A. I guess I don't understand the

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2 question. I left Highland as of -- I'm not
3 aware of -- I left Highland in February --
4 probably the last day of February of 2021.

5 Q. Okay.

6 A. I'm not -- I'm not aware of any --
7 I'm not aware of anything past that date.

8 Q. Okay. While you were the CFO at
9 Highland, did Highland prepare in the ordinary
10 course of business a document that reported
11 operating results on a monthly basis?

12 A. Yes.

13 Q. And are you generally familiar with
14 the monthly operating reports?

15 A. Yeah. You are referring to the
16 reports that we filed to the Court every month?

17 Q. I apologize, I'm not. I'm taking
18 you back to the pre-petition period. There was
19 a report that I have seen that I'm going to
20 show you, but I'm just asking for your
21 knowledge.

22 MR. MORRIS: Let's put it up on the
23 screen, Exhibit 39.

24 (Exhibit 39 marked.)

25 Q. Do you see this is a document that

1 WATERHOUSE - 10-19-21

2 is called operating results?

3 A. Yeah, that's the title of it.

4 Q. Okay. And was a report of operating
5 results prepared by Highland on a monthly basis
6 during the time that you served as CFO?

7 A. No.

8 Q. Are you familiar with a document of
9 this type? And we can certainly look at the
10 next page or two to refresh your recollection.

11 A. I'm just looking at the title. I
12 don't really -- again, as I discussed before, I
13 don't have any records or documents or emails
14 or appointments or anything that I was able to
15 use prior to -- prior to this deposition, so
16 I'm doing the best I can.

17 Q. Okay. You don't need to apologize.
18 I'm just asking you if you are familiar with
19 the document called Operating Results that was
20 prepared on a monthly basis at Highland?

21 MS. DEITSCH-PEREZ: Object to the
22 form.

23 Q. If you're not, you're not.

24 A. I don't believe this was prepared on
25 a monthly basis.

1 WATERHOUSE - 10-19-21

2 Q. Okay. Do you see that this one
3 is -- is dated February 2018?

4 A. Yes.

5 Q. Do you have -- do you believe --
6 have you ever seen a document that was
7 purporting to report operating results for
8 Highland?

9 MS. DANDENEAU: Objection to form.

10 A. Yes.

11 Q. Okay. And when you say that you
12 don't believe it was produced on a monthly
13 basis, was it produced on any periodic bases to
14 the best of your recollection?

15 A. I believe it was -- it was prepared
16 on an annual basis.

17 Q. Okay.

18 MR. MORRIS: Can we look at the next
19 page.

20 Q. Do you see that there is a statement
21 here called: Significant items impacting
22 HCMLP's balance sheet?

23 And it is dated February 2018.

24 A. Yes.

25 Q. Do you recall that there was a

1 WATERHOUSE - 10-19-21

2 report that Highland prepared that identified
3 significant items impacting the balance sheet?

4 A. A report that was prepared.

5 Q. Let me ask a better question: Did
6 Highland prepare reports to the best of your
7 recollection that identified significant items
8 that impacted its balance sheet?

9 A. Well, so Highland prepared a -- a
10 monthly close package. And maybe I'm
11 getting -- and -- and maybe change names at one
12 time or maybe I'm just -- again, just
13 misremembering -- but in that, yes, there is a
14 page that would detail just changes in -- you
15 know, just changes month over month on the
16 balance sheet.

17 Q. Okay. And maybe it is my fault.
18 Maybe I didn't know the proper name for it.
19 But let's use the phrase "monthly close
20 package."

21 Did Highland prepare a monthly close
22 package in the ordinary course of business
23 during the time that you served as CFO?

24 MS. DANDENEAU: Objection to form.

25 A. Yes.

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2 Q. And did the monthly close package
3 that Highland prepared include information
4 concerning significant items that impacted
5 Highland's balance sheet?

6 A. Yes, it had a page like that is --
7 that is on the screen that detailed items
8 like -- of that nature.

9 Q. And do you know who -- was there
10 anybody at Highland who was responsible for
11 overseeing the preparation of the monthly
12 reporting package?

13 A. That would have been -- again, it
14 varies over time during my tenure as CFO.
15 It -- it varied over -- over time, but -- but
16 typically a -- a corporate accounting manager.

17 Q. And who were the corporate
18 accounting managers during your tenure as CFO?

19 A. It would have been Dave Klos and
20 Kristin Hendrix.

21 Q. And did the corporate accounting
22 manager deliver to you drafts of the monthly
23 close package before it was finalized?

24 A. Sometimes.

25 Q. Was that the practice even if there

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2 were exceptions to the practice?

3 A. The practice meaning that they
4 sometimes lured them to me?

5 Q. That that was the expectation even
6 if circumstances prevented that from happening
7 from time to time.

8 MS. DEITSCH-PEREZ: Object to the
9 form.

10 A. I -- I would say it started out that
11 way but over the years it -- it was not
12 enforced.

13 Q. Okay. So you were -- you reviewed
14 and approved monthly -- monthly reporting
15 packages for a certain period of time and then
16 over time you stopped doing that.

17 Do I have that right?

18 MS. DANDENEAU: Objection to form.

19 A. Yes, I mean, if you're talking about
20 a formal meeting where we sit down and go
21 through and approve it. I would say that was
22 standard practice a decade -- you know, early
23 on. And as time went on that -- that -- that
24 practice wasn't followed.

25 Q. Okay.

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2 A. And, quite frankly, I don't even
3 know if these were -- these were sent to me
4 even in any capacity.

5 Q. What was the purpose of preparing
6 the monthly reporting package -- withdrawn.

7 What was the purpose of preparing
8 the monthly close package?

9 MS. DEITSCH-PEREZ: Object to the
10 form.

11 A. The -- the original purpose was so
12 that it would just -- it would be a report that
13 was reviewed monthly with senior management.

14 Q. Who was included in the idea of
15 senior management?

16 A. You know, I think originally when
17 this was conceived that would have been like
18 Jim Dondero and Mark Okada.

19 Q. Were monthly reporting -- withdrawn.
20 Were monthly close packages prepared
21 to the best of your knowledge until the time
22 you left Highland?

23 A. To my knowledge -- I don't know,
24 actually. I mean, to my knowledge, I believe
25 it was being -- that was still being done. I

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2 don't know because, again, I wasn't reviewing
3 them. I hadn't reviewed a close package for --
4 for a long time. But I believe the standard
5 practice that was still being carried out.

6 Q. Did you ever have any discussions
7 with the debtor's independent board concerning
8 any promissory notes that were issued by any of
9 the affiliates or Mr. Dondero?

10 A. I can't -- I can't -- I can't recall
11 specifically.

12 Q. Did you speak with the independent
13 board from time to time?

14 A. Yes, from -- from -- from time to
15 time I had discussions with the independent
16 board members, you know, either -- either, you
17 know, by themselves or wholly, you know, as --
18 as a -- as a combined work.

19 Q. Okay. Before we talk about
20 Mr. Seery, do you recall ever having a
21 conversation with Mr. Nelms or Mr. Dubel
22 concerning any promissory note that was
23 rendered by one of the affiliates or
24 Mr. Dondero to Highland?

25 A. I don't recall any conversations

1 WATERHOUSE - 10-19-21

2 specifically.

3 Q. Do you know if the topic was ever
4 discussed, even if you don't remember it
5 specifically?

6 MS. DANDENEAU: Objection to form.

7 A. It -- it -- it may have. I don't
8 know. I don't recall.

9 Q. Do you recall ever discussing any
10 promissory note issued by any of the affiliates
11 or Mr. Dondero with James Seery?

12 A. I don't -- I don't recall
13 specifically.

14 Q. Do you recall generally ever
15 discussing the topic of promissory notes issued
16 by any of the affiliates or Mr. Dondero to
17 Highland with Mr. Seery?

18 A. Nothing -- nothing is really jumping
19 out at me.

20 Q. Do you recall if you ever told
21 Mr. Seery that any of the affiliates or
22 Mr. Dondero didn't have an obligation to pay
23 all amounts due and owing under their notes?

24 A. I don't recall having that
25 conversation.

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2 Q. Did you ever tell Mr. Seery that you
3 had any reason to believe that the amounts
4 reflected in the notes issued by the affiliates
5 and Mr. Dondero were invalid for any reason?

6 A. I don't -- I don't recall.

7 Q. Did you tell Mr. Dondero -- did you
8 tell Mr. Seery that you thought the promissory
9 notes issued by the advisors and Mr. Dondero
10 that were outstanding as of the petition date
11 were assets of the estate?

12 A. I don't recall having a specific
13 conversation about those -- you know, those
14 notes outstanding as -- as of the petition date
15 being assets on the estate. I mean, we put
16 together -- you know, they're in the books and
17 records of the financial statements. I don't
18 recall having a specific conversation.

19 Q. Did you ever prepare any documents
20 that were delivered to Mr. Seery that concerned
21 the promissory notes issued by any of the
22 affiliates or Mr. Dondero?

23 MS. DANDENEAU: Objection to form.

24 A. Did I produce any that concerned --
25 you mean did I just -- did I give Mr. Seery

1 WATERHOUSE - 10-19-21

2 anything that -- that said I have concerns over
3 these notes?

4 Q. No. Let me try again. Maybe it was
5 my question.

6 Did you ever give Mr. Seery any
7 information concerning any of the notes that
8 were issued by any of the affiliates or
9 Mr. Dondero?

10 MS. DANDENEAU: Objection to form.

11 A. I don't recall if I did or not. I
12 don't -- I don't remember. I mean, you have my
13 emails. You may have asked. Again, I don't --
14 I don't know.

15 MR. MORRIS: Can we put up the
16 document that has been premarked as Exhibit
17 39?

18 MS. DANDENEAU: John, that is this
19 document, isn't it?

20 MR. MORRIS: Oh, yeah, it might be,
21 as a matter of fact. Let's go to Number
22 40.

23 (Exhibit 40 marked.)

24 Q. During the bankruptcy,
25 Mr. Waterhouse, did you prepare documents that

1 WATERHOUSE - 10-19-21

2 were filed with the bankruptcy court?

3 A. I didn't -- I didn't prepare them
4 personally.

5 Q. Did people prepare them under your
6 direction?

7 A. Yes. There were members of the team
8 that prepared them, and they worked in -- you
9 know, there were members of DSI that were
10 involved in the process as well.

11 Q. To the best of your knowledge, did
12 DSI rely on the employees of Highland for the
13 information that they used to prepare the
14 bankruptcy filings?

15 A. Yes. The books and records were
16 with the Highland personnel.

17 Q. Okay. And do you see on the screen
18 here, there is a document that we have marked
19 as Exhibit 40 that is -- that is titled Summary
20 of Assets and Liabilities?

21 A. Uh-huh.

22 Q. Okay. And do you recall reviewing
23 any summary of assets and liabilities before it
24 was filed with the bankruptcy court?

25 A. Yes, I recall reviewing this at a

1 WATERHOUSE - 10-19-21

2 high level.

3 Q. And did you believe that it was
4 accurate at the time it was filed?

5 A. I didn't have any other reason to
6 believe otherwise.

7 Q. Okay. Do you see that the total
8 value of all properties listed in Part 1 is
9 approximately \$410 million?

10 MS. DEITSCH-PEREZ: Objection to
11 form.

12 A. Yes, it is in 1c.

13 Q. Yes.

14 A. Yes, I see that.

15 Q. Okay. If we go to the second page,
16 now I think I may just have excerpts here, just
17 so everybody is clear, but if we scroll down to
18 the second page, you will see that there is
19 a -- a little further. There you go. You will
20 see there is a reference to Item 71, notes
21 receivable.

22 Do you see that?

23 A. I do.

24 Q. And that was a reference to the
25 notes receivable from the affiliates and

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2 Mr. Dondero, among others; is that right?

3 MS. DANDENEAU: Objection to form.

4 A. Yes. The affiliate notes and the
5 Dondero notes were in this amount, but they
6 weren't -- again, like you said, and among
7 others.

8 Q. Okay. We will look at the
9 specificity because I'm not playing gaming
10 here, but do you know if the \$150 million of
11 notes receivable was included within the
12 \$410 million of total value of the debtor's
13 assets?

14 MS. DANDENEAU: Objection to form.

15 A. I -- I -- I believe so.

16 Q. Right. And so is it fair to say
17 that as of the date this document was prepared,
18 the notes receivable were more than one-third
19 of the value of the debtor's assets?

20 MS. DEITSCH-PEREZ: Object to the
21 form.

22 MS. DANDENEAU: Object to the form.

23 A. Again, if you are just taking the
24 math, 150 divided by whatever the \$400 million
25 number is above, then yes, you get there.

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2 Q. Okay.

3 A. You know, but as of the time of this
4 filing, that is what was put in this filing,
5 right, but, you know, I mean, numbers --
6 numbers change, facts and circumstances change.

7 Q. But as the CFO of Highland, the
8 debtor in bankruptcy, did you believe that this
9 number accurately reflected the total amount
10 due under the notes receivable?

11 A. That is what we had in our books and
12 records.

13 Q. Okay. And did you believe as the
14 CFO that the books and records accurately
15 reported the then value of the debtor's assets?

16 MS. DANDENEAU: Objection to form.

17 A. We didn't -- as part of this filing,
18 there was no fair value measurement or
19 anything. These were just accounting entries
20 for the promissory notes. There is no analysis
21 for impairment or fair market value adjustments
22 or anything of that nature. This is purely
23 taking numbers and putting them in our form.

24 Q. Did you do any impairment analysis
25 at any time while you were employed by

1 WATERHOUSE - 10-19-21

2 Highland?

3 A. Yes, we did do impairment analysis
4 on -- on assets.

5 Q. Okay. Did you ever do an impairment
6 analysis on any of the promissory notes that
7 were given to Highland by any of the affiliates
8 or Mr. Dondero?

9 A. Not that I recall.

10 Q. Under what circumstances do you
11 prepare impairment analyses?

12 A. As -- as -- if you're preparing
13 financials in accordance with GAAP, generally
14 accepted accounting principles, if you're
15 preparing full GAAP financials, you should be
16 preparing -- you should be undergoing on a
17 periodic basis any fair market value
18 adjustments to assets.

19 As I was instructed at the time of
20 the petition date, we weren't producing GAAP
21 financials. So this wasn't something I was
22 worried about nor concerned about.

23 Q. Okay. Were NexPoint and HCMFA and
24 Highland's audited financial statements
25 prepared in accordance with GAAP?

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2 A. The audited financials -- yes,
3 audited financial statements are prepared in
4 accordance with GAAP.

5 Q. Do you recall whether any of
6 Highland or HCMFA or NexPoint ever made a fair
7 market value adjustment to any of the notes
8 issued by any of the affiliates or Mr. Dondero
9 to Highland?

10 A. I do not recall that happening, but
11 the -- it is because under -- under GAAP,
12 the -- the treatment of liabilities is
13 different than assets.

14 Q. Okay. So then let's just focus on
15 Highland's audited financial statements.

16 The last audited financial
17 statements were for the period ending December
18 31st, 2018; correct?

19 A. That is my understanding.

20 Q. And you had -- you had an obligation
21 to disclose anything to PricewaterhouseCoopers
22 concerning any subsequent events between the
23 end of 2018 and June 3rd, 2019; correct?

24 MS. DANDENEAU: Objection to form.

25 MS. DEITSCH-PEREZ: Form.

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2 A. Correct.

3 Q. Okay. To the best of your
4 knowledge, as Highland's CFO, did Highland ever
5 make any fair market value adjustments to any
6 of the promissory notes that were carried on
7 its balance sheet and that were issued by any
8 of the affiliates or Mr. Dondero?

9 A. I think I answered that question
10 earlier. I don't recall doing that for any of
11 the -- those -- those notes. So it would have
12 included the audit for the -- for the 2018
13 period.

14 Q. Okay.

15 MR. MORRIS: Can we go to the next
16 page.

17 Q. Do you see this is a note a list of
18 notes receivable? Do you see that?

19 A. Yes, I do.

20 Q. And do you see that this ties into
21 the page that we were just looking?

22 A. I'm sorry, can we go back to the
23 prior page? I mean, it was at 150,331,222. It
24 was on the prior page. Next page. Yes, it
25 agrees.

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2 Q. Okay. So now let's look at that
3 schedule. So this was the face amount of all
4 of the promissory notes that Highland held at
5 the time this document was filed with the
6 bankruptcy court; right?

7 A. Yes.

8 Q. There is a footnote there that says,
9 doubtful or uncollectible accounts are
10 evaluated at year-end.

11 Do you see that?

12 A. I do.

13 Q. Okay. And is it fair to say that as
14 of the year-end 2018, the year before this,
15 that to the extent any of these notes were
16 outstanding at that time, they weren't deemed
17 to be doubtful or uncollectible?

18 A. Yeah. For the 2018 audit, there
19 weren't any -- there weren't any adjustments to
20 fair value.

21 Q. Okay. And during the bankruptcy, do
22 you recall that Highland subsequently reserved
23 for the Hunter Mountain Investment Trust note?

24 A. Yes.

25 Q. Why did Highland -- were you

1 WATERHOUSE - 10-19-21

2 involved in the decision to reserve the Hunter
3 Mountain Investment Trust note?

4 A. I was not.

5 Q. Do you know why Highland decided to
6 reserve for the Hunter Mountain Investment
7 Trust note?

8 A. I don't know yet decision was made.
9 I believe it was made by someone at DSI.

10 Q. Okay. I'm just asking if you know
11 why.

12 Did you ever ask anyone why they
13 reserved for that particular note?

14 A. I don't recall.

15 Q. Do you know whether the debtor
16 reserved for any other note on this list during
17 the bankruptcy?

18 A. Again, I don't recall. I wasn't
19 part of any process of -- again, like any fair
20 value adjustments or anything to that degree.
21 Like I said, a lot of that was done by DSI and
22 it was kind of out of our court.

23 Q. Okay. Do you know if any note
24 receivable on this list was ever deemed by the
25 debtor to be doubtful or uncollectible?

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2 A. I don't -- I don't have a
3 recollection of every filing, so I don't know.

4 Q. Did you ever have a discussion with
5 anybody at any time about whether any of the
6 notes receivable on this list should be deemed
7 to be doubtful or uncollectible?

8 A. No. As I previously stated, we were
9 told we didn't have to keep GAAP financials.
10 We weren't having -- you know, there is no
11 underlying audits being performed, so I mean,
12 it wasn't something I worried about.

13 MR. MORRIS: I move to strike.

14 Q. Did you ever have a conversation
15 with anybody about any of the notes receivable
16 and whether they should be deemed to be
17 doubtful or uncollectible? Did you have the
18 conversation, yes or no?

19 MS. DANDENEAU: Objection to form.

20 A. I don't recall.

21 Q. Do you recall ever telling anybody
22 that you believed any of the notes receivable
23 on this list should be doubtful -- should be
24 deemed to be doubtful or uncollectible?

25 MS. DANDENEAU: Objection to form.

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2 A. I don't recall. I mean, it may have
3 happened, you know, again, when we initially
4 getting DSI up to speed and going through
5 financials, it may have happened, but I don't
6 recall specifically.

7 Q. While you were the CFO of Highland
8 during the time that the company was in
9 bankruptcy, did you have any reason to believe
10 that any of the notes receivable on this list
11 other than Hunter Mountain Investment Trust
12 should have been characterized as doubtful or
13 uncollectible?

14 MS. DANDENEAU: Objection to form.

15 MS. DEITSCH-PEREZ: Form.

16 A. I didn't know. I didn't form an
17 opinion. Bankruptcy was new to me. It still
18 is new to me, even after going through this.
19 So I really didn't know what to expect nor
20 really -- you know, I didn't know.

21 MR. MORRIS: I move to strike.

22 Q. During the period of Highland's
23 bankruptcy when you were serving as CFO, did
24 you have any reason to believe any of the notes
25 on this list were doubtful or uncollectible?

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2 MS. DEITSCH-PEREZ: This is like the
3 fifth time you've asked it. Object to the
4 form.

5 MR. MORRIS: I'm moving to strike,
6 if you haven't noticed, because he's not
7 answering the question.

8 MS. DEITSCH-PEREZ: He was answering
9 the question, you just didn't like it, like
10 the answer.

11 MR. MORRIS: Good Lord.

12 Q. Go ahead, Mr. Waterhouse.

13 A. Again, I don't -- we brought up a
14 myriad of issues at the start of the bankruptcy
15 case. I don't recall if this was one of them,
16 but, again, there are a lot of things we
17 couldn't change. Even, you know, I was told
18 status quo, blah, blah, blah, right, there is a
19 stay, you can't -- you know, I don't recall
20 specifically, but that doesn't mean it didn't
21 happen.

22 MR. MORRIS: I move to strike.

23 Q. During the time that Highland was in
24 bankruptcy and you served as CFO, did you have
25 any reason to believe that any of the notes

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2 receivable on this list were doubtful or
3 uncollectible?

4 MS. DEITSCH-PEREZ: Object to the
5 form.

6 A. Potentially.

7 Q. Did you ever tell anybody that?

8 A. As I just stated like five times,
9 yes, we -- at the beginning after filing and we
10 were getting DSI and others up to speed, you
11 know, we had a myriad of discussions of a lot
12 of things and this was likely one of them. I
13 don't -- but I don't recall specifically we
14 talked --

15 Q. I don't want to know -- I don't want
16 to know what was --

17 MS. DEITSCH-PEREZ: Wait, wait.

18 Excuse me. Mr. Morris, you did not let him
19 finish his answer.

20 A. I spoke -- we had -- we were
21 bringing Fred Karesa and Brad Sharp (phonetic)
22 up to speed on all of these items, contracts,
23 and investments and going through -- we had
24 hours and hours and hours of discussion. And
25 then not only do I have to repeat this not

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2 once, twice, three, four times with -- you
3 know, I mean, we -- I don't -- I don't remember
4 the sum culmination of all these discussions.
5 They all kind of blend together.

6 MR. MORRIS: Okay. I move to strike
7 and I will try one more time.

8 Q. Did you ever tell anybody at DSI
9 that you believed any of the notes receivable
10 on this list were doubtful or uncollectible?

11 MS. DANDENEAU: Object to form.

12 A. Potentially.

13 Q. Potentially you told them or
14 potentially they were doubtful or
15 uncollectible?

16 A. Potentially I told them that we
17 needed to look at the value of these -- of
18 these assets.

19 Q. Okay. Did you -- okay. It is
20 potential that you told them and it is
21 potentially that you didn't; right?

22 MS. DANDENEAU: Objection to form.

23 A. I've gone through that. I don't
24 recall specifically.

25 Q. So you should just -- I don't want

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2 to tell what you to do. Do you have --

3 MS. DANDENEAU: Good.

4 Q. Other than -- other than telling
5 them that they should look at the values, do
6 you have any recollection whatsoever of ever
7 having told anybody at DSI that any of the
8 notes receivable on this page were doubtful or
9 uncollectible?

10 MS. DEITSCH-PEREZ: Object to the
11 form.

12 MS. DANDENEAU: Objection.

13 A. I recall having general discussions
14 about everything on our balance sheet which
15 would have included these -- these notes
16 receivable.

17 Q. Okay.

18 A. I don't recall specifically where
19 those discussions delved into.

20 Q. Do you recall any discussion at all
21 on the topic of whether any of these notes on
22 this list were doubtful or uncollectible?

23 MR. AIGEN: Mr. Morris, how on earth
24 is that question different from the
25 question that you just asked for the last

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2 five times? I mean, really I thought you
3 were -- (overspeak.)

4 MR. MORRIS: Because he never
5 answered it.

6 MS. DEITSCH-PEREZ: Are you
7 listening to him?

8 MR. MORRIS: You know --

9 MS. DEITSCH-PEREZ: He basically
10 said that he had a conversation with DSI
11 that went over all of this stuff and that
12 conversation could have included the notes
13 but he doesn't recall specifically.

14 What more do you want him -- to ask
15 of him?

16 MR. MORRIS: I want him -- I would
17 love him to say -- I would like him to
18 testify to the truth, and that is he has no
19 recollection.

20 MS. DEITSCH-PEREZ: Well, the truth
21 as you would like to see it, but -- but he
22 is testifying truthfully. And I -- and, by
23 the way, I move to strike that comment --

24 MR. MORRIS: Okay.

25 MS. DEITSCH-PEREZ: -- because it

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2 suggests that he has not testified
3 truthfully.

4 MR. MORRIS: I will ask my question
5 again. And if at any time you want to
6 direct him not to answer, that is your
7 prerogative.

8 Q. Mr. Waterhouse, do you have any
9 recollection at all of ever telling anybody
10 from DSI that any of these notes were doubtful
11 or uncollectible?

12 MS. DANDENEAU: Object to form.

13 A. I don't remember specifically.

14 Q. Do you remember generally that
15 specific topic?

16 A. We generally talked about assets,
17 values. If -- we had discussions of that and
18 collectability in nature. I mean, of Highland,
19 the funds, the CLOs, the entire complex. We
20 had discussions like that, which is, you know,
21 as you look at a billion dollar consolidated
22 balance sheet.

23 So I generally remember -- this is
24 billions of dollars, including these assets --
25 having discussions of this -- of this type.

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2 Q. Do you believe that an affiliate
3 loan on this list was doubtful or
4 uncollectible? Would you have told that to
5 DSI?

6 MS. DANDENEAU: Objection to form.

7 MS. DEITSCH-PEREZ: Object to form.

8 A. If we had, like -- again, if we --
9 if -- if we weren't preparing financial
10 statements in accordance with GAAP, and -- you
11 know, if DSI at that point -- they were --
12 again, I was new to bankruptcy.

13 The CRO is -- we are delegating
14 everything to the CRO. All the decisionmaking.
15 Remember -- remember when you and I went into
16 Delaware Court and we were saying DSI basically
17 does everything, remember this, Mr. Morris?

18 You were my counsel at the time, and
19 basically we're running everything through DSI.
20 That was what this was like in the early part.

21 Everything was communicated through
22 DSI. So DSI says this. DSI says that. That
23 is what we're doing, and we're pointing out
24 things to them.

25 Now, they decide what direction this

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2 goes.

3 Q. Did you point out that any of
4 these --

5 A. I don't recall specifically.

6 Q. Okay. At any time that you served
7 as Highland's CFO, did you ever point out to
8 DSI that any of these loans were doubtful or
9 uncollectible?

10 MS. DEITSCH-PEREZ: Object to the
11 form.

12 MS. DANDENEAU: Objection.

13 A. If you're asking me if I had a
14 conversation with DSI, if any of these loans
15 were doubtful or uncollectible, I don't recall
16 specifically.

17 Q. Do you recall that the debtor filed
18 on the docket monthly operating reports?

19 A. Yes.

20 Q. You prepared those personally,
21 didn't you?

22 MS. DEITSCH-PEREZ: Objection to
23 form.

24 A. I didn't personally prepare them,
25 the team did with DSI.

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2 Q. But you signed them; correct?

3 A. My signature is on the MORs.

4 Q. And you signed them as the preparer
5 of the document; correct?

6 A. Yes, I did this pursuant to DSI's
7 instructions.

8 Q. Okay. You wouldn't have signed the
9 document if you didn't believe it to be
10 accurate; correct?

11 A. If I had reason to believe it
12 wasn't, presumably I wouldn't have signed it.

13 Q. Okay. And do you have any reason to
14 believe right now that any monthly operating
15 report that has your signature on it was
16 inaccurate in any way?

17 MS. DEITSCH-PEREZ: Object to the
18 form.

19 A. My understanding of the monthly
20 operating reports is we were filing them in
21 accordance with the standards set by the Court.
22 It wasn't -- you know, again, I don't -- you
23 know, it wasn't GAAP. It wasn't these other
24 standards, so I testified I didn't have
25 experience in this. The CRO was running the

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2 show. I followed their advice.

3 Q. But you assured yourself that
4 everything in the report was accurate before
5 you signed them; correct?

6 MS. DANDENEAU: Objection to form.

7 A. I trusted the guidance from the CRO
8 and their team and their experience and their
9 guidance for doing this for many, many, many
10 years to -- to -- to categorize and put things
11 in ways on the form.

12 You know, my team had -- had not
13 filled out these forms before and needed all of
14 this guidance. I'm not an expert in this. I
15 have oversight of it. I signed the form. DSI
16 told me to.

17 Q. And you and your team are the source
18 of the information that DSI used to create the
19 reports; correct?

20 MS. DANDENEAU: Objection to form.

21 A. The books and records reside with
22 the -- with -- with the corporate accounting
23 team.

24 Q. Okay. And the corporate accounting
25 team was the corporate accounting team that was

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2 under your direction; correct?

3 A. Yes.

4 Q. So -- so your team was responsible
5 for maintaining Highland's books and records;
6 correct?

7 A. I'm sorry, my team was responsible?

8 Q. Correct.

9 A. Yes. They -- they -- they were
10 the -- the -- the general ledger of Highland,
11 that responsibility was with the corporate
12 accounting team.

13 Q. The corporate accounting group
14 reported to you; correct?

15 A. Yes.

16 MR. MORRIS: Can we put up 41,
17 please.

18 (Exhibit 41 marked.)

19 Q. All right. You will see that this
20 is a report that is dated January 31st, 2020,
21 but it is for the month ending December 2019.

22 Do you see that?

23 A. I do.

24 Q. And you signed this report in your
25 capacity as the chief financial officer of

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2 Highland; correct?

3 A. Yes.

4 Q. And you're the preparer -- you're
5 identified as the preparer of the report;
6 correct?

7 A. That is correct.

8 Q. Do you recall participating in the
9 preparation of monthly operating reports?

10 A. As I testified earlier, it was put
11 together, you know, with the team. The team
12 worked with DSI to put these monthly operating
13 reports together. We had no experience at this
14 time of the monthly operating reports or things
15 of this nature.

16 MR. MORRIS: Can you turn to the
17 next page, please.

18 Q. Do you see a line item under assets
19 due from affiliates?

20 A. Yes, I do.

21 Q. Okay. And to the best of your
22 knowledge and understanding, as the person who
23 is identified as the preparer of this report,
24 does that line item include the affiliate loans
25 that we've been talking about?

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2 A. Again, I would have to see, just
3 like we did with the financial statements of
4 Highland and NexPoint, I would have to see a
5 detailed build, but, you know, if you look at
6 the other line items, you know, the only other
7 place it could be would be in -- in other
8 assets.

9 Q. Okay. And as a matter of
10 arithmetic, is it fair to say that is the value
11 of the assets due from affiliates was more than
12 25 percent of the value of Highland's total
13 assets as of 12/31/2019?

14 MS. DANDENEAU: Objection to form.

15 A. I'm really not doing the mental math
16 right now, so I've been going at this depo for
17 hours, so I'm really not -- you know --

18 Q. All right. No problem.

19 A. -- these are millions of dollars.

20 Q. Let's look at the Footnote 1,
21 please. Do you see there is a reference to the
22 Hunter Mountain note?

23 A. Yes, I see that in Footnote 1.

24 Q. Okay. And that's the reserve that
25 was taken against that note?

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2 A. Yes, that is what this indicates.

3 Q. Okay. And were you aware that the
4 reserve was being taken on that it was?

5 A. I was -- I was aware, yeah, at some
6 point, yes.

7 Q. Okay. And are you aware of any
8 reserve being taken with respect to any other
9 note that was issued in favor of Highland?

10 A. Again, as I testified, we didn't go
11 through an analysis on -- on -- on the other
12 notes.

13 Q. Can we turn --

14 A. I believe -- I believe it says that
15 in Footnote 1, fair value has not been
16 determined with respect to any of the notes.

17 So this footnote -- footnotes, look,
18 there has been no determination.

19 Q. Okay. The determination was made in
20 the audited financial statements just six
21 months earlier; right? We saw that earlier?

22 A. That was as of 12/31/18. I mean,
23 things -- circumstances -- there's a bank --
24 circumstances change, things change -- things
25 change over time, you know, facts and

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2 circumstances change. Again, you have to do an
3 analysis.

4 Q. Okay. And you do recall that in
5 Highland's 2018 financial statement, all of the
6 notes issued by affiliates and Mr. Dondero that
7 were due at year-end had a fair value equal to
8 the carrying value; correct? We looked at
9 that?

10 A. Yes. That was in the -- in the
11 disclosure for the -- for the affiliate notes,
12 yes.

13 Q. And -- and you were obligated to
14 share with PwC any subsequent events between
15 the end of 2018 and the date that you signed
16 your management representation letter on June
17 3rd, 2019; correct?

18 MS. DEITSCH-PEREZ: Object to the
19 form.

20 A. Yes. I -- I -- I signed the
21 management, you know, my signature is in the
22 management representation letter -- I hope I'm
23 answering your question -- that is dated in
24 June with the representations made in that
25 management representation letter.

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2 Q. Okay. And there was nothing that
3 caused PricewaterhouseCoopers to include in
4 subsequent events any adjustment to the
5 conclusion that the fair value of the affiliate
6 notes and the notes issued by Mr. Dondero
7 equaled the carrying value; correct?

8 MS. DANDENEAU: Objection to the
9 form.

10 A. That is correct. That is what was
11 in the -- in the -- in the footnotes.

12 Q. Okay. So are you aware of anything
13 that occurred between June 3rd, 2019 and
14 December 31st, 2019 that would have caused the
15 fair value of the notes to differ from the
16 carrying value?

17 A. Yeah. Highland filed for
18 bankruptcy, things changed -- I mean, there was
19 a bankruptcy filed in October of -- of -- of
20 2019, right, the petition date that we've
21 described earlier.

22 I mean, I had a -- I guess looking
23 back naively, I thought we were going to get an
24 audit from PwC for year-ended 2019, and when we
25 had discussions with PwC, they were like, are

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2 you crazy, we're not auditing this. Values
3 change, all these things change, bankruptcy
4 changes the entire scenario. I mean -- and
5 they're like, we're not -- we're not touching
6 this.

7 And so, you know, I was like, okay,
8 sorry, I get it, okay, no an audit.

9 I mean, it is -- you know, and --
10 you know, and we weren't preparing GAAP
11 financial statements.

12 Again, I didn't know what we were
13 doing in relation to our financial statements,
14 but these were the discussions I was having at
15 the time. And yeah, I mean, filing bankruptcy
16 from what I got from outside auditors and
17 others involved changed things dramatically.

18 Q. Okay. Highland wasn't the obligor
19 under any of the notes that we're talking
20 about; correct?

21 A. No.

22 Q. So --

23 A. That's right.

24 Q. So can you identify any fact that
25 would cause the fair value to deviate from the

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2 carrying value during the seven-month period
3 between June 3rd and the end of the year, 2019?

4 MS. DANDENEAU: Objection to form.

5 A. No. I mean, I'm putting myself back
6 at that time, right. Hindsight is 2020, but we
7 didn't do an analysis, but we would have done a
8 fulsome analysis and looked at all of the facts
9 and circumstances at the time, but asset values
10 change. You know, there could have been a
11 market crash in hindsight in 2020, which --
12 which affected entities' abilities.

13 There could have been all of these
14 things, right, that -- that happen. It is --
15 it is easy to look back in hindsight, but when
16 you are looking at this in -- in realtime, the
17 analysis is different, and again, we didn't do
18 an analysis.

19 Q. Okay. You didn't do an analysis.

20 Do I have that right?

21 A. I don't -- I don't recall doing one
22 or maybe -- you know, I don't recall doing one.

23 MR. MORRIS: Okay. I'm going to
24 take a break. I may be done, so the time
25 now is -- is 4:30 your time. Let's just

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2 take a short break until 4:40 your time.

3 MS. DANDENEAU: Okay.

4 VIDEOGRAPHER: We're going off the
5 record, 4:31 p.m.

6 (Recess taken 4:31 p.m. to 4:43 p.m.)

7 VIDEOGRAPHER: We are back on the
8 record at 4:43 p.m.

9 MR. MORRIS: I have no further
10 questions.

11 MR. RUKAVINA: Okay.

12 Mr. Waterhouse, I will go next.

13 EXAMINATION

14 BY MR. RUKAVINA:

15 Q. Sir, my name is Davor Rukavina. I'm
16 the lawyer for --

17 MR. MORRIS: Hey, Davor, just before
18 you begin, I just want to put on the record
19 Highland's objection to documents that were
20 produced to me 10 minutes before the
21 deposition began.

22 MR. RUKAVINA: What the basis of
23 your objection?

24 MR. MORRIS: That they were due
25 quite some time ago, and the fact that you

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2 had -- I just think it's appropriate to --
3 to dump documents on somebody 10 minutes
4 before the deposition. I just think
5 that's --

6 MR. RUKAVINA: Well, these are
7 documents Highland produced. I'm not aware
8 of any rule I have to give you advance
9 documents when I know for the record that
10 other than the exhibits that you sent to us
11 last week, most of the exhibits you used
12 today you did not provide to me prior to
13 this deposition.

14 MR. MORRIS: No, but the documents
15 were produced by me in -- in litigation,
16 right?

17 MR. RUKAVINA: I'm going to use
18 primarily, John, the documents that you
19 produced to me today, but you may.

20 MR. MORRIS: Primarily. I've got --
21 I've got my objection. You have got your
22 response. Proceed.

23 Q. Mr. Waterhouse, again, I represent
24 the advisors, HCMFA and NexPoint Advisors.

25 Do you understand that?

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2 A. Yes.

3 Q. You and I have never met or talked
4 before today, have we?

5 A. No, I have -- I have heard your
6 voice on calls before.

7 Q. Okay.

8 MR. RUKAVINA: Madam Court Reporter,
9 I will use a few exhibits today. My
10 associate, Mr. Nguyen, will find some way
11 to get them to you. I don't know how to do
12 that, but it looks like you guys do.

13 I am going to use numbers as well.
14 But to differentiate them from Mr. Morris
15 we're going to mark mine with the prefix A
16 for advisors.

17 Do you understand?

18 COURT REPORTER: Yes.

19 MR. RUKAVINA: Okay. Perfect.

20 Q. Okay. So, Mr. Waterhouse, let's
21 start with those two HCMFA notes that you were
22 asked about, one for 5 million and one for
23 2.4 million.

24 Do you recall those notes?

25 A. Yes.

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2 Q. Were you ever the CFO of HCMFA?

3 A. I don't recall.

4 Q. So to the best of your recollection,
5 you were still an officer of HCMFA in 2019,
6 just that your title was treasurer?

7 MR. MORRIS: Object to the form of
8 the question. There is no leading here.
9 He works for your client.

10 MS. DANDENEAU: That is not -- that
11 is not true.

12 MR. MORRIS: He's the treasurer --
13 he is the treasurer of your client. I
14 don't -- I'm going to object every time you
15 try to lead, so...

16 MR. RUKAVINA: Totally fine to
17 object.

18 MR. MORRIS: Okay.

19 Q. Please answer my question,

20 Mr. Waterhouse.

21 A. I'm sorry, could you repeat? There
22 was...

23 Q. Yes. You were -- you testified
24 earlier that in 2019 you were an officer of
25 HCMFA; correct?

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2 A. Yes, I testified that I was the
3 treasurer and I didn't know if that incumbency
4 certificate, you know, was one that appointed
5 me as a treasurer, but yes.

6 Q. I'm just trying to confirm that
7 sitting here today, to the best of your
8 recollection, at that time you were -- your
9 title was treasurer. It was not chief
10 financial officer.

11 A. I don't recall that being my title.

12 Q. Okay. And in May of 2019, however,
13 I think you testified you were the chief
14 financial officer of the debtor; correct?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. Yes, I was -- yes.

18 Q. Okay. As such, in May of 2019, did
19 you have the authority, to your understanding,
20 to unilaterally loan \$5 million or \$2.4 million
21 to anyone on behalf of the debtor?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Sorry, can you repeat that?

25 Q. Yes. So in your capacity as the

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2 chief financial officer of the debtor, Highland
3 Capital Management, L.P., in May of 2019, did
4 you believe that you unilaterally, just Frank
5 Waterhouse, had the authority to loan on behalf
6 of the debtor to anyone \$5 million and
7 \$2.4 million?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. No.

11 Q. Is it because loans of that amount
12 would have had to be approved by someone else?

13 A. Yes.

14 Q. Who in '20 -- in May of 2019, if
15 Highland wanted to loan 5 million or
16 \$2.4 million to someone, what would have been
17 the internal approval procedure?

18 MR. MORRIS: Objection to the form
19 of the question.

20 A. If -- if we had loans of that nature
21 that needed to be made due to their size, we
22 would have gotten approval from the -- the
23 president of Highland.

24 Q. And who that was individual?

25 A. It was James Dondero.

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2 Q. Okay. Now, I'm going to ask you a
3 similar question but for a different entity.

4 In May of 2019, as the treasurer of
5 HCMFA, did you believe that you unilaterally
6 had the ability to cause HCMFA to become the
7 borrower of a \$5 million loan and a
8 \$2.4 million loan?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. No.

12 Q. What would -- what would the
13 approval have taken place -- strike that.

14 What would the approval process have
15 been like in May of 2019 at HCMFA for HCMFA to
16 take out a \$7.4 million loan?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. The process would have been similar
20 to what we just discussed on -- for Highland to
21 make a loan to others. So, again, you know,
22 we -- we would have -- either myself or someone
23 on the team would have discussed this with
24 the -- the president and owner of -- of HCMFA.

25 Q. And who was that individual?

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2 A. That was James -- Jim Dondero.

3 Q. So do I understand that in May of
4 2019, on behalf of both the lender, Highland,
5 and the borrower, HCMFA, Mr. Dondero would have
6 had to approve \$7.4 million in loans?

7 MR. MORRIS: Objection to the form
8 of the question.

9 A. Yes.

10 Q. You mentioned when Mr. Morris was
11 asking you the NAV error, N-A-V error, with
12 respect to TerreStar, without writing us a
13 novel, unless you feel like you have to, can
14 you summarize what that NAV error was? What
15 happened?

16 A. There was a -- in the Highland
17 Global Allocation Fund, it owned at the time an
18 equity interest in a company called TerreStar.
19 And TerreStar is -- at the time was a private
20 company, and it may still be today. Again, I'm
21 putting myself back then as a private company.

22 We had -- sorry, I don't mean we --
23 the fund and the advisor used Houlihan Lokey
24 to -- to value that investment. And during
25 that time there was some trades that were

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2 executed at market levels that were much lower
3 than the Houlihan Lokey model.

4 And based on information and
5 discussions with the portfolio managers and,
6 you know, principals that were very familiar
7 with TerreStar, it was determined that those
8 trades were non-orderly and they were not
9 considered in the valuation as consulted with
10 Houlihan Lokey and PricewaterhouseCoopers at
11 the time.

12 Subsequent to a -- I can't remember
13 the exact circumstances of why the SEC got
14 involved. I think it was due to this -- this
15 investment became a material position in the
16 fund. It triggered an SEC, kind of, inquiry.
17 And as part of that inquiry, they questioned
18 the valuation methodology. "They" meaning the
19 SEC.

20 And at the culmination of that
21 process -- this is all summarized -- the value
22 that was -- that ultimately had to be used in
23 the fund's NAV was different than -- materially
24 different than what the original valuation at
25 Houlihan Lokey provided.

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2 And given that there was this fund
3 was, as we discussed -- I don't know if we
4 discussed it, but it was an open-ended fund
5 that was going -- that was converting to a
6 close-end fund.

7 Due to the fact that it was an
8 open-ended fund, you had to recalculate NAV and
9 see what the impact was on people -- on
10 investors coming in and out of the fund and if
11 there is a detrimental impact and to calculate
12 what that -- what that impact was and if there
13 was any amounts owed to the fund pursuant to
14 the error.

15 Q. Were you personally involved
16 internally at either Highland or HCMFA with
17 these investigations and discussions with the
18 SEC?

19 A. I was.

20 Q. Which other key people or senior
21 people at Highland were involved, to your
22 recollection?

23 A. Myself, Thomas Surgent, David Klos,
24 Lauren Thedford, Jason Post.

25 Q. Mr. Dondero, was he --

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2 A. I believe Cliff Stoops. I'm trying
3 to think. And maybe that is -- that is -- that
4 is -- that is all kind I can recall at the
5 moment.

6 Q. Do you recall whether it was
7 determined that the fund suffered losses as a
8 result of this error?

9 A. The -- the fund -- the -- the --
10 because the open-ended nature of the fund,
11 there were losses that were attributable to
12 investors. Meaning they -- they would have
13 redeemed and got a less money or -- or they
14 subscribed in and maybe because they didn't get
15 enough shares and then they later sold and then
16 they were harmed in that fashion.

17 And there is -- there is -- there
18 were very -- there were very detailed
19 calculations and, you know, all these different
20 scenarios that we had to -- I'm sorry, I keep
21 saying "we" -- that the individuals involved
22 had to calculate and quantify.

23 Q. Well, do you recall whether HCMFA
24 admitted certain fault and liability for this
25 error?

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2 A. I don't recall specifically.

3 Q. Do you recall whether HCMFA caused
4 any funds to be paid to the investors and the
5 fund the subject of the NAV error?

6 A. Yes.

7 Q. Do you recall the approximate amount
8 of funds, moneys paid to the investors and the
9 fund?

10 A. It was -- it was approximately
11 \$7 million.

12 Q. If I was to suggest 7.8 million,
13 would that ring more true or are you sticking
14 with your original answer?

15 A. It was -- it was approximately 7 --
16 7 to \$8 million. Again, I don't remember the
17 exact number, but it was in that ballpark.

18 Q. So regardless of whether HCMFA
19 accepted fault or liability, it caused some
20 \$7 million or more to be paid out to affected
21 investors in the fund?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. And I want to make sure I'm
25 understanding your question because there is a

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2 lot of different entities that are going on to
3 my head.

4 I think what you are saying is based
5 on this error, shareholders were harmed by this
6 approximately \$7.8 million -- by approximately
7 \$7.8 million. Is that what you are asking?

8 Q. Yes, sir.

9 A. Yes, that was -- again, I don't have
10 the exact numbers. If I take -- it was -- it
11 was in that ballpark, and there is a detail
12 calculation and write-up that could, that --
13 that exists someplace.

14 Q. Now, at that time, at the time that
15 the NAV error occurred, was there a contract in
16 place between HCMFA and the debtor pursuant to
17 which the debtor was providing services to
18 HCMFA?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. Yes.

22 Q. Was that contract generally called a
23 shared services agreement?

24 A. It was generally called that, but
25 there were -- there were -- I mean, it -- it --

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2 it depends on who you talk to, but yes,
3 generally, there were -- there are multiple
4 agreements.

5 Q. Pursuant to one or more of those
6 agreements, was the debtor providing certain
7 services to HCMFA?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. Yes.

11 Q. And can you at a very high level
12 summarize in 2018 and 2019 what those services
13 were?

14 A. Yes, there was a -- yes.

15 Q. Okay. Please -- please go -- go
16 through a short summary.

17 A. There was a -- a cost reimbursement
18 agreement between Highland Capital Management
19 Fund Advisors and Highland Capital Management,
20 L.P. That agreement was for what we referred
21 to as front office services, so investment
22 management, things of that nature.

23 There was I think what most people
24 refer to as the shared services agreement that
25 was -- that agreement was between Highland

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2 Capital Management Fund Advisors and Highland
3 Capital Management for back office services.

4 Q. And can you summarize what you mean
5 by back office services?

6 A. Those services were for accounting,
7 finance, tax, valuation, HR, IT, you know,
8 legal compliance, things of -- things of those
9 nature -- or things of that nature, excuse me.

10 Q. So in the spring of 2019, do you
11 recall whether HCMFA took the position that it
12 was actually Highland that caused the NAV error
13 to occur pursuant to the valuation services
14 that Highland was providing?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I do not recall.

18 Q. Did you ever have any discussions
19 with anyone, Jim Dondero or anyone in the first
20 half of 2019 as to whether Highland, the
21 debtor, that is, had any liability to HCMFA
22 related to the NAV error?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I do not recall.

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2 Q. And then you mentioned that the fund
3 was being closed and some compensation related
4 to that. Can you -- can you elaborate? What
5 were you referring to?

6 A. Right. So the advisor, pursuant to
7 board approval, put a proposal in front of the
8 shareholders of the Highland Global Allocation
9 Fund to convert it from an open-ended fund to a
10 closed-end fund.

11 So an open-ended fund, when
12 shareholders subscribe to the fund or redeem
13 into the fund, they do it at NAV.

14 When it is -- when you have a
15 closed-end fund, closed-end funds are -- are
16 publicly-traded, like on the New York Stock
17 Exchange, exchanges like that, and -- and
18 shareholders or investors, they're not --
19 they're -- they're not subscribing and
20 redeeming with the fund. They are like shares
21 of Apple.

22 Those shares of the Highland Global
23 Allocation Fund trade on an exchange, and that
24 is how you, you know, that is how, you know,
25 you become an equity owner in the fund or you

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2 sell your shares and you are no longer an
3 equity owner.

4 As part of that proposal, the
5 advisor told shareholders if you -- if you vote
6 for this proposal to -- to convert it from an
7 open-ended fund to a closed-end fund, we will
8 pay you some amounts of money. I forgot -- a
9 certain number of points. I think it was
10 like -- it was like two to three points or
11 something -- something like that.

12 Q. Okay. You mentioned when Mr. Morris
13 was asking you, going back to those two
14 promissory notes, you will recall the 5 million
15 and 2.4 million, you mentioned something to the
16 effect that Mr. Dondero told -- told you to pay
17 some moneys out of Highland. Do you remember
18 that discussion with Mr. Morris?

19 A. I do.

20 Q. So, to the best of your
21 recollection, did you have a discussion with
22 Mr. Dondero about making some payments in May
23 of 2019 out of Highland?

24 A. I recall, as I testified earlier,
25 that I had a conversation with Mr. Dondero

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2 for -- for these amounts attributable to -- it
3 was either the error -- you know, the error,
4 and in that conversation he said, go get the
5 money from Highland. I believe that is what I
6 testified earlier, and that -- that is my
7 recollection.

8 Q. Do you recall if that was an
9 in-person meeting or some other mode for the
10 meeting?

11 A. I -- I -- I recall that being
12 in-person.

13 Q. Do you recall if anyone else was
14 present, or was it just you and Mr. Dondero?

15 A. I recall just he and I.

16 Q. And the moneys that he told you to
17 find from -- or get from Highland, was that in
18 the amount of \$5 million and \$2.4 million?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. I believe so, but I would have to go
22 back and look and see when those moneys were
23 actually paid into the -- into the fund and,
24 you know, when those transfers were done. If
25 they were all done around that same time, then

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2 yes, I would say it was -- it was all related
3 to that.

4 Q. Did Mr. Dondero tell you that those
5 funds would be a loan from Highland to HCMFA?

6 A. I don't recall.

7 MR. MORRIS: Objection to the form
8 of the question.

9 Q. Now, and forgive me, I'm probably
10 the only non-American born here, but I speak
11 reasonably well in English. I don't recall,
12 does that mean you don't remember or does that
13 mean it didn't happen?

14 MR. MORRIS: Objection to the form
15 of the question.

16 A. It -- it means I don't -- I don't
17 remember.

18 Q. Did Mr. Dondero tell you to have
19 those two promissory notes prepared?

20 A. I don't recall.

21 Q. When you -- again, when you say, I
22 don't recall today, that means that sitting
23 here today, you just don't remember one way or
24 the other. Is that accurate?

25 A. Yes.

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2 Q. Is it possible that you, having
3 heard what Mr. Dondero said and seeing funds
4 being transferred, assumed that that would be a
5 loan without him actually telling you that
6 would be a loan?

7 MR. MORRIS: Objection to the form
8 of the question.

9 A. Sorry, I want to make sure -- did I
10 ask the amounts that were transferred that I --
11 that -- that I assumed that that was a loan?

12 Q. Well, let me -- let me take -- let
13 me try again.

14 So you have established already that
15 there were quite a number of promissory notes
16 back and forth -- I'm sorry, quite a number of
17 promissory notes with affiliated companies and
18 individuals owing Highland money; right?

19 A. Yes.

20 Q. And you have established that there
21 were many transactions and transfers going back
22 and forth over the years; right?

23 MS. DANDENEAU: Objection to form.

24 A. In -- yes, in my capacity as CFO and
25 my employment, yes, that is -- yes.

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2 Q. And that's part of the reason why
3 you just can't remember some of the details
4 today because this -- this happened years ago,
5 and there were a number of transactions. Is
6 that accurate?

7 MS. DANDENEAU: Objection to the
8 form.

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. I mean, I deal with thousands of --
12 of -- of -- of transactions, you know, whether
13 it has -- the processing of transactions, you
14 know, if it has got, you know, more -- more
15 zeros, you know, behind it than others.

16 When you look at thousands of
17 transactions over the years for funds and
18 advisors and -- and, you know, financial
19 statements, I mean, it is -- it is very hard
20 going back in -- in -- in my -- you know,
21 14-ish year career at -- at Highland to
22 remember a lot of those details, especially
23 when I don't have any records or books or
24 anything like that, and -- and going back many
25 years.

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2 Q. And that is fine. That -- that --
3 that is why I asked the question.

4 Is it possible in May of 2019 when
5 Mr. Dondero told you to transfer the funds from
6 Highland, you just assumed on your own that
7 those would be loans without him actually
8 telling you that those would be loans?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. I don't know.

12 Q. I'm sorry, you --

13 A. I said I don't know.

14 Q. Okay. Well, as the -- as the CFO
15 for Highland, if you saw \$7.4 million going
16 out, you would feel some responsibility to
17 account for that, wouldn't you?

18 MR. MORRIS: Objection to the form
19 of the question.

20 A. Yes.

21 Q. Is it fair to say that those would
22 be in the range large enough to rise up to your
23 level?

24 MR. MORRIS: Objection to the form
25 of the question.

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2 A. If -- I don't know if I understand
3 your question. Those amounts would arise to my
4 level where I would be involved or...

5 Q. You would want to know what a
6 transfer for that amount, \$7.4 million, was all
7 about, as the CFO of Highland, wouldn't you?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. Yes, I make it -- I mean, I -- I
11 review all sorts of payments, I mean, even
12 smaller dollar payments on a periodic basis,
13 you know, to -- to -- to understand and to make
14 sure that we are paying things in a -- you
15 know, in -- in -- in an informed way. And, you
16 know -- and we're -- and we're paying things
17 pursuant to vendor contracts and things like
18 that.

19 Q. So as part of that, is it possible
20 that seeing \$7.4 million go out you would have
21 promissory notes made in order to keep a paper
22 trail, assuming that those were loans, when
23 perhaps they were never intended to be loans by
24 Mr. Dondero?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. I don't know. As I testified
4 earlier, I had conversations with Mr. Dondero
5 about -- about the -- the -- the moneys that
6 were needed for the NAV error. And I recall
7 him saying go get it from Highland -- or get it
8 from Highland.

9 Q. Well, why did you sign those
10 promissory notes and why didn't you have him
11 sign them?

12 MR. MORRIS: Objection to the form
13 of the question.

14 A. I don't know. I don't know.

15 Q. You mentioned earlier that you
16 typically don't sign promissory notes. Am I
17 remembering your testimony correctly?

18 I mean, promissory notes on behalf
19 of the entities. Not yourself, obviously.

20 A. Yes, that is what I said earlier.

21 Q. Do you recall any other promissory
22 notes in the million-plus range that you had
23 ever signed before on behalf of any entity?

24 A. There is -- there has been a lot of
25 transactions over the years. I don't -- I

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2 don't -- I don't recall generally. I don't --
3 I don't recall.

4 Q. So -- but to the best of your
5 recollection, it was on your initiative,
6 following your discussion with Mr. Dondero,
7 that you had someone draft those two promissory
8 notes; is that correct?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. Yes, we would have -- the team, as I
12 stated earlier, we don't draft promissory
13 notes. "The team" meaning the accounting and
14 finance team.

15 So the team would have worked with
16 the legal group at Highland to draft any notes.

17 Q. Do you believe or do you have any
18 recollection as to whether you would have done
19 that pursuant to an email or telephone call or
20 in-person meeting?

21 MR. MORRIS: Objection to the form
22 of the question.

23 A. Are you asking if I would have -- if
24 those notes would have been drafted pursuant to
25 an email or phone call?

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2 Q. Strike that.

3 Do you recall whether you sent an
4 email to anyone asking them to draft those two
5 promissory notes?

6 A. I don't recall because, again,
7 once -- I would have instructed -- likely
8 instructed the team to -- to work with the
9 legal group to draft these documents.

10 I -- I -- I -- yeah, I didn't -- I
11 mean, that is more an operational-type
12 procedure. So, you know, a manager or a
13 controller or working with legal. You know,
14 they -- they can certainly handle that task to
15 get that -- you know, to request that from
16 legal.

17 Q. And who on your team do you think
18 you would have asked to do that?

19 MR. MORRIS: Objection --

20 Q. Who would have been the logical
21 person or people, if you don't remember their
22 name today?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. It -- it -- there is only two

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2 managers of the group. That would have been
3 Dave Klos or Kristin Hendrix.

4 Dave was the -- one of his duties
5 was managing the valuation team, and so he was
6 intimately involved with this process. So, you
7 know...

8 Q. Okay.

9 A. I don't recall specifically but, I
10 mean, my general -- you know, I -- I -- I
11 likely would have talked to Dave first about it
12 versus someone like Kristin who hadn't been
13 intimately involved.

14 Q. And -- and do you have a view as to
15 whether it is most likely that you would have
16 done that by email or in-person or how would
17 you believe you would have communicated that to
18 Mr. Klos?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. I likely would have done that in
22 person. Again, if things of this nature
23 that -- again, you have to put ourselves back
24 to, we have been working on this very stressful
25 project for many, many months. And once the

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2 go-ahead was to -- you know, we see the light
3 at the end of the tunnel with wrapping this up
4 and making shareholders whole -- sorry to say
5 "we" -- you know, the -- so the folks that are
6 involved in it.

7 I like to talk to people
8 face-to-face and -- and -- and go to -- and go
9 to their desk, because that shows if I'm going
10 to their desk that -- that is something that I
11 want done, you know.

12 Q. And do you remember, Mr. Waterhouse,
13 getting those two promissory notes in paper
14 format or by email before they were executed?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I don't recall.

18 Q. For whatever was the ordinary course
19 back then in May 2019, would you expect to have
20 received them only on paper or would you have
21 expected to have received them in Word document
22 or PDF document by email?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I -- I didn't sign -- I signed very

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2 few documents via email. I can't say that it
3 never happened, but people either stopped by my
4 office and physically walked in documents for
5 signature that we discussed face-to-face.

6 Or documents were -- if -- if --
7 if -- if -- let's say I wasn't there or I
8 wasn't available, documents were dropped off.
9 I had -- I had some in- and outboxes in front
10 of my -- my office there at the Crescent.

11 Documents would be dropped off for
12 signature. There would be a cover sheet that
13 would be -- have been applied to those
14 documents detailing, you know, who dropped it
15 off, the purpose, why, what time.

16 And then, you know, as I stated, I
17 don't draft documents and I always go to the
18 legal group and the compliance group to make
19 sure that they're in the loop. And there is
20 a -- a box or section that says, Has legal
21 reviewed or approved, or something to that
22 nature.

23 Again, I don't -- I don't have
24 access to that cover sheet anymore, but it
25 was -- it was something to that effect.

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2 And my assistant, you know, if she
3 was there, she would review that -- you know,
4 whatever was being dropped off. And if that
5 has legal, you know, reviewed or -- reviewed or
6 approved it, if that wasn't -- if that stuff
7 hadn't been done, it was like she would just
8 tell them like, go -- go -- go to the legal
9 group, because --

10 Q. Let me -- let me pause --

11 MS. DANDENEAU: Let him finish.

12 MR. MORRIS: Thank you. Go ahead.

13 A. I take -- go to the legal group
14 because that -- that was my -- you know, I
15 didn't -- I didn't review anything that -- that
16 they weren't -- you know, or there wasn't some
17 representation made to me that they had
18 reviewed, approved in some capacity.

19 Again, my -- my -- my goal, as CFO,
20 is to provide transparency and make sure that
21 groups like compliance and other things -- and
22 the other group in legal are -- are in -- you
23 know, their -- they're made aware of
24 transactions of -- you know, that are crossing
25 my desk.

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2 Because I'm not in every
3 conversation. They're not in every
4 conversation -- meaning legal compliance -- and
5 I just want to make sure that -- that everyone
6 is in sync to, you know, to -- to the extent
7 possible.

8 Q. So if we summarize, you don't
9 specifically remember signing these two notes,
10 but most likely it would have been that they
11 would have presented -- been presented to you
12 physically on paper?

13 MR. MORRIS: Objection to the form
14 of the question.

15 A. They would -- they would have been
16 presented physically on paper most likely or
17 someone would have left it. But, I mean,
18 again, I don't -- I don't recall.

19 Q. I understand. Understand.

20 When you signed -- when you signed
21 documents, when you personally signed
22 documents, did you typically use a ink pen or
23 did you use a stamp?

24 A. No, I -- I -- I use a -- an -- an
25 ink pen.

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2 Q. Do you know -- was there a file at
3 Highland kept anywhere with ink-signed
4 originals of a promissory notes in general or
5 these two promissory notes specifically?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Sorry, I just want to make sure I
9 understand your question. Are you saying is
10 there a file somewhere that has ink-signed
11 originals of these two promissory notes?

12 Q. Yes.

13 A. I would -- I would assume they're
14 some place. I mean --

15 Q. Well, was there a -- was there a
16 place where Highland generally kept originals
17 of promissory notes owed to it?

18 A. I wouldn't -- no.

19 MR. RUKAVINA: Mr. Nguyen, would you
20 please pull up my A7, alpha 7.

21 Q. These are the two promissory notes,
22 Mr. Waterhouse.

23 (Exhibit A7 marked.)

24 Q. And please -- Mr. Waterhouse, please
25 command my associate to scroll down as you need

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2 to, but I want you to take a very close look at
3 your two signatures here and tell me whether
4 you believe, in fact, that you ink signed them
5 or whether you --

6 MS. DANDENEAU: Mr. Rukavina,
7 Mr. Waterhouse has the copies.

8 MR. RUKAVINA: Perfect. Then you
9 can take this down, Mr. Nguyen.

10 A. These -- these -- these signatures
11 are identical, now that I stare at them, and I
12 mean, they are so close -- I mean, they're
13 identical that, I mean, even with my chicken
14 scratch signature, I don't know if I can -- you
15 know, I do this 100 times, could I do that
16 as -- as precisely as I see between the two
17 notes.

18 Q. Well, that is why I ask.
19 Mr. Waterhouse, now that you have examined
20 them, does it seem like it is more likely that
21 you actually electronically signed these?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Is -- I don't -- I don't recall
25 specifically. As I said before, my assistant

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2 did have a -- an electronic signature, and that
3 was used from time to time. It wasn't as
4 common practice back in 2019. It definitely
5 was more common practice when we had to work
6 from home and remotely for COVID because it
7 that made it almost impossible to, right,
8 provide wet signatures since we're all working
9 from home remotely.

10 Q. Well, going just for these two
11 promissory notes, Mr. Waterhouse, in light of
12 your inability to remember any details, are you
13 sure you actually signed either or both of
14 those notes?

15 MS. DANDENEAU: Objection to form.

16 A. I don't recall specifically
17 signing -- actually physically signing these
18 notes. As I said before, I don't recall doing
19 that. This -- this looks like my signature,
20 but yet these two signatures are identical.

21 Q. So you don't recall physically
22 signing them, and I take it you don't recall
23 electronically signing them either?

24 A. I don't recall. You know, Highland
25 has all my emails. If that occurred, you know,

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2 you know, I don't have any of these records is
3 what I'm saying. I don't have any of those
4 records.

5 Q. That is why I'm asking you these
6 questions in great detail because I don't have
7 those emails. I'm trying to -- I'm hoping that
8 you will give me some names or some details so
9 I can go look for more emails, but again, you
10 don't remember any -- any individual, other
11 than Mr. Dondero that we've discussed, you
12 don't remember any individual with whom you
13 discussed these promissory notes prior to their
14 execution?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I don't recall discussing it with
18 anybody else.

19 Q. Okay.

20 A. I mean, prior --

21 Q. I understand.

22 A. You know, there was no one else --
23 there was no one else in that meeting that I
24 recall with Mr. Dondero.

25 Q. Now, when you established that by

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2 May of 2019 --

3 A. And -- and from what I recall, and
4 the reason why I was by myself is -- is, you
5 know, I don't -- I don't want to speculate, I'm
6 sorry.

7 Q. Okay. We have established that by
8 May of 2019, in your view, the liabilities of
9 HCMFA exceeded its assets; correct?

10 A. Yeah. I mean, again, I don't have
11 financial statements in front of me, but I
12 think, if I recall, we'd have to go through the
13 testimony with Mr. Morris, I believe that was
14 the case.

15 Q. In fact, you will recall that in
16 April of 2019, Mr. Dondero signed a document
17 that extended the demand feature of two prior
18 notes to May 31, 2019. Do you recall that?

19 MS. DEITSCH-PEREZ: I think you
20 might -- maybe have the court reporter read
21 that back. You might have misspoke.

22 (Record read.)

23 MR. RUKAVINA: And I did misspeak.

24 Q. I meant to say to May 31, 2021. Do
25 you recall that, sir?

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2 MR. MORRIS: Objection to the form
3 of the question.

4 A. Yes.

5 MR. RUKAVINA: And, Mr. Nguyen, just
6 so that the record is clear, will you please
7 pull up my Exhibit Alpha 10, A10.

8 (Exhibit A10 marked.)

9 Q. You don't have this one in front of
10 you, Mr. Waterhouse? This is the one that
11 Mr. Morris used earlier. Do you see that
12 document, sir?

13 A. Yes, I do.

14 Q. And this is what you were testifying
15 about before when Mr. Morris was asking you.
16 Do you remember that?

17 A. Yes.

18 Q. So here is my question for you,
19 Mr. Waterhouse: As the chief financial officer
20 of Highland, was it prudent for Highland less
21 than three weeks later to be lending
22 \$7.2 million to an insolvent entity that
23 couldn't even then pay its debts back to
24 Highland?

25 MS. DANDENEAU: Objection to form.

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2 MR. MORRIS: Objection to the form
3 of the question.

4 A. Sorry, I just want to make sure --
5 are you asking me, did you say, was it prudent
6 for Highland to loan \$7.4 million to HCMFA a
7 few weeks after this document was executed?

8 Q. Yes, and at a time when HCMFA's
9 liabilities exceeded its assets.

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. I don't -- it is odd. I don't know.

13 MR. RUKAVINA: You can take this
14 exhibit down, Mr. Nguyen.

15 Q. Do you recall asking anyone,
16 Mr. Dondero or -- or anyone outside as to
17 whether Highland ought to be lending
18 \$7.4 million to HCMF regarding HCMF's
19 creditworthiness?

20 MR. MORRIS: Objection to the form
21 of the question.

22 A. I don't recall.

23 Q. Did you receive personally any of
24 that \$7.4 million?

25 A. No.

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2 Q. Did you even --

3 MR. MORRIS: I didn't hear that
4 question, sir.

5 MR. RUKAVINA: The one that he
6 answered, John, or my new one?

7 MR. MORRIS: No, no, your question,
8 Davor.

9 MR. RUKAVINA: I had asked him
10 whether he received any of the
11 \$7.4 million. He said no.

12 MR. MORRIS: Yeah. I thought there
13 was a question after that. Maybe I was
14 mistaken. I apologize.

15 MR. RUKAVINA: I had started a new
16 question, so here, let me start the new
17 question again.

18 Q. Did you personally receive any
19 direct benefit from those two notes for
20 \$7.4 million?

21 A. No.

22 Q. Did you ever personally consider
23 yourself obligated to repay either or both of
24 those notes?

25 A. No.

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2 MR. RUKAVINA: Pull up those notes
3 again, Mr. Nguyen.

4 Q. You can have them in front of you,
5 Exhibit 7, Mr. Waterhouse, whatever is easier
6 for you. If you go to your signature page, my
7 question to you is, why did you not include
8 your title as treasurer by your name, Frank
9 Waterhouse?

10 MS. DANDENEAU: Objection to form.

11 A. I didn't -- I didn't draft this
12 document.

13 Q. So you relied on whoever drafted it
14 to draft it correctly?

15 A. Yes.

16 Q. Okay. But back then when you signed
17 this, did it ever cross your mind that you were
18 the maker on these notes?

19 A. No.

20 Q. Back then when you signed this
21 document, did it ever cross your mind that you
22 could be a co-obligor on these notes?

23 A. No. I didn't receive \$7.4 million,
24 I mean...

25 Q. But can you say that HCMFA received

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2 \$7.4 million?

3 A. I would have to go back and look and
4 check in, you know, the -- the financial
5 records and the bank statements.

6 MR. RUKAVINA: You can take this
7 exhibit down, Mr. Nguyen.

8 Q. Mr. Waterhouse, I'm not trying to be
9 a smart-ass, but if the law says that because
10 of the way that you signed this promissory
11 note, if that is what the law says, that that
12 made you personally -- personally liable, then
13 you would agree with me that that was never
14 your intent?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. That was never -- I wouldn't sign a
18 note and not get consideration in return.

19 Q. So putting all other issues aside,
20 if the law -- if the law says that you were
21 liable for those notes because of how you
22 signed them, then would you agree with me that
23 these notes are a mistake?

24 MR. MORRIS: Objection to the form
25 of the question.

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2 MS. DANDENEAU: Objection to the
3 form.

4 A. Yes.

5 Q. So do you agree with me that it's
6 odd -- I think that is the word you used --
7 that Highland would be loaning \$7.4 million a
8 few weeks after that extension to an entity
9 whose liabilities exceeded its assets, and you
10 would agree with me that it was never your
11 intention to be in any way liable for these two
12 promissory notes; correct?

13 MR. MORRIS: Objection to the form
14 of the question.

15 A. Sorry, you -- you asked a lot there.

16 MR. RUKAVINA: I will strike it and
17 I will move on.

18 Let's go to -- pull up Exhibit 9,
19 please Mr. Nguyen -- Alpha 9, I'm sorry, Alpha
20 9, A9.

21 (Exhibit A9 marked.)

22 Q. Sir, take a moment to look at this,
23 but this is an email, and you will see attached
24 July 31, 2020 affiliate notes.

25 Do you see that attachment?

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2 A. Yes.

3 Q. Okay. And do you see an entry for
4 Highland Capital Management Fund Advisors?

5 MR. MORRIS: I'm sorry, hold on.

6 Where are you looking?

7 MR. RUKAVINA: Last page, John.

8 MR. MORRIS: Is it the page on the
9 screen?

10 MR. RUKAVINA: Oh, I'm sorry.

11 Mr. Nguyen just did it. Yes, the last page
12 there.

13 MR. MORRIS: Thank you.

14 Q. Do you see an entry there for HCMFA?

15 A. Yes.

16 Q. About \$10.5 million.

17 Do you see that?

18 A. I do.

19 Q. And, now, do you have any
20 explanation for why if HCMFA owed \$7.4 million,
21 plus the 5.3 million that had been extended,
22 why that amount was only 10.5 million?

23 A. I don't know. Okay.

24 MR. RUKAVINA: Close this one and
25 pull up, Mr. Nguyen, the schedules,

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2 schedule of assets. What exhibit is this
3 of ours, Mr. Nguyen?

4 MR. NGUYEN: This is A11.

5 MR. RUKAVINA: Oh, this will be A11.
6 (Exhibit A11 marked.)

7 Q. You don't have this in front of you,
8 Mr. Waterhouse?

9 A. Okay.

10 Q. This is what Mr. Morris used
11 earlier. Do you remember looking at this with
12 Mr. Morris?

13 A. Yes.

14 MR. RUKAVINA: You might have to
15 zoom in a little. Okay.

16 Q. Now, I see Affiliate Note A, B, and
17 C.

18 Do you have any recollection as to
19 why the names of the affiliates are omitted?

20 A. I don't. I testified earlier that,
21 you know, the team worked with DSI in providing
22 these. I -- I don't -- I don't know.

23 Q. Can we deduce -- is it logical to
24 deduce that Affiliate Note A would be NexPoint
25 given its size of \$24.5 million?

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2 MR. MORRIS: Objection to the form
3 of the question.

4 A. I mean, it -- it is a -- it is -- it
5 is approximate.

6 Q. Well, can we -- can we deduce -- or,
7 I'm sorry, strike that.

8 Can you, sitting here today,
9 logically conclude that Affiliate Note B or C
10 represents HCMFA?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. I don't know. I don't know. I
14 can't.

15 Q. Okay. As of the petition date, we
16 have established that HCMFA, under promissory
17 notes, owed \$7.4 million and \$5.3 million to
18 the debtor; correct?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. Yes.

22 Q. Okay. And by my reckoning, that
23 would be somewhere approaching \$13 million.

24 MR. MORRIS: Objection to the form
25 of the question.

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2 Q. It would be \$12.7 million. Is that
3 generally correct?

4 A. Sorry, the amounts were 7.4, 5.3.

5 Q. Yes.

6 A. Okay. Yeah, that -- that -- I can
7 do that math, yes.

8 Q. Do you have any explanation or any
9 understanding of why there is no similar entry
10 listed here on the schedule of assets filed
11 with the bankruptcy court?

12 MR. MORRIS: Objection to the form
13 of the question.

14 A. I don't know. We have to look at
15 the supporting schedules, like I talked about
16 other -- presumably there is -- there is a
17 build to the schedule that would provide the
18 detail.

19 Q. Well, that was going to be my next
20 question. You anticipated it.

21 MR. RUKAVINA: You can -- you can
22 take this down, Mr. Nguyen.

23 Q. Do you believe that whenever you and
24 your team provided the underlying data to the
25 financial advisor that the actual names of the

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2 affiliates for Affiliate Note A, B, and C would
3 have been listed there?

4 A. Are you asking we provided the names
5 to the financial advisor? I don't -- I don't
6 understand who the financial advisor is.

7 Q. I'm sorry, DSI.

8 Let me ask the question this way,
9 Mr. Waterhouse.

10 Whenever you provided information
11 about the affiliate notes to DSI, do you
12 believe that you would have included the actual
13 names of the affiliates, you or your team, or
14 that you would have done the Affiliate Note A,
15 Note B, Note C?

16 MR. MORRIS: Objection to the form
17 of the question.

18 MS. DANDENEAU: Objection to the
19 form.

20 A. We -- like I testified earlier, when
21 we were -- we gave everything to -- to DSI. We
22 were giving all of our records, all of our
23 files, everything to DSI. We weren't redacting
24 information or saying, hey, here is a note,
25 here is Affiliate Note A or B.

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2 I mean, it was -- our job and our
3 focus -- and I testified in court back in 2019;
4 right -- was -- was to be transparent and, you
5 know, get DSI up to speed on -- on the matters
6 at Highland. So I can't see us redacting at
7 that point.

8 MR. RUKAVINA: Mr. Nguyen, will you
9 please pull up Mr. Morris' Exhibit 36.

10 Just the very first page, the very top
11 email. You might zoom in a little bit.

12 Q. Now, you recall being asked about
13 this by Mr. Morris?

14 A. Yes, I do.

15 Q. And you wrote: The HCMFA note is a
16 demand note.

17 You wrote that; right?

18 A. Yes.

19 Q. And, in fact, weren't there by that
20 point in time several notes?

21 A. Yes, there were. Again, I don't --
22 I don't remember everything specifically. I
23 mean --

24 Q. I understand. I understand.

25 So this is an example where -- where

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2 you might have made a mistake by referring to a
3 singular instead of a plural; right?

4 A. Yes.

5 Q. Okay. And you -- you wrote -- a
6 couple of sentences later, you wrote: There
7 was an agreement between HCMLP and HCMFA the
8 earliest they could demand is May 2021.

9 You wrote that; right?

10 A. Yes.

11 Q. But I think you -- you agreed with
12 Mr. Morris that that can't possibly apply to
13 the May 2019 notes, can it?

14 MR. MORRIS: Objection to the form
15 of the question. That is not what he
16 testified to.

17 Q. Let me ask -- let me ask a different
18 question.

19 Sitting here today -- or if you can
20 answer me from your memory on October 6,
21 2020 -- did the April acknowledgment that
22 extended the maturity date apply to the
23 May 2019 notes also?

24 A. I don't recall specifically.

25 Q. Well, you recall that the notes that

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2 you signed were demand notes; right?

3 A. Yes.

4 Q. Do you find it logical, based on
5 your experience, that had they intended to have
6 a different or a set maturity date, you would
7 have instructed that that set maturity date be
8 included instead of a demand feature?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. Sorry, just want to make sure I
12 understand. You are saying that -- that the
13 \$5 million note, the \$2.4 million note, if
14 those were supposed to be a term note, that I
15 would have made sure that those were a term
16 note?

17 Q. I'm saying -- I'm saying,
18 Mr. Waterhouse, that on May the 2nd and May the
19 3rd, 2019, if you intended that those two
20 promissory notes could not be called until May
21 2021, would you have included such language in
22 those two promissory notes?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I guess -- I'm sorry, I don't recall

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2 putting language in those May notes. I don't
3 remember what language you are referring to.

4 Q. Well, let's read this again.

5 There was an agreement between HCMLP
6 and HCMFA the earliest they could demand is May
7 2021.

8 Do you recall that agreement?

9 A. Yes, that was the agreement we
10 looked at earlier; correct?

11 Q. Okay. Yes.

12 Do you -- do you understand now that
13 that agreement that we looked at earlier also
14 applied to the May 2019 notes that you signed?

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

16 Q. But as of October 6, 2020, you're
17 writing that there is one demand note and
18 you're categorizing that demand note as not
19 being demandable on May 2021; correct?

20 A. Yes.

21 Q. And you know now that you made at
22 least one mistake in this email; correct?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. Yes.

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2 MR. RUKAVINA: You can pull this
3 down, Mr. Nguyen.

4 Q. So, Mr. Waterhouse, you don't
5 remember Mr. Dondero telling you to make these
6 loans or not. HCMLP was loaning \$7.4 million
7 to someone that their assets were less than
8 their liabilities.

9 We don't see on the July list of
10 notes, where there is \$12.7 million of notes,
11 we don't see that on the bankruptcy schedules,
12 and we have this Exhibit 36 where you are
13 confused.

14 Are you prepared to tell me, sir,
15 today that you might have made a mistake in
16 executing those two promissory notes?

17 MR. MORRIS: Objection to the form
18 of the question.

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

20 Q. And if it turns out that you're
21 personally liable for those promissory notes,
22 it would certainly be a mistake, wouldn't it?

23 MS. DANDENEAU: Objection to the
24 form.

25 MR. MORRIS: Join.

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2 A. Yes.

3 Q. If Mr. Dondero testifies that he
4 never told you to make these loans, would you
5 disagree with his testimony?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Like I testified earlier with my
9 conversation with Mr. Dondero, all I recall is
10 he said, get the money from Highland.

11 Q. And if Mr. Dondero testifies that
12 he, in consultation with other senior personnel
13 at Highland, decided that Highland needed to
14 pay HCMFA \$7.4 million as compensation for the
15 NAV error and not a loan, would you have any
16 reason to disagree with Mr. Dondero?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. If that was -- if that was his
20 intent, yes, it would -- I would --

21 Q. Do you have any reason to disagree
22 with him?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. If that was his intent, I don't

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2 know. I don't know how I disagree with that.

3 Q. And just to confirm, you don't
4 remember ever asking Mr. Dondero whether you
5 should have two promissory notes prepared?

6 A. No.

7 Q. And you don't remember discussing
8 with Mr. Dondero what the terms of those two
9 promissory notes should be?

10 A. I don't recall -- I testified all I
11 recall is he said, get the money from Highland.
12 I don't -- the -- the terms of the note, I
13 don't recall ever having a discussion around
14 the terms of the note, but since I don't draft
15 the notes, that -- there could have been a
16 conversation with other people later.

17 Q. Do you have any memory of whether
18 after the notes were drafted, but before you
19 signed them, that you communicated with
20 Mr. Dondero in any way to just confirm or -- or
21 get his blessing or ratification to signing
22 those notes?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I don't recall.

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2 Q. Again, the only thing you remember,
3 sitting here today, was Mr. Dondero said, get
4 the money from Highland, and that is it, that
5 is all you remember?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. I testified to that several times.
9 This was over two years ago. A lot has
10 happened. That is all I recall.

11 Q. And help me here. I'm not very
12 technologically astute. When you -- and I -- I
13 recognize that you do it rarely, but when you
14 sign a document electronically, do you believe
15 that there is an electronic record of you
16 having authorized or signed a document
17 electronically?

18 MR. MORRIS: Objection to the form
19 of the question.

20 A. I -- I don't know the tech answer to
21 that, but, you know, since I don't have -- I
22 don't ever attach my signature block
23 electronically, my assistant would have done
24 that, and if that is done over email like we
25 did several times -- you know, multiple,

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2 multiple times over COVID, she would attach my
3 signature block and then email it out to
4 whatever party.

5 Q. What was your assistant's name in
6 May 2019?

7 A. It was Naomi Chisum.

8 Q. Is she the only one? I'm sorry, was
9 she your only assistant that would have maybe
10 facilitated logistically something like you
11 just described?

12 A. You know, she was out on maternity
13 leave at some point. I don't -- I don't recall
14 those dates where she was out for maternity
15 leave. There was -- there were folks backing
16 her up. I don't recall specifically who
17 those -- who those, you know, administrative
18 assistants were, and I don't recall
19 specifically if she was out during this time on
20 maternity leave.

21 I do know that that she was out for
22 a period of time, or who knows, or she could
23 have been on vacation that day or, you know, I
24 don't know.

25 Q. Switching gears now, the two

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2 complaints that have been filed that is against
3 HCMFA and NexPoint, did you see any drafts of
4 those complaints before they were filed?

5 MR. MORRIS: Objection to the form
6 of the question, and to the extent that you
7 had any communications with counsel or you
8 were shown drafts of the complaints by
9 counsel while you were employed by
10 Highland, I direct you not to answer.

11 A. I -- I reviewed documents yesterday
12 with counsel here. I believe that is the first
13 time I have ever seen those.

14 Q. Okay. Did you ever discuss with
15 Mr. Seery these two lawsuits before or after
16 they were filed?

17 A. I don't recall.

18 Q. Were you ever interviewed by legal
19 counsel, to your knowledge, about these
20 promissory notes before the complaints were
21 filed? Without going into what was said, were
22 you ever interviewed by legal counsel?

23 MR. MORRIS: Objection to the form
24 of the question.

25 A. I don't recall.

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2 Q. Obviously with COVID, it changed,
3 but -- but before COVID, did you used to meet
4 with Mr. Seery from time to time in-person?

5 A. Yeah, I mean, so before COVID -- so
6 we're talking kind of late March, early April,
7 right, there was about -- I don't remember the
8 specific date when the board for Highland was
9 appointed. I believe it was around February of
10 2020, so maybe there was a month-and-a-half,
11 two-month window where we were meeting
12 in-person or, you know, like we were actually
13 in the office, excuse me, we were in the
14 office.

15 And, you know, when they were first
16 appointed, the board members and Mr. Seery
17 were -- were definitely down here more
18 in-person.

19 Q. Did you ever see Mr. Seery taking
20 written notes of -- of his meetings with you or
21 others?

22 A. I don't recall.

23 Q. Do you recall on any Zoom or video
24 conference with Mr. Seery, seeing him take
25 notes, written notes?

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2 A. The Zoom calls we had, I don't
3 recall having seen video or, you know, or if it
4 was on Zoom, I just remember it being -- well,
5 no, you know what, there were some -- you know,
6 I take that back.

7 So there were -- there were some
8 times that I did remember seeing Mr. Seery
9 on -- on some of the Zoom calls.

10 Q. Well, let me --

11 A. I don't -- sorry, I'm thinking. I'm
12 thinking -- I'm going back. I'm trying to
13 process this.

14 Q. I can make it much quicker,
15 Mr. Waterhouse. I have heard -- I have heard
16 that Mr. Seery is a copious note taker.

17 Do you have any knowledge about
18 that?

19 A. No.

20 Q. Okay. Switching gears yet again,
21 and this will be last theme. Do you need a
22 restroom break, or are you good to go for
23 another half an hour?

24 MS. DEITSCH-PEREZ: I need a
25 restroom break.

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2 MR. RUKAVINA: Can we make it five
3 minutes?

4 THE WITNESS: Five minutes would be
5 great.

6 VIDEOGRAPHER: We're going off the
7 record at 5:53 p.m.

8 (Recess taken 5:53 p.m. to 5:59 p.m.)

9 VIDEOGRAPHER: We are back on the
10 record at 5:59 p.m.

11 Q. Mr. Waterhouse, I had asked you
12 earlier about contracts between HCMFA and the
13 debtor, and now I'm going to talk about
14 contracts between the debtor and NexPoint
15 Advisors. Okay?

16 A. Okay.

17 Q. Now, were there contracts similar to
18 the ones with HCMFA that NexPoint had in the
19 nature of employee reimbursement and shared
20 services?

21 A. Yes, they -- NexPoint Advisors and
22 Highland Capital Management Fund Advisors had
23 cost reimbursement and shared services
24 agreements with Highland Capital Management,
25 L.P.

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2 Q. And was that shared services
3 agreement, to the best of your understanding,
4 in place as of December 31, 2020?

5 A. It was -- it was terminated at some
6 point, and I remember the contracts had
7 different termination dates, but I think the --
8 the date of termination was January 31st of
9 2021, after the termination was put in.

10 So yeah, it would be in place at the
11 end of the year of December -- it would be in
12 place at December 31st, 2020.

13 Q. And pursuant to that agreement as of
14 December 31st, 2020, was the debtor providing
15 what you would describe as back office services
16 to NexPoint?

17 A. Yes.

18 Q. Would those have included accounting
19 services?

20 A. Yes.

21 Q. And as part of those accounting
22 services, would the debtor have assisted
23 NexPoint with paying its bills?

24 MR. MORRIS: Objection to the form
25 of the question.

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2 A. Yes.

3 Q. So let's break that up. You were a
4 treasurer of NexPoint as well in December of
5 2020?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Yes.

9 Q. Okay. And in December of 2020, did
10 NexPoint have its own bank accounts?

11 A. Yes.

12 Q. And did it use those bank accounts
13 to pay various of its obligations?

14 A. Yes.

15 Q. Did employees of the debtor have the
16 ability to cause transfers to be made from
17 those bank accounts on behalf of NexPoint?

18 A. Yes.

19 Q. And is that one of services that the
20 debtor provided NexPoint, basically ensuring
21 that accounts payable and other obligations
22 would be paid?

23 A. Yes.

24 MR. MORRIS: Objection to the form
25 of the question.

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2 Q. You answered yes?

3 A. Yes.

4 Q. And the payments, though, whose
5 funds would they be made from?

6 A. From the bank account of NexPoint
7 Advisors. If they were NexPoint advisor
8 obligations, it would be made from NexPoint
9 Advisors' bank account.

10 Q. So let's pull up Exhibit Alpha 1.
11 You should have that -- it is my Tab 1 or my
12 Exhibit 1.

13 (Exhibit A1 marked.)

14 Q. So this is a -- this is a series of
15 emails, Mr. Waterhouse. Let's look at the
16 first page here, November 25, 2020, between
17 Kristin Hendrix and yourself.

18 Do you see that, sir?

19 A. I do.

20 Q. And do you see where Ms. Hendrix
21 writes: NPA.

22 Do you know what NPA stood for?

23 A. Yes.

24 Q. And what does it stand for?

25 A. NexPoint Advisors.

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2 Q. And was that how you-all internally
3 at Highland refer to NexPoint Advisors, L.P.?

4 A. I mean, yes, amongst other things.

5 Q. And she writes at the bottom of her
6 email: Okay to release?

7 Do you see that?

8 A. Yes, I do.

9 Q. So what --

10 MR. MORRIS: Hold on one second.

11 Okay. Go ahead.

12 MR. RUKAVINA: Yeah.

13 Q. So what is -- what is Ms. Hendrix
14 here on November 25 asking of you?

15 A. She is asking me -- so she -- these
16 are -- these are payments -- typically we would
17 do an accounts payable run every week at the
18 end of every Friday. But looking at this date,
19 it is Wednesday, November 25th, which means, to
20 me, it is likely Thanksgiving weekend.

21 So this is the day before
22 Thanksgiving, so this is the last kind of --
23 kind of day before the holidays and vacation
24 and things of that nature. So it is
25 effectively the Friday of that week.

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2 So she is -- she is putting in all
3 the payments for the week because we batch
4 payments weekly. And these are the payments
5 that go out that week, and she is informing me
6 of the payments and -- you know, again, at the
7 bottom of the email, she is asking for my okay
8 to -- to release these payments in the wire
9 system.

10 Q. So these would be accounts payable
11 of NexPoint?

12 A. I mean, it would be accounts payable
13 for all of these entities listed on this email.

14 Q. And who was Ms. Hendrix employed by
15 in November and December of 2020?

16 A. Highland Capital Management.

17 Q. Okay. So -- so part of the services
18 that NexPoint had contracted with was for
19 Highland to ensure that NexPoint timely paid
20 its accounts payable; is that accurate?

21 MR. MORRIS: Objection to the form
22 of the question. You have got to be
23 kidding me.

24 Q. Is that accurate?

25 A. Yes.

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2 Q. And did NexPoint rely on employees
3 of the debtor to ensure that NexPoint's
4 accounts payable were timely paid?

5 MR. MORRIS: Objection to the form
6 of the question.

7 A. Yes.

8 MR. RUKAVINA: Let's flip to the
9 next page, Mr. Nguyen, if you will please
10 scroll to the next page.

11 Q. So this is an email similar to the
12 prior one, November 30th.

13 Do you see where it says, NPA HCMFA,
14 USD \$325,000 one-day loan?

15 Do you see that, sir?

16 A. I do.

17 Q. Do you have any memory of what that
18 was?

19 A. I don't recall what that -- what
20 that payment was for.

21 Q. Did it sometimes occur that one
22 advisor would, on very short-terms, make loans
23 to another advisor?

24 A. Yes. This -- this -- this occurred
25 from -- from -- from time to time. It actually

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2 looking at -- I'm -- I'm looking at the date of
3 this email. It is November 30th. It is the
4 last day of the month.

5 HCMFA has obligations it needs to
6 pay to its broker-dealer, which is HCFD. And
7 it likely was short funds to make those
8 obligations under that -- under its agreement,
9 and so it provided a one-day loan because on
10 the next business day on 12/1 -- or the next
11 business day in December, it would receive
12 management fees from the underlying funds that
13 it managed and it would be able to pay back
14 that loan to NexPoint Advisors.

15 Q. So -- so here Ms. Hendrix was
16 seeking your approval to transfer \$325,000 from
17 NexPoint to HCMFA for a one-day loan; is that
18 correct?

19 A. That is correct.

20 Q. Let's flip to the next page, sir.

21 MR. RUKAVINA: And, Mr. Nguyen, if
22 you will please scroll down.

23 Q. Now we have as an entry for
24 \$325,000, 11/30 loan payment.

25 Do you see that, sir?

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2 A. Yes.

3 Q. And that is probably the loan that
4 was approved on the prior page?

5 A. Yes, most likely.

6 Q. So is it also true, sir, that in
7 addition to accounts payable debtor employees
8 would be assisting NexPoint with respect to
9 paying back its debt?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. I mean, yes, for loans of this
13 nature, yes.

14 Q. Well, what about long term loans?
15 Was it reasonable for NexPoint to expect debtor
16 employees to ensure that NexPoint timely paid
17 its obligations under long-term notes?

18 MR. MORRIS: Objection to the form
19 of the question.

20 MS. DANDENEAU: Objection to form.

21 A. I mean, that is one of the things
22 that the Highland personnel did provide to the
23 advisors. Yes, we would -- we would -- over
24 the years, yes, we -- we -- we -- we did do
25 that generally. Again, I don't remember

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2 specifically but, yes, generally we -- you
3 know, we did do that.

4 Q. So do you recall -- and we can pull
5 it up, if need be -- that under the NexPoint
6 note that Mr. Morris asked you about earlier,
7 the one for more than \$30 million, that
8 NexPoint was obligated to make an annual
9 payment of principal and interest?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. Yes, it was -- yes, it -- it was an
13 amortizing note. It was -- you know, from what
14 we reviewed earlier, it was payable by
15 December 31st of each year. So -- but are --
16 are you asking me --

17 Q. I'm just asking you, sir, if you
18 recall the note.

19 A. Yes, the \$30 million note, yes, we
20 reviewed it earlier, yes.

21 Q. And do you recall Mr. Morris had you
22 go through the fact that NexPoint had made
23 payments in years prior to 2020 on that note?

24 A. I do.

25 Q. And do you believe that employees of

1 WATERHOUSE - 10-19-21

2 the debtor would have played any role in
3 NexPoint having made those prior payments?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. Yes.

7 Q. And what role in years prior to 2020
8 would employees of the debtor have had with
9 respect to NexPoint making that annual payment?

10 A. We -- we -- we would have -- I keep
11 saying "we." The team would have calculated
12 any amounts due under that loan and other
13 loans, as -- as standard course.

14 We would -- since we provided
15 treasury services to the advisors, we would
16 inform the -- the -- the -- we informed
17 Mr. Dondero of any cash obligations that are
18 forthcoming, whether we do cash projections.

19 If, you know, any of these payments
20 would have -- or, you know, the sum total of
21 all of these payments, including any note
22 payments, if there were any cash shortfalls, we
23 would have informed Mr. Dondero of any cash
24 shortfalls. We could adequately plan, you
25 know, in instances like that.

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2 Or, sorry, we -- I say "we" -- I
3 keep saying "we" -- I keep wearing my -- again,
4 my -- my treasurer hat.

5 But, yes, it is to -- it is to
6 inform Mr. Dondero of the obligations of the
7 advisors in terms of cash and obligations that
8 are -- are upcoming and that -- and that are --
9 are scheduled to be paid.

10 Q. And would those obligations that are
11 upcoming and scheduled to be paid prior to 2020
12 have incurred the annual payment on that
13 NexPoint \$30 million note?

14 MS. DANDENEAU: Objection to form.

15 MS. DEITSCH-PEREZ: Davor, I think
16 you misspoke. You might want to just
17 repeat the question.

18 Q. Okay. Let me repeat the question,
19 sir.

20 Prior to 2020, those services that
21 you just described, would that -- on behalf of
22 the debtor, would that have included NexPoint's
23 payments on the \$30 million note?

24 A. Yes.

25 Q. So someone at the debtor in treasury

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2 or accounting would have sent some schedule or
3 a reminder that a payment would be coming due
4 in the future. Is that generally the practice?

5 A. Yes, we would -- you know, again, I
6 didn't -- I didn't micromanage the teams, but
7 we had a -- a corporate accounting calendar
8 that we use as kind of a tickler file to keep
9 track of payments.

10 I actually, you know, don't know how
11 actively they're using that in -- in prior to
12 2020, but it was actively used at some point.

13 We did look at NexPoint cash
14 periodically and cash for the other advisors as
15 well and payments. You know, we -- payments
16 like this would have appeared in our cash
17 projections, in the advisor's cash projections.

18 And, again, as like I said earlier,
19 they would have appeared there, so there would
20 be time to plan for making any of these
21 payments.

22 Q. And based on your experience, would
23 it have been reasonable for NexPoint to rely on
24 the debtors' employees to inform NexPoint of an
25 upcoming payment due on the \$30 million

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2 promissory note?

3 MR. MORRIS: Objection to form of
4 the question.

5 MS. DANDENEAU: Objection to form.

6 A. Yes. Yes, they did. I mean, but I
7 mean, but I don't think these -- these notes
8 were any secret to anybody.

9 Q. I understand, and I'm not suggesting
10 otherwise.

11 MR. RUKAVINA: Please pull up Alpha
12 2, Mr. Nguyen.

13 (Exhibit A2 marked.)

14 Q. Now, this document is similar to the
15 ones we've seen before as of December 31, 2020,
16 and I don't see under NTA anything there for
17 paying the promissory note to Highland.

18 Do you see anything like that?

19 A. I do not.

20 MR. RUKAVINA: You can pull that --
21 that exhibit down, Mr. Nguyen.

22 Q. You are aware, of course, by now
23 that, in fact, NexPoint failed to make the
24 payment due December 31, 2020, are you not?

25 A. I am aware, and yes, I do understand

1 WATERHOUSE - 10-19-21

2 it.

3 Q. Were you aware that Highland
4 accelerated that \$30 million promissory note?

5 A. I am aware.

6 Q. Were you aware of that acceleration
7 at the time that it occurred?

8 A. I don't remember specifically.

9 Q. Do you recall whether anyone asked
10 you -- prior to the acceleration, anyone asked
11 you at Highland, what Highland should do with
12 respect to the missed payment?

13 A. Did anyone ask me what Highland
14 should do about the missed payment?

15 Q. Yes, before acceleration.

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. I mean, what -- what I recall is
19 there was the -- sorry, are you asking me --

20 MS. DANDENEAU: Why don't you just
21 repeat the question, Mr. Rukavina.

22 Q. Let me try again, Mr. Waterhouse,
23 let me try again.

24 I am saying you're the CFO of
25 someone, in this case, Highland, and the

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2 borrower failed to make the required payment.

3 Are you with me so far?

4 A. I am.

5 Q. Did anyone then ask you, what should
6 we do with respect to our rights against the
7 borrower that missed the payment?

8 A. Not that I recall.

9 Q. Did you play a role in the decision
10 to accelerate that \$30 million promissory note?

11 A. I did not.

12 Q. Do you recall whether Mr. Seery ever
13 asked you before the acceleration as to whether
14 he should accelerate the note?

15 A. I don't recall.

16 Q. And you don't recall when you
17 learned of the acceleration itself?

18 MR. MORRIS: Objection to the form
19 of that question.

20 A. It was -- it was sometime in
21 early -- in early 2021. I don't remember
22 specifically.

23 Q. But do you recall whether it was
24 after the acceleration had already been
25 transmitted?

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2 MS. DANDENEAU: Objection to the
3 form of the question.

4 A. I don't recall.

5 Q. Do you recall in early to mid
6 January of 2021, after the default, discussing
7 the default with Mr. Dondero?

8 A. I do recall discussing with
9 Mr. Dondero after December 31, 2020?

10 Q. Yes, the fact of the default.

11 A. I don't recall.

12 MR. RUKAVINA: Let's pull up my
13 Exhibit 6, Alpha 6.

14 (Exhibit A6 marked.)

15 MR. RUKAVINA: And, Mr. Nguyen, if
16 you will please scroll down.

17 Q. This email chain begins with you
18 writing to Ms. Hendrix on January the 12th:
19 NexPoint note to HCMLP.

20 Do you see that, sir?

21 A. I do.

22 Q. Were you discussing this same
23 \$30 million note we're talking about right now
24 with Ms. Hendrix?

25 A. Yes.

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2 Q. Okay. Do you recall what prompted
3 you to send that email to her?

4 A. Yes, I had -- I had a conversation
5 with Jim.

6 Q. Okay. And what -- what did you
7 discuss with Jim that led to this email chain?

8 A. He -- he called me and he said he
9 wanted to make payment on the NexPoint note,
10 and I didn't -- I didn't know the -- the amount
11 offhand, so I reached out to Kristin and got
12 the details and relayed that to him.

13 Q. And you see you sent that email to
14 her at 11:15 a.m. Does that help you remember
15 when you had this discussion with Mr. Dondero?
16 In other words, was it that morning or the day
17 before, or can you -- can you --

18 A. No, it was -- it was that morning.

19 Q. And do you recall how you had that
20 conversation with him?

21 MR. MORRIS: Objection to the form
22 of the question.

23 Q. By telephone, by email, in-person?

24 A. Yeah, he -- he called me. I was at
25 home. We were working from home here in

1 WATERHOUSE - 10-19-21
2 December of 2020. He called me from home. He
3 said he was in court. He wanted to -- he asked
4 about, you know, making payment on the note and
5 the amount, and so I didn't have those numbers
6 in front of me, so I said I would get back to
7 him. I wanted all the details, so here is
8 this -- so I reached out to Kristin.

9 Q. And then she gave you that
10 \$1,406,000 figure?

11 MR. RUKAVINA: Mr. Nguyen, if you
12 will scroll up, please.

13 A. Yes. Yeah, she -- the \$1,406,112.

14 Q. And do you recall whether you
15 conveyed that amount to Mr. Dondero?

16 A. Yes. I -- I called him back and
17 gave him -- gave him this amount.

18 Q. Are you aware of whether NexPoint,
19 in fact, then made that 1 million 406 and
20 change payment?

21 A. Yes, they did.

22 Q. Did you discuss with Mr. Dondero at
23 that time, either the first conference or the
24 second conference that day -- strike that.

25 When you conveyed the number to

1 WATERHOUSE - 10-19-21

2 Mr. Dondero, was -- was it also on January
3 12th?

4 A. Sorry, when I conveyed the
5 \$1.4 million number?

6 Q. Yes.

7 A. Yes, yes, it was that -- it was --

8 Q. So you had --

9 A. It was that point.

10 Q. Well, to the best of your
11 recollection, you had a conference with
12 Mr. Dondero by the telephone in the morning,
13 and then another conference with him by
14 telephone after 11:40 a.m. that morning?

15 A. Yeah, I can't remember -- yeah, it
16 was either that morning or it could have been,
17 you know, early afternoon, but again, I
18 remember calling him back, relaying this
19 information to him, and he said, okay, pay --
20 you know, make -- make this payment.

21 Q. And during either of those two
22 calls, did you tell Mr. Dondero anything to the
23 effect that making those -- I'm sorry, making
24 that payment would not de-accelerate the
25 promissory note?

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2 A. No.

3 Q. Did you tell him anything to the
4 effect that making that payment would not cure
5 the default?

6 A. No.

7 Q. Did you discuss that in any way with
8 him?

9 A. No, I did not.

10 Q. Did he say why he wanted to have
11 that \$1.4 million payment made?

12 MR. MORRIS: Objection to the form
13 of the question.

14 A. He -- he -- he didn't go into
15 specifics.

16 Q. Did he say anything to you to the
17 effect that if NexPoint makes that payment,
18 then the note will be de-accelerated?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. I don't recall.

22 MR. RUKAVINA: You can put this one
23 down, Mr. Nguyen.

24 Q. And, again, when you say you don't
25 recall, you mean you don't remember right now

1 WATERHOUSE - 10-19-21

2 either way; correct?

3 A. Yeah, I don't remember. I don't
4 remember us discussing that.

5 Q. Now -- and we're almost done, I
6 promise. I'm just going to -- I don't know how
7 to ask this question, so I'm just going to try
8 to do my best.

9 Prior to the default on December 31,
10 2020, did Mr. Seery ever tell you any words to
11 the effect that you or someone at Highland
12 should ensure that NexPoint doesn't make its
13 payment?

14 A. No.

15 Q. Did you have any hint or any belief
16 that anyone at NexPoint -- I'm sorry, strike
17 that.

18 Did you have any reason to believe
19 that anyone with Highland was actively trying
20 to get NexPoint to make that default by not
21 paying on December 31?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Are you asking, did any Highland
25 employees actively work to make -- to

1 WATERHOUSE - 10-19-21

2 somehow --

3 Q. Yes. Let me take a step back. Let
4 me take a step back.

5 So you are aware now that as a
6 result of that default, what was still some
7 25-year note was accelerated and became
8 immediately due. You are aware of that now;
9 right?

10 A. Yes.

11 Q. And can you see how someone at
12 Highland might actually have been pleased with
13 that development?

14 MR. MORRIS: Objection to the form.

15 Q. Not that they were --- not that they
16 were pleased, but you can see how someone at
17 Highland might have been pleased with that
18 development?

19 MR. MORRIS: Objection to the form
20 of the question.

21 MS. DANDENEAU: Object to form.

22 A. I don't know how they would have
23 reacted to that.

24 Q. Okay. But you're not -- you're not
25 aware of any instructions or any actions being

1 WATERHOUSE - 10-19-21
2 given or taken at Highland by Mr. Seery, the
3 independent board, DSI, that -- that would have
4 basically led Highland to ensure that NexPoint
5 would fail to make that payment?

6 A. I'm not aware.

7 Q. In other words, there wasn't a trick
8 or a settlement; right?

9 MS. DEITSCH-PEREZ: Objection to
10 form.

11 MS. DANDENEAU: Object to form.

12 MR. MORRIS: Object to form.

13 A. I'm not aware.

14 Look, I'm not aware. I'm not in
15 every conversation. I mean, and I'm just --
16 again, I'm sitting at home. It is the end of
17 the year. Again, I'm not aware.

18 Q. That is a perfectly legitimate
19 answer. I don't know why -- why you think
20 otherwise.

21 Okay. Just give me one second to
22 compose my thoughts.

23 MS. DEITSCH-PEREZ: While you're
24 taking your one second, why don't we take
25 three minutes. I will be right back.

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2 VIDEOGRAPHER: Do we want to go off
3 the record?

4 MR. RUKAVINA: Yes.

5 VIDEOGRAPHER: All right. We're
6 going off the record at 6:27 p.m.

7 (Recess taken 6:27 p.m. to 6:30 p.m.)

8 VIDEOGRAPHER: We are back on the
9 record at 6:30 p.m.

10 MR. HORN: Is Deb back?

11 MS. DANDENEAU: Are you asking about
12 me? I'm here.

13 MR. HORN: Oh, okay. I don't see
14 you, sorry.

15 Q. Actually, yeah, Mr. Waterhouse, so
16 when you had --

17 MS. DANDENEAU: Are you asking about
18 Deb Dandeneau or Deborah? I mean, there
19 are a lot -- as we talked about, a lot of
20 Debs. I'm here.

21 MS. DEITSCH-PEREZ: I'm here.

22 MR. HORN: Yes, I was asking about
23 DDP.

24 MS. DEITSCH-PEREZ: Oh, DDP is here.

25 MR. HORN: Okay. Here we go. I'm

1 WATERHOUSE - 10-19-21

2 going back on mute.

3 MS. DANDENEAU: Get the right
4 nomenclature.

5 Q. Mr. Waterhouse, on January 12th,
6 2021, when you had those talks with Mr. Dondero
7 about the \$1.4 million payment, did you have a
8 communication or a conversation with Mr. Seery
9 about that payment after January 12th, 2021?

10 A. I don't recall.

11 Q. Well, in response to Mr. Dondero
12 reaching out to you, do you recall on that day,
13 January 12th, talking to Mr. Seery or anyone at
14 Highland other than the email chain we just saw
15 about Mr. Dondero's call with you?

16 A. Did I talk to -- I spoke with
17 Kristin -- I don't know if I spoke to her. I
18 likely spoke to Kristin Hendrix because we had
19 to get the wire on NexPoint's behalf to make
20 the payment to Highland.

21 Q. So it is true, then, that -- that
22 employees of the debtor did actually cause that
23 payment to be made when it was made after
24 January 12th?

25 A. Yes, I mean, we -- we -- as I

1 WATERHOUSE - 10-19-21
2 testified earlier, we provided that accounting
3 finance treasury function as -- under the
4 shared services agreement. And so once I
5 got the -- I talked to Jim, got the approval to
6 make this payment, we have to then make the
7 payment, or the team does, and so the payment
8 was made.

9 Q. Okay. But -- okay. And -- and
10 sitting here right now, after Jim called you,
11 you don't remember talking to anyone other than
12 the -- the couple of people you mentioned,
13 talking to anyone about something to the effect
14 that, hey, Jim wants to make this payment now?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I don't -- I don't recall.

18 Q. And does that include legal counsel?
19 Without going into any detail, on
20 January 12th or before that payment was made,
21 did you consult with legal counsel about
22 anything having to do with the \$1.4 million
23 payment?

24 A. I don't recall.

25 Q. Okay. Thank you, sir, for your

1 WATERHOUSE - 10-19-21

2 time.

3 MR. RUKAVINA: Pass the witness.

4 MR. MORRIS: I just have a few
5 questions, if I may.

6 MS. DEITSCH-PEREZ: Don't you go at
7 the end?

8 MR. MORRIS: Oh, I apologize. He is
9 your witness. I'm surprised you want to
10 ask him questions, but go right ahead.

11 MS. DEITSCH-PEREZ: Just have a
12 couple of things.

13 MR. RUKAVINA: And I will just
14 object to that, that he's our witness.
15 That's not --

16 MR. MORRIS: I'm not talking to you.
17 I'm not talking to you.

18 MS. DANDENEAU: Also, Mr. Morris, it
19 is -- it is --

20 MS. DEITSCH-PEREZ: He is not my
21 witness. He's been subpoenaed by you.
22 Okay?

23 That is no offense, Mr. Waterhouse,
24 I'm -- I'm not -- okay. Anyway.

25 EXAMINATION

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2 BY MS. DEITSCH-PEREZ:

3 Q. Good evening. I'm very sorry to be
4 going last and I know you have had a long and
5 taxing day, so I thank you for indulging me.

6 The kinds of services that you
7 describe that the -- that Highland provided for
8 NexPoint, did Highland also provide similar
9 services to that to HCRE and HCMS?

10 A. Yes.

11 MR. MORRIS: Objection to the form
12 of the question.

13 Q. What kind of services did Highland
14 provide to HCRE and HCMS?

15 MR. MORRIS: Objection to the form
16 of the question.

17 MS. DEITSCH-PEREZ: What is your
18 objection, John?

19 MR. MORRIS: It is vague and
20 ambiguous. Unlike the advisors and
21 NexPoint, they actually had shared services
22 agreements.

23 MS. DEITSCH-PEREZ: I got -- I
24 understand your objection. That is fine.

25 Q. Let's take them one at a time.

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2 What kinds of services did Highland
3 provide to HCRE?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. HCMS, Highland employees provided
7 accounting services, treasury management
8 services, potentially legal services. I
9 don't -- but I wouldn't have been directly
10 involved in that. But as far as the teams that
11 I manage, it was accounting, treasury, things
12 of that nature.

13 Q. Okay. And that was for HCM, LLP --

14 A. And -- and, sorry, it would also be
15 any asset valuation if needed as well.

16 Q. Okay. We went back and forth on
17 each other and I apologize, so just to clarify.

18 You were talking about the services
19 that Highland Capital Management provided to
20 HCMS; is that right?

21 A. HCMS. So, again, yes. And
22 accounting, treasury, valuation, and also tax
23 services too.

24 Q. Okay.

25 A. Tax services. Look, I'm expanding

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2 this, their HR services as well.

3 Q. Okay. And did that include bill
4 paying?

5 MR. MORRIS: Objection to the form
6 of the question.

7 Q. Did the services that HCM provided
8 to HCMS include bill paying?

9 MR. MORRIS: Objection to the form
10 of the question.

11 A. Yes.

12 Q. And did the services that HCMLP
13 provided to HCMS include scheduling upcoming
14 bills?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. Yes.

18 Q. And did HCMLP regularly pay -- cause
19 to be paid the payments on loans HCMS had from
20 HCMLP?

21 MR. MORRIS: Objection to the form
22 of the question.

23 A. Yes.

24 Q. Typically -- if there is a
25 typically, how far in advance of due dates did

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2 HCMLP cause HCMS to pay its bills?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. I mean, it -- it -- it depend -- it
6 depended on the nature of the payment and the
7 vendor, but, you know, if there were -- if
8 there were larger scheduled payments, you know,
9 I would like to give at least 30 days notice.

10 And that is -- that is kind of my
11 rule of thumb so no one is surprised.

12 Q. Okay. And was it generally HCMLP's
13 practice to timely pay HCMS' bills?

14 MR. MORRIS: Objection to the form
15 of the question.

16 A. It -- it -- it -- that depended on
17 the nature of the payment.

18 Q. Okay. And can you explain what you
19 mean by that?

20 A. Yeah, I mean if -- if it was -- I
21 mean -- if there was some professional fees
22 that weren't -- you know, they were due but
23 they weren't urgent, those fees may not be paid
24 as timely as others that have a due date or --
25 or things like that.

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2 Q. Okay. Are loan payments the kinds
3 of thing that HCMLP would pay on time because
4 of potential consequences of not paying on
5 time?

6 MR. MORRIS: Objection to the form
7 of the question.

8 A. Yes. As I testified earlier, we
9 would want to give, you know, notice on -- on
10 -- on larger payments and -- and things of that
11 nature so we didn't miss due dates.

12 Q. Okay. And over the course of time,
13 did HCMLP generally pay HCMS' loan payments in
14 a timely fashion?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I can't remember specifically, but
18 generally, yes.

19 Q. Okay. Now, did HCMLP provide
20 similar services to HCRE that you have
21 described it provided to HCMS?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Yes, but I don't think it -- it
25 provided -- I don't think it provided HR

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2 services.

3 Q. Can you describe the accounting and
4 treasury services that HCMLP provided for HCRE?

5 A. Yeah, it -- it would provide
6 bookkeeping services on a -- on a periodic
7 basis. It would make payments, you know, as
8 needed.

9 Q. Okay. So did it provide --

10 A. And -- and I believe it -- it -- it
11 provided tax services as well.

12 Q. Okay. And so did it provide the
13 same kind of bill -- did HCMLP provide the same
14 kind of bill-paying services for HCRE that it
15 provided for HCMS and NexPoint?

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. Yes.

19 Q. And over the course of time, did
20 HCMLP generally cause to be made the loan
21 payments that HCRE owed to HCMLP?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Yes.

25 Q. Did HCMLP make loan payment -- the

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2 loan payment that was due from HCMS to HCMLP in
3 December of 2020?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. I don't believe that payment --
7 payment was made.

8 Q. Okay. And when HCMLP caused HCMS in
9 the past to make loan payments, whose money did
10 it use to make those payments?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. It was the -- the money in HCMS's
14 operating account would be made to that --
15 those moneys would be used to make payment to
16 Highland Capital Management.

17 Q. Okay. And Highland -- is it correct
18 that Highland Capital Management personnel had
19 the access to HCMS's accounts to be able to
20 cause such payments to be made?

21 A. Yes, Highland personnel had access
22 to those accounts.

23 Q. Okay. And so now for HCRE, whose
24 money was used when HCMLP caused HCRE
25 payments -- loan payments to Highland to be

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2 made?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. It was -- it was cash in HCRE's bank
6 account that would be used to make payments to
7 Highland Capital Management.

8 Q. Okay. And so did Highland Capital
9 Management have access to HCRE's funds in order
10 to be able to make such payments?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. Personnel at Highland Capital
14 Management had access to HCRE's bank account to
15 effectuate the payments.

16 Q. Okay. And was the payment due from
17 HCRE to HCMLP due in December of 2020 made?

18 A. It --

19 Q. In December of 2020.

20 A. It was not.

21 Q. Okay. And was there money in HCRE's
22 account that would have enabled the payment to
23 be made had HCM personnel attempted to make the
24 payment?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. I -- I don't recall.

4 Q. Do you have any reason to believe
5 that either HCRE or HCMS simply didn't have the
6 funds on hand to make the December 2020
7 payments?

8 A. I don't know.

9 Q. I guess I'm asking, do you have any
10 reason to believe that they didn't have the
11 funds?

12 A. We managed cash for so many
13 different entities and funds, and I don't
14 recall, you know, where the cash position was
15 for HCRE and HCMS at 12/31/2020.

16 Q. Okay.

17 A. I just don't recall, and I don't --
18 and I don't remember what the loan payment
19 obligations were from HCRE to Highland, and
20 from HCMS to Highland. I don't recall. I
21 don't recall, I mean...

22 Q. Let me come at it a different way.
23 Were the -- were the payments that would
24 otherwise have been due in December of 2020
25 made in January of 2021 for HCMS and HCRE?

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2 A. I believe the HCRE payment was made
3 in January of 2021. I don't recall any
4 payments being made from HCMS to Highland.

5 Q. If it -- how is it the HCRE payment
6 came to be made? Why did you make it -- why
7 did HCM make the payment in January of 2021?

8 A. Jim -- Jim called me and instructed
9 me to -- to make the payment on behalf of HCRE,
10 Jim Dondero -- Jim Dondero.

11 Q. Did he seem upset that -- that the
12 payment had not been made?

13 A. Yeah. On the note that was, you
14 know, that was the term note, yes, he -- he was
15 displeased that the -- that the payment had not
16 been made by year-end.

17 Q. Okay. And did you make the -- cause
18 the payment to be made as -- as requested?

19 A. Yes.

20 Q. And did anyone else from HCM
21 participate with you in causing the payment to
22 be made to -- on the HCRE loan?

23 A. Yes. It would have been Kristin
24 Hendrix. I -- again, I don't -- as I testified
25 earlier, I'm not an officer of HCRE. I don't

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2 believe I'm an authorized signer. So I
3 can't -- other personnel have to make payment
4 from HCRE to -- to -- to -- to Highland.

5 Q. Okay. And in the conversation
6 that -- that you had with Mr. Dondero when he
7 requested the payment to be made, did you say
8 to him words to the effect, Jim, this loan is
9 going to stay in default, what are you making
10 the payment for, anything like that?

11 A. No.

12 Q. In fact, did you have the impression
13 from him that he thought that the loan would
14 be -- the default would be cured by making the
15 payment?

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. Did I get the impression from Jim
19 Dondero that the loan would be cured if the
20 payment from HCRE --

21 Q. Yeah, if that is what he thought.

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. I didn't get any impression from him
25 on that at the time.

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2 Q. Do you know whether there was an
3 HCMS term loan that had a payment due in
4 December of 2020?

5 A. I don't recall.

6 Q. Okay. And so the reason you don't
7 recall whether or not there was a payment in
8 January of 2021 is because you just don't
9 remember whether there was such a loan at all?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. I don't remember. There is -- there
13 is so many notes, and I mean, demands, and I
14 don't -- I don't remember. It's a lot to keep
15 track in your head.

16 Q. I understand, and -- and I hear your
17 frustration when you have explained that the
18 debtor has your documents and you don't, and so
19 I fully appreciate it, and this is no knock on
20 you. It's a knock on somebody else on this
21 call.

22 MR. MORRIS: I move to strike. That
23 was pretty obnoxious, but go ahead.

24 Q. Okay. But so, Mr. Waterhouse, if --
25 if a payment on the HCMS loan was made in

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2 January of 2021, do you think it was part of
3 the same conversation where Jim Dondero said,
4 hey, why didn't that get paid, please make
5 that -- get that payment done?

6 MR. MORRIS: I object to the form of
7 the question.

8 A. Yes. Likely it would have been -- I
9 mean, again, I don't recall a payment being
10 made, but, you know, again, I don't remember
11 everything.

12 Q. Okay. Did -- at the time you were
13 communicating with Kristin Hendrix about the
14 payment being made, whichever payments were
15 made in January, did she say anything to you
16 about the payments not curing the loan
17 defaults?

18 A. No.

19 Q. Okay. All right. So I'm going to
20 take you back to very early in the deposition
21 when Mr. Morris was asking you about the --
22 the -- the -- the agreement with respect to
23 the -- the forgiveness element of the loans, so
24 that is just to orient you.

25 Do you remember that there was a

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2 time that you and Mr. Dondero were
3 communicating about potential means of
4 resolving the Highland bankruptcy by what was
5 colloquially referred to as a pot plan?

6 A. Yes.

7 Q. Okay. And can you tell me generally
8 when that was?

9 A. Like mid -- mid 2020, sometime in
10 2020, mid 2020.

11 Q. Okay. And did the process of trying
12 to figure out what the numbers should be
13 involve looking at what one should pay for the
14 Highland assets?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. Yes.

18 Q. Okay. And did there come a time
19 when you were proposing some potential numbers
20 and Mr. Dondero said something to you like,
21 well, why are you including payment for the
22 related party notes, those, you know, were
23 likely to be forgiven as part of my deferred
24 executive compensation?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. Yes, we did have that conversation.

4 Q. Okay. Was that conversation in
5 connection with trying to figure out the right
6 numbers for a pot plan?

7 A. Yeah. I mean, it was -- it was -- I
8 mean, Jim -- Jim would ask for, you know,
9 most -- most recent asset values, you know, for
10 Highland, and -- and myself and the team
11 provided those to him, so it was in that
12 context.

13 Q. Okay. And does that refresh your
14 recollection that these communications were in
15 2020 rather than 2021?

16 MR. MORRIS: Objection to the form
17 of the question.

18 A. The -- the -- the executive
19 compensation discussions were definitely in
20 2020.

21 Q. Okay. Now, did you ever make
22 proposals that took into account Jim's comment
23 that the notes were likely to end up forgiven
24 as part of his compensation?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. Yes, we -- the team and myself put
4 together, you know, asset summaries of Highland
5 at various times for all the assets of
6 Highland, and not including the notes.

7 Q. Okay. And were those presentations
8 communicated to -- to Mr. Seery?

9 A. No. Well, look, I didn't tell -- I
10 didn't tell Mr. Seery. I don't know what
11 Mr. Dondero did with the information.

12 Q. Okay.

13 A. I did not have conversations with
14 Mr. Seery.

15 Q. Okay. Do you know who saw the
16 presentations that you put together that didn't
17 include the value of the related party notes?

18 A. We're talking presentations -- these
19 are -- these are Excel spreadsheets?

20 Q. Uh-huh.

21 A. I don't know who -- these were given
22 to -- to Jim Dondero. I don't know what was
23 done with them after that.

24 Q. Okay. You also mentioned earlier
25 that sometime during your tenure at Highland

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2 you knew of the practice of giving forgivable
3 loans to executives.

4 MR. MORRIS: Objection to the form
5 of the question.

6 Q. Can you -- can you tell me what you
7 recall about that practice?

8 MR. MORRIS: Objection to the form
9 of the question.

10 A. Yes, so there were -- there were --
11 during my tenure at Highland, there were loans
12 or -- given to employees that were later
13 forgiven at a future date and time.

14 Q. Okay. And when the loans were
15 given, did the notes, to your recollection, say
16 anything about the potential forgiveness term?

17 MR. MORRIS: Objection to the form
18 of the question.

19 A. When you say "did the notes," did
20 the promissory notes detail the forgiveness?

21 Q. Yes.

22 A. Not that I recall.

23 Q. And until such time as whatever was
24 to trigger the forgiveness occurred, were the
25 notes bona fide notes as far as you were

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2 concerned?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. Yes, similar to -- yes.

6 Q. Okay. You were going to say similar
7 to what?

8 A. Mr. Morris earlier today showed
9 notes of the financial statements about various
10 affiliate loans. I -- I -- I do recall these
11 notes because I -- at that time personally
12 worked on the -- the financial statements of
13 Highland. That was, you know, in my role as a
14 corporate accountant.

15 And there were -- those loans
16 were -- to the partners were detailed in the
17 notes to the financial statements, similar to
18 what we went through earlier today in the prior
19 testimony about what we saw with Highland
20 and -- and -- and the -- and HCMFA.

21 Q. Is it fair to say that on Highland's
22 balance sheet there were any number of assets
23 that the value of which could be affected by
24 subsequent events?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. Yes. I mean, yes, that -- there
4 are. And that is -- yes.

5 Q. Okay. And is it typical accounting
6 practice that until there is some certainty
7 about those potential future events, that asset
8 value listed on -- on the books doesn't take
9 into account those potential future events?

10 MR. MORRIS: Objection to the form
11 of the question.

12 A. Yeah, if those -- yes. If -- if
13 those future events, you know, at the time of
14 issuance are not known or knowable, like I
15 discussed earlier with, like, market practice,
16 asset dislocation, or, you know, I mean, things
17 like that, you -- I mean, it -- it could affect
18 its fair value --

19 Q. Okay.

20 A. -- in the future.

21 Q. And am I correct you wouldn't feel
22 compelled to footnote in every possible change
23 in -- in an asset when those possibilities are
24 still remote?

25 MR. MORRIS: Objection to the form

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2 of the question.

3 A. The accounting standard is you have
4 to estimate to the best -- you know, to -- to
5 the best of your ability, the fair value of an
6 asset as of the balance sheet date under --
7 under GAAP.

8 Q. Did -- strike that.

9 Okay. Give me a minute. I'm
10 close -- I'm close to done. Let me just go off
11 and look at my notes for a second. So take two
12 minutes.

13 VIDEOGRAPHER: We're going off the
14 record at 7:02 p.m.

15 (Recess taken 7:02 p.m. to 7:03 p.m.)

16 VIDEOGRAPHER: We are back on the
17 record at 7:03 p.m.

18 Q. Mr. Waterhouse, is it generally your
19 understanding that people you work with now
20 have been asking the debtor for full and
21 unfettered access to their own former files?

22 MR. MORRIS: Objection to the form
23 of the question.

24 A. Yes, I am -- I am generally aware.

25 Q. Okay. And do you think you could

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2 have been better prepared for this deposition
3 if the debtor had complied with those requests?

4 MR. MORRIS: Objection to the form
5 of the question.

6 A. I -- I -- I most certainly -- yes.
7 I mean, again, these are multiple years,
8 multiple years ago, lots and lots of
9 transactions.

10 You know, we asked about NAV errors
11 and, you know, things like that and these
12 are -- it would make this process a lot more --
13 a lot easier and if we had -- if we had access
14 to that.

15 Q. Okay. And has the debtor -- is the
16 debtor suing you right now?

17 A. Yes.

18 Q. And is the debtor trying to renege
19 on deals that it had previously made with you?

20 MR. MORRIS: Objection to the form
21 of the question.

22 A. Sorry, I need to -- it is my
23 understanding that the litigation trust is
24 suing me. And not being a lawyer, I don't
25 know -- is that the debtor?

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2 Is that -- I don't know the
3 relationship. So, again, I'm not the lawyers.
4 I've said many times. But my understanding is
5 the litigation trust is suing me. I could be
6 wrong there. I don't know.

7 Q. Okay. I understand.

8 Someone with some connection to the
9 Highland debtor has brought a claim against
10 you; is that fair?

11 MR. MORRIS: Objection to the form
12 of the question.

13 A. Yes.

14 Q. Okay. And is there also some motion
15 practice in the bankruptcy where the debtor or
16 someone associated with the debtor is
17 attempting to undo something that was
18 previously resolved with you?

19 A. Yes.

20 Q. And so in one action somebody is
21 associated with the debtors trying to --
22 threatening you with trying to take money from
23 you, and then in the other -- and trying to --
24 and in the other they are threatening not to
25 pay you things that had previously been agreed;

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2 is that correct?

3 MR. MORRIS: Objection to the form
4 of the question.

5 A. I want to be -- yes, I -- there
6 is -- I'm being sued, again, on -- on something
7 that was agreed to with Mr. Seery and myself.
8 I don't -- I don't -- I don't own that claim.

9 Q. Okay.

10 A. To be transparent, I don't own that
11 claim. So it is not my personal property.

12 Q. Okay.

13 A. And -- and being the nonlawyer, I
14 don't know how I can get sued for something
15 that I don't owe or, like, I don't own
16 anything. I'm not the lawyer. But, I mean, if
17 that is -- if I'm understanding the facts
18 correctly.

19 Q. Okay. And the lawsuit that was
20 filed that names you, that was just filed
21 this -- this past week; is that right?

22 MS. DANDENEAU: Ms. Deitsch-Perez, I
23 do want to interrupt at this point because
24 just as I told Mr. Morris, that this is a
25 deposition about the noticed litigation.

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2 I really don't want to go -- go
3 afield --

4 MS. DEITSCH-PEREZ: Yeah.

5 MS. DANDENEAU: -- and open up a
6 whole new line of inquiry about the lawsuit
7 or the -- the motion and the bankruptcy
8 court. We will be here all night.

9 MS. DEITSCH-PEREZ: And I
10 understand.

11 Q. My -- my point is: Do you feel
12 like -- like there is some effort by these
13 parties related to the debtor to intimidate
14 you -- not that you -- I'm not saying you are
15 or you aren't.

16 But do you feel like there is some
17 effort to intimidate you and maybe an effort to
18 deter you from being as prepared as you might
19 be in this deposition?

20 MR. MORRIS: Objection to the form
21 of the question.

22 A. I was -- I was surprised by the
23 lawsuit, by me being named, because, again, I
24 don't own the asset and things like that.
25 Yeah, I just -- I want to move forward with my

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2 life at Skyview.

3 MS. DEITSCH-PEREZ: Thank you.

4 THE WITNESS: Thank you.

5 FURTHER EXAMINATION

6 BY MR. MORRIS:

7 Q. If I may, I just have a few
8 questions.

9 Mr. Waterhouse, we saw a number of
10 documents that Mr. Rukavina put up on the
11 screen where Ms. Hendrix would send you a
12 schedule of payments that were due on behalf of
13 certain Highland affiliates.

14 Do you remember that?

15 A. Yes.

16 Q. And in each instance she asked for
17 your approval to make the payments; is that
18 right?

19 A. Yes, she did.

20 Q. And was that the -- was that the
21 practice in the second half of 2020 whereby
22 Ms. Hendrix would prepare a list of payments
23 that were due on behalf of Highland associates
24 and ask for approval?

25 A. Yes.

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2 Q. And I think you said that there was
3 a -- a --

4 A. It was -- I think I testified to
5 this earlier when we talked about procedures
6 and policy, you know, again, I want to be
7 informed of -- of -- of -- of -- of any
8 payments that are going out. I want to be made
9 aware of these payments, and that was just a
10 general policy, not just for 2020.

11 Q. Okay. So it went beyond 2020?

12 A. Yes.

13 Q. Is that right?

14 A. Yes.

15 Q. Okay. And the corporate accounting
16 group would prepare a calendar that would set
17 forth all of the payments that were anticipated
18 in the -- in the three weeks ahead; is that
19 right?

20 A. I -- like I testified earlier, we
21 had a corporate calendar that was set up, you
22 know, to -- to provide reminders or, you know,
23 of anything of any nature, whether it is
24 payments or -- or financial statements or, you
25 know, whatever it is, you know, to meet

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2 deadlines.

3 I don't know how, as I testified
4 earlier, how much they were using that
5 calendar.

6 Q. Okay. But -- but you did get notice
7 and a request to approve the payments that were
8 coming due on behalf of Highland's affiliates.
9 Do I have that right?

10 MS. DANDENEAU: Objection to form.

11 A. I mean, generally, yes. I mean, you
12 know, as we saw with these emails, generally, I
13 mean, did that encompass everything, no.

14 Q. Okay. Do you know why the
15 payment -- do you know why there was no payment
16 made by NexPoint at the end of 2020?

17 A. Yes. There was -- there was -- we
18 talked about these agreements between the
19 advisors and Highland, the shared services and
20 the cost reimbursement agreement.

21 And in late 2020, there were
22 overpayments, large overpayments that had been
23 made over the years on these agreements, and it
24 was my understanding that the advisors were --
25 were talking with -- like Jim Seery and others

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2 to offset any obligations that the advisors
3 owed to Highland as offset to the overpayments
4 on these agreements.

5 Q. Okay. Did you participate in any of
6 those conversations?

7 A. I did not.

8 Q. Okay. Do you know -- do you recall
9 that the -- at the end of November, the debtor
10 did notice to the advisors of their intent to
11 terminate the shared services agreements?

12 A. Like I testified earlier, there
13 was -- the agreements weren't identical, from
14 what I recall, and there is one that had a
15 longer notice period, which I think had a
16 60-day notice period. I don't recall which one
17 that was, so not all of them were -- notice
18 hadn't been given as of November 30th, for all
19 of the agreements.

20 Q. Upon the receipt of the -- the
21 termination notices that you recall, do you
22 know if the advisors decided at that point not
23 to make any further payments of any kind to
24 Highland?

25 MR. RUKAVINA: Objection, form.

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2 A. No. The advisors -- the advisors
3 had stopped making payments prior to that
4 notice.

5 Q. Okay. And how do you know that the
6 advisors stopped making -- making payments
7 prior to the notice?

8 A. I had -- I had a conversation
9 with -- with Jim Dondero.

10 Q. And did Mr. Dondero tell you that
11 the advisors would no longer make payments to
12 Highland?

13 MS. DEITSCH-PEREZ: Object to the
14 form.

15 A. Yes, he -- he -- again, he said
16 they -- they -- the advisors have overpaid on
17 these agreements, to not make any future
18 payments, and that there needs to be offsets,
19 and they're working on getting offsets to these
20 overpayment.

21 Q. Do you know if anybody ever
22 instructed Highland's employees to make the
23 payment that was due by NexPoint at the end of
24 the year?

25 A. Did anyone instruct Highland's

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2 employees to make that payment?

3 Q. Correct.

4 A. Anyone -- not that I'm aware.

5 Q. Were any of Highland's employees
6 authorized to make the payments on behalf of
7 its affiliates -- withdrawn.

8 Was any of Highland's employees
9 authorized to effectuate the payment on behalf
10 of NexPoint that was due at the end of the year
11 without getting approval from either you or
12 Mr. Dondero?

13 A. They had the -- they had the ability
14 to make the payment, but they didn't -- you
15 know, that -- that payment needed to be
16 approved.

17 Q. Okay. And it needed to be approved
18 by you or Mr. Dondero; is that right?

19 A. I mean, I'm not going to make the
20 unilateral decision.

21 Q. Is that a decision that you
22 understood had to be made by Mr. Dondero?

23 A. Yes. Sitting back in December of
24 2020, the -- that -- there was this off --
25 offset negotiation that -- that was happening,

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2 so I mean, until those negotiations were
3 resolved, you know, there wasn't any
4 payments -- there weren't any payments.

5 Q. And -- and there were no payments
6 until the negotiations were resolved because
7 that was the directive that you received from
8 Mr. Dondero; correct?

9 A. I don't think he said -- I mean, I
10 think -- yeah, I mean -- I'm trying to recall
11 the conversation. It was -- you know, there
12 is -- there is these negotiations. There's --
13 there needs to be these offsets. They're
14 talking with the debtor. So, you know, until
15 this is resolved, right, I mean, depending on
16 how, whatever that resolution was, were we to
17 take any action.

18 Q. Okay. How about with respect to
19 HCMS, did HCMS have a term payment due at the
20 end of the year?

21 A. Again, I don't -- I don't recall.

22 Q. Okay. You discussed briefly two
23 payments that were made in January of 2021, one
24 on behalf of NexPoint, and one on behalf of
25 HCMS. Do I have that right?

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2 A. No. The two payments I recall were
3 NexPoint and HCRE.

4 Q. Okay. And those two payments --
5 thank you for the correction. And those two
6 payments were made because Mr. Dondero
7 authorized those payments to be made; correct?

8 A. Yes.

9 Q. And they hadn't been made before
10 that because Mr. Dondero had not authorized
11 them to be made?

12 MS. DEITSCH-PEREZ: Object to the
13 form.

14 A. Yes, because of these negotiations.

15 Q. Okay. Just a couple of more
16 questions.

17 Did anybody, to the best of your
18 knowledge, on behalf of HCMFA, ever tell the
19 SEC that HCMLP was responsible for the mistakes
20 that were made on the TerreStar valuation?

21 A. Did anyone from Highland on HCMFA's
22 behalf tell the SEC that Highland -- that
23 Highland was responsible for there -- I just
24 want to make sure --

25 Q. It was a little bit different, so

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2 let me try again.

3 A. These are very long questions, John.

4 I'm not trying to be --

5 Q. That is good. Do you know whether
6 anybody -- do you know whether anybody on
7 behalf of HCMS -- HCMFA ever told the SEC that
8 Highland was the responsible party for the
9 TerreStar valuation error?

10 A. Not that I'm aware.

11 Q. Okay. Did anybody on behalf of
12 the -- on behalf of HCMFA ever tell the retail
13 board that Highland was responsible for the
14 TerreStar valuation error?

15 A. Not that I'm aware.

16 Q. Do you know if HCMFA made an
17 insurance claim with respect to the damages
18 that were incurred in relation to the TerreStar
19 valuation error?

20 A. Yes.

21 Q. And do you know why they made that
22 insurance claim?

23 A. Because there was an error. I
24 mean --

25 Q. Was the insured's claim made -- was

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2 the insurance claim made under HCMFA's policy?

3 A. Yes.

4 Q. Did HCMFA at any time prior to the
5 petition date -- withdrawn.

6 You were asked a couple of questions
7 where -- where you said that Mr. Dondero told
8 you that he was ascribing zero value to the
9 notes as part of a pot plan because he believed
10 that the notes were part of executive
11 compensation.

12 Do I have that right?

13 MS. DEITSCH-PEREZ: Object to the
14 form.

15 A. Yes.

16 Q. Okay. Have you ever heard that
17 before the time that Mr. Dondero told you that
18 in the conversation about the pot plan?

19 A. Had I heard that prior to my
20 conversation with Mr. Dondero?

21 Q. Yes.

22 A. No, I had not heard that prior.

23 Q. Okay. And that was in the context
24 of his formulation of the settlement proposal;
25 is that right?

1 WATERHOUSE - 10-19-21

2 A. I mean, generally, yes. You know,
3 we were asked to provide asset values, right,
4 and he was having settlement discussions.
5 Again, I don't know who those went to
6 ultimately. I don't recall.

7 MR. MORRIS: I have no further
8 questions. Thank you very much for your
9 patience. I apologize for the late hour.

10 MS. DEITSCH-PEREZ: John, you stay
11 on about your email when --

12 MR. RUKAVINA: Hold on, I'm not
13 done.

14 MS. DEITSCH-PEREZ: Oh, okay. Davor
15 still has questions. Sorry. I was going
16 to say both John and Davor, could you stay
17 on afterwards just to talk about the
18 requests.

19 FURTHER EXAMINATION

20 BY MR. RUKAVINA:

21 Q. Mr. Waterhouse, you were just now
22 testifying about a discussion you had with
23 Mr. Dondero where he said something like no
24 more payments.

25 Do you remember that testimony?

1 WATERHOUSE - 10-19-21

2 A. Yes.

3 Q. Okay. And was that late November or
4 early December of 2020?

5 A. It was, I would say, first or second
6 week of November.

7 Q. Okay. Do you recall whether --
8 whenever you had that discussion, whether
9 Mr. Dondero had already been fired by the
10 debtor?

11 A. Yes, I -- I believe he was not an
12 employee of the debtor anymore at that time.

13 Q. And when you were discussing this
14 with Mr. Dondero and he said no more payments,
15 you were discussing the two shared services
16 agreements and employee reimbursement
17 agreements we testified -- you testified about
18 before; is that correct?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. That is correct.

22 Q. And had your office or you -- and we
23 will talk at a future deposition about the
24 administrative claim.

25 But had -- by that time that you

1 WATERHOUSE - 10-19-21

2 talked to Mr. Dondero, had your office or you
3 done any estimate of what the alleged
4 overpayments were?

5 MR. MORRIS: Objection to the form
6 of the question.

7 A. Yes, we had -- there was a -- there
8 was a detailed analysis that was put together
9 by David Klos at the time.

10 Q. And do you recall just generally
11 what the total amount for both advisors of the
12 overpayments was?

13 A. It was in excess of \$10 million.

14 Q. Was it in excess of \$14 million?

15 MR. MORRIS: Objection to the form
16 of the question.

17 A. I -- I remember it was an
18 eight-figure number. I don't remember
19 specifically.

20 Q. Okay. And did you convey that
21 number to Mr. Dondero when you had that
22 conversation?

23 A. Yes.

24 Q. What was his reaction?

25 A. I mean, he wasn't happy.

1 WATERHOUSE - 10-19-21

2 Q. Is it fair to say he was upset?

3 A. Yes.

4 Q. Did Mr. Dondero ever expressly tell
5 you to not have NexPoint make the required
6 December 31, 2020, payment?

7 A. Yes, I recall him saying don't make
8 the payment because it was being negotiated, as
9 I discussed with Mr. Morris, this offset
10 concept. So there were obligations due by the
11 advisors to Highland, they should be offset
12 that -- you know, those obligations should be
13 offset by this -- by this overpayment.

14 Q. And when did he tell you that?

15 A. I would say -- I would say around --
16 probably December -- December-ish.

17 Q. Early December, late December?

18 A. I don't recall with as much
19 specificity as -- as -- as -- as stopping the
20 shared services payments, because we had
21 actually made one shared services payment in
22 November. So that is why I need to remember
23 that one more clearly. I don't remember where
24 exactly in December that conversation occurred.

25 Q. Did Mr. Dondero expressly use the

1 WATERHOUSE - 10-19-21

2 word "NexPoint" when he was saying don't make
3 these payments?

4 MR. MORRIS: Objection to the form
5 of the question, asked and answered.

6 A. Yeah, we were -- we were discussing
7 advisor obligations. So it was -- you know, it
8 was just obligations from the advisors.

9 And -- and he specifically talked
10 about the NexPoint payment as well.

11 Q. Okay. And it is your testimony that
12 he expressly told you not to make that NexPoint
13 December 31 payment?

14 MR. MORRIS: Objection, asked and
15 answered twice.

16 A. Yes, he -- he did, during that
17 conversation.

18 Q. And did you ever follow up with him
19 after that about whether NexPoint should or
20 shouldn't make that payment?

21 A. I did not.

22 Q. Did you ever, on or about
23 December 31, 2020, remind him and say, hey,
24 this payment is due, what shall I -- what
25 should I do?

1 WATERHOUSE - 10-19-21

2 A. I did not.

3 Q. So sitting here today, you -- you
4 remember distinctly that Dondero in December of
5 2020 expressly told you not to have NexPoint
6 make that payment?

7 MR. MORRIS: Objection, asked and
8 answered three times.

9 A. Yes.

10 Q. Can you say categorically it wasn't
11 just some general discussion where he told you
12 not to make payments?

13 MR. MORRIS: Objection, asked and
14 answer four times.

15 MR. HORN: Four times now. Go for
16 five.

17 A. Yes.

18 Q. Did you tell Mr. Seery that?

19 A. I don't believe I did. I don't
20 recall.

21 Q. And was this an in-person discussion
22 or telephone or email? Do you remember?

23 A. This was a phone -- a phone
24 conversation.

25 Q. Okay. Would you have a record of --

1 WATERHOUSE - 10-19-21

2 on your cell phone of when that conversation
3 might have taken place?

4 I'm sorry, strike that.

5 Was that by cell phone?

6 A. I believe -- yes, because we -- I
7 was at home. I mean, I don't have a landline.
8 All I have is my cell phone.

9 Q. Do you know whether your cell phone
10 still has records of conversations from
11 December 2020 on it?

12 A. My call log doesn't go back that
13 far.

14 Q. Okay. Thank you.

15 MR. RUKAVINA: I will pass the
16 witness.

17 MS. DEITSCH-PEREZ: Just a couple
18 quick questions.

19 FURTHER EXAMINATION

20 BY MS. DEITSCH-PEREZ:

21 Q. With respect to HCRE and HCMS, am I
22 correct there was -- there was no direction not
23 to pay those loan payments?

24 MR. MORRIS: Objection to the form
25 of the question.

1 WATERHOUSE - 10-19-21

2 A. Yes, I don't recall having
3 conversations about, you know, those -- those
4 entities.

5 Q. And, in fact, what was the tone that
6 Mr. Dondero had when he talked to you about the
7 fact that HCRE and HCMS payments hadn't been
8 made when he found out that they hadn't been
9 paid?

10 MS. DANDENEAU: Objection to form.

11 MR. MORRIS: Objection to form.

12 Q. What was the tone he took with you?

13 A. Oh, it was -- it was -- it was -- it
14 was very negative. I mean, I think he cursed
15 at me and he doesn't usually curse.

16 Q. Okay. And in your mind, is that
17 consistent with the fact that he was surprised
18 that those payments hadn't been made?

19 MR. MORRIS: Objection to the form
20 of the question.

21 A. Yes.

22 Q. Okay. Thank you.

23 MR. MORRIS: I have nothing further.

24 Thank you so much, Mr. Waterhouse.

25 MR. HORN: I have no questions.

1 WATERHOUSE - 10-19-21

2 Thank you, Mr. Waterhouse. We appreciate
3 your time. I am logging off the discussion
4 and I will talk to y'all tomorrow.

5 MR. MORRIS: Super.

6 VIDEOGRAPHER: If there are no
7 further questions, this ends the
8 deposition -- excuse me. This ends the
9 deposition, and we are going off the record
10 at 7:30 p.m.

11 (Deposition concluded at 7:30 p.m.)

12

13

14

FRANK WATERHOUSE

15

16 Subscribed and sworn to before me

17 this day of 2021.

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WATERHOUSE - 10-19-21

C E R T I F I C A T E

I, SUSAN S. KLINGER, a certified shorthand reporter within and for the State of Texas, do hereby certify:

That FRANK WATERHOUSE, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 19th of October, 2021.



Susan S. Klinger, RMR-CRR, CSR
Texas CSR# 6531

1 WATERHOUSE - 10-19-21

2 NAME OF CASE: In re: Highland Capital

3 DATE OF DEPOSITION: October 19, 2021

4 NAME OF WITNESS: Frank Waterhouse

5 Reason Codes:

6 1. To clarify the record.

7 2. To conform to the facts.

8 3. To correct transcription errors.

9 Page____Line____Reason_____

10 From_____to_____

11 Page____Line____Reason_____

12 From_____to_____

13 Page____Line____Reason_____

14 From_____to_____

15 Page____Line____Reason_____

16 From_____to_____

17 Page____Line____Reason_____

18 From_____to_____

19 Page____Line____Reason_____

20 From_____to_____

21 Page____Line____Reason_____

22 From_____to_____

23 Page____Line____Reason_____

24 From_____to_____

25

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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	§	
Reorganized Debtor.	§	Case No. 19-34054-sgj 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	21-03005-sgj
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO AND THE DUGABOY INVESTMENT TRUST,	§	
Defendants.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	21-03006-sgj
	§	

¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

HIGHLAND CAPITAL MANAGEMENT	§	
SERVICES, INC., JAMES DONDERO, NANCY	§	
DONDERO, AND THE DUGABOY	§	
INVESTMENT TRUST,	§	
	§	
Defendants.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
vs.	§	21-03007-sgj
	§	
HCRE PARTNERS, LLC (N/K/A NEXPOINT	§	
REAL ESTATE PARTNERS, LLC), JAMES	§	
DONDERO, NANCY DONDERO, AND THE	§	
DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

HIGHLAND’S OBJECTION TO MOTION OF DEFENDANT NEXPOINT ADVISORS, L.P. TO EXTEND EXPERT DISCLOSURE AND DISCOVERY DEADLINES

Highland Capital Management, L.P., the reorganized debtor (“Highland”) in the above-captioned chapter 11 case (the “Bankruptcy Case”) and the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”), hereby objects (the “Objection”) to the *Motion of NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines* [AP Docket No. 86]² (the “Motion”) filed by defendant NexPoint Advisors, L.P. (“NexPoint”) and joined by certain defendants in other related adversary proceedings. Highland fully incorporates by reference its contemporaneously filed brief (the “Brief”) ³ in opposition to the Motions and would show unto the Court as follows:

² Unless specified otherwise, references to “AP Docket No. ___” are to the docket entries in NexPoint’s Adversary Proceeding, 21-03005.

³ Capitalized terms used but not defined herein shall take on the meaning scribed thereto in the Brief.

RELIEF REQUESTED

1. By this Objection, Highland respectfully requests that the Court enter an order denying the Motions seeking to extend the expert disclosure and discovery deadlines set forth in the Scheduling Order.

2. Pursuant to Rules 7.1(d) and (h) of the *Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas* (the “Local Rules”), the Brief is being filed contemporaneously with this Objection and is incorporated by reference.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Highland respectfully requests that the Court enter an order (i) denying in whole the relief requested in the Motions, and (ii) granting Highland such further and additional relief as the Court deems just and proper.

Dated: December 1, 2021.

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	
Reorganized Debtor.	§	Case No. 19-34054-sgj1
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	21-03005-sgj
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO AND THE DUGABOY INVESTMENT TRUST,	§	
Defendants.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	21-03006-sgj
	§	

¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,

Defendants.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Plaintiff,

vs.

HCRE PARTNERS, LLC (N/K/A NEXPOINT REAL ESTATE PARTNERS, LLC), JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,

Defendants.

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Adversary Proceeding No.
21-03007-sgj

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**HIGHLAND’S MEMORANDUM OF LAW IN SUPPORT OF OBJECTION TO
MOTION OF DEFENDANT NEXPOINT ADVISORS, L.P. TO EXTEND EXPERT
DISCLOSURE AND DISCOVERY DEADLINES**

Highland Capital Management, L.P., the reorganized debtor (“Highland”) in the above-captioned chapter 11 case (the “Bankruptcy Case”) and the plaintiff in the above-captioned adversary proceeding (the “Adversary Proceeding”), hereby objects (the “Objection”) to the *Motion of NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines* [AP Docket No. 86]² (the “Motion”) filed by defendant NexPoint Advisors, L.P. (“NexPoint”) and joined by certain defendants in other related adversary proceedings.³ In support of its Objection, Highland respectfully states as follows:

I. PRELIMINARY STATEMENT⁴

1. NexPoint’s Motion to modify the Scheduling Order is without merit and should be denied.

2. This Adversary Proceeding arises from NexPoint’s default under its Note in the original principal amount of \$30.7 million. The Note required NexPoint to make Annual Installment payments to Highland on December 31 of each year.

3. NexPoint blames Highland for its failure to timely make the Annual Installment payment. Initially, NexPoint contended that Highland breached its obligations by negligently failing to make the payment on NexPoint’s behalf. Then, Frank Waterhouse, an officer of NexPoint, a current employee of Skyview (the entity that services numerous of Mr. Dondero’s

² Unless specified otherwise, references to “AP Docket No. ___” are to the docket entries in NexPoint’s Adversary Proceeding, 21-03005.

³ See *Motion of Highland Capital Management Services, Inc. to Extend Expert Disclosure and Discovery Deadlines*, filed at Docket No. 91 in Adversary Proceeding 21-03006 (“HCMS’s Joinder”) (incorporating NexPoint’s Motion), and *Motion of HCRE Partners, LLC to Extend Expert Disclosure and Discovery Deadlines*, filed at Docket No. 86 in Adversary Proceeding 21-03007 (“HCRE’s Joinder”, and together with HCMS’s Joinder, the “Joinders,” and collectively with the Motion, the “Motions”) (incorporating NexPoint’s Motion).

⁴ Capitalized terms used but not defined in this Preliminary Statement shall have the meanings ascribed thereto below.

businesses), and Highland’s former Chief Financial Officer, testified in his deposition that NexPoint failed to make the Annual Installment payment because Mr. Dondero instructed him in December 2020 not to make *any* payments to Highland from *any* of the entities that Mr. Dondero controlled.

4. NexPoint contends that, in light of this testimony, an expert is necessary to testify regarding whether Highland violated an “affirmative duty or obligation” it owed to NexPoint under Section 6.01 of the Shared Services Agreement to effectuate the payment on behalf of NexPoint, despite Mr. Dondero’s instructions to the contrary. According to NexPoint:

[T]he question becomes whether Waterhouse or the Debtor ‘put their head in the sand’ in violation of any affirmative duty or obligation they may have had regarding the matter, such as; to ask Dondero whether they correctly understood him; to ask Dondero whether he meant NexPoint or the Note; to inform Dondero of the potential consequences of a default by potentially accelerating a 30-year promissory note; or to try to dissuade him from his decision.

Motion ¶ 13.

5. NexPoint’s Motion to extend the expert disclosure and discovery deadlines in order to retain a testifying expert on Highland’s duties of care under the Shared Services Agreement is without merit.

6. NexPoint’s suggested expert testimony is improper because it concerns “the standards and duties of care under the parties’ Shared Services Agreement” and otherwise seeks to interpret that Agreement for the Court. It is black-letter law that the determination of the existence and scope of contractual and other legal duties are improper subjects of expert opinion because they constitute legal conclusions that fall within the exclusive province of the Court.

7. Even if that were not the case (and it is), NexPoint fails to satisfy its burden of demonstrating “good cause” to modify the Scheduling Order under Rule 16(b) for three independent reasons. *First*, as set forth below, the Motion is untimely. *Second*, the suggested expert testimony is irrelevant because it would not assist a factfinder in determining any technical

or complex issues in this case. By its plain terms, the Shared Services Agreement does not impose an affirmative duty on—or even authorize—Highland to effectuate payments on behalf of NexPoint without authorization from a NexPoint Representative. NexPoint’s reliance on Section 6.01 as the source of Highland’s alleged duties is thus misguided, as that provision applies only to duties specifically set forth under the Agreement.⁵ *Finally*, allowance of the expert testimony at this late juncture would substantially prejudice Highland, with such prejudice being exacerbated (and not cured) by a continuance. If the Motion is granted, Highland will be forced to expend significant resources addressing NexPoint’s latest theories of its defense, including through additional discovery and motion practice. It will also cause a further delay of the trial on the merits, thereby impeding Highland’s ultimate recovery under the Note, all at the expense of Highland’s creditors.

8. Separately, as ill-conceived as the Motion is, the Joinders raise considerable questions of good faith, because neither Highland Management Services, Inc. (“HCMS”) nor HCRE Partners, LLC (“HCRE”) even alleges that it is a party to a shared services agreement (let alone the Shared Services Agreement submitted with the Motion), nor can it. The Motion seeks to “designate a testifying expert on the standards and duties of care under the parties’ Shared Services Agreement,” but the Joinders offer no explanation for why such expert testimony would have any relevance to them since they are not parties to *any* shared services agreement.

9. For the reasons set forth herein, Highland respectfully requests that the Court deny the Motion in all respects.

⁵ NexPoint offers no explanation for why Highland’s alleged obligations under the Shared Services Agreement supersede Mr. Waterhouse’s fiduciary duties to NexPoint. If anyone had a duty to ask Mr. Dondero “Are you sure?” or “Do you know what you’re doing” (an absurd concept on its own), it was surely Mr. Waterhouse—not in his capacity as a Highland employee—but in his capacity as an officer of, and a fiduciary to, NexPoint.

II. STATEMENT OF FACTS

A. The Note

10. On May 31, 2017, James Dondero (“Mr. Dondero”) signed a 30-year term note on behalf of NexPoint and in favor of Highland (the “Note”). Morris Dec.⁶ Exhibit 1.

11. The Note consolidated NexPoint’s obligations under five Prior Notes (as that term is defined in the Note) and was for an original principal amount of \$30,746,812.33. See Morris Dec. Exhibit 1, Ex. A. Highland received no consideration for consolidating the five demand notes into a single 30-year term note.

12. NexPoint and Mr. Dondero knew that NexPoint was required to pay Highland in Annual Installments, because it was spelled out plainly in the Note:

2.1 Annual Payment Dates. During the term of this Note, [NexPoint] shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each payment) in thirty (30) equal annual payments (the “Annual Installments”) until the Note is paid in full. *[NexPoint] shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note*, commencing on the first such date to occur after the date of execution of this Note.

Morris Dec. Exhibit 1 § 2.1 (emphasis added).

13. NexPoint and Mr. Dondero also knew the consequences of failing to timely make the required Annual Installment payments, because they were also spelled out plainly in the Note:

4. Acceleration Upon Default. *Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof [i.e., Highland], without notice, demand presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable* and subject to those remedies of the holder hereof [i.e., Highland].

Id. § 4 (emphases added).

⁶ References to “Morris Dec. ___” are to the *Declaration of John Morris in Support of Objection to Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosures and Discovery Deadlines* being filed concurrently herewith.

14. Finally, Mr. Dondero expressly agreed on behalf of NexPoint to waive any notice of default or acceleration:

5. Waiver. [NexPoint] hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration, and all other notices of any kind hereunder.

Id. § 5.

15. Thus, based on the plain terms of the Note executed by Mr. Dondero on NexPoint's behalf at a time when Mr. Dondero indisputably controlled both entities, NexPoint agreed (a) to make Annual Installment payments to Highland on December 31 of each year; (b) that Highland would have the unilateral right upon a default to accelerate all unpaid principal and interest due under the Note without notice or demand; and (c) to waive, among other things, a grace period, notice of nonpayment, notice of intent to accelerate, and "all other notices of any kind hereunder."

B. NexPoint Defaults under the Note and Highland Sues to Collect

16. NexPoint does not dispute that it failed to make the Annual Installment payment due under the Note on December 31, 2020 in the amount of \$1,406,111.92.

17. By letter dated January 7, 2021, in an exercise of its unambiguous and unconditional rights under the Note, Highland demanded that NexPoint immediately pay all unpaid principal and interest then due under the Note (the "Demand Letter"). Morris Dec. Exhibit 2. The Demand Letter stated:

Because of Maker's failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$24,471,804.98; however, interest continues to accrue under the Note.

The Note is in default, and payment is due immediately.

Id.

18. On January 22, 2021, after NexPoint failed to meet its obligations under the Note, Highland commenced this Adversary Proceeding. [AP Docket No. 1].

C. NexPoint Blames Highland for Its Default

19. On March 1, 2021, NexPoint filed its *Original Answer* asserting, among other things, that “[p]ursuant to that certain Shared Services Agreement, [Highland] was responsible for making payments on behalf of [NexPoint] under the note” such that any “alleged default” was caused by Highland’s own negligence and breach of contract (the “Original Defense”). *Defendant’s Original Answer* [AP Docket No. 6] (the “Original Answer”) ¶¶ 39-41.

20. On August 9, 2021, NexPoint filed its *First Amended Answer*, which did not substantively alter its Original Defense. [AP Docket No. 50] (the “Amended Answer”) ¶¶ 39-41.

21. On September 1, 2021, after Highland amended its Complaint, NexPoint filed its *Answer to Amended Complaint* [AP Docket No. 64] (the “Final Answer”). The Final Answer did not substantively alter NexPoint’s Original Defense. *See id.* ¶¶ 80-82.

22. Thus, at all times prior to filing the Motion, NexPoint contended that its failure to timely make the Annual Installment due on December 31, 2020 was caused by Highland’s own alleged negligence and breach of the Shared Services Agreement.

D. The Court Enters the Scheduling Order

23. On September 6, 2021, the Court entered the *Order Approving Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* [AP Docket No. 70] (the “Scheduling Order”).

24. The Scheduling Order provides, in pertinent part, that “expert designations and disclosures of all opinions, and the bases therefor, will be made by October 29, 2021, and experts will be deposed between October 29, 2021 and November 8, 2021.” Scheduling Order ¶ 3.

E. Mr. Waterhouse Testifies that Mr. Dondero Instructed Him Not to Make Any Payments to Highland

25. In December 2020, Frank Waterhouse (“Mr. Waterhouse”) wore multiple hats that Mr. Dondero gave to him, including: (a) Chief Financial Officer of Highland; (b) Treasurer of NexPoint; (c) Treasurer of HCMS; (d) Treasurer of Highland Capital Management Fund Advisors, L.P. (“HCMFA”, and together with NexPoint, the “Advisors”); and (e) Principal Executive Officer of certain funds managed by the Advisors. *See* Morris Dec. Exhibit 3 at 24:2-25; 35:8-22; 120:7-12; 327:3-8.

26. At a recent deposition, Mr. Waterhouse testified that NexPoint did not make the Annual Installment payment due on December 31, 2020 because Mr. Dondero had instructed him in December 2020 not to cause any payments to be made to Highland. Mr. Waterhouse also testified that he never followed up with Mr. Dondero or reminded him that the payment was coming due at the end of the month. *See* Morris Dec. Exhibit 3 at 390:4-392:17.

27. Mr. Dondero testified that he was unaware of anyone ever instructing or authorizing Highland to make the Annual Installment payment due under the Note on NexPoint’s behalf. Morris Dec. Exhibit 4 at 462:16-463:9. Mr. Waterhouse concurred and confirmed that Highland’s employees were not authorized to make the Annual Installment payment due at the end of the year without prior approval:

Q: Do you know if anybody ever instructed Highland’s employees to make the payment that was due by NexPoint at the end of the year?

A: Did anyone instruct Highland’s employees to make that payment?

Q: Correct.

A: Anyone – not that I’m aware.

Q: . . . [Were] any of Highland’s employees authorized to effectuate the payment on behalf of NexPoint that was due at the end of the year without getting approval from either you or Mr. Dondero?

A: They had the – they had the ability to make the payment, but they didn’t – you know, that – that payment needed to be approved.

Morris Dec. Exhibit 3 at 381:21-382:16.

F. Highland’s Obligations under the Shared Services Agreement Were Limited to Those “Specifically” Identified Therein

28. NexPoint and Highland entered into that certain *Amended and Restated Shared Services Agreement* effective as of January 1, 2018 (the “SSA”). Rukavina Dec., Exhibit A.⁷

29. Article II of the SSA required Highland to provide “assistance and advice” with respect to certain specified services. Highland is unaware of any provision in the SSA—and NexPoint cites to none—that authorized Highland to control NexPoint’s bank accounts or required Highland to effectuate payments on behalf of NexPoint without receiving instruction or direction from an authorized representative of NexPoint.

30. In fact, Article II of the SSA expressly provided that “for the avoidance of doubt . . . [Highland] shall *not* provide any advice to [NexPoint] or perform any duties on behalf of [NexPoint], other than the back- and middle office services contemplated herein, with respect to (a) the general management of [NexPoint], its business or activities” SSA at § 2.02 (emphasis added).

31. To emphasize the point further, the SSA expressly curtailed Highland’s authority to act on NexPoint’s behalf:

Section 2.06 Authority. [Highland’s] scope of assistance and advice hereunder is *limited to the services specifically provided for in this Agreement. [Highland] shall not assume or be deemed to assume any rights or obligations of [NexPoint] under any other document or agreement to which NexPoint is a party. . . .* [Highland] shall not have any duties or obligations to [NexPoint] unless those duties and obligations are specifically provided for in this Agreement (or in any amendment, modification or novation hereto or hereof to which [NexPoint] is a party.

⁷ References to “Rukavina Dec. ___” are to the *Declaration of Davor Rukavina* [AP Docket No. 86-1] attached to the Motion.

Id. § 2.06 (emphasis added).

32. There can be no credible dispute that (a) the Note is a “document or agreement to which NexPoint is a party,” and that (b) the making of the Annual Installment payments were “obligations of” NexPoint under the Note.

G. The Instant Motion

33. Apparently stunned by Mr. Waterhouse’s testimony, NexPoint now seeks to extend the expert disclosure and discovery deadlines set forth in the Scheduling Order so it can obtain expert testimony regarding Highland’s legal duties under Section 6.01 of the Shared Services Agreement. Specifically, NexPoint proposes to retain an expert to testify “on the standards and duties of care under the parties’ Shared Services Agreement . . . with respect to Highland’s role in NexPoint’s alleged failure to make a December 21, 2020 payment on the Note (defined below); specifically, that Highland was responsible for ensuring that NexPoint made this payment.”

Motion ¶ 1.

III. ARGUMENT

A. NexPoint’s Suggested “Expert Testimony” Is Improper as a Matter of Law

34. NexPoint’s suggested expert testimony is improper as a matter of law because it amounts to a legal conclusion.

35. A party may not offer an expert opinion on the scope of a party’s “legal duty” because such testimony amounts to a legal conclusion. *See Panhandle Adver., LLC v. United Rentals Realty, LLC*, 2:19-CV-189-Z-BR, 2021 WL 1112901, at *5 (N.D. Tex. Feb. 12, 2021); *Flax v. Quitman County Hosp., LLC*, 2:09-CV-101-M-D, 2011 WL 3585870, at *5 (N.D. Miss. Aug. 16, 2011).

36. NexPoint’s suggested expert testimony relates to Highland’s “duties of care under the parties’ [SSA]” and, specifically, whether “Highland was responsible” under the SSA for

“ensuring that NexPoint made” its Annual Installment payment under its Note. Motion ¶¶ 1, 18. This is precisely the type of expert testimony that courts preclude because it constitutes a legal conclusion. *See Panhandle*, 2021 WL 1112901 at *5 (granting plaintiff’s motion to exclude expert testimony “as to his opinions regarding the legal duties Defendant owed Plaintiff under the lease at issue” because “opinions on the duties owed by the defendants and whether they fulfilled those duties were legal conclusions and not the proper subject for expert testimony”); *Flax*, 2011 WL 3585870 at *5 (prohibiting expert testimony “on the issue of *law* of whether a duty of care was owed”) (emphasis in original); *Hanspard v. Otis Elevator Co.*, CIV.A. 05-1292, 2007 WL 839994, at *2 (W.D. La. Jan. 12, 2007) (granting plaintiff’s motion *in limine* to exclude expert testimony where “an opinion as to the scope of [party’s] contractual duties” constitutes a legal conclusion); *Taylor Pipeline Const., Inc. v. Directional Rd. Boring, Inc.*, 438 F. Supp. 2d 696, 706 (E.D. Tex. 2006) (finding expert testimony improper where it “opines as to the duties” owed by parties because “they amount to conclusions of law”).

37. The question of whether Highland owed or breached any legal duties is an issue for the trier of fact to decide. *See Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997) (affirming lower court’s preclusion of expert testimony regarding whether officers and directors “fulfilled their fiduciary duties to the Company ... is a legal opinion and inadmissible. Whether the officers and directors breached their fiduciary duties is an issue for the trier of fact to decide. It is not for [the expert] to tell the trier of fact what to decide”).

38. Accordingly, NexPoint’s suggested expert testimony on Highland’s duties under the SSA is improper as a matter of law, and the Motion should be denied on this basis alone.

B. NexPoint Fails to Establish that Good Cause Exists to Modify the Scheduling Order

39. NexPoint fails to satisfy its burden of demonstrating good cause to modify the Scheduling Order.

40. Under Rule 16(b) of the Federal Rules of Civil Procedure, a scheduling order may be modified only for “good cause.” FED. R. CIV. P. 16(b)(4). Courts consider four factors in determining whether “good cause” is shown: “(1) the explanation for the failure to identify the witness; (2) the importance of the testimony; (3) potential prejudice in allowing the testimony; and (4) the availability of a continuance to cure such prejudice.” *Geiserman v. MacDonald*, 893 F.2d 787, 791 (5th Cir.1990). These are the same four factors used to determine whether to exclude expert testimony under Rule 37(c)(1) of the Federal Rules of Civil Procedure. *See Grand Time Corp. v. Watch Factory, Inc.*, 3:08-CV-1770-K, 2009 WL 10678210, at *2 (N.D. Tex. Nov. 18, 2009). Ultimately, “the good cause standard requires the ‘party seeking relief to show that the deadlines [could not] reasonably [have been] met despite the diligence of the party needing the extension.’” *Binh Hoa Le v. Exeter Fin. Corp.*, 3:15-CV-3839-L, 2019 WL 1436375, at *14 (N.D. Tex. Mar. 31, 2019) (quoting *S&W Enters., L.L.C. v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 535 (5th Cir. 2003)).

41. “Under Rule 16(b), the movant has the burden of showing good cause to modify a scheduling order.” *Grand Time*, 2009 WL 10678210 at *3. Whether to modify a scheduling order is within the court’s broad discretion. *See Geiserman*, 893 F.2d at 790 (“[O]ur court gives the trial court broad discretion to preserve the integrity and purpose of the pretrial order”) (internal quotations omitted); *Reliance Ins. Co. v. La. Land & Expl. Co.*, 110 F.3d 253, 257 (5th Cir. 1997). Moreover, “a trial court’s decision to exclude evidence as a means of enforcing a pretrial order must not be disturbed absent a clear abuse of discretion.” *Geiserman*, 893 F.2d at 790.

42. Each of the four factors weighs in favor of denying modification of the Scheduling Order.

1. NexPoint’s Explanation for Failing to Timely Designate an Expert Is Deficient

43. NexPoint’s explanation for its failure to timely designate an expert is disingenuous. NexPoint contends that, *inter alia*, its failure to previously designate an expert was “due solely to not having the benefit of Waterhouse’s and Seery’s recent deposition testimony,” and that expert testimony is now “necessitated by Waterhouse’s testimony and not any prior action or inaction of NexPoint Motion.” Motion ¶ 21. NexPoint seeks to modify the Scheduling Order simply because the deposition of one of its witnesses did not go well. This is plainly improper under Rule 16(b). *See Reliance*, 110 F.3d at 257 (affirming lower court’s denial of party’s request to supplement expert report where “[movant] asked for an opportunity to avoid the deadline for its expert report merely because the deposition of its expert witness did not go well,” noting that “[d]istrict judges have the power to control their dockets by refusing to give ineffective litigants a second chance to develop their case”).

44. Moreover, NexPoint filed its Original Answer nine (9) months ago and its Original Defense was expressly based on the SSA. [AP Docket No. 6 ¶¶ 39-41]. Given the testimony of Mr. Dondero (which could not have been unexpected) and Mr. Waterhouse that NexPoint never authorized or instructed Highland to make the Annual Installment payment due on December 31, 2020, *see* Section II.E, *supra*, NexPoint has always had the burden of proving that Highland owed a duty under the SSA, yet it never offered expert opinions on the topic. If NexPoint wanted to offer “expert testimony” concerning Highland’s duties under the SSA, it had nine months to do so, and Mr. Waterhouse’s testimony, expected or not, does nothing to change that. *See Geiserman*, 893 F.2d at 792 (finding party failed to provide a “valid reason that would justify excusing him from the deadlines imposed by the lower court,” noting “[t]he claimed importance of expert testimony underscores the need for [party] to have timely designated his expert witness,” and “[t]he importance of such proposed testimony cannot singularly override the enforcement of local rules

and scheduling orders”). NexPoint’s conclusory statements regarding the need for expert testimony are insufficient under Rule 16(b). *See Binh Hoa*, 2019 WL 1436375 at *20 (finding “vague and conclusory statements regarding the need for additional information or facts do not adequately explain [party’s] failure to meet the expert deadline in the Scheduling Order”).

45. Accordingly, the first factor strongly favors denial of the Motion.

2. NexPoint’s Suggested “Expert” Testimony Is Irrelevant

46. The second factor—the importance of the suggested expert testimony— weighs heavily in favor of denying modification of the Scheduling Order.

47. In addition to being improper, the suggested expert testimony is also irrelevant. To be relevant, “expert testimony [must] ‘assist the trier of fact to understand the evidence or to determine a fact in issue.’” *Charalambopoulos v. Grammer*, 3:14-CV-2424-D, 2017 WL 930819, at *9 (N.D. Tex. Mar. 8, 2017) (quoting *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 245 (5th Cir. 2002)).

48. NexPoint contends that its suggested expert testimony is “important because the duties of care as specified in the [SSA] are terms of art necessitating an expert analysis.” Motion ¶ 21. NexPoint’s reliance on Section 6.01 in support of its Motion is misplaced.

49. By its express terms, Section 6.01 does not impose a duty on Highland to make or effectuate Annual Installment payments on NexPoint’s behalf without authorization from a representative of NexPoint. Rather, Section 6.01 sets forth a “standard of care” that applies *only* with respect to the discharge of “duties under this Agreement.”⁸ In fact, to remove all doubt, the

⁸ Notably, and notwithstanding the “standard of care” set forth in Section 6.01, the SSA provides Highland with considerable exculpation and indemnification protections that alone defeat NexPoint’s Original Defense. For example, NexPoint agreed not to hold Highland liable for any acts or omissions unless it is determined by a court of competent jurisdiction to “be the result of gross negligence or to constitute fraud or willful misconduct.” Rukavina Dec., Exhibit A § 6.02. NexPoint also agreed to indemnify Highland “from and against any and all claims and causes of action” for, among other things, “negligence.” *Id.* § 6.03.

SSA emphasizes multiple times that Highland had *no* duties or obligations except with respect to those “specifically” identified therein. *See* Rukavina Dec., Exhibit A §§ 2.02, 2.06. NexPoint does not and cannot identify any provision in the SSA that imposes a duty on Highland to make Annual Installment payments on NexPoint’s behalf without direction from an authorized NexPoint representative. *See* Original Answer ¶¶ 39-41 (no SSA provision cited); Amended Answer ¶¶ 39-41 (no SSA provision cited); Final Answer ¶¶ 80-82 (no SSA provision cited); Motion, generally (citing only to Section 6.01).

50. Thus, based on the plain terms of the SSA and NexPoint’s own pleadings, expert testimony regarding Highland’s alleged “duties” is irrelevant. *See Geiserman*, 893 F.2d at 791 (affirming lower court’s refusal to modify scheduling order, noting that expert testimony “is not critical” if the issue at hand is “obvious to a layperson or established as a matter of law”); *Rolls-Royce Corp. v. Heros, Inc.*, CIV.A. 307-CV-0739-D, 2010 WL 184313, at *6 (N.D. Tex. Jan. 14, 2010) (“Testimony is irrelevant [] when an expert offers a conclusion based on assumptions unsupported by the facts of the case”).

51. Moreover, the suggested expert testimony will not help the factfinder understand a complex fact in issue. Contrary to NexPoint’s representations, this Adversary Proceeding does not involve complicated or technical issues. The issues in this Adversary proceeding are whether NexPoint defaulted on its Note and whether NexPoint can prove that Highland’s alleged “negligence” or “breach of contract” caused such default. Final Answer ¶¶ 80-82. These issues are well within a fact-finder’s understanding and are not the type which would necessitate an expert. *See Nola Ventures, LLC v. Upshaw Ins. Agency, Inc.*, CV 12-1026, 2014 WL 12721924, at *10 (E.D. La. Nov. 7, 2014), *on reconsideration*, CIV.A. 12-1026, 2014 WL 6090584 (E.D. La. Nov. 13, 2014) (excluding expert testimony where, “[d]espite Plaintiffs’ arguments to the contrary, this case is not about the complicated inner workings of the insurance industry. It is about whether

an insurance agent misrepresented the type of coverage that Plaintiffs believed they were purchasing, and whether Defendants owed a heightened duty of care to Plaintiffs. Nothing in [expert's] report or proposed testimony will help the jury to understand a fact in issue that is not within the common understanding of a lay juror"); *Henderson v. Atmos Energy*, 496 F. Supp. 3d 1011, 1017 (E.D. La. 2020) (excluding expert testimony as irrelevant and unnecessary where "it is one based in common sense").

52. At all relevant times, Mr. Waterhouse was an officer and a fiduciary of NexPoint, serving as its Treasurer. If anyone had an obligation to ask Mr. Dondero if he wanted to reconsider his instructions, it was Mr. Waterhouse in the first instance—not in his capacity as an employee of Highland, but as an officer and fiduciary of the obligor, NexPoint. Whether Mr. Dondero or Mr. Waterhouse is telling the truth is an interesting issue, but the Court need not resolve their dispute because it would only be relevant if the SSA imposed a duty on Highland to effectuate the Annual Installment payment without ever receiving any direction or instruction from a duly authorized representative of NexPoint. And, as Mr. Waterhouse testified, the SSA imposes no such duty.

53. Accordingly, the suggested expert testimony is irrelevant, and the Motion should be denied on this basis.

3. Allowing the Testimony Would Prejudice Highland

54. The third and fourth factors also weigh in favor of denying the Motion.

55. Allowing the suggested expert testimony would prejudice Highland because Highland would need to expend additional resources responding to NexPoint's latest theory of its defense by way of: (i) retaining a rebuttal expert; (ii) deposing NexPoint's expert; or (iii) moving to strike the expert testimony. *See Geiserman*, 893 F.2d at 791 (affirming lower court's striking of untimely witness designation and preclusion of expert testimony where delay of "a couple

weeks in designating the expert witness” would have “disrupted the court’s discovery scheduling and the opponent’s preparation,” and resulted in “expense that would result from an extended discovery schedule for [movant’s] failure to adhere to deadlines,” noting that “the trial court has latitude to control discovery abuses and cure prejudice by excluding improperly designated evidence”); *Binh Hoa*, 2019 WL 1436375 at *20 (“It would [] be patently unfair to allow Plaintiff to supplement and amend his expert report this late in the case without: (1) allowing Defendants to amend their expert designations and provide an expert report to address the matters in Plaintiff’s amended and supplemental expert reports, (2) giving Defendants an opportunity to depose Plaintiff’s expert regarding his most recent opinion . . .”).

56. A continuance would not cure this prejudice because the trial on the merits of the underlying action would be unnecessarily delayed. This would ultimately delay Highland’s potential recovery under the Note and distributions to creditors under Highland’s Plan. *See S&W Enters.*, 315 F.3d at 537 (affirming lower court’s denial of untimely submission of expert report where defendant would be forced to conduct additional discovery in response to movant’s new materials, noting that “while a continuance could be granted for additional discovery . . . a continuance would unnecessarily delay the trial”); *Reliance*, 110 F.3d at 257-58 (affirming lower court’s denial to modify scheduling order to add expert testimony where court found “[t]o allow plaintiff to add more material now and create essentially a new report would prejudice the defendants, who would then have to get an expert to address these last-minute conclusions, and thus disrupt the trial date in this case”) (internal quotations omitted); *Geiserman*, 893 F.2d at 791 (finding that while attorney “could have conducted new discovery and redeposed witnesses under a continuance in response to the untimely designation, this would have resulted in additional delay and increased the expense of defending the lawsuit”); *Binh Hoa*, 2019 WL 1436375 at *20 (“Ordering another continuance would only serve to reward Plaintiff for his dilatory conduct and

failure to comply with court-ordered deadlines and this district's Local Civil Rules and result in additional delay and expense. Regardless, it is not incumbent on the court to award litigants for failing to develop their cases”). A simple collection action like the Adversary Proceeding should not be continually extended simply because the defendant is unsatisfied with its defenses and the evidence adduced in discovery.

57. For these additional reasons, NexPoint fails to demonstrate good cause to excuse it from the deadlines set forth in the Scheduling Order. Accordingly, the Motion should be denied.

C. HCRE’s and HCMS’s Joinders Have Even Less Merit than the Motion and Should Be Denied

58. The Joinders are even more frivolous than the Motion. In addition to the reasons set forth above, neither HCMS nor HCRE was ever a party to any shared services agreement with Highland, let alone the SSA that is the foundation of the Motion. Accordingly, the Joinders are without merit and should be summarily denied by the Court.

CONCLUSION

For the foregoing reasons, Highland respectfully requests that the Court (i) deny the Motions and (ii) grant such other and further relief as the Court deems just and proper.

Dated: December 1, 2021.

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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	§	
Reorganized Debtor.	§	Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	21-03005-sgj
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO AND THE DUGABOY INVESTMENT TRUST,	§	
Defendants.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	21-03006-sgj
	§	

¹ The Reorganized Debtor’s last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

HIGHLAND CAPITAL MANAGEMENT
SERVICES, INC., JAMES DONDERO, NANCY
DONDERO, AND THE DUGABOY
INVESTMENT TRUST,

Defendants.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Plaintiff,

vs.

HCRE PARTNERS, LLC (N/K/A NEXPOINT
REAL ESTATE PARTNERS, LLC), JAMES
DONDERO, NANCY DONDERO, AND THE
DUGABOY INVESTMENT TRUST,

Defendants.

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Adversary Proceeding No.
21-03007-sgj

**DECLARATION OF JOHN A. MORRIS IN SUPPORT OF HIGHLAND’S OBJECTION
TO MOTION OF DEFENDANT NEXPOINT ADVISORS, L.P.
TO EXTEND EXPERT DISCLOSURE AND DISCOVERY DEADLINES**

I, John A. Morris, pursuant to 28 U.S.C. § 1746(a) and under penalty of perjury, declare as follows:

1. I am an attorney in the law firm of Pachulski, Stang, Ziehl & Jones LLP, counsel to the above-referenced Reorganized Debtor, and I submit this Declaration in support of *Highland’s Objection to Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines* (the “Objection”) being filed concurrently with this Declaration. I submit this Declaration based on my personal knowledge and review of the documents listed below.

2. Attached as **Exhibit 1** is a true and correct copy of a 30-year term note on behalf of NexPoint Advisors, L.P. and in favor of Highland Capital Management, L.P. for an original principal amount of \$30,746,812.33, dated May 31, 2017.

3. Attached as **Exhibit 2** is a true and correct copy of a Demand Letter dated January 7, 2021.
4. Attached as **Exhibit 3** is a true and correct copy of the October 19, 2021 deposition transcript of Frank Waterhouse.
5. Attached as **Exhibit 4** is a true and correct copy of the October 29, 2021 deposition transcript of James Dondero.

Dated: December 1, 2021.

/s/ John A. Morris
John A. Morris

EXHIBIT 1

PROMISSORY NOTE

\$30,746,812.33

May 31, 2017

THIS PROMISSORY NOTE (this "Note") is in substitution for and supersedes in their entirety each of those certain promissory notes described in Exhibit A hereto, from NexPoint Advisors, L.P., as Maker, and Highland Capital Management, L.P. as Payee (collectively, the "Prior Notes"), together with the aggregate outstanding principal and accrued and unpaid interested represented thereby.

FOR VALUE RECEIVED, NEXPOINT ADVISORS, L.P. ("Maker") promises to pay to the order of HIGHLAND CAPITAL MANAGEMENT, L.P. ("Payee"), in legal and lawful tender of the United States of America, the principal sum of THIRTY MILLION, SEVEN HUNDRED FORTY SIX THOUSAND, EIGHT HUNDRED TWELVE AND 33/100 DOLLARS (\$30,746,812.33), together with interest, on the terms set forth below. All sums hereunder are payable to Payee at 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other address as Payee may specify to Maker in writing from time to time.

1. Interest Rate. The unpaid principal balance of this Note from time to time outstanding shall bear interest at the rate of six percent (6.00%) per annum from the date hereof until Maturity Date (hereinafter defined), compounded annually on the anniversary of the date of this Note. Interest shall be calculated at a daily rate equal to 1/365th (1/366 in a leap year) of the rate per annum, shall be charged and collected on the actual number of days elapsed, and shall be payable annually.

2. Payment of Principal and Interest. Principal and interest under this Note shall be payable as follows:

2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the "Annual Installment") until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this Note.

2.2 Final Payment Date. The final payment in the aggregate amount of the then outstanding and unpaid Note, together with all accrued and unpaid interest thereon, shall become immediately due and payable in full on December 31, 2047 (the "Maturity Date").

3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.

4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same

shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.

6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

7. Limitation on Agreements. All agreements between Maker and Payee, whether now existing or hereafter arising, are hereby limited so that in no event shall the amount paid, or agreed to be paid to Payee for the use, forbearance, or detention of money or for the payment or performance of any covenant or obligation contained herein or in any other document evidencing, securing or pertaining to this Note, exceed the maximum interest rate allowed by law. The terms and provisions of this paragraph shall control and supersede every other provision of all agreements between Payee and Maker in conflict herewith.

8. Governing Law. This Note and the rights and obligations of the parties hereunder shall be governed by the laws of the United States of America and by the laws of the State of Texas, and is performable in Dallas County, Texas.

9. Prior Notes. The original of each of the Prior Notes superseded hereby shall be marked "VOID" by Payee.

MAKER:

NEXPOINT ADVISORS, L.P.

By: NexPoint Advisors GP, LLC, its general partner

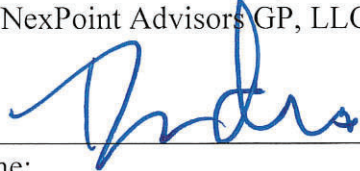
By:  _____
Name:
Title:

EXHIBIT A

PRIOR NOTES

Loan Date	Initial Note Amount	Interest Rate	Principal and Interest Outstanding as of May 31, 2017
8/21/14	\$4,000,000	6.00%	\$4,616,739.73
10/1/14	\$6,000,000	6.00%	\$6,959,671.23
11/14/14	\$2,500,000	6.00%	\$2,881,780.82
1/29/15	\$3,100,000	6.00%	\$3,534,679.45
7/22/15	\$12,075,000	6.00%	\$12,753,941.10
	\$27,675,000		\$30,746,812.33

EXHIBIT 2

HIGHLAND CAPITAL MANAGEMENT, L.P.

January 7, 2021

NexPoint Advisors, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James Dondero

Re: Demand on Promissory Note

Dear Mr. Dondero,

On May 31, 2017, NexPoint Advisors, L.P, entered into that certain promissory note in the original principal amount of \$30,746,812.33 (the “Note”) in favor of Highland Capital Management, L.P. (“Payee”).

As set forth in Section 2 of the Note, accrued interest and principal on the Note is due and payable in thirty equal annual payments with each payment due on December 31 of each calendar year. Maker failed to make the payment due on December 31, 2020.

Because of Maker’s failure to pay, the Note is in default. Pursuant to Section 4 of the Note, all principal, interest, and any other amounts due on the Note are immediately due and payable. The amount due and payable on the Note as of January 8, 2021 is \$24,471,804.98; however, interest continues to accrue under the Note.

The Note is in default, and payment is due immediately. Payments on the Note must be made in immediately available funds. Payee’s wire information is attached hereto as **Appendix A**.

Nothing contained herein constitutes a waiver of any rights or remedies of Payee under the Note or otherwise and all such rights and remedies, whether at law, equity, contract, or otherwise, are expressly reserved. Interest, including default interest if applicable, on the Note will continue to accrue until the Note is paid in full. Any such interest will remain the obligation of Maker.

Sincerely,

/s/ James P. Seery, Jr.

James P. Seery, Jr.
Highland Capital Management, L.P.
Chief Executive Officer/Chief Restructuring Officer

cc: Fred Caruso
James Romey
Jeffrey Pomerantz
Ira Kharasch
Gregory Demo
DC Sauter

Appendix A

ABA #: 322070381
Bank Name: East West Bank
Account Name: Highland Capital Management, LP
Account #: 5500014686

EXHIBIT 3

1 WATERHOUSE - 10-19-21
2 IN THE UNITED STATES BANKRUPTCY COURT
3 FOR THE NORTHERN DISTRICT OF TEXAS
4 DALLAS DIVISION

5 -----
6 IN RE:

7 Chapter 11
8 HIGHLAND CAPITAL
9 MANAGEMENT, L.P., CASE NO.
10 19-34054-SGI11

11 Debtor.

12 -----
13 HIGHLAND CAPITAL MANAGEMENT, L.P.,

14 Plaintiff,

15 vs. Adversary
16 Proceeding No.

17 HIGHLAND CAPITAL MANAGEMENT 21-03000-SGI
18 FUND ADVISORS, L.P.; NEXPOINT
19 ADVISORS, L.P.; HIGHLAND
20 INCOME FUND; NEXPOINT
21 STRATEGIC OPPORTUNITIES FUND;
22 NEXPOINT CAPITAL, INC.; and
23 CLO HOLDCO, LTD.,

24 Defendants.
25 -----

26 REMOTE VIDEOTAPED DEPOSITION OF

27 FRANK WATERHOUSE

28 October 19, 2021

29

30

31

32

33 Reported by: Susan S. Klinger, RMR-CRR, CSR

34 Job No: 201195

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1 WATERHOUSE - 10-19-21

2

3

4 October 19, 2021

5 9:30 a.m.

6

7

8

9 Remote Deposition of FRANK WATERHOUSE,

10 held before Susan S. Klinger, a Registered

11 Merit Reporter and Certified Realtime Reporter

12 of the State of Texas.

13

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25

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1 WATERHOUSE - 10-19-21

2 Attorneys for Jim Dondero, Nancy Dondero, HCRA,

3 and HCMS:

4 Deborah Deitsch-Perez, Esq.

5 Michael Aigen, Esq.

6 STINSON

7 3102 Oak Lawn Avenue

8 Dallas, Texas 75219

9

10 Attorneys for Dugaboy Investment Trust:

11 Warren Horn, Esq.

12 HELLER, DRAPER & HORN

13 650 Poydras Street

14 New Orleans, Louisiana 70130

15

16 Attorneys for Marc Kirschner as the trustee for

17 the litigation SunTrust:

18 Deborah Newman, Esq.

19 QUINN EMANUEL URQUHART & SULLIVAN

20 51 Madison Avenue

21 New York, New York 10010

22

23 Also Present:

24 Ms. La Asia Canty

25

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1 WATERHOUSE - 10-19-21

2 APPEARANCES:

3 (All appearances via Zoom.)

4 Attorneys for the Reorganized Highland Capital

5 Management:

6 John Morris, Esq.

7 Hayley Winograd, Esq.

8 PACHULSKI STANG ZIEHL & JONES

9 780 Third Avenue

10 New York, New York 10017

11 Attorneys for the Witness:

12 Debra Dandeneau, Esq.

13 Michelle Hartmann, Esq.

14 BAKER MCKENZIE

15 1900 North Pearl Street

16 Dallas, Texas 75201

17 Attorneys for NexPoint Advisors, LP and

18 Highland Capital Management Fund Advisors,

19 L.P.:

20 Davor Rukavina, Esq.

21 An Nguyen, Esq.

22 MUNSCH HARDT KOPF & HARDD

23 500 North Akard Street

24 Dallas, Texas 75201-6659

25

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1 WATERHOUSE - 10-19-21

2 here, as we did yesterday. If anybody has

3 a problem with what was just stated, can

4 you state your objection now?

5 Okay. No response, so everybody

6 accepts the stipulation and the instruction

7 that was just given.

8 VIDEOGRAPHER: Thank you. This is

9 the start of media labeled Number 1 of the

10 video recorded deposition of Frank

11 Waterhouse In Re: Highland Capital

12 Management, L.P., in the United States

13 Bankruptcy Court for the Northern District

14 of Texas, Dallas Division, Case Number

15 21-03000-SGI.

16 This deposition is being held via

17 video conference with participants

18 appearing remotely due to COVID-19

19 restrictions on Tuesday, October 19th, 2021

20 at approximately 9:32 a.m. My name is

21 Scott Hatch, legal video specialist with

22 TSG Reporting, Inc. headquartered at 228

23 East 45th Street, New York, New York. The

24 court reporter is Susan Klinger in

25 association with TSG Reporting.

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1 WATERHOUSE - 10-19-21

2 PROCEEDINGS

3 VIDEOGRAPHER: Good morning,

4 Counselors. My name is Scott Hatch. I'm a

5 certified legal videographer in association

6 with TSG Reporting, Inc.

7 Due to the severity of COVID-19 and

8 following the practice of social

9 distancing, I will not be in the same room

10 with the witness. Instead, I will record

11 this videotaped deposition remotely. The

12 reporter, Susan Klinger, also will not be

13 in the same room and will swear the witness

14 remotely.

15 Do all parties stipulate to the

16 validity of this video recording and remote

17 swearing, and that it will be admissible in

18 the courtroom as if it had been taken

19 following Rule 30 of the Federal Rules of

20 Civil Procedures and the state's rules

21 where this case is pending?

22 MR. HORN: Yes.

23 MS. DANDENEAU: Yes.

24 MR. MORRIS: Yes. John Morris. I

25 would just try to do a negative notice

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1 WATERHOUSE - 10-19-21

2 Counsel, please introduce

3 yourselves.

4 MR. MORRIS: John Morris, Pachulski

5 Stang Ziehl & Jones for the reorganized

6 Highland Capital Management, L.P., the

7 plaintiff in these actions.

8 MS. DANDENEAU: Deborah Dandeneau

9 from Baker McKenzie. My partner, Michelle

10 Hartmann, is also in the room with me,

11 representing Frank Waterhouse individually.

12 MS. DEITSCH-PEREZ: Deborah

13 Deitsch-Perez from Stinson, LLP,

14 representing Jim Dondero, Nancy Dondero,

15 HCRA, and HCMS.

16 MR. HORN: Warren Horn with Heller,

17 Draper & Horn in New Orleans representing

18 Dugaboy Investment Trust.

19 MR. RUKAVINA: Davor Rukavina with

20 Munsch Hardt Kopf & Harr in Dallas

21 representing NexPoint Advisors, LP and

22 Highland Capital Management Fund Advisors,

23 L.P.

24 MR. AIGEN: Michael Aigen from

25 Stinson, and I represent the same parties

Page 10

1 WATERHOUSE - 10-19-21
 2 as Deborah Deitsch-Perez.
 3 MS. NEWMAN: This is Deborah Newman
 4 from Quinn Emanuel. We represent the
 5 litigation – Marc Kirschner as the trustee
 6 for the litigation SunTrust.
 7 MR. MORRIS: I think that is
 8 everybody.
 9 VIDEOGRAPHER: Thank you. Will the
 10 court reporter please swear in the witness.
 11 FRANK WATERHOUSE,
 12 having been first duly sworn, testified as
 13 follows:
 14 EXAMINATION
 15 BY MR. MORRIS:
 16 Q. Please state your name for the
 17 record.
 18 A. My name is Frank Waterhouse.
 19 Q. Good morning, Mr. Waterhouse. I'm
 20 John Morris, as you know, from Pachulski Stang
 21 Ziehl & Jones. You understand that my firm and
 22 I represent Highland Capital Management, L.P.;
 23 is that right?
 24 A. Yes.
 25 Q. Okay. And do you understand that

Page 12

1 WATERHOUSE - 10-19-21
 2 to finish your answers before I begin a
 3 question, but if I fail to do that, will you
 4 let me know?
 5 A. I can certainly do that.
 6 Q. Okay. Do you understand that this
 7 deposition is being videotaped?
 8 A. Yes.
 9 Q. You understand that I may seek to
 10 use portions of the videotape in a court of
 11 law?
 12 A. I did not know that, until you just
 13 said that.
 14 Q. Okay. And you are aware of that now
 15 before the deposition begins substantively; is
 16 that right?
 17 A. Yes.
 18 Q. So unlike I think the other
 19 depositions that you have given, this one is
 20 being given remotely. So that presents some
 21 unique challenges, at least as compared to a
 22 deposition that is taken in-person.
 23 From time to time we're going to put
 24 documents up on the screen, Mr. Waterhouse.
 25 And it is important that I give you the

Page 11

1 WATERHOUSE - 10-19-21
 2 we're here today for your deposition in your
 3 individual capacity?
 4 A. Yes.
 5 Q. Did you review and – did you
 6 receive and review a subpoena that Highland
 7 Capital Management, L.P., served upon you?
 8 A. Yes.
 9 Q. You have been deposed before; right?
 10 A. Yes.
 11 Q. How many times have you been
 12 deposed?
 13 A. About three or four times.
 14 Q. Okay. And I defended you in one
 15 deposition; isn't that right?
 16 A. That is correct.
 17 Q. So the general ground rules for this
 18 deposition are largely the same as the
 19 depositions you have given before. And that is
 20 I will ask you a series of questions, and it is
 21 important that you allow me to finish my
 22 question before you begin your answer; is that
 23 fair?
 24 A. Yes.
 25 Q. And it is important that I allow you

Page 13

1 WATERHOUSE - 10-19-21
 2 opportunity to review any portion of the
 3 document that you think you need in order to
 4 fully and completely answer the question.
 5 So I would ask you to let me know if
 6 there is a portion of a document that you need
 7 to see in order to fully and completely answer
 8 the question. Can you do that for me?
 9 A. Yes.
 10 MS. DANDENEAU: Mr. Morris, I would
 11 just note that we do have hard copies of
 12 the documents that you sent, so if you can
 13 just refer to the exhibit number as
 14 reflected in the documents that you sent,
 15 Mr. Waterhouse will be able to look at the
 16 hard copies of those documents.
 17 MR. MORRIS: I appreciate that,
 18 and – and I will encourage him to do so.
 19 There will be other documents that we did
 20 not send to you that we'll be using today
 21 though.
 22 Q. Okay. With that as background, if
 23 there is anything that I ask you, sir, that you
 24 don't understand, will you let me know?
 25 A. Yes.

Page 14

1 WATERHOUSE - 10-19-21
 2 Q. Okay. Are you currently employed?
 3 A. Yes.
 4 Q. By whom?
 5 A. The Skyview Group.
 6 Q. When did you become employed by the
 7 Skyview Group?
 8 A. I believe March 1st of 2021.
 9 Q. Do you have a title at Skyview?
 10 A. Yes.
 11 Q. What is your title?
 12 A. My title is chief financial officer.
 13 Q. Do you report to anybody in your
 14 role as CFO?
 15 A. I don't, no.
 16 Q. No. Is there a president or a CEO
 17 of Skyview?
 18 A. Yes.
 19 Q. Who is that?
 20 A. That is Scott Ellington.
 21 Q. But you don't report to
 22 Mr. Ellington; is that right?
 23 A. I don't think so.
 24 Q. Does Skyview Group –
 25 MS. DANDENEAU: Excuse me, we –

Page 16

1 WATERHOUSE - 10-19-21
 2 A. Yes.
 3 Q. Is it more than 30?
 4 A. I don't know.
 5 Q. Can you tell me what portion of
 6 Skyview – Skyview's revenue is derived from
 7 entities that are directly or indirectly owned
 8 or controlled by Jim Dondero?
 9 MS. DANDENEAU: Mr. Morris, I mean,
 10 you called Mr. Waterhouse here individually
 11 for purposes of his testimony in connection
 12 with the noticed litigation. I have given
 13 you some leeway to ask him some background
 14 information about Skyview Group, but this
 15 is not a substitute for a deposition in
 16 connection with any other pending disputes
 17 that exist. And – and we agreed to accept
 18 the subpoena on the basis of he – this is
 19 testimony that he is giving in connection
 20 with the noticed litigation.
 21 I really think that you are now
 22 going a little bit far afield from the
 23 purpose of this deposition.
 24 MR. MORRIS: Okay. It is – I'm not
 25 intending to use these – the answers to

Page 15

1 WATERHOUSE - 10-19-21
 2 A. I – I – I might. I just – I
 3 don't recall.
 4 Q. Okay. Does Skyview Group provide
 5 any services to any entity directly or
 6 indirectly owned or controlled by Jim Dondero?
 7 A. Yes.
 8 Q. Can you name – is that pursuant to
 9 written contracts?
 10 A. Yes.
 11 Q. And do you know how many contracts
 12 exist?
 13 A. Approximately six or so.
 14 Q. And is the Skyview Group made up of
 15 individuals who were formerly employees of
 16 Highland Capital Management, L.P.?
 17 A. No.
 18 Q. Do you know how many – how many –
 19 how many employees does Skyview have?
 20 A. Approximately 35.
 21 Q. And can you tell me how many of
 22 those 35 are former officers, directors, or
 23 employees of Highland Capital Management, L.P.?
 24 A. I don't know the exact number.
 25 Q. Is it more than 20?

Page 17

1 WATERHOUSE - 10-19-21
 2 these questions for any purpose other than
 3 this litigation. I think you understand
 4 fully why I'm asking the questions, and I
 5 just have a couple more, if you will bear
 6 with me.
 7 MS. DANDENEAU: Okay.
 8 MS. DEITSCH-PEREZ: Can we have an
 9 agreement that an objection by one is an
 10 objection for any other party here?
 11 MR. MORRIS: Sure. I would – I
 12 would encourage that, sure.
 13 MS. DEITSCH-PEREZ: Thank you.
 14 MR. MORRIS: It can't be sustained
 15 or overruled more than one time, so...
 16 Q. Mr. Waterhouse, can you answer my
 17 question, please.
 18 MS. DANDENEAU: Do you want to
 19 repeat it, Mr. Morris, for his benefit?
 20 MR. MORRIS: Sure.
 21 Q. Can you – can you tell me the
 22 approximate portion of Skyview's revenue that
 23 is derived from entities that are directly or
 24 indirectly owned or controlled by Mr. Dondero?
 25 A. I don't know the exact number.

Page 18

1 WATERHOUSE - 10-19-21
 2 Q. Is it more than 75 percent?
 3 A. Yes.
 4 Q. Is it more than 90 percent?
 5 A. I don't know.
 6 Q. Okay. Can I refer to Highland
 7 Capital Management, L.P., as Highland?
 8 A. Yes.
 9 Q. All right. And you previously
 10 served as Highland's CFO; correct?
 11 A. Yes.
 12 Q. When did you join Highland?
 13 A. I don't recall the exact date.
 14 Q. Can you tell me what year?
 15 A. 2006.
 16 Q. When did you -- in what year did you
 17 become Highland's CFO?
 18 A. I don't recall the exact date.
 19 Q. I'm not asking you for the exact
 20 date. I'm asking you if you recall the year in
 21 which you were appointed CFO.
 22 A. I don't recall the exact year.
 23 Q. Can you tell me which years it is
 24 possible that you were appointed to CFO of
 25 Highland?

Page 20

1 WATERHOUSE - 10-19-21
 2 from at least 2014 until the time you left
 3 Highland?
 4 MS. DANDENEAU: Objection to form.
 5 A. I don't want to speculate the exact
 6 or what year that changed or -- so I would like
 7 to stick with my testimony.
 8 Q. Can you recall when you began
 9 reporting to Mr. Dondero?
 10 A. I don't recall.
 11 Q. Can you -- can you give me an
 12 estimate of what year you think you might have
 13 began reporting to Mr. Dondero?
 14 A. I will go back to my prior
 15 testimony.
 16 Q. Okay. There is no -- you have no
 17 ability to tell me when you began reporting to
 18 Mr. Dondero.
 19 Do I have that right?
 20 MS. DANDENEAU: Objection to form.
 21 A. I don't recall.
 22 Q. Okay. Do you recall who you might
 23 have reported to before you began reporting to
 24 Mr. Dondero?
 25 A. Yes.

Page 19

1 WATERHOUSE - 10-19-21
 2 A. 2011 or 2012.
 3 Q. Did you serve as Highland's CFO on a
 4 continuous basis from in or around 2011 or 2012
 5 until early 2021?
 6 A. Yes.
 7 Q. During that entire time you reported
 8 directly to Jim Dondero; correct?
 9 A. I -- I don't know.
 10 Q. Is there anybody else you reported
 11 to -- withdrawn.
 12 Did you report to Mr. Dondero for
 13 some portion of the time that you served as
 14 CFO?
 15 A. Yes.
 16 Q. Is there a portion of time that you
 17 don't recall who you reported to?
 18 A. Yes.
 19 Q. What portion of time do you have in
 20 your mind when you can't recall who you
 21 reported to?
 22 A. From the 2011 to -- for
 23 approximately a year or two.
 24 Q. Okay. So is it fair to say that you
 25 reported to Mr. Dondero in your capacity as CFO

Page 21

1 WATERHOUSE - 10-19-21
 2 Q. Who might you have reported to in
 3 your capacity as CFO before you started
 4 reporting to Mr. Dondero?
 5 A. That would have been Patrick Boyce.
 6 Q. Are you aware that Highland filed
 7 for bankruptcy on October 19th, 2019?
 8 A. Yes.
 9 Q. And we refer to that as the petition
 10 date?
 11 A. Yes.
 12 Q. Okay. Do you hold any professional
 13 licenses, sir?
 14 A. Yes.
 15 Q. Can you tell me what professional
 16 licenses you hold?
 17 A. I'm a certified public accountant.
 18 Q. Okay. Anything else?
 19 A. No.
 20 Q. Do you have any other professional
 21 licenses or certificates?
 22 A. When you say "professional license,"
 23 that is not education?
 24 Q. Tell me -- sure. Anything other
 25 than a driver's license.

Page 22

1 WATERHOUSE - 10-19-21
 2 Do you have any other license or
 3 certificate or certification?
 4 A. Are you asking, like, where I went
 5 to school and the –
 6 Q. I am not. I am not. I didn't say
 7 education. I didn't ask about degrees.
 8 Do you know what a license is?
 9 A. Well, yeah, I mean, a license is
 10 something you get after you receive a certain
 11 level of proficiency.
 12 Q. Do you have any licenses or
 13 certifications other than your CPA?
 14 MS. DANDENEAU: Objection, form.
 15 I assume you mean professional
 16 licenses, Mr. Morris; correct?
 17 Q. Can you answer my question, sir?
 18 A. Mr. Morris, I'm thinking. I
 19 don't – I don't think I have any others.
 20 Q. Are you familiar with an entity
 21 called Highland Capital Management Fund
 22 Advisors?
 23 A. Yes.
 24 Q. Were you ever – can we refer to
 25 that entity as HCMFA?

Page 24

1 WATERHOUSE - 10-19-21
 2 treasurer and acting treasurer?
 3 A. I said "acting treasurer" as I am an
 4 employee of Skyview, as you previously
 5 stated – or asked.
 6 Q. But you are the treasurer of HCMFA
 7 today; correct?
 8 A. I am – I am the acting treasurer
 9 for HCMFA.
 10 Q. How did you become the treasurer of
 11 HCMFA?
 12 A. Are you asking how I became the
 13 treasurer of HCMFA today?
 14 Q. How did you become appointed to
 15 serve as the treasurer of HCMFA?
 16 A. Well, in – in – in what time
 17 capacity?
 18 Q. The first time that you were
 19 appointed.
 20 A. First time. I believe I was asked
 21 to serve as treasurer for HCMFA the first time.
 22 Q. By who? Who asked you to do that?
 23 A. I don't recall.
 24 Q. Is there anything that would refresh
 25 your recollection as to who appointed you as

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1 WATERHOUSE - 10-19-21
 2 A. Yes.
 3 Q. Were you ever employed by HCMFA?
 4 A. Not that I recall.
 5 Q. Were you ever – did you ever hold
 6 the title of an officer or director of HCMFA?
 7 A. Yes.
 8 Q. What title did you hold?
 9 A. Treasurer.
 10 Q. When did you become the treasurer of
 11 HCMFA?
 12 A. I don't recall.
 13 Q. Can you tell me the year?
 14 A. I don't – I don't know the year.
 15 Q. Can you approximate the year in
 16 which you became the treasurer of HCMFA?
 17 A. I don't know.
 18 Q. Can you tell me if it was before or
 19 after 2016?
 20 A. I don't recall.
 21 Q. Are you still the – do you know if
 22 you're still the treasurer of HCMFA today?
 23 A. Today, I am the acting treasurer for
 24 HCMFA.
 25 Q. Is there a distinction between

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1 WATERHOUSE - 10-19-21
 2 the treasurer of CF- – HCMFA for the first
 3 time?
 4 A. I don't – I mean, there would be
 5 some documents, some legal documents. I don't
 6 know where those are.
 7 Q. How many times have you been
 8 appointed the treasurer of HCMFA?
 9 A. I don't know.
 10 Q. Was it more than once?
 11 A. I don't know.
 12 Q. Can you tell me any period of time
 13 since 2016 that you did not hold the title of
 14 treasurer of HCMFA?
 15 MS. DANDENEAU: Objection to form.
 16 A. I don't recall.
 17 Q. What are your duties and
 18 responsibilities as the treasurer of HCMFA?
 19 A. My duties are to do the best job
 20 that I can as the – as an accountant and
 21 finance guy.
 22 Q. What specific duties and
 23 responsibilities do you have as the treasurer
 24 of HCMFA?
 25 A. My duties are to do the best job

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1 WATERHOUSE - 10-19-21
 2 that I can as the accounting and finance person
 3 for HCMFA.
 4 Q. As the accounting and finance person
 5 for HCMFA, do you have any particular areas of
 6 responsibility?
 7 A. Yeah, it is to manage the accounting
 8 and finance function for HCMFA.
 9 Q. Would that include – do you have
 10 responsibility for overseeing HCMFA's annual
 11 audit?
 12 A. Can I please elaborate on my prior
 13 question?
 14 Q. Of course. You – you are giving
 15 answers. I'm asking questions.
 16 A. Okay. Yes, so the – it – like I
 17 said, it is to manage the accounting finance
 18 aspect, but I am, as we discussed, the
 19 treasurer. That is – being treasurer is what
 20 gives me that – that management function.
 21 Q. Does anybody report to you in your
 22 capacity as treasurer of HCMFA?
 23 A. I don't believe so.
 24 Q. Does HCMFA have a chief financial
 25 officer?

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1 WATERHOUSE - 10-19-21
 2 A. I don't know.
 3 Q. Are you still the treasurer of
 4 NexPoint today?
 5 A. I am the acting treasurer for
 6 NexPoint.
 7 Q. When did your title change from
 8 treasurer to acting treasurer?
 9 A. I don't know.
 10 Q. Did your duties and responsibilities
 11 change at all when your title was changed from
 12 treasurer to acting treasurer?
 13 A. I don't – I don't believe so.
 14 Q. Why did –
 15 A. I still manage the finance and
 16 accounting function for NexPoint.
 17 Q. Why did your title change from
 18 treasurer to acting treasurer?
 19 A. I don't – I'm using the term
 20 "acting treasurer" as I'm a Skyview employee.
 21 I don't – I don't know – again, I am a – as
 22 I am the Skyview employee.
 23 Q. Okay.
 24 A. And we – we provide officer
 25 services.

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1 WATERHOUSE - 10-19-21
 2 A. I don't – I don't know.
 3 Q. You don't know?
 4 You're the treasurer of HCMFA but
 5 you don't know if HCMFA has a chief financial
 6 officer.
 7 Do I have that right?
 8 A. That's right.
 9 Q. Okay. Have you heard of a company
 10 called NexPoint Advisors?
 11 A. Yes.
 12 Q. We will refer to that as NexPoint.
 13 Okay?
 14 A. Okay.
 15 Q. Were you ever employed by NexPoint?
 16 A. I don't recall.
 17 Q. Did you ever hold any title with
 18 respect to the entity known as NexPoint?
 19 A. Yes.
 20 Q. What titles have you held in
 21 relation to NexPoint?
 22 A. Treasurer. I think it was only
 23 treasurer.
 24 Q. Can you tell me the approximate year
 25 you became the treasurer of NexPoint?

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1 WATERHOUSE - 10-19-21
 2 Q. And you serve as an officer of
 3 HCMFA; correct?
 4 A. I think we went over that with my
 5 testimony. Yes, I'm the acting treasurer for
 6 HCMFA.
 7 Q. And you are an officer of NexPoint;
 8 correct?
 9 A. I think – I am the acting treasurer
 10 for NexPoint Advisors.
 11 Q. And – and who appointed you acting
 12 treasurer of NexPoint Advisors?
 13 A. I don't recall specifically.
 14 Q. Do you have any recollection of who
 15 might have appointed you the treasurer of
 16 NexPoint?
 17 A. I mean, it – it – I don't recall
 18 exactly who it was.
 19 Q. Who were the possibilities?
 20 MS. DEITSCH-PEREZ: Object to the
 21 form.
 22 Q. You can answer.
 23 A. Someone in the legal group for
 24 NexPoint. The other officers as well.
 25 Q. Have you heard of a company called

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1 WATERHOUSE - 10-19-21
 2 Highland Capital Management Services, Inc.?
 3 A. Yes.
 4 Q. We will refer to that as HCMS.
 5 Okay?
 6 A. HCMS. Okay.
 7 Q. Were you ever employed by HCMS?
 8 A. No.
 9 Q. Have you ever held any titles in
 10 relation to HCMF – I apologize – HCMS?
 11 A. Yes.
 12 Q. What titles have you held in
 13 relation to HCMS?
 14 A. Treasurer and acting treasurer.
 15 Q. When did you first become treasurer
 16 or acting treasurer of HCMS?
 17 A. I don't recall the exact dates.
 18 Q. Can you recall – can you
 19 approximate the year that you became the
 20 treasurer of HCMS?
 21 A. I don't – I don't know.
 22 Q. Are you still the treasurer of HCMS
 23 today?
 24 A. I am the acting treasurer for HCMS.
 25 Q. And are your duties and

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1 WATERHOUSE - 10-19-21
 2 the witness knows.
 3 Q. You're familiar with an entity
 4 called HCRE Partners, LLC; correct?
 5 A. Yes.
 6 Q. Okay. So that is the entity that we
 7 will refer to as HCRE. If you're aware of any
 8 successor, that is great. If not, let's just
 9 define it as such.
 10 Have you ever been employed by HCRE
 11 or any entity that you know to have succeeded
 12 HCRE?
 13 A. No.
 14 Q. Did you ever serve as an officer or
 15 director of HCRE or any successor?
 16 A. Not that I recall.
 17 Q. Okay. Can we refer to NexPoint and
 18 HCMFA as the advisors?
 19 A. Yes.
 20 Q. In general, the advisors provided
 21 investment advisory services to certain retail
 22 funds; correct?
 23 A. Yes.
 24 Q. And we will refer to the retail
 25 funds that are served by the advisors

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1 WATERHOUSE - 10-19-21
 2 responsibilities as the acting treasurer for
 3 HCMS and the acting treasurer for NexPoint the
 4 same as your duties and responsibilities in
 5 your role as the acting treasurer of HCMFA?
 6 A. More or less.
 7 Q. Have you ever heard of a company
 8 called HCRE Partners, LLC?
 9 A. Yes.
 10 Q. And do you understand that that
 11 entity is now known today as NexPoint Real
 12 Estate Partners?
 13 A. I did not know that.
 14 Q. All right. Can we refer to HCRE
 15 Partners as HCRE?
 16 MS. DANDENEAU: Objection to form.
 17 Did you mean NexPoint Real Estate
 18 Partners, Mr. Morris?
 19 MR. MORRIS: No.
 20 MS. DANDENEAU: Oh.
 21 MR. MORRIS: He said he wasn't
 22 familiar that it was succeeded by that
 23 entity. So –
 24 MS. DANDENEAU: Okay.
 25 MR. MORRIS: – let's go with what

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1 WATERHOUSE - 10-19-21
 2 collectively as the retail funds; is that okay?
 3 A. Okay.
 4 Q. Each of the retail funds is governed
 5 by a board; correct?
 6 A. Yes.
 7 Q. And do you know the people who serve
 8 on the boards of the retail funds?
 9 MS. DANDENEAU: Objection to form.
 10 A. I don't know all of them.
 11 Q. Do you know whether the same people
 12 serve on the board of each of the retail funds
 13 as we've defined that term?
 14 A. Which – so when you say "retail
 15 funds" – again, I want to be – what retail
 16 funds are you referring to, because there are
 17 – there are several distinctions?
 18 What retail funds are you using when
 19 you refer to them?
 20 Q. That is why – that is why I tried
 21 to define the terms. So let me do it again.
 22 Retail funds for the purposes of
 23 this deposition means any retail fund to which
 24 either of the advisors provides advisory
 25 services. Okay?

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1 WATERHOUSE - 10-19-21
 2 A. Okay.
 3 Q. Okay. So do you know whether the
 4 same people serve on the board of each of the
 5 retail funds?
 6 A. I don't know.
 7 Q. Were you ever employed by any of the
 8 retail funds?
 9 A. No.
 10 Q. No?
 11 A. No.
 12 Q. Okay. Do you have any title with
 13 respect to any of the retail funds?
 14 A. Yes.
 15 Q. What titles do you hold –
 16 withdrawn.
 17 Do you have the same titles with
 18 respect to all of the retail funds or do
 19 they – or just something else?
 20 MS. DANDENEAU: Objection to form.
 21 Q. Withdrawn.
 22 Do you have the same title with
 23 respect to each of the retail funds?
 24 A. No.
 25 Q. Tell me which title you have with

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1 WATERHOUSE - 10-19-21
 2 witness' camera.
 3 Do you want to go off the record and
 4 make some adjustments?
 5 MR. MORRIS: Sure, but just for this
 6 purpose. I don't want to take a break. We
 7 just started.
 8 MS. DANDENEAU: Yeah, that is fine.
 9 That is fine. We're going to put you on
 10 mute.
 11 MR. MORRIS: All right.
 12 MS. DANDENEAU: I'm going to try to
 13 open up some of the shades.
 14 VIDEOGRAPHER: We're going off the
 15 record at 10:08 a.m.
 16 (Recess taken 10:08 a.m. to 10:11 a.m.)
 17 VIDEOGRAPHER: We are back on the
 18 record at 10:11 a.m.
 19 Q. Mr. Waterhouse, when did you become
 20 the principal executive officer of the four
 21 retail funds that you just identified?
 22 A. I don't recall.
 23 Q. Do you recall the approximate year
 24 that you became the principal executive officer
 25 of the four funds?

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1 WATERHOUSE - 10-19-21
 2 respect to each retail fund.
 3 Actually, let's do it a different
 4 way. I withdraw the question.
 5 Can you give me one title you have
 6 in relation to any retail fund?
 7 A. Yes.
 8 Q. What title – what title can you
 9 give me?
 10 A. Principal executive officer.
 11 Q. Do you serve as principal executive
 12 officer for each of the retail funds?
 13 A. No.
 14 Q. Can you identify for me the retail
 15 funds in which you serve as the principal
 16 executive officer?
 17 A. Yes. Highland Funds 1, Highland
 18 Funds 2, Highland Income Fund, Highland Global
 19 Allocation Fund.
 20 Q. I'm sorry, you said "Global
 21 Allocation Fund"?
 22 A. Yes.
 23 VIDEOGRAPHER: Excuse me,
 24 Mr. Morris. This is the videographer. I'm
 25 concerned about the lighting in the

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1 WATERHOUSE - 10-19-21
 2 A. 2021.
 3 Q. Did you ever hold any title with
 4 respect to any of the four funds you have just
 5 identified other than principal executive
 6 officer?
 7 A. I don't recall.
 8 Q. Is it possible that you held a
 9 position or a title with the four funds you
 10 just identified prior to 2021?
 11 A. Yes.
 12 Q. But you don't recall if you did or
 13 not; do I have that right?
 14 A. No. You – I thought you asked, did
 15 I hold other titles.
 16 Q. Did you hold any title at the four
 17 retail funds for which you now serve as
 18 principal executive officer at any time prior
 19 to 2021?
 20 A. Yes.
 21 Q. What titles did you hold?
 22 A. I don't recall all the titles.
 23 Q. Do you recall any of the titles?
 24 A. Yes.
 25 Q. What titles do you recall holding at

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1 WATERHOUSE - 10-19-21
 2 those four retail funds before 2021?
 3 A. Principal executive officer.
 4 Q. Were you the principal executive
 5 officer of the four retail funds that you have
 6 identified?
 7 A. Sorry, could you repeat the
 8 question?
 9 Q. Were you the principal executive
 10 officer for each of the four retail funds that
 11 you have identified?
 12 A. Yes.
 13 Q. When did you become the principal
 14 executive – withdrawn.
 15 Can you give me the approximate year
 16 that you became the principal executive officer
 17 for each of the four retail funds you've
 18 identified?
 19 A. I don't recall.
 20 Q. What are your duties and
 21 responsibilities as the principal executive
 22 officer of these four retail funds?
 23 A. It is to manage the finance and
 24 accounting positions.
 25 Q. So at the same time you serve as the

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1 WATERHOUSE - 10-19-21
 2 A. I don't recall during my tenure of
 3 Highland or my – as CFO of Highland – yeah,
 4 if there are any loans as CFO of Highland.
 5 Q. I'm just talking about officers and
 6 employees right now. You have no recollection
 7 of Highland ever making a loan to any of its
 8 officers or employees during the time that you
 9 served as CFO. Do I have that right?
 10 MS. DANDENEAU: Objection to form.
 11 A. So I thought you were saying
 12 officers and employees as CFO, right, so there
 13 were – I mean, okay, yes.
 14 Q. I would ask you to listen carefully
 15 to my question. If I – if I'm not clear, let
 16 me know, but I'm really trying to be as clear
 17 as I can.
 18 A. I'm listening as carefully as I can,
 19 and you are asking very specific questions in a
 20 timeline. And I'm trying to answer your
 21 questions as specifically as I can, and I
 22 apologize if – if I'm going back. I am – you
 23 are asking very specific questions. Thank you.
 24 Q. During the period that you served as
 25 Highland's CFO, from time to time Highland

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1 WATERHOUSE - 10-19-21
 2 treasurer of the advisors, you also serve as
 3 the principal executive officer of these four
 4 retail funds; correct?
 5 A. Yes.
 6 Q. Did you ever hold any title with
 7 respect to any other retail fund?
 8 A. Not that I recall.
 9 Q. During the period that you served as
 10 Highland's CFO, from time to time Highland
 11 loaned money to certain of its officers and
 12 employees; correct?
 13 A. Yes.
 14 Q. During the period that you served as
 15 Highland's CFO, from time to time Highland
 16 loaned money to certain –
 17 A. Let me – let me retract that,
 18 sorry, that – you asked during the time I was
 19 CFO, Highland loaned moneys to employees. I
 20 don't – I don't recall that during my tenure
 21 of CFO.
 22 Q. You have no recollection during the
 23 time that you were the CFO of Highland of
 24 Highland ever loaning any money to any officer
 25 or director of Highland?

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1 WATERHOUSE - 10-19-21
 2 loaned money to certain corporate affiliates;
 3 correct?
 4 MS. DANDENEAU: Objection to form.
 5 A. What are corporate affiliates?
 6 Q. How about the ones that are in
 7 Highland's audited financial statements under
 8 the section entitled Loans to Affiliates. Why
 9 don't we start with those. Do you have any
 10 understanding of what the phrase "affiliates"
 11 means?
 12 MS. DANDENEAU: Objection to form.
 13 A. I understand what affiliates are,
 14 yet affiliates can have different meanings in
 15 different contexts, so...
 16 Q. Why don't you – why don't you tell
 17 me what your understanding of the term
 18 "affiliate" is in relation to Highland Capital
 19 Management, L.P.
 20 A. Is that a – it depends on the
 21 context.
 22 Q. How about the context of making
 23 loans?
 24 MS. DANDENEAU: Objection to form.
 25 A. I didn't make the determination of

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1 WATERHOUSE - 10-19-21
 2 who an affiliate was or is at the time those –
 3 I didn't – that wasn't my job to make a
 4 determination of who an affiliate is.
 5 Q. All right. So as the CFO of
 6 Highland, do you have any ability right now to
 7 tell me which companies that were directly or
 8 indirectly owned and/or controlled by
 9 Mr. Dondero in whole or in part received loans
 10 from Highland Capital Management, L.P.?
 11 MS. DANDENEAU: Objection to form.
 12 MS. DEITSCH-PEREZ: Objection, form.
 13 A. Yes.
 14 Q. Okay. Identify every entity that
 15 you can think of that was directly or
 16 indirectly owned and/or controlled by
 17 Mr. Dondero in whole or in part that received a
 18 loan from Highland Capital Management, L.P.
 19 MR. RUKAVINA: Objection, legal
 20 conclusion.
 21 A. NexPoint Advisors, Highland Capital
 22 Management Fund Advisors, HCM Services,
 23 Dugaboy. Sorry, I don't think – Dugaboy
 24 doesn't fit that definition. You said owned
 25 and controlled. I don't think that that

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1 WATERHOUSE - 10-19-21
 2 Q. Okay. Can we refer to the four
 3 entities that you just named and Mr. Dondero as
 4 the affiliates?
 5 A. So that would be Jim Dondero,
 6 NexPoint Advisors, Highland Capital Management
 7 Fund Advisors, and HCRE.
 8 Q. And HCMS?
 9 A. And HCMS, okay.
 10 Q. And can we refer to the loans that
 11 were given to each of those affiliates as the
 12 affiliate loans?
 13 A. Yes.
 14 Q. And is it fair to say that each of
 15 the affiliates were the borrowers under the
 16 affiliate loans as we're defining the term?
 17 MR. RUKAVINA: Objection, legal
 18 conclusion.
 19 A. The borrowers are whoever were on
 20 the notes. I don't – I don't know. I'm not
 21 the legal person.
 22 Q. But you –
 23 A. I don't know.
 24 Q. You do know, as Highland's former
 25 CFO, that each of the affiliates that you have

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1 WATERHOUSE - 10-19-21
 2 definition –
 3 Q. I said owned and/or controlled.
 4 A. I don't – again, I'm not – I'm not
 5 the legal expert. I don't think it controls –
 6 he controls Dugaboy, so again, I'm not the
 7 legal person.
 8 Q. I'm not asking you for a legal
 9 conclusion, sir. I'm asking you for your
 10 knowledge, okay, as the CFO – the former CFO
 11 of Highland Capital Management, other than
 12 NexPoint, HCMFA, and HCMF – HCMS, can you
 13 think of any other entities that were owned
 14 and/or controlled directly or indirectly in
 15 whole or in part by Jim Dondero who received a
 16 loan from Highland Capital Management, L.P.?
 17 MS. DANDENEAU: Objection to form.
 18 A. HCRE.
 19 Q. Any others?
 20 A. That is – that is all I can think
 21 of.
 22 Q. And you're aware that from time to
 23 time while you were the CFO, Highland loaned
 24 money to Jim Dondero; correct?
 25 A. Yes.

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1 WATERHOUSE - 10-19-21
 2 identified tendered notes to Highland; correct?
 3 MR. RUKAVINA: Hey, John, will you
 4 just give me a running objection to legal
 5 conclusion to HCM –
 6 MR. MORRIS: No. No, if you want to
 7 object –
 8 MR. RUKAVINA: I will object every
 9 time. Object to legal conclusion.
 10 MR. MORRIS: That is fine.
 11 A. Sorry, can you repeat the question?
 12 Q. Are you aware that each of the –
 13 that each of the affiliates, as we have defined
 14 the term, gave to Highland a promissory note in
 15 exchange for the loans?
 16 MR. RUKAVINA: Objection to the
 17 extent that calls for a legal conclusion.
 18 A. I don't.
 19 Q. No, you don't know that?
 20 A. No, they didn't – you said they
 21 exchanged a promissory note for a loan. I
 22 don't – I don't understand that question, so I
 23 said no.
 24 Q. At the time of the bankruptcy
 25 filing, did Highland have in its possession

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1 WATERHOUSE - 10-19-21
 2 promissory notes that were signed by each
 3 the affiliates?
 4 A. Yes.
 5 Q. To the best of your knowledge,
 6 during the time that you served as Highland's
 7 CFO, did Highland disclose to its outside
 8 auditors all of the loans that were made to
 9 affiliates?
 10 MR. RUKAVINA: Objection, that calls
 11 for a legal conclusion.
 12 MS. DEITSCH-PEREZ: I also couldn't
 13 hear you, John, because there was some
 14 garbling on -- on the -- on the call.
 15 MR. MORRIS: Folks, I've got to tell
 16 you this is not going well, and I'm
 17 reserving my right --
 18 MS. DANDENEAU: John, it was just
 19 the end of that question. It was just the
 20 end of that question. I couldn't hear it
 21 either. Sorry, if you could repeat it,
 22 please.
 23 MR. MORRIS: That is less than an
 24 hour into this, but folks are trying to run
 25 out the clock, and so I'm just going to

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1 WATERHOUSE - 10-19-21
 2 financial statements?
 3 MR. RUKAVINA: Objection, legal
 4 conclusion.
 5 A. When an audit was performed, any
 6 loans that were made by Highland to the
 7 affiliates were disclosed to auditors.
 8 Q. Are you aware of any loan that was
 9 made to any affiliate that was not disclosed to
 10 the auditors?
 11 A. I'm not aware.
 12 Q. To the best of your knowledge, did
 13 each of the affiliates who were --
 14 (inaudible) -- loaned from Highland execute a
 15 promissory note in connection with that loan?
 16 MR. RUKAVINA: Objection, legal
 17 conclusion.
 18 A. Sorry, you -- halfway through the
 19 question it got muffled.
 20 Can you repeat that again?
 21 Q. To the best of your knowledge, did
 22 every affiliate execute a promissory note in
 23 connection with each loan that it obtained from
 24 Highland?
 25 MR. RUKAVINA: Objection, legal

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 2 state that now.
 3 MS. DANDENEAU: You know, and,
 4 Mr. Morris, I really object to that. I
 5 mean --
 6 MR. MORRIS: Okay.
 7 MS. DANDENEAU: -- Mr. Waterhouse
 8 just told you he's trying to listen to your
 9 questions and answer them carefully, and
 10 you have no basis for saying that.
 11 MR. MORRIS: Okay.
 12 MS. DANDENEAU: This does not --
 13 this is not an experienced witness, so he's
 14 trying to do the best he can.
 15 Q. Mr. Waterhouse, during the time that
 16 you served as Highland's CFO, did Highland
 17 disclose to its outside auditors all of the
 18 loans that it made to each of the affiliates
 19 that you have identified?
 20 MR. RUKAVINA: Objection, legal
 21 conclusion.
 22 A. Yes.
 23 Q. To the best of your knowledge, while
 24 you were Highland's CFO, were all of the
 25 affiliate loans described in Highland's audited

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1 WATERHOUSE - 10-19-21
 2 conclusion.
 3 A. Yes.
 4 Q. You are not aware of any loan that
 5 any affiliate ever obtained from Highland where
 6 the affiliate did not give a promissory note in
 7 return; is that fair?
 8 A. Yes, I'm not aware.
 9 Q. And to the best of your knowledge,
 10 did Highland loan to each affiliate an amount
 11 of money equal to the principal amount of each
 12 promissory note?
 13 MR. RUKAVINA: Objection, legal
 14 conclusion.
 15 A. Yes.
 16 Q. During the time that you served as
 17 CFO, did Highland ever loan money to
 18 Mark Okada?
 19 A. I -- I don't recall.
 20 Q. Did you ever see any promissory
 21 notes executed by Mark Okada?
 22 A. I don't recall.
 23 Q. Do you know if Highland ever forgave
 24 any loan that it ever made to Mr. Okada?
 25 A. I don't recall.

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1 WATERHOUSE - 10-19-21

2 Q. Do you recall if Mr. Okada paid back

3 all principal and interest due and owing under

4 any loan he obtained from Highland?

5 MS. DEITSCH-PEREZ: Objection to

6 form.

7 MS. DANDENEAU: Objection to form.

8 A. I don't recall.

9 Q. Do you recall whether – during your

10 time as CFO, whether Highland ever loaned money

11 to Jim Dondero?

12 A. Yes.

13 Q. To the best of your knowledge, did

14 Mr. Dondero sign and deliver to Highland a

15 promissory note in connection with each loan

16 that he obtained from Highland?

17 A. If you are referring to the

18 promissory notes that, you know, part of

19 Highland's records, yes.

20 Q. Okay. You're not aware of any loan

21 that Mr. Dondero took from Highland that wasn't

22 backed up by – by a promissory note with a

23 face – with a principal amount equal to the

24 amount of the loan; correct?

25 A. Am I aware that Jim Dondero took a

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1 WATERHOUSE - 10-19-21

2 Q. Okay. And so I appreciate the

3 distinction.

4 Is it fair to say that, to the best

5 of your knowledge, Highland did not forgive a

6 loan that it made to an officer or employee

7 after 2013?

8 MS. DANDENEAU: Objection to form.

9 A. I don't recall.

10 Q. To the best of your knowledge, did

11 Highland disclose to its auditors every

12 instance where it forgave, in whole or in part,

13 a loan that it had made to one of its officers

14 or employees?

15 A. No.

16 Q. Can you think of – can you – can

17 you identify any loan to an officer or employee

18 that was forgiven by Highland, in whole or in

19 part, that was not disclosed to Highland's

20 outside auditors?

21 A. Look, I don't recall all of the

22 loans and the loan forgiveness. I just know as

23 part of the audit process there is a

24 materiality concept.

25 So if there were loans to employees

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1 WATERHOUSE - 10-19-21

2 loan?

3 Q. Without giving a – let me ask a

4 better question. I'm sorry, Mr. Waterhouse.

5 Are you aware of any loan that

6 Mr. Dondero obtained from Highland where he

7 didn't give a promissory note in return?

8 A. I'm not aware.

9 Q. During the time that you served as

10 Highland's CFO, did Highland ever forgive any

11 loans, in whole or in part, that it made to

12 Mr. Dondero?

13 A. Not that I'm aware.

14 Q. At the time that you served as

15 Highland's CFO, did Highland ever forgive any

16 loan, in whole or in part, that it made to any

17 affiliate as we've defined the term today?

18 A. Not that I'm aware.

19 Q. During the time that you served as

20 Highland's CFO, did Highland ever forgive, in

21 whole or in part, any loan that it ever made to

22 any officer or employee?

23 A. Highland forgave loans to officers

24 and employees. It may not have been at the

25 time when my title was CFO.

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2 that were of – you know, that were deemed

3 immaterial, those items may not have been

4 disclosed by the team to the auditors.

5 Q. I appreciate that.

6 Do you have an understanding as to

7 what the level of materiality was?

8 A. I don't recall.

9 Q. As the CFO of Highland, to the best

10 of your knowledge, did Highland disclose to its

11 outside auditors every loan that was forgiven,

12 in whole or in part, that was material as that

13 term was defined by the outside auditors?

14 A. Yes.

15 Q. And do you recall where – do you

16 recall where the definition of materiality can

17 be found for – for this particular purpose?

18 MS. DANDENEAU: Objection to form.

19 A. No. You – I don't determine

20 materiality.

21 Q. Okay. I'm just asking you if you

22 can help me understand where it is, but I think

23 we will find it in a few minutes.

24 You are aware that Highland has

25 commenced lawsuits against each of the

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1 WATERHOUSE - 10-19-21
 2 affiliates, as we've defined the term, to
 3 collect under certain promissory notes; is that
 4 right?
 5 A. Yes.
 6 Q. And are you familiar with the notes
 7 that are issue – at issue in the lawsuits?
 8 MS. DANDENEAU: Objection to form.
 9 A. Generally familiar.
 10 Q. Can we refer to the lawsuits that
 11 Highland has commenced against the affiliates
 12 collectively as the lawsuits?
 13 A. Yes. And, again, the affiliates are
 14 NexPoint, HCMFA, HCMS, and HCRE.
 15 Q. And Mr. Dondero?
 16 A. Okay. See, that is a new – and now
 17 Mr. Dondero is included in your affiliate
 18 definition.
 19 Q. I just –
 20 A. I thought affiliates – I thought
 21 affiliates were just the four prior entities,
 22 so I just want to be clear.
 23 Q. I appreciate that. So let's –
 24 let's keep them separate and let's refer to the
 25 four corporate entities as the affiliates, and

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1 WATERHOUSE - 10-19-21
 2 were given by the affiliates and Mr. Dondero?
 3 A. Yes.
 4 Q. Can you describe the process for me?
 5 A. The process, payment should be
 6 applied as laid out in the – in the promissory
 7 note.
 8 Q. From time to time were payments made
 9 that were not required under the promissory
 10 notes?
 11 MS. DANDENEAU: Objection to form.
 12 A. Yes.
 13 Q. Who was responsible for deciding
 14 when and how much the payments would be made
 15 with respect to each of the notes that were
 16 issued by the affiliates and Mr. Dondero?
 17 A. Who was responsible for deciding how
 18 much was paid prior to the due date?
 19 Q. Yes.
 20 A. I don't know.
 21 Q. Did you approve of each payment that
 22 was made against principal and interest on the
 23 notes that were given by the affiliates and
 24 Mr. Dondero?
 25 MS. DANDENEAU: Objection to form.

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 2 Mr. Dondero we will call Mr. Dondero. Okay?
 3 A. Okay. Thank you. As you can see,
 4 Mr. Morris, there is a lot of entities – a lot
 5 here. I just want to be clear.
 6 Q. Okay. Now, the affiliates of
 7 Mr. Dondero signed promissory notes that are
 8 not subject to the lawsuit.
 9 Do you understand that?
 10 MS. DANDENEAU: Objection to form.
 11 A. The affiliates and Mr. Dondero
 12 signed –
 13 Q. You know what? I will skip it.
 14 That is okay. Okay.
 15 From time to time while you were
 16 Highland's CFO, payments were applied against
 17 principal and interests that were due under the
 18 notes that were tendered by the affiliates and
 19 Mr. Dondero; correct?
 20 MR. RUKAVINA: Objection to the
 21 extent that calls for a legal conclusion.
 22 A. Yes.
 23 Q. Did Highland have a process where –
 24 whereby payments would be applied against
 25 principal and interest against the notes that

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 2 A. Did I approve the payments? I
 3 approve – I approve – if there was cash – if
 4 there was cash being repaid on a note payment,
 5 yes, I approved in the general sense of being
 6 made aware of the payment and the amount.
 7 Q. And are you the person who
 8 authorized Highland's employees to effectuate
 9 those payments?
 10 A. Yes.
 11 Q. When you gave the instruction to
 12 effectuate the payment, did you obtain
 13 Mr. Dondero's prior approval?
 14 A. I mean, it – I mean, it – it
 15 depends.
 16 Q. Can you think of any instance where
 17 you directed Highland's employees to make a
 18 payment of principal or interest against any
 19 note that was tendered by an affiliate or
 20 Mr. Dondero that Mr. Dondero did not approve of
 21 in advance?
 22 A. I can't recall specifically.
 23 Q. Can you identify – withdrawn.
 24 Did Mr. Dondero ever tell you that a
 25 payment that was made against principal and

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1 WATERHOUSE - 10-19-21
 2 interest due under one of the notes that was
 3 tendered by an affiliate or himself should not
 4 have been made?
 5 A. Yes.
 6 Q. Can you identify the payment for me?
 7 A. It would be for – for NexPoint
 8 Advisors.
 9 Q. Okay. And when did Mr. Dondero tell
 10 you that a payment that you had initiated on
 11 behalf of NexPoint should not have been made?
 12 A. I wasn't initiating payment. It was
 13 in the context of the – I think you used this
 14 term, "the advisors," so NexPoint Advisors and
 15 Highland Capital Management Fund Advisors had
 16 overpaid on certain agreements with Highland
 17 Capital Management, L.P. And as a part of that
 18 process, the advisors – what I was told at the
 19 time were in talks and negotiations and
 20 discussions with Highland Capital Management,
 21 L.P., on offsets in relation to those
 22 overpayments.
 23 Q. When did this conversation take
 24 place?
 25 MS. DANDENEAU: Objection to form.

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 2 A. No.
 3 Q. Are you certain that the payment –
 4 that the payment that you have in mind related
 5 to the promissory note that NexPoint issued in
 6 favor of Highland?
 7 MS. DANDENEAU: Objection to form.
 8 A. Yes.
 9 Q. Okay. Other than that one payment,
 10 can you identify any other instance where
 11 Mr. Dondero told you that a payment should not
 12 have been applied against principal and
 13 interest under any promissory note tendered by
 14 any affiliate or Mr. Dondero?
 15 MS. DANDENEAU: Objection to form.
 16 MS. DEITSCH-PEREZ: Objection to
 17 form.
 18 A. Not that I recall.
 19 Q. Thank you very much.
 20 Do you know if Mr. Dondero approved
 21 in advance of each loan made to each affiliate
 22 and himself during the time that you were the
 23 CFO?
 24 MS. DEITSCH-PEREZ: Object to the
 25 form.

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 2 A. I don't recall specifically.
 3 Q. Do you recall what year it was?
 4 A. Yes.
 5 Q. What year did the conversation with
 6 Mr. Dondero take place that you just described?
 7 A. 2020.
 8 Q. Okay. Do you remember if it was
 9 December 2020?
 10 A. It – it – I don't – I don't
 11 recall what month specifically, but it would
 12 have been November or December.
 13 Q. And we're talking here about a
 14 payment of principal and/or interest that was
 15 due – withdrawn.
 16 We're talking here about a payment
 17 of principal and interest that was applied
 18 against NexPoint's note; correct?
 19 MS. DANDENEAU: Objection to form.
 20 A. I don't recall what that payment
 21 consisted of.
 22 Q. Is it possible that the payment you
 23 have in mind related to the shared services
 24 agreement?
 25 MS. DANDENEAU: Objection to form.

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1 WATERHOUSE - 10-19-21
 2 A. Yes, generally.
 3 Q. Can you identify any loan that was
 4 ever made to an affiliate or to Mr. Dondero
 5 that Mr. Dondero did not approve of in advance?
 6 A. Other than the ones that are in
 7 dispute, I'm not aware.
 8 Q. Do you believe that Mr. Dondero did
 9 not approve of each of the loans that are in
 10 dispute in advance of the time that the loan
 11 was made?
 12 MS. DANDENEAU: Objection to form.
 13 A. Given what is in the dispute, you
 14 know, and – and – and the way things might –
 15 yeah, I mean...
 16 Q. I am not asking about the dispute,
 17 and it was probably my mistake to follow you
 18 there.
 19 Were you aware of every loan made by
 20 Highland to each of its affiliates and
 21 Mr. Dondero while you were the CFO at the time
 22 each loan was made?
 23 A. Was I aware of every loan, yes.
 24 Q. Okay. And if you put yourself back
 25 in time, do you recall that any of the loans

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1 WATERHOUSE - 10-19-21
 2 that were made to one of the affiliates or
 3 Mr. Dondero during the time that you were the
 4 CFO was made without Mr. Dondero's prior
 5 knowledge and approval?
 6 A. Not that I recall.
 7 Q. Thank you. In fact, do you – as
 8 the CFO, would you have allowed Highland to
 9 loan money to an affiliate or to Mr. Dondero
 10 without obtaining Mr. Dondero's prior approval?
 11 MS. DANDENEAU: Objection to form.
 12 A. I can't – there was so many times
 13 over the years, I can't speak for every single
 14 one, but generally, yes, I – I spoke to him.
 15 Q. You – you never – you never –
 16 withdrawn. I will just take that.
 17 Can you recall any payment that was
 18 ever made against principal and interest on a
 19 note that was issued in favor of Highland by an
 20 affiliate or Mr. Dondero that you personally
 21 did not know about in advance?
 22 A. There are so many through the years,
 23 I don't – I don't – I don't recall every
 24 single one.
 25 Q. Okay. Can you identify any payment

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1 WATERHOUSE - 10-19-21
 2 generally, yes.
 3 Q. Did you personally communicate with
 4 Mr. Dondero to let him know each time a payment
 5 of principal or interest was being made against
 6 any note that was tendered by an affiliate or
 7 Mr. Dondero to Highland?
 8 A. I don't – are you saying, did I let
 9 Mr. Dondero know if a payment was made on any
 10 affiliate or loan to Mr. Dondero? I mean,
 11 not – not every – no.
 12 Q. Let me ask it this way: Did you
 13 have a practice of informing Mr. Dondero when
 14 payments were made against principal and
 15 interest on any note that was tendered by an
 16 affiliate or Mr. Dondero?
 17 MS. DEITSCH-PEREZ: Objection to
 18 form.
 19 MS. DANDENEAU: Objection to form.
 20 A. No, I did not.
 21 Q. Did Mr. Dondero ever tell you that a
 22 payment of principal or interest had been made
 23 against a note that was tendered by an
 24 affiliate or himself that he had been unaware
 25 of?

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1 WATERHOUSE - 10-19-21
 2 that was made against principal and interest on
 3 any note tendered by any affiliate or
 4 Mr. Dondero that you didn't know about in
 5 advance?
 6 A. I don't recall.
 7 Q. Other than Mr. Dondero – withdrawn.
 8 Did anybody at Highland have the
 9 authority to make a payment against principal
 10 and interest due under a loan given to the
 11 affiliates and Mr. Dondero without your
 12 knowledge and approval?
 13 MS. DANDENEAU: Objection to form.
 14 A. Sorry, there was – to make a
 15 payment on an affiliate loan, what you are
 16 saying would it require my knowledge and
 17 approval, yes.
 18 Q. Okay. I appreciate that. Thank
 19 you.
 20 Did anybody at Highland have the
 21 authority, to the best of your knowledge, to
 22 effectuate a loan to an affiliate without
 23 Mr. Dondero's prior knowledge and approval?
 24 MS. DANDENEAU: Objection to form.
 25 A. I can't speak for all, but

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1 WATERHOUSE - 10-19-21
 2 A. Not that I recall.
 3 Q. Are you aware that Mr. Dondero and
 4 the affiliates – withdrawn.
 5 Are you aware that Mr. Dondero
 6 NexPoint, HCRE, and HCMS all contend that they
 7 do not have to pay on any of the notes they
 8 issued because they are subject to an oral
 9 agreement between Mr. Dondero and Nancy
 10 Dondero, in her capacity as the trustee of the
 11 Dugaboy Investment Trust?
 12 MS. DANDENEAU: Objection to form.
 13 A. I didn't – I didn't – I didn't
 14 know that it was all notes.
 15 Q. Okay. Are you – did you ever learn
 16 that there was an oral agreement between Jim
 17 Dondero and Nancy Dondero pertaining to any
 18 notes issued by any affiliate or Mr. Dondero?
 19 MS. DEITSCH-PEREZ: Object to the
 20 form.
 21 A. Yes.
 22 Q. Do you have any understanding as to
 23 the terms of that agreement?
 24 A. Yes.
 25 Q. What is your understanding of the

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1 WATERHOUSE - 10-19-21

2 terms of the agreement?

3 A. That there were certain milestones

4 that had to be reached.

5 Q. Do you have any understanding of the

6 terms of the agreement between Mr. Dondero and

7 Nancy Dondero concerning any of the notes

8 issued by the affiliates or Mr. Dondero other

9 than that there have to be milestones reached?

10 MS. DEITSCH-PEREZ: Object to the

11 form.

12 A. There are milestones, I found out

13 yesterday, or there was some –

14 MS. DANDENEAU: Okay. I'm just

15 going to object to the extent that you

16 learned anything in conversations with

17 counsel, please don't reveal – that is

18 privileged, and don't reveal any privileged

19 communications.

20 THE WITNESS: Okay.

21 A. So I'm not aware of anything else.

22 Q. Do you know what the milestones

23 were?

24 MS. DANDENEAU: Objection to form.

25 A. I don't.

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2 A. I don't recall.

3 Q. Do you recall how you learned of the

4 agreement?

5 Was it in a meeting? Was it in a

6 phone call? Was it in an email?

7 A. I don't recall.

8 Q. Do you recall when you learned of

9 the agreement?

10 A. Not specifically.

11 Q. Do you recall what year you learned

12 of the agreement?

13 A. In – look, I mean, there are so

14 many notes. I may be getting – I believe it

15 was 2020.

16 Q. All right. I'm not asking about

17 notes, sir. I'm asking about the agreement

18 that you testified you knew about between Jim

19 and Don- – Nancy Dondero. Okay.

20 Do you understand my question now?

21 Should I ask my question again?

22 A. Yeah, sure. Go ahead.

23 Q. I'm going to use the word

24 "agreement" to refer to the agreement that

25 Mr. Dondero and Nancy Dondero entered into

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2 Q. Do you know anything about – do you

3 know what promissory notes the agreement

4 covered?

5 A. I don't.

6 Q. Do you know if – if Jim and Nancy

7 Dondero entered into one agreement or more than

8 one agreement?

9 MS. DEITSCH-PEREZ: Object to the

10 form.

11 A. I don't know.

12 Q. Do you know if the agreement is in

13 writing?

14 A. I don't know.

15 Q. How did you learn of the existence

16 of the agreement?

17 MS. DANDENEAU: Objection to form.

18 Again –

19 A. I don't – I don't recall who told

20 me.

21 Q. You have no recollection of who told

22 you about this agreement between Jim and Nancy

23 Dondero?

24 MS. DEITSCH-PEREZ: Object to the

25 form.

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2 where you understood that certain milestones

3 had to be reached. Okay?

4 A. Uh-huh.

5 MS. DANDENEAU: Objection.

6 MS. DEITSCH-PEREZ: Object to the

7 form.

8 MR. MORRIS: Just defining a term,

9 what is the objection.

10 MS. DEITSCH-PEREZ: The objection –

11 MR. MORRIS: I will move on. I will

12 move on.

13 MS. DEITSCH-PEREZ: John –

14 Q. Sir, are you okay with that

15 definition of agreement?

16 A. Okay.

17 Q. Okay. So you don't recall who –

18 who informed you of the existence of the

19 agreement; is that right?

20 A. I don't recall.

21 Q. You don't recall who told you the

22 terms of the agreement.

23 Do I have that right?

24 A. Correct.

25 Q. And you don't recall if you learned

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1 WATERHOUSE - 10-19-21
 2 about the agreement in a meeting, through an
 3 email, or through a phone call.
 4 Do I have that right?
 5 A. I don't recall.
 6 Q. Can you tell me when you learned of
 7 the agreement?
 8 A. I don't – I don't – I don't
 9 remember specifically.
 10 Q. Can you tell me if you learned of
 11 the agreement before or after the petition
 12 date?
 13 A. It would have been – it would have
 14 been after.
 15 Q. Can you tell me if you learned of
 16 the agreement before or after January 9th,
 17 2020?
 18 A. It would have been after.
 19 Q. Can you tell me if you learned of
 20 the agreement before or after you left Highland
 21 Capital Management in February of 2021?
 22 A. I don't – I don't – I don't know.
 23 Q. It is possible that you learned of
 24 it while you were a Highland employee.
 25 Do I have that right?

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 2 Jim Seery.
 3 Q. Did you tell anybody at DSI about
 4 this agreement?
 5 A. No.
 6 Q. Did you tell any of Highland's
 7 independent directors about this agreement?
 8 A. No.
 9 Q. Did you tell anybody at Pachulski
 10 Stang Ziehl & Jones about this agreement?
 11 A. No.
 12 Q. Did you tell any employee of
 13 Highland about this agreement?
 14 A. No.
 15 MS. DANDENEAU: Mr. Morris, it has
 16 been an hour and a half. Is this a good
 17 time for a break?
 18 MR. MORRIS: Sure.
 19 Q. Mr. Waterhouse, I will just remind
 20 you that during the break please don't speak
 21 with anybody about the deposition, the
 22 substance of your testimony or anything else
 23 concerning the deposition. Okay?
 24 A. Yes.
 25 MR. MORRIS: So it is 11:02. We're

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 2 A. I don't remember the – I mean, it
 3 was sometime in 2021. I don't remember when.
 4 Q. All right. So to the best of your
 5 recollection, it was in 2021 but you don't
 6 recall if it was before or after you ceased to
 7 be a Highland employee.
 8 Do I have that right?
 9 A. Yeah, I mean, it was – it was
 10 likely after I was – after I left Highland
 11 because, if I put myself back into the last
 12 days of – of 2021, it was – you know, the
 13 communications with Mr. Dondero were – were –
 14 were – there weren't as many communications
 15 because of the circumstances.
 16 Q. And so based on that you believe
 17 that it is most likely that you learned of this
 18 agreement sometime after you left Highland
 19 employment?
 20 A. I wouldn't use the term "most
 21 likely." I don't recall specifically. I don't
 22 recall.
 23 Q. Do you recall ever telling Jim Seery
 24 about this agreement?
 25 A. No, I don't – I didn't tell

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 2 at 11:02 your time. Let's come back, I
 3 guess, at 15 – at 11:15 your time.
 4 VIDEOGRAPHER: We're going off the
 5 record at 11:02 a.m.
 6 (Recess taken 11:02 a.m. to 11:20 a.m.)
 7 VIDEOGRAPHER: We are back on the
 8 record at 11:20 a.m.
 9 Q. Mr. Waterhouse, did you speak with
 10 anybody during the break about this deposition?
 11 A. No.
 12 MS. DANDENEAU: Other than – other
 13 than his counsel.
 14 Q. Did you speak to your counsel about
 15 the substance of your deposition today?
 16 A. No, I didn't bring it up.
 17 Q. I didn't ask you if you brought it
 18 up. I asked you if you had any conversation
 19 with your lawyer about the substance of your
 20 deposition.
 21 MS. DANDENEAU: Yes, he did.
 22 Q. Can you tell me what the – you
 23 discussed?
 24 MS. DANDENEAU: No, I object to
 25 that. He's not going to answer. That is a

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 2 privileged conversation.
 3 MR. MORRIS: So I just want to make
 4 sure that I understand. During the break
 5 you spoke with your client about the
 6 substance of this deposition; is that
 7 right?
 8 MS. DANDENEAU: Yes, John.
 9 MR. MORRIS: And you refuse – you
 10 refuse to let your client tell me what was
 11 discussed; is that right?
 12 MS. DANDENEAU: That's correct.
 13 MR. MORRIS: You know, I had given
 14 the instruction prior to the break not to
 15 speak with counsel. I would have
 16 appreciated –
 17 MS. DANDENEAU: No, you didn't –
 18 actually, that is not true, Mr. Morris.
 19 You said not to speak with anyone. We
 20 never have interpreted that to mean
 21 conversations with counsel. That's never
 22 been – I have never, ever heard that
 23 instruction.
 24 MR. MORRIS: Okay. We will – we
 25 will – we will deal with it when and if we

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 2 notes where you learned that one of the terms
 3 of the agreement was milestones reached?
 4 A. Okay.
 5 Q. And did you understand that that was
 6 the – the agreement that we were referring to
 7 every time we used the word "agreement" in this
 8 deposition?
 9 A. I don't know anything about this
 10 agreement. So, look, I do – it – I don't
 11 know whether –
 12 Q. Let's – let's try this again.
 13 A. Yeah. Look, I don't know what this
 14 agreement relates.
 15 MS. DEITSCH-PEREZ: John, John –
 16 Q. Let me try –
 17 MS. DEITSCH-PEREZ: John, please let
 18 the witness finish.
 19 MR. MORRIS: Please stop. Please
 20 stop. Please stop talking.
 21 MS. DEITSCH-PEREZ: No, you stop.
 22 Let the witness –
 23 MR. MORRIS: Stop talking.
 24 MS. DEITSCH-PEREZ: – finish – you
 25 interrupted him.

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 2 have to.
 3 Q. Mr. Waterhouse, after learning about
 4 the agreement, did you ask anybody if the
 5 agreement was reflected in a writing?
 6 MS. DANDENEAU: Objection to form.
 7 A. No.
 8 Q. Did you ask anybody if the terms of
 9 the agreement were memorialized anywhere?
 10 MS. DANDENEAU: Objection to form.
 11 MR. MORRIS: What is the –
 12 A. No.
 13 MS. DANDENEAU: Well, because you
 14 keep talking about this agreement and I –
 15 I – I think, Mr. Morris, that is really
 16 not clear what you mean by "the agreement."
 17 And maybe you can just go back and restate
 18 what that is.
 19 MR. MORRIS: Okay. Your client has
 20 agreed with me twice on the definition, but
 21 I will try one more time.
 22 Q. Mr. Waterhouse, do you understand
 23 that when I use the term "agreement," I'm
 24 referring to the agreement between Jim and
 25 Nancy Dondero concerning certain promissory

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 2 MR. MORRIS: You know what, you
 3 guys, this is really wrong. It is really,
 4 really wrong. Okay?
 5 I had the witness agree not once,
 6 but twice to the definition of agreement.
 7 Okay? I'm going to try and do it a third
 8 time.
 9 MS. DANDENEAU: No, but, please,
 10 John, really –
 11 MR. MORRIS: No, please stop
 12 talking. Please. It is my deposition.
 13 Object to questions.
 14 MS. DANDENEAU: No, but also you
 15 instructed him that – that if you were
 16 going – if you were interrupting him, that
 17 he should remind you that you're
 18 interrupting him and – and –
 19 MR. MORRIS: Let him do that. Let
 20 him do that.
 21 MS. DANDENEAU: Okay. Well, you –
 22 MR. MORRIS: Please stop talking.
 23 A. Okay. I don't know any of the
 24 details of these agreements. I don't know
 25 anything about them. I heard – someone – I

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1 WATERHOUSE - 10-19-21
 2 don't know who, I don't know when, as you
 3 asked, sometime in '21, someone told me about
 4 this – or I don't honestly know – I don't
 5 even recall exactly how I was made aware of
 6 this, but I was. I don't know – I don't know
 7 any of these details, and I'm getting – again,
 8 there is, you know, I – I – I had a passing
 9 conversation with – with Jim at some point
 10 on – on some – on the executive comp, and I'm
 11 getting confused of what is what, because
 12 again, I don't know any of these details.
 13 Q. Okay. Let me try again,
 14 Mr. Waterhouse, and I apologize.
 15 Are you aware of any agreement
 16 between Jim Dondero and Nancy Dondero
 17 concerning any promissory note that was given
 18 to Highland by any affiliate or Mr. Dondero?
 19 MS. DEITSCH-PEREZ: Object to the
 20 form.
 21 A. I've heard of an agreement. That
 22 is – that is – I mean, if you are using aware
 23 as heard, sure.
 24 Q. And you understand that one of the
 25 terms of the agreement is that it was based on

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1 WATERHOUSE - 10-19-21
 2 form.
 3 Q. You can answer.
 4 A. I don't – I heard about the
 5 agreement. I don't know anything – I heard
 6 there was an agreement. That is – again, as I
 7 testified before – I said before, heard about
 8 it, don't know the details. I believe it was
 9 sometime this year.
 10 Q. Do you have any personal knowledge
 11 about the terms of the agreement, sir?
 12 MS. DANDENEAU: Objection to form.
 13 A. Other than what I have previously
 14 discussed, I don't – I don't know.
 15 Q. Did – did Mr. Dondero tell you
 16 about the existence of the agreement?
 17 A. I don't recall.
 18 Q. Do you recall the source of your
 19 information when you learned about the
 20 agreement?
 21 A. No, I don't – I don't recall. I
 22 don't remember. I just – I heard about it
 23 generally. I don't remember – I don't
 24 remember who, how, if, how. I don't remember.
 25 Q. You know, Mr. Waterhouse, I just

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 2 milestones that had to be reached; is that
 3 right?
 4 MS. DANDENEAU: Objection to form.
 5 A. That was one of the words that was
 6 used when I heard about it, yes.
 7 Q. And when you heard about this
 8 agreement that had a term in it concerning
 9 milestones reached, did you ask the person who
 10 was telling you about the agreement whether or
 11 not it was in writing?
 12 A. I did not.
 13 Q. Did you ask any questions at all?
 14 MS. DANDENEAU: Objection to form.
 15 A. Not that I recall.
 16 Q. But do you understand that going
 17 forward, we're going to refer to the agreement
 18 as the agreement that you just described that
 19 you were –
 20 MS. DANDENEAU: Object to the form.
 21 A. Yes.
 22 Q. Okay. You don't have any personal
 23 knowledge concerning the terms of the
 24 agreement; correct?
 25 MS. DEITSCH-PEREZ: Object to the

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 2 want to be clear that I never would have asked
 3 you to appear at this deposition if your name
 4 hadn't been included in responses to discovery
 5 as to somebody with knowledge about the – who
 6 was told about the existence of the agreement.
 7 That is what prompted me to do this,
 8 and I really do feel compelled to tell you that
 9 I otherwise would never have called you as a
 10 witness. So I regret that you're being put
 11 through this today. I had no intention of
 12 burdening you or taking your time, but that is
 13 the reason that we issued the subpoena is
 14 because certain of the defendants identified
 15 you as somebody –
 16 MS. DEITSCH-PEREZ: Mr. Morris, you
 17 are here to ask questions, not to have –
 18 MR. MORRIS: I feel badly for the
 19 guy. I really do.
 20 MS. DEITSCH-PEREZ: I'm sure you do.
 21 MR. MORRIS: I do. Stop.
 22 MS. DEITSCH-PEREZ: You stop.
 23 MR. MORRIS: I'm allowed.
 24 MS. DEITSCH-PEREZ: No, you're not
 25 allowed to have a chat with the witness.

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2 Q. Okay. Well, I hope that you

3 appreciate what I'm saying here,

4 Mr. Waterhouse.

5 MS. DANDENEAU: All right. Let's go

6 ahead and ask questions, and again, you're

7 entitled to probe his – his knowledge

8 of – whatever knowledge he has about

9 this – this agreement and –

10 MR. MORRIS: That is what I'm doing.

11 MS. DANDENEAU: – he will answer

12 the questions to the best that he can.

13 MR. MORRIS: That is what I'm doing.

14 Q. Mr. Waterhouse, I take it you do not

15 know which promissory notes issued by which

16 affiliates or Mr. Dondero are the subject of

17 this agreement; do I have that right?

18 A. Yes, I don't – I don't know.

19 Q. Do you know of any way to determine

20 which promissory notes issued by the affiliates

21 and Mr. Dondero are the subject of this

22 agreement other than asking Jim or Nancy

23 Dondero?

24 MS. DANDENEAU: Objection to form.

25 A. I don't know.

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2 A. No.

3 Q. Did anybody ever describe to you the

4 nature of the milestones that you referred to

5 earlier?

6 A. No, I don't – I don't have any

7 details of this.

8 Q. That is fine.

9 PricewaterhouseCoopers served as

10 Highland's outside auditors prior to the

11 petition date; correct?

12 A. Yes.

13 Q. You refer to PricewaterhouseCoopers

14 as PwC?

15 A. Yes.

16 Q. PricewaterhouseCoopers audited

17 Highland's financial statements on an annual

18 basis; correct?

19 A. During my – during my time as – as

20 CFO, yes, PricewaterhouseCoopers was the

21 auditor.

22 Q. Do you know why Highland had its

23 annual financial statements audited each year?

24 A. Generally.

25 Q. Tell me your general understanding

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2 Q. Did you ever make –

3 A. I don't know anything about these

4 agreements.

5 Q. Did you ever make any effort to

6 determine which promissory notes are subject to

7 this agreement?

8 A. No.

9 Q. Did you ever ask anybody which

10 promissory notes are subject to this agreement?

11 A. No.

12 Q. Do you know if there is a list

13 anywhere of the promissory notes that are

14 subject to this agreement?

15 A. I'm not aware.

16 Q. Have you ever seen the terms of the

17 agreement written down anywhere?

18 A. No.

19 Q. Have you ever asked anybody whether

20 the terms of the agreement were written down

21 anywhere?

22 A. I have not.

23 Q. Did learning about the agreement

24 cause you to do anything in response?

25 MS. DANDENEAU: Objection to form.

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2 as to the reason why Highland had its annual

3 financial statements audited each year.

4 A. From – from time to time, they were

5 used – or asked for, as part of diligence or

6 transactions or – or things of that nature.

7 Q. And were they given to third parties

8 for purposes of diligence or transactions from

9 time to time?

10 A. As far as I'm aware, yes.

11 Q. And was it your understanding as the

12 CFO that the third parties who received the

13 financial statements in diligence or

14 transactions was going to rely on those?

15 MS. DANDENEAU: Objection to form.

16 A. I don't know – I don't know gen –

17 I don't know specifically what they were going

18 to rely on. You know, we would get requests

19 for audited financial statements. I don't know

20 what they were relying on.

21 Q. And –

22 A. You would have to ask them.

23 Q. Did you personally play a role in

24 PwC's annual audit and the conduct of the

25 audit?

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 2 MS. DANDENEAU: Objection to form.
 3 A. During my tenure as CFO, I played a
 4 very minimal role.
 5 Q. What was the minimal role that you
 6 played?
 7 A. You know, again, it was – it was to
 8 check in with the team, to make sure that, you
 9 know, audit – the deadlines were being hit,
 10 information was being presented to the auditors
 11 in a – in a timely fashion, but, you know,
 12 other than that, it was a very capable team
 13 that are still current employees of Highland
 14 and, you know, they – they conducted 99
 15 percent of – look, I don't want to give
 16 percentages. I mean, this is – but I – I –
 17 I played a minimal role towards the end.
 18 Before during my earlier years as
 19 CFO, I did more, and then as time went on, I
 20 did less in it.
 21 Q. Okay. Was there a person at
 22 Highland who was responsible for overseeing
 23 Highland's participation in PwC's audit during
 24 the time that you were the CFO?
 25 A. Yeah. I mean, there was – there

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 2 ran the audit all report to you, directly or
 3 indirectly?
 4 A. Yes.
 5 Q. And did you have any responsibility
 6 for making sure that the audit report was
 7 accurate before it was finalized?
 8 A. Yeah. I mean, you know, that –
 9 that is – my responsibility to the auditors
 10 was – again, is – and the CFO is to – we are
 11 providing accurate financial statements; right?
 12 And – and – and as part of any
 13 audit, we disclose all relevant information as
 14 part of any audit.
 15 Q. Okay. And as the CFO, did you take
 16 steps to make sure that the audit report was
 17 accurate?
 18 A. I mean, I would say in a general
 19 sense, yes. But, again, I mean, I had a
 20 very – I had a very capable and competent
 21 team. I wasn't managing them.
 22 You know, part of what I do is I let
 23 the team – I want managers to grow. I want
 24 managers to have rope. And that is – you
 25 know, I'm not a stand-behind-you type of guy.

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 2 was a – there was a point – it varies. It
 3 varies by year, in function, in time and, you
 4 know, depending on the request, but yes, I
 5 mean, there is – there is – there is
 6 generally a point person of communication.
 7 Q. And who was the point person from
 8 2016 until the time you left Highland?
 9 A. I don't – I don't know
 10 specifically, but it would have been, you
 11 know – you know, someone on the corporate
 12 accounting team.
 13 Q. And was there a head of the
 14 corporate accounting team?
 15 A. Yes, so – yes.
 16 Q. Who was the head of corporate
 17 accounting for the five years prior to the time
 18 you left Highland?
 19 A. I don't – if you're asking from
 20 2016 on, I don't – it was Dave Klos, but,
 21 again, there was – there was changes to the
 22 team and the reporting structure. I don't
 23 remember exactly when that happened during –
 24 you know, over the last – since 2016.
 25 Q. Did the folks who participated and

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 2 If you – if you talk to my team members, I'm
 3 not micromanaging people. I want people to
 4 learn and grow in their function so they can go
 5 on and do bigger and better things with their
 6 careers.
 7 And so, yes, generally I was
 8 responsible for it, but I wanted the team to
 9 learn and grow and be responsible for the bulk
 10 of the audit.
 11 Q. Did you personally review each audit
 12 report before it was finalized to satisfy
 13 yourself that it was accurate?
 14 A. I don't – I don't recall, you know,
 15 for every single – we're talking 2016, there
 16 would have been three years, 2016 to '17, '18.
 17 I don't – we're – we're going back
 18 five years-plus. I don't – you know, I don't
 19 recall.
 20 Q. Did you have a practice that you
 21 employed to make sure that you were satisfied
 22 that Highland's audit reports were true and
 23 accurate to the best of your knowledge?
 24 A. I mean, our – the practice was set
 25 up with our – the – the practice to put

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2 together accurate audited or accurate financial

3 statements is to your control environment.

4 So, you know, the – so the practice

5 was to maintain a stable control environment

6 which then the output is – is accurate

7 financial statements.

8 So – so, you know, if I was

9 comfortable that the control environment was

10 operating, then, you know, that would dictate

11 how I would – you know, what I might or might

12 not do in a given year.

13 Q. Okay. Do you recall ever being

14 uncomfortable with the control environment

15 during the period that you served as CFO?

16 A. Yeah. I mean, look, yes, there are

17 times – you know, nothing is perfect. So

18 there were – there were times when, yes, you

19 know – there are times I learned I was

20 uncomfortable with the control environment, and

21 that is part of the management of the process

22 and having, you know – and – and working

23 through whatever obstacles present themselves.

24 Q. Okay. Were you ever uncomfortable

25 with the control process as it related to

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2 this is a letter dated June 3rd. And if we

3 could go to the signature page.

4 And do you see that you and

5 Mr. Dondero signed this document?

6 A. Yes.

7 Q. That is your signature; right?

8 A. Yes.

9 MR. MORRIS: Okay. Can you go back

10 to the top.

11 MS. DANDENEAU: Mr. Morris, can you

12 have somebody post this in the chat so that

13 we have can have a copy of this, please.

14 MR. MORRIS: Yeah, sure. Asia, can

15 you do that, please.

16 Q. Okay. Do you see at the bottom of

17 the second paragraph there is a reference to

18 materiality?

19 A. Yes.

20 Q. Okay. It says, Materiality used for

21 purposes of these representations is

22 \$1.7 million.

23 Do you see that?

24 A. I do.

25 Q. And did PwC set that level of

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2 reporting and disclosures of loans to

3 affiliates and Mr. Dondero?

4 MS. DANDENEAU: Objection to form.

5 A. I don't – I don't recall –

6 Q. So you don't recall –

7 A. – the –

8 MS. DANDENEAU: Mr. Morris –

9 A. I don't recall being uncomfortable.

10 But, again, we're going back several years. I

11 don't – you know, the practice in an audit is

12 to disclose all information to the auditors.

13 And I don't – I don't recall.

14 Q. As part of the process of the audit,

15 did you sign what is sometimes referred to as a

16 management representation letter?

17 A. Yes.

18 MR. MORRIS: Can we put up on the

19 screen a document that we have premarked as

20 Exhibit 33.

21 (Exhibit 33 marked.)

22 MS. DANDENEAU: Mr. Morris, that is

23 not in the binder; correct?

24 MR. MORRIS: Correct.

25 Q. So you will see, Mr. Waterhouse,

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2 materiality?

3 A. Yes.

4 Q. And for purposes of the audit, did

5 PwC set the level of materiality each year?

6 A. Yes.

7 Q. Did that number change over time?

8 A. I'm not aware of what materiality is

9 every single year, so – but, you know, this

10 number would likely fluctuate.

11 Q. Okay. I'm going to go back to a

12 question I asked you earlier today. And that

13 is in connection – this letter is issued in

14 connection with the audit for the period ending

15 12/31/2018; correct?

16 A. Yes.

17 Q. Okay. And is it fair to say that if

18 any – actually, withdrawn. I'm going to take

19 it outside of this.

20 If Highland ever forgave the loan to

21 any affiliate or any of its officers or

22 employees, in whole or in part, to the best of

23 your knowledge, would that forgiveness have

24 been disclosed in the audited financial

25 statements if it exceeded the level of

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 2 materiality that PwC established?
 3 MS. DANDENEAU: Objection to form.
 4 A. So, again, during my tenure as CFO,
 5 and – Highland – it was – it is required to
 6 disclose any affiliate loans that are in excess
 7 of materiality.
 8 Now, the forgiveness of those loans
 9 may or may not – I mean, since materiality
 10 fluctuates every year, a – you know, if a loan
 11 was forgiven, it may or may not, you know –
 12 and, look, I would want to consult the guidance
 13 around this.
 14 It is not something we do – you
 15 know, it is not – you know, GAAP can be and
 16 disclosures can be very specialized so, again,
 17 we want to consult the guidance. But we would
 18 see if and what would need to be disclosed if
 19 it were deemed immaterial.
 20 Q. Did you and Mr. Dondero sign
 21 management representation letters of this type
 22 in each year in which you served as Highland's
 23 CFO?
 24 A. I – I – I will speak for myself.
 25 I signed them. There may have been others that

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 2 but I don't – I don't know for sure, and I
 3 would want to rely on the document.
 4 Q. Let me ask the question a little bit
 5 differently then.
 6 Do you have any reason to believe
 7 that Highland had its annual financial audit
 8 and you did not sign a management
 9 representation letter in connection with that
 10 audit?
 11 MS. DANDENEAU: Objection to form.
 12 A. I don't believe it would, but,
 13 again, I would want to – I don't recall and I
 14 would want to confirm it to – to make, you
 15 know, an affirmative – to give an affirmative
 16 answer.
 17 Q. Do you know whether PwC required
 18 management to sign management representation
 19 letters?
 20 MS. DANDENEAU: Objection to form.
 21 A. Yes. I mean, it – management
 22 representation letters are signed by
 23 management.
 24 Q. Okay. And do you know – do you
 25 have any understanding as to why PwC requires

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1 WATERHOUSE - 10-19-21
 2 signed as well. I don't – I don't recall.
 3 Q. But to the best of your knowledge,
 4 you, personally, signed a management
 5 representation letter in connection with
 6 Highland's audit each year that you served as
 7 the CFO; correct?
 8 A. I would say generally speaking,
 9 Mr. Morris. I don't recall for every single
 10 year, you know, generally, but I would want to
 11 refer to all the rep letters and see who signed
 12 them.
 13 Q. Do you recall Highland having its
 14 financial statements audited in any year during
 15 the period that you were a CFO where you didn't
 16 sign the management representation letter?
 17 A. I don't recall. But, John, we're
 18 going back five, six, seven, eight, nine,
 19 decade. I don't – I don't remember.
 20 Q. I don't want to go back that many
 21 decades, but I'm just asking you if you recall
 22 that there was you didn't sign it?
 23 A. I – I – I don't, but my memory
 24 is – again, I – I – I can't tell you what I
 25 did in 2012. I mean, I think generally, yes,

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 2 management to sign management representation
 3 letters?
 4 MS. DEITSCH-PEREZ: Object to the
 5 form.
 6 A. I don't know why PwC's – what PwC's
 7 specific practice is. I know generally what
 8 management representation letters are.
 9 Q. Okay. Do you personally – I'm not
 10 asking about PwC. I'm asking for you – I'm
 11 asking about you, do you have an understanding
 12 as to why the auditor asks for management
 13 representation letters?
 14 A. Okay. So you're asking me in my
 15 personal capacity, yes, I have a general
 16 understanding of why.
 17 Q. Can you give me the general
 18 understanding that you have as to why
 19 management representation letters are required?
 20 A. They are – they are required to –
 21 they are – they are one of the items required
 22 in an audit to help verify completeness.
 23 Q. Do you have any – any other
 24 understanding as to why management
 25 representation letters are required?

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2 A. That is – that is – other than

3 what I said, it is – it is – it is required

4 so – to ensure that the – you know, there

5 is – there is completeness in what is being

6 audited.

7 Q. Did you – did you have a practice

8 whereby you and Mr. Dondero conferred about the

9 management representation letters before you

10 signed them?

11 A. No.

12 Q. Did you have a practice –

13 withdrawn.

14 Do you see just the next sentence

15 after the materiality, there is a sentence that

16 states: We confirm, to the best of our

17 knowledge and belief, as of June 3rd, 2019, the

18 date of your report, the following

19 representations made to you during your audit.

20 Do you see that sentence?

21 A. Yes.

22 Q. Okay. Did you understand when you

23 signed this letter that you were confirming the

24 representations that followed?

25 A. When I signed this management

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2 A. The agreement – the agreement that

3 we talked about earlier?

4 Q. Correct.

5 A. Look, as I said earlier, the first

6 time I heard of this agreement was sometime

7 this year.

8 Q. Okay. Can we turn – let's just

9 look at a couple of items on the list. If we

10 can go to page 33416. Do you see in Number 35

11 it talks about the proper recording or

12 disclosure in the financial statements of ND

13 relationships and transactions with related

14 parties.

15 Do you see that?

16 A. I do.

17 Q. As the CFO, do you have any

18 understanding as to whether Dugaboy is a

19 related party?

20 A. I don't recall.

21 Q. Do you know whether any of the

22 affiliates are related parties?

23 A. If – if it was NexPoint, HCMFA,

24 HCMS, HCRE, yeah, if – if that is the

25 affiliate definition, and there. In ASC 850 –

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2 letter – representation letter, yes.

3 Q. Okay. Did you discuss this letter

4 with Mr. Dondero before you signed it?

5 A. I don't recall.

6 Q. Do you recall if Mr. Dondero asked

7 you any questions before he signed the letter?

8 A. I don't recall.

9 Q. Do you recall if you asked

10 Mr. Dondero any questions before you signed

11 this letter?

12 A. I don't recall.

13 Q. Is it fair to say that Mr. Dondero

14 did not disclose to you the existence of the

15 agreement that we have – as we've defined that

16 term prior to the time you signed this letter?

17 MS. DANDENEAU: Objection to form.

18 A. I don't think I understand the

19 question. So, again, you are saying, did

20 Mr. Dondero not disclose to me the existence of

21 this letter?

22 Q. No, I apologize.

23 Did Mr. Dondero disclose to you the

24 existence of the agreement prior to the time

25 you signed this letter on June 3rd, 2019?

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2 again, I mean, I haven't looked at ASC 850 in

3 quite some time, but, you know, if – if there

4 is a control language, you know, ASC 850, would

5 that – that section in GAAP would – would

6 pick up and define what are related parties.

7 So, you know, like I said, if – one

8 of the four entities I just described, if – if

9 they are in that control definition of ASC 850,

10 they would be picked up in 35D.

11 Q. Do you – do you have any reason to

12 believe that they would be picked up in that

13 definition, based on your knowledge and

14 experience?

15 A. I – I believe that entities

16 controlled under GAAP are – are affiliates.

17 Q. Okay. Would Mr. Dondero also

18 qualify as a related party for purposes of

19 Section 35D, to the best of your knowledge?

20 A. Yeah, I don't – I don't know. I

21 would think – I would have to read the code

22 section to see if someone personally – is it

23 talking about related parties. So, look, if

24 your own in control, yeah, I mean, I would have

25 to read the section.

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2 Q. To the best of your knowledge, was

3 the existence of the agreement ever disclosed

4 to PwC?

5 A. I'm not – I'm not aware.

6 Q. Do you recall if the agreement was

7 ever disclosed in Highland's audited financial

8 statements?

9 A. I don't – I don't remember if it

10 was in every Highland's audited financial

11 statements during my tenure. We would have to

12 read the financial statements to see what was

13 disclosed, but I'm not – I mean, as I sit here

14 today, I'm not aware.

15 Q. That is all I'm asking for.

16 A. I'm not aware.

17 Q. Can we go to the next page, please,

18 and look at 36. 36 says, we have disclosed to

19 you the identity of the partnership's related

20 party relationships and all the related party

21 relationships and transactions of which we are

22 aware.

23 Do you see that?

24 A. Yes.

25 Q. To the best of your knowledge, as of

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1 WATERHOUSE - 10-19-21

2 Q. And do you understand – do you have

3 an understanding that PwC wanted to know that

4 as of the date of the audit whether any

5 material changes had occurred since the end of

6 the fiscal year, using the definition of

7 materiality that is in this particular

8 management representation letter?

9 A. It – it is – it is – it is a –

10 it is as described. It is just a poorly worded

11 question, so it is hard for me to say yes.

12 Q. If I asked you this, I apologize,

13 but did you ever learn when the agreement was

14 entered into?

15 A. I don't – I don't – like I said

16 before, I don't know or have any details of the

17 agreement.

18 Q. Okay. Did you ever ask anybody when

19 the agreement was entered into?

20 A. I did not.

21 Q. Let's look at the audited financial

22 statements. We will put up on the screen a

23 document that has been premarked as Exhibit 34.

24 (Exhibit 34 marked.)

25 MS. DANDENEAU: And again, if Ms. La

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2 June 3rd, 2019, did Highland disclose to PwC

3 the identity of the partnership's related

4 parties and all the related party relationships

5 and transactions of which it was aware?

6 A. I mean, I can speak for myself as

7 signer of this representation letter. I

8 disclosed what – what, you know, what –

9 what – what I knew. Sorry, look, yes, so I –

10 I disclosed what I knew.

11 Q. Okay. Can we go to page 419. Do

12 you see at the end there is a reference to

13 events that occurred since the end of the

14 fiscal year and the date of the letter?

15 A. Yes.

16 Q. And were you aware of that – of

17 that provision of the management representation

18 letter before you signed the document?

19 A. Yes.

20 Q. Do you have an understanding as to

21 why PwC asked for that confirmation of that

22 particular part of the management

23 representation letter?

24 A. It is – it is – it is just – it

25 is a typical audit request.

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2 Canty could please put that in the chat

3 room, that would be great.

4 MR. MORRIS: I will assure you we

5 will put every document in the chat room.

6 Q. Now, I'm just going to ask you

7 questions that are related to the provisions of

8 this report that concern the affiliate loans,

9 but again, Mr. Waterhouse, if there is any part

10 of the document that you need to see or that

11 you think you might need to see in order to

12 refresh your recollection to answer any of my

13 questions, will you let me know that?

14 A. Yes.

15 Q. Because this is a pretty lengthy

16 document, but do you see that the cover page

17 here is the Highland consolidated financial

18 statements for the period ending December 31st,

19 2018?

20 A. Yes.

21 Q. If we can go to – I think it is the

22 next one, looking for PwC's signature line.

23 MS. CANTY: I'm sorry, John, did you

24 say something?

25 MR. MORRIS: Yes, can we turn the

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 2 page. I think it is 215. Yes, stop right
 3 there, just above – I'm sorry, I want to
 4 see just the date of the report.
 5 Q. Okay. Do you see at the bottom of
 6 that page there, Mr. Waterhouse,
 7 PricewaterhouseCoopers has signed this audit
 8 report?
 9 A. Yes, I see their signature.
 10 Q. Okay. And it is the dated same day
 11 as your management representation letter; is
 12 that right?
 13 A. It is – yes, it is the same day.
 14 Q. Was that the practice to sign the
 15 management representation letter on the same
 16 day that the audit report was signed?
 17 A. Yes, that is typical in every audit.
 18 Q. Can we just scroll down to the
 19 balance sheet on the next page.
 20 Do you see that there is a line
 21 there that says, Notes and Other Amounts Due
 22 from Affiliates?
 23 A. Yes.
 24 Q. Does that line, to the best of your
 25 knowledge, include the amounts that were due

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 2 any of the promissory notes issued by an
 3 affiliate or Mr. Dondero would have been
 4 included?
 5 MS. DANDENEAU: Objection to form.
 6 A. Sorry, am I aware of any asset of an
 7 affiliate being included –
 8 Q. That – let me – let me try again.
 9 Do you see there is a number of
 10 different assets that are described on this
 11 balance sheet?
 12 A. Yes.
 13 Q. One of the assets that is described
 14 is Notes and Other Amounts Due from Affiliates;
 15 right?
 16 A. Yes.
 17 Q. And it is reasonable to conclude
 18 that the notes from the affiliates and
 19 Mr. Dondero are included in that line item;
 20 right?
 21 A. Yes, based on this description.
 22 Again, I would want to see a build of this to
 23 100 percent confirm, but based on the
 24 description, the asset description, it is – it
 25 is likely.

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 2 under the affiliate under the notes signed by
 3 the affiliates and Mr. Dondero?
 4 MR. RUKAVINA: Objection to the
 5 extent that calls for a legal conclusion.
 6 A. I mean, I would want to see the
 7 detail and the build to this \$173,398,000, but,
 8 yes, I mean, if – if – given what we
 9 discussed before, you know, it – it should
 10 capture that.
 11 Q. And – and while you were the CFO of
 12 Highland, were all notes held by Highland that
 13 were issued by an affiliate or Mr. Dondero
 14 carried as assets on Highland's balance sheets?
 15 MS. DANDENEAU: Objection to form.
 16 MS. DEITSCH-PEREZ: Object to form.
 17 A. I don't – I don't know how else
 18 they would be carried.
 19 Q. Okay. Can you think of any – are
 20 you aware of any promissory note issued by an
 21 affiliate or Mr. Dondero that was not carried
 22 on Highland's audited financial balance sheets?
 23 A. I'm – I'm – I'm not aware.
 24 Q. Okay. Are you aware of any category
 25 of asset on Highland's balance sheet in which

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 2 Now, does that mean absolute? I
 3 don't know.
 4 Q. Do you have any reason to believe
 5 that the promissory notes would have been
 6 carried on the balance sheet in a category
 7 other than Notes and Other Amounts Due from
 8 Affiliates?
 9 A. If they were deemed – no. If they
 10 were deemed an affiliate, you know, under GAAP,
 11 they should be carried in that line.
 12 Otherwise, it would go into another line.
 13 Q. Okay. And do you see the total
 14 asset base as of December 31st, 2018, was
 15 approximately \$1.04 billion?
 16 A. Yes.
 17 Q. Is my math correct that the Notes
 18 and Other Amounts Due from Affiliates
 19 constituted approximately 17 percent of
 20 Highland's assets as of the end of 2018?
 21 A. Well, so how are you defining
 22 Highland?
 23 Q. Highland Capital Management, L.P.,
 24 the entity that this audit is subject to – or
 25 the subject of.

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2 A. On a consolidated or unconsolidated

3 basis?

4 Q. I'm looking at the balance sheet.

5 It is a consolidated balance sheet. Okay?

6 Does the Notes and Other Amounts Due

7 from Affiliates constitute approximately

8 17 percent of the total assets of Highland

9 Capital Management, L.P., on a consolidated

10 basis?

11 MS. DANDENEAU: Objection to form.

12 A. I don't have a calculator in front

13 of me but I will take your math, if you are

14 taking the 173 divided by the billion.

15 Q. Okay.

16 A. If that is accurate, yes. But,

17 again, on a consolidated basis.

18 Q. And on an unconsolidated basis the

19 percentage would be higher; correct?

20 A. I -- no. I don't know.

21 Q. Well, okay. That is fair.

22 MR. MORRIS: Can we turn to

23 page 241, please.

24 Q. Do you see that this is a section of

25 the audit report that is entitled Notes and

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2 of the financial statements are -- the purpose

3 is to disclose any material items in relation

4 to that balance sheet line item.

5 Q. Okay. And all of the information,

6 to the best of your knowledge, that is set

7 forth in this section of the audit report was

8 provided by Highland; correct?

9 A. Yes, it would have been provided by

10 the corporate accounting team.

11 Q. Okay. And the corporate accounting

12 team, did that team report to you in the

13 organizational structure?

14 A. Yes.

15 Q. And did you have any concerns about

16 the controls that were in place to make sure

17 that the information provided with respect to

18 Notes and Other Amounts Due from Affiliates was

19 accurate and complete?

20 MS. DANDENEAU: Objection to form.

21 A. Not that I recall.

22 Q. Okay. Do you recall ever being

23 concerned that any portion of the Notes and

24 Other Amounts Due from Affiliates in any audit

25 report was inaccurate, incomplete, or not

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2 Other Amounts Due from Affiliates?

3 A. Sorry, I can't see the -- the --

4 Q. It is at the top.

5 A. Notes and Other Amounts Due from

6 Affiliates, yes, I see that. I don't -- I

7 don't have a page number, but I'm on a page

8 that says at the top: Notes and Other Amounts

9 Due from Affiliates.

10 Q. Okay. And that is the same title of

11 the line item on the balance sheet that we just

12 looked at; right? Notes and Other Amounts Due

13 from Affiliates?

14 A. Yes.

15 Q. And is it your understanding, based

16 on your experience and knowledge as the CFO,

17 that this is the section of the narrative that

18 ties into the line item that we just looked at?

19 A. Yes.

20 Q. And is this section of the audit

21 report intended to describe and disclose all of

22 the material facts concerning the Notes and

23 Other Amounts Due from Affiliates?

24 MS. DANDENEAU: Objection, form.

25 A. This -- these notes -- these notes

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2 reliable?

3 A. I didn't -- I had concerns about,

4 you know, like I talked about before, of there

5 were -- there were potentially issues in the

6 control environment. But as far as it relates

7 to the audited financial statements, any -- the

8 team would work with the auditors to disclose

9 all -- all notes in Highland's possession.

10 And any -- any notes that were

11 deemed material by the auditor, right, these

12 were disclosed in these -- in this section, you

13 know, in -- in the notes to the consolidated

14 financial statements as you presented.

15 Q. Do you recall ever having a

16 conversation with anybody at any time

17 concerning the accuracy of the section of audit

18 reports that relates to Notes and Other Amounts

19 Due from Affiliates?

20 MS. DANDENEAU: Objection to form.

21 A. You know, as -- as -- I didn't have

22 direct conversations with

23 PricewaterhouseCoopers as I had, you know --

24 I -- I had the team that managed this.

25 Again, I wasn't anywhere chose to

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 2 being the point person of this audit. And I
 3 can't recall, you know, when -- you know, I
 4 don't even know if I was ever the point person
 5 during my tenure as CFO.
 6 I don't know if PwC had any concerns
 7 when they were performing those audit
 8 procedures. They may have and they may have --
 9 and it may not have been communicated to me. I
 10 don't know.
 11 MR. MORRIS: All right. I move to
 12 strike.
 13 Q. And I'm going to ask you to listen
 14 carefully to my question.
 15 Did you -- do you recall ever having
 16 a conversation with anybody at any time
 17 concerning the accuracy of the reporting
 18 provided in the audited financial statement on
 19 the topic of Notes and Other Amounts Due?
 20 MS. DANDENEAU: Objection to form.
 21 A. I don't recall for this, but that
 22 doesn't mean that it didn't exist.
 23 Q. Okay. But you have no reason to
 24 believe, as you sit here right now, that you
 25 ever discussed with anybody concerns over the

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 2 A. -- Highland's responsibility.
 3 Highland's responsibility.
 4 Q. Who, at Highland, was responsible
 5 for drafting this section of the audit report?
 6 A. I -- I don't know the answer to
 7 that. Again, there was a team who worked on
 8 this. And I don't know, you know, whether it
 9 was the staff or the manager.
 10 Again, this is where I let the teams
 11 manage. And, you know, there may be a
 12 corporate accountant who worked on this. I
 13 just -- you know, I wasn't part of that process
 14 to give that person experience. I don't know.
 15 Q. Do you recall having any
 16 communications with anybody at any time
 17 concerning this section of the report?
 18 A. Yeah, I don't recall.
 19 Q. Do you recall whether you ever told
 20 anybody at any time that any aspect of this
 21 section of the report was inaccurate or
 22 incomplete?
 23 A. I don't recall.
 24 Q. As you sit here today, do you have
 25 any reason to believe that this section of the

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 2 accuracy of the section of the audit reports
 3 called Notes and Other Amounts Due from
 4 Affiliates; correct?
 5 MS. DANDENEAU: Object to the form.
 6 MS. DEITSCH-PEREZ: Objection to
 7 form.
 8 A. I don't recall having any
 9 conversations. But, again, I mean, this is --
 10 this is two years ago.
 11 Q. I'm just asking for your
 12 recollection, sir.
 13 A. Yes.
 14 Q. If you don't recall, this will --
 15 A. Yeah.
 16 Q. (Overspeak) -- if you don't
 17 recall --
 18 A. Yeah, I don't -- I don't recall.
 19 Q. Do you know who was responsible for
 20 drafting the audit report?
 21 A. Are you asking the actual Highland
 22 employee responsible? I mean, it was
 23 Highland's responsibility, so, I mean, that
 24 is --
 25 Q. Right.

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 2 audit report is incomplete or inaccurate in any
 3 way?
 4 And I'm happy to give you a moment
 5 to -- to look at it, if you would like.
 6 MS. DANDENEAU: Objection to form.
 7 MS. DEITSCH-PEREZ: Same.
 8 A. I mean, I would have to look at -- I
 9 would have to look at the bill to the note
 10 schedule to make sure I know you presented me
 11 with materiality, but again, there might be a
 12 note as of 12/31/18 that somehow was -- was
 13 under materiality not disclosed. I don't -- I
 14 don't know. I would need more information.
 15 Q. Okay. But without more information,
 16 you have no reason to believe anything this
 17 section is inaccurate; correct?
 18 MS. DANDENEAU: Objection to form.
 19 A. I don't. I mean, you know, this was
 20 part of the audit.
 21 Q. Thank you. Now, you will see if we
 22 could scroll just a little bit more that each
 23 of the first five paragraphs concerns
 24 specifically the four affiliates that we've
 25 been discussing and Mr. Dondero.

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2 MR. MORRIS: If we could go the

3 other way, La Asia. We don't need Okada.

4 We're going to have to thread the needle.

5 Okay. Good, perfect.

6 Q. Do you see those five paragraphs

7 certain the four affiliates and Mr. Dondero as

8 we've been referring to today?

9 A. Yes.

10 Q. Okay. And do you see at the end of

11 every paragraph it states, quote: A fair value

12 of a partnership's outstanding notes receivable

13 approximates the carrying value of the notes

14 receivable?

15 A. Yes, I see that.

16 Q. Do you have an understanding of what

17 that means?

18 A. Yes.

19 Q. What is your understanding of that

20 sentence?

21 A. It is the – again, the – the fair

22 value, right, which is – which is what the –

23 what Highland could sell that asset for. This

24 statement is comparing the fair value of the

25 notes to the carrying value, so the carrying

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2 Q. Is that the carrying value or the

3 fair value?

4 A. That would be the carrying value –

5 Q. And is the last –

6 A. – in my opinion.

7 Q. Okay. And it is in your opinion as

8 the chief financial officer of Highland during

9 the period of time that you described; right?

10 It is an educated opinion?

11 A. I'm reading this at face value. I'm

12 taking that as that is carrying value.

13 Q. Okay. And does the last sentence

14 say that the carrying value is roughly

15 approximate to the fair market value?

16 MS. DANDENEAU: Objection to form.

17 MS. DEITSCH-PEREZ: Objection, form.

18 A. Again, this note to the financial

19 statement is specific to notes and other

20 amounts due from affiliates.

21 Q. Correct.

22 A. If the interest component is

23 reported elsewhere on the balance sheet, you

24 know, it – it – it could be off. Again, I

25 don't have the detail. I don't know, but yes,

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2 value is the line item that you showed me

3 earlier that is in Notes and Other Amounts Due

4 from Affiliates.

5 Q. Okay. Is another way to say this is

6 that the fair market value of the notes equals

7 the principal amount and – withdrawn.

8 Is the fair way to interpret this

9 that the fair market value of the notes equals

10 all remaining unpaid principal and interest due

11 under the notes?

12 MS. DANDENEAU: Objection to the form.

13 MS. DEITSCH-PEREZ: Objection, form.

14 A. I don't know the answer to that,

15 because I don't recall where – where any –

16 where – in what line item was the interest

17 component reported.

18 Q. All right. Well, if we look in this

19 audit report, you will see in the middle of the

20 first paragraph, for example, it states that as

21 of December 31st, 2018, total interest and

22 principal due on outstanding promissory notes

23 was approximately \$5.3 million.

24 Do you see that?

25 A. I do.

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2 look, I mean, if you – I mean, if you are

3 saying the 5.3 million is in the notes and

4 other amounts due from affiliates, then the

5 last statement is saying the fair value

6 approximates 5.3 million. That is what that

7 last sentence is saying.

8 Q. Do you see in the middle of the

9 first paragraph – not in the middle, the next

10 to last sentence there is a statement that the

11 partnership will not demand payment on amounts

12 that exceed HCMFA's excess cash availability

13 prior to May 31st, 2021.

14 Do you see that?

15 A. I do.

16 Q. Do you know when Highland agreed not

17 to demand payment as described in that

18 sentence?

19 A. I don't know specifically.

20 Q. Do you know why Highland agreed not

21 to demand payment on HCMFA's notes until May

22 2021?

23 A. Yes.

24 Q. Why was that decision made?

25 A. You know, well, it – it – that

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2 decision was made as to not put HCMFA into a

3 position where it didn't have sufficient assets

4 to pay for the demand note.

5 Q. And at the time the agreement was

6 entered into, pursuant to which the partnership

7 wouldn't demand payment, did HCMFA have

8 insufficient assets to satisfy the notes if a

9 demand had been made?

10 MS. DANDENEAU: Objection to form.

11 A. I don't have HCMFA's financial

12 statements in front of me as of 12/31/18.

13 Q. Was there a concern that HCMFA would

14 be unable to satisfy its demands under the

15 notes if demand was made?

16 MS. DANDENEAU: Objection to form.

17 A. Well, there is -- I don't recall --

18 I mean, there is something, right, in place to

19 basically not demand payment until May 31, 2021

20 as detailed here.

21 Q. And who made the decision to enter

22 into -- who made the decision on behalf of

23 Highland not to demand payment until May 31st,

24 2021?

25 A. I'm trying to remember. I don't

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2 Q. And did you and Mr. Dondero discuss

3 HCMFA's ability to satisfy the notes if a

4 demand was made at the time this agreement was

5 entered into?

6 MS. DANDENEAU: Objection to form.

7 A. I don't -- I don't -- I don't recall

8 having a specific conversation, if I did, or --

9 or David Klos.

10 Q. Okay. I'm just asking if you recall

11 any conversations that you had.

12 A. I don't recall.

13 Q. Okay. Do you know why Highland

14 loaned the money to HCMFA that is the subject

15 of the notes described in this paragraph?

16 A. I don't remember specifically why

17 5.3 million was loaned. I mean, I -- it would

18 have to be put in the context.

19 Q. Do you have any recollection at all

20 as to why Highland ever loaned any money to

21 HCMFA?

22 A. Yes.

23 MS. DANDENEAU: Objection to form.

24 Q. What do you remember about that?

25 A. There was a Highland Global

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2 remember exactly -- I don't remember if it was

3 myself or -- or Jim Dondero who -- who -- there

4 was -- there was something signed, from what I

5 recall, that -- that -- that backed up this

6 line item in the -- in the notes I'm -- look,

7 I'm, I'm --

8 Q. We will get to that.

9 A. You --

10 Q. I'm just --

11 A. You have -- I mean --

12 Q. We're going to give that to you.

13 I'm going to give that to you.

14 A. You -- you -- you have all the

15 documents. I don't have the documents, and

16 that is what makes it so hard. I don't have

17 any documents to prepare for this deposition;

18 right? You have all -- I don't -- I don't -- I

19 don't remember, but, you know, again, it would

20 probably be myself or Jim.

21 Q. Do you know if Highland received

22 anything in return for its agreement not to

23 make a demand for two years?

24 A. I don't -- I don't think it referred

25 anything.

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2 Allocation Fund, which was a -- a fund managed

3 by Highland Capital Management Fund Advisors.

4 There was a -- we -- I'm just telling you,

5 there was -- there was -- there was a -- a

6 ultimately a NAV error found in this fund while

7 it was an open-ended fund and, you know, there

8 were amounts owed by the advisor in -- in

9 relation to that NAV error.

10 There were also, for the same fund,

11 that same fund was ongoing an

12 open-end-to-close-end conversion, and as part

13 of that proposal, shareholders who voted for

14 the conversion received compensation from the

15 advisor.

16 Q. All right. Now, the events that

17 you're describing occurred in the spring of

18 2019; right?

19 A. These started back -- I think, I

20 mean --

21 Q. I apologize.

22 A. -- that -- I mean, the answer to

23 that is no.

24 Q. I apologize, the loans that were

25 made in connection with the events that you're

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 2 describing occurred in May 2019; right?
 3 MR. RUKAVINA: Objection to the
 4 extent that calls for a legal conclusion.
 5 A. I don't recall specifically what
 6 amounts of money were moved when, for what
 7 purpose.
 8 Q. Okay. Fair enough. Going to the
 9 next paragraph, do you recall that NexPoint
 10 Advisors had obtained a number of loans from
 11 Highland, and they rolled up those loans into
 12 one note in approximately 2017?
 13 A. This is for NexPoint Advisors?
 14 Q. Yes.
 15 A. I – I mean, I don't – I don't
 16 recall the NexPoint Advisors loan being a
 17 roll-up loan, but –
 18 Q. Do you know why?
 19 A. But, look, if you have documents
 20 that show – I mean, look, I just don't recall.
 21 Q. Okay. That is fair. Do you know
 22 why – do you have any recollection as to why
 23 Highland loaned money to NexPoint?
 24 A. Yes.
 25 Q. Why did High – why do you recall –

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 2 Do I have that right?
 3 A. Yes.
 4 Q. How about HCRE? Do you know why
 5 HCRE borrowed money from Highland?
 6 A. I don't remember specifically.
 7 Q. Do you remember generally?
 8 A. Generally, yeah – I mean, yes.
 9 Q. Can you tell me your general
 10 recollection as to why Highland loaned money to
 11 HCRE?
 12 A. For – for – for investment
 13 purposes.
 14 Q. So HCRE made the investment and it
 15 obtained a loan, or loans, from Highland in
 16 order to finance that investment or those
 17 investments.
 18 Do I have that right?
 19 A. I mean, I – you know, generally.
 20 Q. Okay. How about Highland Management
 21 Services, Inc.?
 22 Do you have any recollection as to
 23 why HCMS borrowed money from Highland?
 24 A. Generally.
 25 Q. What is your general recollection as

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 2 what is the reason you recall Highland lending
 3 money to NexPoint?
 4 A. I mean, I was just – I just – I
 5 just recall. I mean, I just – I don't
 6 remember why.
 7 Q. I understand. And I'm asking you if
 8 you recall –
 9 A. Oh, why – I thought you say –
 10 NexPoint Advisors was launching a fund which
 11 is – I believe that the legal name is NexPoint
 12 Capital, Inc. And it – it provided a
 13 co-invest into that fund.
 14 And, from what I remember, the –
 15 the – that NexPoint borrowed money from
 16 Highland at the time to make that co-invest.
 17 Q. So this was an investment that
 18 NexPoint was required to make; is that right?
 19 MS. DANDENEAU: Objection to form.
 20 A. I don't know if it was required to
 21 make, I don't recall that, or if it just made
 22 it.
 23 Q. Okay. But your recollection is that
 24 NexPoint made an investment and they borrowed
 25 money from Highland to finance the investment.

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 2 to why HCMS borrowed money from Highland?
 3 A. For – for investment purposes.
 4 Q. So it is the same thing, HCMS wanted
 5 to make investments and it borrowed money from
 6 Highland in order to finance those investments;
 7 is that right?
 8 A. I mean, yes, generally. I mean, I
 9 can't – I don't – on the services, there –
 10 there are several loans in these schedules.
 11 You know, I can't remember why every single one
 12 of these were made, but I would say, yeah, I
 13 mean, generally.
 14 Q. Okay. I appreciate that.
 15 MR. MORRIS: Let's go to the page
 16 with Bates No. 251. La Asia, are you
 17 there?
 18 MS. CANTY: Sorry, John. It went
 19 out for a minute. Can you say that again.
 20 I don't know what is going on.
 21 MR. MORRIS: The page with Bates
 22 No. 251, can we go to that.
 23 MS. CANTY: Yes, sorry.
 24 MR. MORRIS: Keep going to the
 25 bottom. Yeah, there you go.

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2 Q. Do you see, Mr. Waterhouse, that

3 there is a section there called Subsequent

4 Events?

5 A. I do.

6 Q. And does this relate to the last

7 sentence above the signature line on the

8 management representation letter that we talked

9 about earlier where you made the representation

10 that you disclosed subsequent events?

11 A. I mean, it relates to it, but not in

12 its entirety.

13 Q. Okay.

14 MR. MORRIS: If we can scroll up to

15 capture the entirety of this section right

16 here.

17 Q. And what do you mean by that, sir?

18 MR. MORRIS: Yeah, right there.

19 Perfect.

20 A. There are – there are different

21 subsequent events in – under GAAP. So there

22 are – and – and – so what we see in the

23 notes to the financial statements are one type

24 of subevent.

25 Q. Okay. And – and would the type of

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2 if – you know, what – if that 7.4 million was

3 solely attributable to the NAV error.

4 Q. Okay. But there is no question that

5 Highland told PricewaterhouseCoopers that over

6 the course of 2019 HCMFA issued promissory

7 notes to the partnership in the aggregate

8 amount of \$7.4 million; correct?

9 A. In the course of the audit, we would

10 have produced all promissory notes in our

11 possession, including the ones that are

12 detailed here.

13 Q. Do you recall that you signed the

14 two promissory notes that are referenced in

15 that provision?

16 MS. DANDENEAU: Objection to form.

17 A. I didn't recall initially but I've

18 been reminded.

19 Q. Okay. And – and do you recall that

20 those notes are dated May 2nd and May 3rd,

21 2019?

22 A. Yes.

23 Q. So that was just a month before the

24 audit was completed; correct?

25 A. Yes. I think we had a June 3rd

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2 subsequent event relating to affiliate loans be

3 captured in this section if they were – if

4 they were made after the end of the fiscal year

5 and prior to the issuance of the audit report?

6 A. Yes, if they were deemed material or

7 disclosable.

8 Q. Okay. I appreciate that.

9 Do you see the next to the last

10 entry there? It says, Over the course of 2019

11 through the report date, HCMFA issued

12 promissory notes to the partnership in the

13 aggregate amount of \$7.4 million?

14 A. Yes.

15 Q. And does that refresh your

16 recollection that those are the notes that

17 related to the NAV error that you mentioned

18 earlier?

19 A. I don't – I don't remember the

20 exact. Again, there are – I mentioned two

21 line items; right?

22 Q. Yes.

23 A. I mean, it was the GAAP conversion

24 process plus the – the NAV error. I don't

25 have the details. I don't recall specifically

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2 date, right, if – if my memory serves me

3 right.

4 Q. Yes, I will represent to you that

5 your memory is accurate in that regard.

6 Did anybody ever instruct you as the

7 CFO to correct this statement that we're

8 looking at in subsequent events?

9 A. So let me understand. You're saying

10 when I was CFO at Highland Capital did anyone

11 ever ask me to correct the – over the course

12 of 2019 through the report date HCMFA issued

13 promissory notes, this statement?

14 Q. Right.

15 A. Not that I'm aware.

16 Q. While you were the CFO of Highland,

17 did anybody ever tell you that that sentence

18 was wrong?

19 A. Not that I'm aware.

20 Q. Highland – withdrawn.

21 HCMFA disclosed these notes in its

22 own audited financial statements; right?

23 MR. RUKAVINA: Objection, form.

24 A. I assume that these would be

25 material – if these are material financial

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 2 statements, yes, they -- they -- they should be
 3 and they were likely disclosed.
 4 Q. Now, there is no statement
 5 concerning the 2019 notes about the forbearance
 6 that we looked at in the affiliated note
 7 section of the report; right?
 8 MS. DANDENEAU: Objection to form.
 9 Q. I'll withdraw. That was bad.
 10 Do you recall when we were looking
 11 at the paragraph concerning HCMFA earlier it
 12 had that disclosure about the agreement whereby
 13 Highland wouldn't ask for demand on the -- on
 14 the HCMFA notes?
 15 A. Yes.
 16 Q. That forbearance disclosure is not
 17 made with respect to the 2019 notes; right?
 18 A. Not -- look, not that I can recall,
 19 unless -- unless it was done at a subsequent
 20 day.
 21 Q. Right. And it is not in the
 22 subsequent event section that we're looking at
 23 right now where the 2019 notes are described;
 24 right?
 25 A. Right. But this is through

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 2 we looked at earlier for Highland?
 3 A. I would imagine I would have been
 4 asked to. I don't recall if I did.
 5 Q. Do you recall ever being asked by an
 6 auditor to sign a management representation
 7 letter and then not doing it?
 8 A. No.
 9 MR. MORRIS: Can we just scroll down
 10 again. I just want to see the date of the
 11 document.
 12 A. I mean, let me -- you know, there
 13 are different versions to management
 14 representation letters I will qualify.
 15 Yes, there are certain -- from time
 16 to time auditors can make representations
 17 that -- in the rep letter that is being
 18 proposed that are inaccurate or out of scope or
 19 things like that and they've asked for
 20 signature.
 21 In that context, yes. I mean, you
 22 know -- I mean, if I have been asked to sign
 23 and make those representations and those
 24 representations are invalid, yes, I would not,
 25 I mean, I -- I wouldn't sign that.

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1 WATERHOUSE - 10-19-21
 2 June 3rd. It could have been done on June 4th.
 3 I don't -- I don't -- I don't recall.
 4 Q. Okay.
 5 MR. MORRIS: Can we put up on the
 6 screen the HCMFA audit report. And while
 7 we're --
 8 MS. DANDENEAU: What exhibit is
 9 this?
 10 MR. MORRIS: La Asia, what number is
 11 that?
 12 MS. CANTY: 45.
 13 MR. MORRIS: So this will be marked
 14 as Exhibit 45.
 15 (Exhibit 45 marked.)
 16 MS. CANTY: Yeah, and I will put it
 17 in the chat.
 18 MS. DANDENEAU: Thank you.
 19 Q. Okay. All right. Do you see that
 20 this is the consolidated financial statements
 21 for HCMFA for the period ending 12/31/18?
 22 A. Yes.
 23 Q. As the treasurer of HCMFA at the
 24 time, did you have to sign a management
 25 representation letter similar to the one that

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1 WATERHOUSE - 10-19-21
 2 Q. Okay. PricewaterhouseCoopers served
 3 as HCMFA's outside auditors as well; correct?
 4 A. Yes.
 5 Q. Do you see that this audit report is
 6 signed on June 3rd, 2019, just like the
 7 Highland audit report?
 8 A. That is correct.
 9 Q. And did the process of -- of
 10 preparing HCMFA's audit report, was that the
 11 same process that Highland followed when it did
 12 its audit report at this time?
 13 A. I mean, it is a different entity.
 14 There are different assets. You know, it --
 15 it -- it is -- as you saw, Highland's
 16 financials are on a consolidated basis. This
 17 is different, so it is under the same control
 18 environment and team.
 19 Q. Okay. I appreciate that. So the
 20 same control environment and team participated
 21 in the preparation of the audit for Highland
 22 and for HCMFA at around the same time; correct?
 23 A. Yes.
 24 MR. MORRIS: Can we go to page 17 of
 25 the report. I don't have the Bates number.

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1 WATERHOUSE - 10-19-21

2 Q. Okay. Do you see that just like

3 Highland's audited financial report, HCMFA's

4 audited financial report also has a section

5 related to subsequent events?

6 A. Yes.

7 Q. And am I reading this correctly that

8 just as Highland had done, HCMFA disclosed in

9 its audited financial report a subsequent event

10 that related to the issuance of promissory

11 notes to Highland in the aggregate amount of

12 \$7.4 million in 2019?

13 A. That is what I see in the report.

14 Q. And you were the treasurer of HCMFA

15 at the time; right?

16 A. Yes, to the best of my knowledge.

17 Q. And did anybody ever tell you prior

18 to the time of the issuance of this audit

19 report that that sentence relating to HCMFA's

20 2019 notes was inaccurate or wrong in any way?

21 A. Not that I recall.

22 Q. As you sit here right now, has

23 anybody ever told you that that sentence is

24 inaccurate or wrong in any way?

25 A. Not that I recall.

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1 WATERHOUSE - 10-19-21

2 Q. All right. So I don't know if you

3 have seen this before, sir. Do you see that

4 this is a complaint against HCMFA?

5 A. Yes, I am looking at it on the

6 screen.

7 Q. Okay. And have you ever seen this

8 document before?

9 A. I went through some of these

10 documents with my counsel here yesterday.

11 MR. MORRIS: All right. Can we go

12 to Exhibit 1 of this document.

13 Q. Do you see Exhibit 1 is a

14 \$2.4 million promissory note back in 2019?

15 A. Yeah, I found it in the book. Yes,

16 I have it here in front of me.

17 Q. And this is a demand note, right, if

18 you look at Paragraph 2?

19 A. Yes.

20 Q. And this is a note where the maker

21 is HCMFA, and Highland is the payee; right?

22 A. Yes.

23 MR. MORRIS: And if we can scroll

24 down, can we just see Mr. Waterhouse's

25 signature.

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1 WATERHOUSE - 10-19-21

2 Q. I apologize if I asked you this

3 already, but has anybody ever told you at any

4 time that you are not authorized to sign the

5 promissory notes that are the subject of the

6 sentence we're looking at?

7 A. Not that I recall.

8 Q. Did anybody ever tell you at any

9 time that you had made a mistake when you

10 signed the promissory notes that are the

11 subject of this sentence?

12 A. Say that again. Did anyone ever say

13 that I made a mistake?

14 Q. Let me ask the question again.

15 Did anybody ever tell you at any

16 time that you made a mistake when you signed

17 the two promissory notes in Highland's favor on

18 behalf of HCMFA in 2019?

19 A. Not that I recall.

20 MR. MORRIS: Let's just look at the

21 promissory notes quickly. Can we please

22 put up Document Number 1, and so this is in

23 the pile that y'all have. We'll just go

24 for a few more minutes and we can take our

25 lunch break.

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1 WATERHOUSE - 10-19-21

2 Q. Is that your signature, sir?

3 A. Yes, it is.

4 Q. And did you sign this document on or

5 around May 2nd, 2019?

6 A. I don't recall specifically signing

7 this, but this is my signature.

8 Q. Okay. And do you recall that

9 Highland transferred \$2.4 million to HCMFA at

10 or around the time you signed this document?

11 A. I don't recall specifically. I

12 would want to, as I sit here today, go back and

13 confirm that, but again, presumably that --

14 that -- that did happen.

15 Q. You wouldn't have signed this

16 document if you didn't believe that HCMFA

17 either received or was going to receive

18 \$2.4 million from Highland; is that fair?

19 A. I mean, it -- if -- if -- if there

20 wasn't a transfer of value, yeah, I mean, you

21 know, I would have no reason to -- to sign a

22 note.

23 Q. And -- and Highland wouldn't have

24 given this note to PricewaterhouseCoopers if --

25 withdrawn.

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1 WATERHOUSE - 10-19-21
 2 HCMFA wouldn't have given this note
 3 to PricewaterhouseCoopers if it hadn't received
 4 the principal value of – of the note in the
 5 form of a loan; correct?
 6 MR. RUKAVINA: Objection, legal
 7 conclusion, speculation and form.
 8 A. Again, we – what we provided to PwC
 9 were, as part of the audit, any promissory
 10 notes executed and outstanding. You know, as a
 11 part of the audit, they, you know, they – they
 12 have copies of all the bank statements,
 13 things – things of that sort.
 14 MR. MORRIS: Okay. Can we go to
 15 Exhibit 2.
 16 (Exhibit 2 marked.)
 17 Q. Do you see that this is a promissory
 18 note dated May 3rd, 2019 in the amount of
 19 \$5 million?
 20 A. Yes.
 21 Q. Do you believe this is also a demand
 22 note if you look at Paragraph 2?
 23 A. Yes.
 24 Q. And do you see that HCMFA is the
 25 maker, and Highland is the payee?

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1 WATERHOUSE - 10-19-21
 2 nature. So, you know, to me this was just
 3 another document, to be perfectly honest.
 4 Q. Sir, would you have signed
 5 promissory notes with the principal amount of
 6 \$7.4 million if you didn't believe you were
 7 authorized to do so?
 8 MS. DANDENEAU: Objection to form.
 9 Q. Are you frozen?
 10 A. No. I'm just – you know, it is –
 11 you know, again, I typically don't sign
 12 promissory notes, and I don't recall why I
 13 signed these, but – you know, but I did.
 14 Q. All right. So listen carefully to
 15 my question. Would you have ever signed
 16 promissory notes with a face amount of
 17 \$7.4 million without believing that you were
 18 authorized to do so?
 19 A. No. I mean, I'm – I'm putting my
 20 signature on there, so no.
 21 Q. Okay. And would you have signed two
 22 promissory notes obligating HCMFA to pay
 23 Highland \$7.4 million without Mr. Dondero's
 24 prior knowledge and approval?
 25 MS. DEITSCH-PEREZ: Object to the

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1 WATERHOUSE - 10-19-21
 2 A. Yes.
 3 Q. And if we go to the bottom, can we
 4 just confirm that that is your signature?
 5 A. Yes.
 6 Q. And together these notes are the
 7 notes that are referred to both in Highland and
 8 HCMFA's audited financial reports in the
 9 subsequent event sections; correct?
 10 MS. DANDENEAU: Objection to form.
 11 A. They – they – they totaled
 12 \$7.4 million, so presumably, yes.
 13 Q. Okay. And you were authorized to
 14 sign these two notes; correct?
 15 MR. RUKAVINA: Objection, legal
 16 conclusion.
 17 A. Yeah. I mean, I'm – I was the
 18 officer of – of HCMFA. You know, I – I'm not
 19 the legal expert on – on what that – what
 20 that confers to me or what it doesn't. I mean,
 21 that is my signature on the notes.
 22 Q. And you believed you were authorized
 23 to sign the notes; is that fair?
 24 A. I signed a lot of documents in my
 25 capacity, just because it is operational in

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1 WATERHOUSE - 10-19-21
 2 form.
 3 A. You know, from – from what I recall
 4 around these notes, you know, I don't recall
 5 specifically Mr. – Mr. Dondero saying to – to
 6 make this a loan.
 7 So my conversation with Mr. Dondero
 8 around the culmination of the NAV error as
 9 related to TerreStar which was a – a – I
 10 think it was a year and a half process. I
 11 don't know, it was a multi-month process, very
 12 laborious, very difficult.
 13 When we got to the end, I had a
 14 conversation with Mr. Dondero on where to, you
 15 know, basically get the funds to reimburse the
 16 fund, and I recall him saying, get the money
 17 from Highland.
 18 Q. And so he told you to get the money
 19 from Highland; is that right?
 20 A. That is what I recall – in my
 21 conversation with him, that is – that is what
 22 I can recall.
 23 Q. Do you know who drafted these notes?
 24 A. I don't.
 25 Q. Did you ask somebody to draft the

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1 WATERHOUSE - 10-19-21
 2 notes?
 3 A. I didn't ask – I don't specifically
 4 ask people to draft notes really. I mean,
 5 again, you know, the legal group at Highland is
 6 responsible and has always been responsible for
 7 drafting promissory notes.
 8 Q. So based on your – based on the
 9 practice, you believe that somebody from the
 10 Highland's legal department would have drafted
 11 these notes. Do I have that right?
 12 MS. DEITSCH-PEREZ: Object to the
 13 form. John, I also asked you for the Word
 14 versions of these notes so we could look at
 15 the properties, and you have not provided
 16 them. Are you intending to?
 17 MR. MORRIS: No.
 18 Q. Can you answer my question, sir?
 19 A. Again, I –
 20 MS. DANDENEAU: Do you want him to
 21 repeat it?
 22 A. Yeah, why don't you repeat it?
 23 Q. Sure. Mr. Waterhouse, based on the
 24 practice that you have described in your
 25 understanding, do you believe that these notes

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 2 to the legal team, the – you know, we always
 3 loop in compliance. And compliance – when you
 4 go to the legal team, compliance is part of
 5 legal team. They're made aware of – of – of
 6 these types of transactions.
 7 Q. And do you believe that you had
 8 the – withdrawn.
 9 Did you ever tell Mr. Dondero –
 10 (inaudible) – did you see those?
 11 A. Sorry.
 12 MS. DEITSCH-PEREZ: I did not hear
 13 the end of that question.
 14 Q. Did you ever tell Mr. Dondero that
 15 you signed these two notes?
 16 A. I don't recall ever – no, I don't
 17 recall having a conversation with him.
 18 Q. Did you ever discuss these two notes
 19 with him at any time?
 20 A. The conversation, I recall, was what
 21 I described earlier. And that is the only time
 22 I recall ever discussing this.
 23 Q. Okay. But the corporate accounting
 24 group had a copy of this – of these two notes.
 25 And pursuant to the audit process, the

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1 WATERHOUSE - 10-19-21
 2 would have been drafted by somebody in the
 3 legal department?
 4 MS. DEITSCH-PEREZ: Object to the
 5 form.
 6 A. Yes.
 7 Q. Okay. And do you know who would
 8 have instructed – do you have any knowledge as
 9 to who would have instructed the legal
 10 department to draft these notes?
 11 MS. DEITSCH-PEREZ: Object to the
 12 form.
 13 A. It was whoever was working – I
 14 mean, it was likely someone on the team. I
 15 mean, I don't remember exactly on every note or
 16 every document, but, again, a lot of these
 17 things of this nature – they're operational in
 18 nature – were handled by the team.
 19 The team knows to – I mean, we
 20 don't draft documents. We're not lawyers.
 21 We're not attorneys. It is not what I do or
 22 accountants do.
 23 So they are always instructed to go
 24 and – and go to the legal team to get
 25 documents like this drafted. Also, when you go

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1 WATERHOUSE - 10-19-21
 2 corporate accounting group gave the two notes
 3 to PricewaterhouseCoopers in connection with
 4 the audit; correct?
 5 MS. DANDENEAU: Objection to form.
 6 A. Yes. I mean, that is – yeah, I
 7 mean, they – unless the legal team can also
 8 retain copies of items like this. I mean, I
 9 don't know everything that they would retain as
 10 well.
 11 The legal team would also, if they
 12 had documents as part of audits, turn that over
 13 to the auditors as well. So it could have been
 14 the corporate accounting team. It could be
 15 someone on the legal team.
 16 Q. All right. So you didn't – you
 17 didn't draft this note; right?
 18 A. I – I – I did not.
 19 Q. But somebody at Highland did; is
 20 that fair?
 21 MS. DEITSCH-PEREZ: Object to the
 22 form.
 23 A. I don't know. I mean, we can go to
 24 the legal team. I don't – I'm not sitting
 25 behind someone in legal. Maybe they went to

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1 WATERHOUSE - 10-19-21
 2 outside counsel. I have no idea.
 3 Q. Did you have any reason to believe
 4 you weren't authorized to sign this note,
 5 either of these two notes?
 6 A. I think I have already answered that
 7 question.
 8 Q. Okay. You didn't give these notes
 9 to PricewaterhouseCoopers; correct?
 10 MS. DANDENEAU: Objection to form.
 11 A. I don't recall giving these to
 12 PricewaterhouseCoopers.
 13 Q. And in the practice that you have
 14 described, somebody in the corporate accounting
 15 group would have given these two notes to
 16 PricewaterhouseCoopers; correct?
 17 MS. DANDENEAU: Objection to form.
 18 A. I think I've answered that. I said
 19 either the corporate accounting team or maybe
 20 the legal team.
 21 MR. MORRIS: Okay. Why don't we
 22 take our lunch break here.
 23 VIDEOGRAPHER: We're going off the
 24 record at 1:04 p.m.
 25 (Recess taken 1:04 p.m. to 1:49 p.m.)

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1 WATERHOUSE - 10-19-21
 2 certificate before?
 3 A. I have.
 4 Q. Do you have a general understanding
 5 of what an incumbency certificate is?
 6 A. I have a general understanding.
 7 Q. What is your general understanding?
 8 A. You know, those -- my general
 9 understanding is that the incumbency
 10 certificate basically lists folks that can --
 11 are like authorized signers.
 12 Q. Okay. And do you see that this is
 13 an incumbency certificate for Highland Capital
 14 Management Fund Advisors, L.P.?
 15 A. Yes.
 16 Q. Okay. And if we could scroll down
 17 just a little bit, do you see that it's dated
 18 effective as of April 11th, 2019?
 19 A. Yes, I see that.
 20 Q. Okay. And is that your signature in
 21 the middle of the signature block?
 22 A. Yes, it is.
 23 Q. And by signing it, did you accept
 24 appointment as the treasurer of HCMFA effective
 25 as of April 11th, 2019?

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1 WATERHOUSE - 10-19-21
 2 VIDEOGRAPHER: We are back on the
 3 record at 1:49 p.m.
 4 Q. Mr. Waterhouse, did you speak with
 5 anybody during the break about the substance of
 6 this deposition?
 7 A. I spoke to -- to Deb and Michelle.
 8 Q. About the substance of the
 9 deposition?
 10 A. Yes.
 11 Q. Can you tell me what you talked
 12 about?
 13 MS. DANDENEAU: No. We object on
 14 the basis of privilege.
 15 Q. Okay. You are going to follow your
 16 counsel's objection here?
 17 A. Yes.
 18 Q. Okay.
 19 MR. MORRIS: Can we put up on the
 20 screen Exhibit 35.
 21 (Exhibit 35 marked.)
 22 Q. Are you able to see that document,
 23 sir?
 24 A. Yes.
 25 Q. Have you ever seen an incumbency

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 2 A. Again, I'm not the legal -- I don't
 3 know if this makes me the treasurer or the
 4 appointment. I don't know -- I don't know
 5 that, so I don't -- I don't know if that
 6 document -- again, I think -- again, I'm not
 7 the legal expert. I think isn't there --
 8 aren't there other legal documents that detail
 9 who the officers are that could be incorporated
 10 or things like that? Again, I don't want to
 11 play armchair attorney here.
 12 Q. I'm not asking you for a legal
 13 conclusion. I'm asking you for your knowledge
 14 and understanding. When you signed this
 15 document, did you understand that you were
 16 accepting an appointment as the treasurer of
 17 HCMFA?
 18 MS. DANDENEAU: Objection to form.
 19 MS. DEITSCH-PEREZ: Objection, form.
 20 A. Again, I don't think this -- that
 21 wasn't my understanding. I don't think this
 22 makes -- this document makes me the treasurer.
 23 Q. What do you think this document --
 24 why did you sign this document?
 25 MS. DEITSCH-PEREZ: Objection to

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1 WATERHOUSE - 10-19-21
 2 form.
 3 MR. MORRIS: You're objecting to the
 4 form of the question when I asked him why
 5 did you sign the document? What is the
 6 basis for the objection?
 7 MS. DEITSCH-PEREZ: Because, John, I
 8 think that it does call for a legal
 9 conclusion other than -- with him saying
 10 because somebody told me to sign this
 11 document. But if you want to go there,
 12 that is fine.
 13 MR. MORRIS: Okay.
 14 MS. DANDENEAU: I don't think --
 15 he's already said he's not a lawyer.
 16 MR. MORRIS: I'll allow the witness
 17 to answer this question.
 18 Q. Why did you sign this document, sir?
 19 A. I mean, our -- our legal group would
 20 bring by these incumbency certificates from
 21 time to time. I have no idea why they're being
 22 updated, and I was asked to sign.
 23 Q. Did you ask anybody, what is this
 24 document?
 25 A. No.

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1 WATERHOUSE - 10-19-21
 2 legal questions, to be clear. I'm asking
 3 for this witness' understanding as to how
 4 he became the acting treasurer of HCMFA.
 5 If he doesn't know, he can say he doesn't
 6 know, but this legal stuff is nonsense, and
 7 I really object to it.
 8 Q. Sir, I'm asking you a very simple
 9 question.
 10 MS. DANDENEAU: Argumentative.
 11 Q. You testified -- you testified that
 12 you became the acting treasurer of HCM --
 13 HCMFA; correct?
 14 A. Yes.
 15 Q. How did that happen?
 16 MS. DANDENEAU: Again, object to
 17 form.
 18 MR. MORRIS: I can't wait to do this
 19 in a courtroom. Good God.
 20 Q. Go ahead, sir.
 21 A. I don't know the exact process of
 22 how that happened.
 23 Q. Do you have any idea whether signing
 24 this document was part of the process?
 25 MR. MORRIS: You know what --

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1 WATERHOUSE - 10-19-21
 2 Q. Did anybody tell you why they needed
 3 you to sign the document?
 4 A. Not that I can recall.
 5 Q. You testified earlier that you
 6 understood that you served as the acting
 7 treasurer for HCMFA; correct?
 8 A. Yes.
 9 Q. How did you become the acting
 10 treasurer of HCMFA?
 11 MS. DANDENEAU: Objection to form.
 12 A. I don't -- I don't know the legal --
 13 I don't know the legal mechanic of how I became
 14 the acting treasurer.
 15 Q. I'm not asking for the legal
 16 mechanic. I'm asking you as the person who
 17 is --
 18 MS. DANDENEAU: John, you said --
 19 MR. MORRIS: Stop.
 20 MS. DANDENEAU: -- how did you
 21 become the treasurer. That is --
 22 MR. MORRIS: Please stop.
 23 MS. DANDENEAU: That is a legal
 24 question.
 25 MR. MORRIS: I am not asking any

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1 WATERHOUSE - 10-19-21
 2 MS. DANDENEAU: Objection.
 3 MR. MORRIS: -- withdrawn. You guys
 4 want to do this, I can't wait. I can't
 5 wait. This is the craziest stuff ever.
 6 MS. DANDENEAU: John, he said he's
 7 not a lawyer, and you are asking him for a
 8 legal conclusion, and he says he doesn't
 9 know, and you persist.
 10 MR. MORRIS: Okay.
 11 MS. DANDENEAU: So you can ask these
 12 questions --
 13 MR. MORRIS: Did anyone -- please
 14 stop talking.
 15 MS. DANDENEAU: -- at another
 16 point -- no, no, no, I'm entitled to talk,
 17 too; right? If you're going to make these
 18 accusations as if we're trying to stonewall
 19 you, this is not the witness to ask that
 20 question.
 21 MR. MORRIS: I can't -- I can't
 22 wait -- I can't wait to do this in a
 23 courtroom. I will just leave it at that.
 24 MS. DANDENEAU: That's right, I'm
 25 sure you can't.

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2 Q. Did anyone ever tell you, sir, that

3 even though you were the acting treasurer of

4 HCMFA, that you were not authorized to sign the

5 two promissory notes that we looked at before

6 lunch?

7 A. I'm not sure I understand the

8 question. I wasn't -- I mean, I'm -- I'm the

9 current acting treasurer.

10 Q. Did anybody ever tell you at any

11 time that even though you were the acting

12 treasurer of HCMFA, that you were not

13 authorized to sign the two promissory notes

14 that we looked at before lunch?

15 MS. DANDENEAU: Objection to form.

16 A. Not that I recall.

17 Q. Did anybody ever tell you at any

18 time that you were not authorized to sign the

19 two promissory notes that we looked at before

20 lunch?

21 A. Not that I recall.

22 Q. Did anybody ever tell you at any

23 time that you should not have signed the two

24 promissory notes that we looked at before

25 lunch?

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1 WATERHOUSE - 10-19-21

2 form.

3 MS. DANDENEAU: Objection, form.

4 A. Yes.

5 Q. As of October 20th -- withdrawn.

6 I'm trying to take your mind back to

7 a year ago, October 2020. Do you recall at

8 that time that the boards of the retail funds

9 were making inquiries about obligations that

10 were owed by the advisors to Highland in

11 connection with their 15(c) review?

12 MS. DANDENEAU: Objection to form.

13 A. I don't -- I don't recall.

14 Q. As of October 2020, you had no

15 reason to believe you weren't authorized to

16 sign the two promissory notes that we just

17 looked at; correct?

18 MS. DANDENEAU: Objection, form.

19 MS. DEITSCH-PEREZ: Objection to

20 form.

21 A. I didn't think about it in October

22 of 2020, but I mean --

23 Q. Did you have any reason to believe

24 at that time that you weren't authorized to

25 sign the two notes that we just looked at?

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1 WATERHOUSE - 10-19-21

2 A. Not that I recall.

3 Q. Did you ever tell anybody at any

4 time that you weren't authorized to sign the

5 two promissory notes that we looked at before

6 lunch?

7 A. Not that I recall.

8 Q. Did you ever tell anybody at any

9 time that you made a mistake when you signed

10 the two promissory notes that we looked at

11 before lunch?

12 A. Not that I recall.

13 Q. As you sit here right now, do you

14 have any reason to believe that you were not

15 authorized to sign the two documents that we

16 looked at before lunch?

17 MS. DANDENEAU: Objection to form.

18 A. If -- if this is the -- the valid

19 incumbency certificate, I mean, this does --

20 this does detail who the signers are.

21 Q. Okay. And looking at that document,

22 does that give you comfort that you were

23 authorized to sign the two promissory notes

24 that we looked at before lunch?

25 MS. DEITSCH-PEREZ: Object to the

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1 WATERHOUSE - 10-19-21

2 A. Not that I'm aware, no.

3 Q. Did you have any reason to believe a

4 year ago that you made a mistake when you

5 signed those two notes?

6 A. Not that I'm aware.

7 Q. A year ago you believed that HCMFA

8 owed Highland the unpaid principal amounts that

9 were due under those two notes; correct?

10 A. They're -- they're promissory notes

11 that were -- as you presented, that were --

12 that were executed. Whether they're valid or

13 if there's other reasons, I didn't -- I don't

14 know.

15 Q. I'm not asking you whether they're

16 valid or not. I'm asking you for your state of

17 mind. A year ago you believed that HCMFA

18 was -- was obligated to pay the unpaid

19 principal amount under the two notes that you

20 signed; correct?

21 A. Yeah, I'm -- I'm -- yes.

22 Q. Thank you. Are you aware -- you're

23 aware that -- that in 2017, NexPoint issued a

24 note in favor of Highland in the approximate

25 amount of \$30 million; correct?

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1 WATERHOUSE - 10-19-21

2 A. I'm – I'm – I'm generally aware.

3 Q. Okay. And are you generally aware

4 that from time to time, after the note was

5 issued by NexPoint, that moneys were applied to

6 principal and interest that were due under the

7 NexPoint note?

8 A. Yes, I'm generally aware.

9 Q. Okay. And did anybody ever tell you

10 that the payments that were made against the

11 NexPoint notes were made by mistake?

12 A. Yes.

13 Q. And is it the one payment that we

14 talked about earlier today?

15 A. We talked about a lot of things

16 today. What payment are we talking about?

17 Q. Okay. Who told you that any payment

18 made against the NexPoint note was made by

19 mistake?

20 A. D.C. Sauter.

21 Q. When did Mr. Sauter tell you that?

22 A. I don't – I don't remember

23 specifically.

24 Q. Do you remember what payments –

25 A. Sometime – sometime this year.

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1 WATERHOUSE - 10-19-21

2 I'm going to object here, and I'm going to

3 instruct the witness not to answer

4 depending on the discussion that you had –

5 Mr. Waterhouse, I'm the lawyer for

6 NexPoint, and as everyone here knows, D.C.

7 Sauter is in-house counsel.

8 So if you and Mr. Sauter were having

9 a factual discussion and him preparing his

10 affidavit, et cetera, then go ahead and

11 answer that. But if you were having a

12 discussion as to our legal strategy in this

13 lawsuit, or anything having to do with

14 that, then do not answer that.

15 And if you need to talk to either

16 your counsel or me about that, then we need

17 to have that discussion now.

18 A. Okay. Yeah, I don't – I don't

19 really know how to make that distinction, so

20 maybe I need to talk to counsel before I

21 answer, or if I can answer.

22 Q. Let me just ask you this question:

23 Did – did you have any conversation with

24 Mr. Sauter about any payment of principal and

25 interest prior to the time that you left

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2 Q. Sometime in 2021?

3 A. Yes.

4 Q. Do you remember what payment he was

5 referring to?

6 A. It was the – the payment made in

7 January of 2021 or – yeah, January of – of

8 this – January of 2021.

9 Q. Okay. So did anybody ever tell you

10 at any time that any payment that was made

11 against principal –

12 A. And – and – and – hold on, and it

13 may have been other – again, it may have been

14 that payment or – or there may have been what

15 he was explaining, a misapplication of prior

16 payments as well.

17 Q. Can you – can you give me any

18 specificity – withdrawn.

19 Withdrawn. Can you tell me

20 everything that Mr. Sauter told you about –

21 about errors in relation to payments made

22 against principal and interest due under the

23 NexPoint note?

24 MS. DANDENEAU: Can I just –

25 MR. RUKAVINA: Hold on. Hold on.

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2 Highland's employment, or did it happen after

3 you left Highland's employment?

4 A. I don't – I don't recall if – I

5 don't recall. I mean, it was sometime in 2021.

6 I don't remember if it was before or after I

7 was let go from Highland.

8 Q. Okay. So – so nobody told you

9 prior to 2021 that any error or mistake was

10 made in the application of payments against

11 principal and interest due on the NexPoint

12 note. Do I have that right?

13 A. Yeah, I don't – I don't recall this

14 being in 2020.

15 Q. Okay. And it didn't happen in 2019;

16 correct?

17 A. I don't recall that happened.

18 Q. And it didn't happen in 2018;

19 correct?

20 A. I don't – I don't recall that

21 happening.

22 Q. And it didn't happen in 2017;

23 correct?

24 A. I don't recall.

25 Q. But – but you believe the

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2 conversation took place in 2021. You just

3 don't remember if it was before or after you

4 left Highland's employment. Do I have that

5 right?

6 A. It was sometime this year. I

7 don't – I don't remember.

8 Q. Okay. Did you report this

9 conversation to Mr. Seery at any point?

10 A. I don't believe so.

11 Q. Did you report this conversation to

12 anybody at DSI at any time?

13 A. I don't recall.

14 Q. Do you have – you don't have a

15 recollection of ever doing that, correct?

16 A. Yeah, that's right. I don't recall

17 doing that.

18 Q. Do you recall telling anybody at

19 Pachulski Stang about the conversation you

20 recall with Mr. Sauter?

21 A. No, I don't – I don't recall.

22 Q. Did you tell any of the independent

23 board members about your conversation with

24 Mr. Sauter?

25 A. I don't recall.

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2 kind that NexPoint has ever made to try to

3 recover the amounts that it contends were – or

4 that Mr. Sauter contend were mistakenly applied

5 against principal and interest due under the

6 NexPoint note?

7 A. I'm not aware.

8 MS. DANDENEAU: Objection to form.

9 Q. Okay. The advisors' agreements with

10 the retail funds are subject to annual renewal;

11 correct?

12 A. Yes.

13 Q. And do you participate in the

14 renewal process each year?

15 A. Yes.

16 Q. What role do you play in the renewal

17 process?

18 A. I'm – I'm asked by the retail board

19 to walk-through the advisors financials.

20 Q. And do you do that in the context of

21 a board meeting?

22 A. Yes, it is – yes, it is typically

23 done in a board meeting.

24 Q. And do you recall the time –

25 does – does the renewal process happen around

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2 Q. Did you tell any of the employees at

3 Highland before you left Highland's employment

4 about this call that you had with Mr. Sauter?

5 MS. DANDENEAU: Objection to form.

6 A. No, I don't – no, I don't recall.

7 Q. NexPoint – to the best of your

8 knowledge, did NexPoint ever file a proof of

9 claim against Highland to try to recover moneys

10 that were mistakenly paid against the principal

11 and interest due under the note?

12 A. Okay. Hold on. You are saying did

13 NexPoint Advisors file a proof of claim to

14 Highland for errors related to payments under

15 the NexPoint note to Highland?

16 Q. Correct.

17 A. I'm – I'm – I'm not – I'm not

18 aware.

19 Q. Are you aware –

20 A. I'm not the legal person here, I

21 don't know.

22 Q. I'm just asking for your knowledge,

23 sir.

24 A. Yeah, I don't know. I'm not aware.

25 Q. Are you aware of any claim of any

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2 the same time each year?

3 A. Yes, it is – it is around the same

4 time every year.

5 Q. And what – what time period of the

6 year does the renewal process occur?

7 A. Approximately the September

8 timeframe.

9 Q. During that process, in your

10 experience, does the board typically conduct

11 its own diligence and ask for information?

12 A. Does the board ask for lots of – I

13 mean, just – I mean, lots of information as a

14 part of that – that – as part of that board

15 meeting and that process.

16 Q. Okay. And do you recall that the

17 process in 2020 spilled into October?

18 A. Yes. Yes.

19 Q. Okay. And as part of the process in

20 2020, the retail board asked – asked what are

21 referred to as 15(c) questions; right?

22 A. I guess I don't want to be – they

23 asked 15(c) – are you saying they asked 15(c)

24 questions and this is why it went into October

25 or –

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2 Q. No, I apologize.

3 Do you have an understanding of

4 what – of what 15(c) refers to in the context

5 of the annual renewal process?

6 A. Yes, generally.

7 Q. All right. What is your general

8 understanding of the term "15(c)" in the

9 context of the annual renewal process?

10 A. I – I think 15(c) is the section

11 that – that – you know, that – that the

12 board has to evaluate every year, the retail

13 board. They have to, you know, go through,

14 evaluate, and go through that approval process

15 on a yearly basis.

16 Q. Okay.

17 MR. MORRIS: Can we put up on the

18 screen Exhibit 36, please.

19 (Exhibit 36 marked.)

20 MR. MORRIS: I guess let's just

21 start at the bottom so Mr. Waterhouse can

22 see what is here.

23 Q. You see this begins with an email

24 from Blank Rome to a number of people.

25 MR. MORRIS: And if we can scroll

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2 Q. And then do you see that

3 Ms. Thedford includes you on the email string

4 on Tuesday, October 6th, at 5:52?

5 A. Yes.

6 Q. And she asks you and Dave Klos and

7 Kristin Hendrix for advice on that particular

8 Request No. 2 that I have just read; right?

9 A. Yes.

10 Q. Okay. Can you tell me who

11 Ms. Thedford is?

12 A. She was an attorney that was in the

13 legal group.

14 Q. At Highland Capital Management,

15 L.P.?

16 A. I'm – I'm – I'm – I don't

17 remember if she was an employee of Highland or

18 any of the advisors.

19 Q. Okay. Do you know if she served as

20 the corporate secretary for both HCMFA and

21 NexPoint?

22 A. Yes.

23 Q. And – okay.

24 Do you know whether Ms. Thedford

25 held any positions in relation to the retail

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2 up – keep going just a little bit.

3 Q. You will see that there is an email

4 from Lauren Thedford to Thomas Surgent and

5 others where she reports that she was attaching

6 and reproducing below additional 15(c)

7 follow-up questions from the board.

8 Do you see that?

9 A. Yes.

10 Q. And do you see Question No. 2 asks

11 whether there are any material outstanding

12 amounts currently payable or due in the future

13 (e.g., notes) to HCMLP by HCMFA or NexPoint

14 Advisors or any other affiliate that provides

15 services to the funds?

16 Do you see that?

17 A. Yes.

18 Q. And – and did you – do you recall

19 that in – in October of 2020 the retail boards

20 were asking for that information?

21 A. I don't recall it, but there –

22 they're obviously asking in this email.

23 Q. Okay.

24 MR. MORRIS: Can we scroll up a

25 little bit, please.

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2 funds as we defined that term?

3 A. Yes.

4 Q. What is your understanding of the

5 positions that Ms. Thedford held at the retail

6 funds?

7 A. I – I recall her being an officer.

8 I don't recall her title.

9 Q. Okay. Is she still an officer at

10 any of the retail funds today?

11 A. No.

12 Q. Do you know when she ceased to be an

13 officer of the retail funds?

14 A. Approximately.

15 Q. And when did she approximately cease

16 to be an officer of the retail funds?

17 A. It was in – it was in early of

18 2021.

19 Q. Okay. Do you know when she became

20 an officer of the retail funds?

21 A. I don't recall.

22 Q. To the best of your recollection,

23 was she an officer of the retail funds in

24 October of 2020?

25 A. I believe so.

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2 Q. Okay. Do you know what title she

3 held in her capacity as an officer, if any?

4 A. I told you I don't remember.

5 Q. Okay. So she sends this email to

6 you at 5:52 p.m. on October 6th.

7 And if we can scroll up to the

8 response, you responded a minute later with a

9 one-word answer: Yes.

10 Do you see that?

11 A. Yes.

12 Q. And – and yes is – yes was in

13 response to the retail board's Question No. 2,

14 right, whether there are any material

15 outstanding amounts currently payable or due in

16 the future?

17 A. Yes.

18 MR. MORRIS: And can we scroll up to

19 see what happened next.

20 Q. So Ms. Thedford writes back to you a

21 few minutes later and she asks whether you

22 could provide the amounts.

23 Do you see that?

24 A. Yes.

25 Q. And then you respond further and you

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2 Q. Okay. And then if we can scroll up,

3 you see Ms. Thedford responds to you

4 nine minutes later with a draft response.

5 Do you see that?

6 A. Yes.

7 Q. And she says that she is taking from

8 the 6/30 financials certain information about

9 amounts that were due to HCMLP and affiliates

10 as of June 30th, 2020.

11 Do you see that?

12 A. I do.

13 Q. Okay. And did you believe, as the

14 treasurer of NexPoint and HCMFA and as the CFO

15 of Highland, that the information that

16 Ms. Thedford obtained from the 6/30 financials

17 was accurate and responsive in relation to the

18 retail fund board's question?

19 A. I just want to make sure I

20 understand the question.

21 Are you saying that the financial

22 information provided to the retail board as

23 part of the 15(c) process, which included

24 financial statements as of June 30th of 2021,

25 did I feel like those were responsive to their

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2 refer her to the balance sheet that was

3 provided to the board as part of the 15(c)

4 materials.

5 Do you see that?

6 A. Yes.

7 Q. And – and did the advisors provide

8 to the board certain balance sheets in 2020 in

9 connection with the 15(c) review?

10 A. Yes, they did.

11 Q. Okay. And were the amounts that

12 were outstanding or that were to be due in the

13 future by the advisors to Highland included in

14 the liability section of the balance sheet that

15 was given to the retail board?

16 A. Yes. Notes would be reflected as

17 liabilities.

18 Q. Okay. And –

19 A. If I'm understanding your question

20 correctly.

21 Q. You are. And – and – and those

22 liabilities you – you were – you believed

23 were responsive to the retail board's question;

24 correct?

25 A. Yes.

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2 questions?

3 Q. Yes.

4 A. Yes.

5 Q. Thank you.

6 MS. DEITSCH-PEREZ: John, it is not

7 in the chat yet. Can you just make sure it

8 gets put in there.

9 MR. MORRIS: Sure.

10 MS. CANTY: I put it in there. I

11 think maybe I just sent it directly, so let

12 me make sure it says to everyone. But I

13 did put it in there. I will try again.

14 MR. MORRIS: Thank you, La Asia.

15 MS. DANDENEAU: What number is it.

16 MR. MORRIS: What, the Bates number?

17 MS. DEITSCH-PEREZ: No, the –

18 this – yeah, 36 is not in the chat.

19 MR. MORRIS: Okay. We'll get it.

20 MS. DANDENEAU: I think that

21 Ms. Canty just sent it to me originally.

22 Sorry.

23 MR. MORRIS: Okay. We will get it

24 there.

25 MS. CANTY: Okay. It is there now

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 2 for everyone.
 3 MS. DEITSCH-PEREZ: Got it. Thank
 4 you.
 5 Q. Do you recall if the proposed
 6 response that Ms. Thedford crafted was
 7 delivered to the retail board with the – with
 8 the yellow dates having been completed?
 9 A. I don't know.
 10 MR. MORRIS: Davor, I'm going to ask
 11 that the advisors and – the advisors of
 12 both HCMFA and NexPoint produce to me any
 13 report that was given to the retail board
 14 concerning the promissory notes at issue,
 15 including the obligations under the notes.
 16 Q. Do you know – do you know if
 17 ultimately NexPoint informed the retail board
 18 in response to its question that NexPoint owed
 19 Highland approximately 23 or \$24 million?
 20 MS. DANDENEAU: Objection to the
 21 form.
 22 A. Sorry, are you asking, did NexPoint
 23 tell the retail board that it owed Highland?
 24 Q. Let me ask a better question,
 25 Mr. Waterhouse.

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 2 obligations under the notes to Highland?
 3 MS. DANDENEAU: Objection to form.
 4 MS. DEITSCH-PEREZ: Object to the
 5 form.
 6 A. I don't recall specifically.
 7 Q. Do you have any general recollection
 8 of discussing with the retail board the
 9 advisors' obligations to Highland under the
 10 notes that they issued?
 11 MS. DANDENEAU: Object to the form.
 12 MS. DEITSCH-PEREZ: Object to the
 13 form.
 14 A. I just recall generally just – it
 15 is just – I present the financial statements,
 16 and if they have questions, I answer their
 17 questions and walk them through.
 18 I don't recall what they asked. I
 19 don't recall where the discussion went. I
 20 don't recall anything of that nature.
 21 Q. Okay. Do you know if anybody on
 22 behalf of HCMF – HCMFA ever told the retail
 23 board that HCMFA had no obligations under the
 24 two 2019 notes that you signed? Withdrawn.
 25 Do you know whether anybody on

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 2 Did – do you know if anybody ever
 3 answered the retail board's question that was
 4 Number 2?
 5 A. I don't – I can't say for sure.
 6 Q. Okay. Do you recall – I think you
 7 testified earlier that you walked through the
 8 advisors' financials with the retail board;
 9 correct?
 10 A. Yes.
 11 Q. And as part of that process, did you
 12 disclose to the retail board the obligations
 13 that NexPoint and HCMFA had to Highland under
 14 promissory notes?
 15 A. The retail board, as I stated
 16 earlier, receives financial information,
 17 balance sheet, income statement information
 18 from the advisors. That information is
 19 provided to the retail board in connection with
 20 the 15(c) process.
 21 So any notes between the advisors
 22 and the Highland would be – anything would be
 23 detailed in those financial statements.
 24 Q. Do you recall in 2020 ever speaking
 25 with the retail board about the advisors'

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 2 behalf of HCMFA ever told the retail boards
 3 that you weren't authorized to sign either of
 4 the two 2019 notes?
 5 MS. DANDENEAU: Objection to form.
 6 A. I'm not aware.
 7 Q. Are you aware of anybody on behalf
 8 of HCMFA ever telling the retail boards that
 9 your execution of the two 2019 notes was a
 10 mistake?
 11 MS. DANDENEAU: Objection to form.
 12 A. I'm not aware.
 13 Q. Are you aware of anybody on behalf
 14 of HCMFA ever telling the retail boards that
 15 HCMFA did not have to pay the amounts reflected
 16 in the two notes that you signed in 2019?
 17 A. I'm not aware.
 18 Q. Do you know whether anybody ever
 19 told the retail boards – withdrawn.
 20 Do you know whether anybody ever
 21 told the retail boards that Highland has
 22 commenced a lawsuit to recover on the two notes
 23 that you signed in 2019?
 24 A. I'm not aware.
 25 Q. Are you aware of anybody informing

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 2 the retail boards that Highland has sued to
 3 recover on the NexPoint note?
 4 A. I'm not aware.
 5 Q. Do you know whether anybody ever
 6 told the retail board that Highland had
 7 declared a default with respect to the two
 8 HCMFA notes that you signed in 2019?
 9 A. I'm not aware.
 10 Q. Are you aware of anybody ever
 11 informing the retail boards that Highland had
 12 declared a default under the NexPoint note?
 13 A. I'm not aware.
 14 Q. Are you aware of anybody telling the
 15 retail board that Highland made a demand for
 16 payment under the 2019 notes that you signed on
 17 behalf of HCMFA?
 18 A. I'm not aware.
 19 Q. Let's – let's see if there is a
 20 response to Ms. Thedford's email, if we can
 21 scroll up.
 22 Do you see you responded to
 23 Ms. Thedford five minutes after she provided
 24 the draft response to you?
 25 A. Yes.

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 2 Q. Does Mr. Norris play a role in
 3 formulating the advisors' responses to the
 4 questions asked by the retail board in
 5 connection with the 15(c) annual review?
 6 MS. DANDENEAU: Objection to form.
 7 A. He – Dustin Norris is there in the
 8 board meetings. But – so he has a role, yes.
 9 Q. Okay. And does Mr. Norris hold any
 10 positions, to the best of your knowledge, in
 11 relation to any of the retail funds?
 12 A. I don't – I don't believe he does.
 13 Q. How about Mr. Post, do you know
 14 whether Mr. Post holds any position in either
 15 of the advisors?
 16 A. I mean, he – he – yes.
 17 Q. What is your understanding of the
 18 positions that Mr. Post holds in relation to
 19 the advisors?
 20 MS. DANDENEAU: Objection to form.
 21 A. He is an employee of NexPoint
 22 Advisors. He is also the chief compliance
 23 officer for – for NexPoint.
 24 Q. Who is the chief compliance officer
 25 for HCMFA, if you know?

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 2 Q. Okay. And do you see that Dustin
 3 Norris is copied on this email?
 4 A. Yes, he is.
 5 Q. Great. Do you know whether
 6 Mr. Norris held any positions at either of the
 7 advisors as of October 6, 2020?
 8 A. I will go back to – I'm not the
 9 legal expert of what appoints you or how or
 10 why, but you did see Dustin's name on the
 11 incumbency certificate that you produced
 12 earlier.
 13 Q. Do you know what his title was in
 14 October of 2020?
 15 MS. DANDENEAU: Objection to form.
 16 A. I don't – I don't recall.
 17 Q. Was he – did he have a title with
 18 each of the advisors, to the best of your
 19 recollection?
 20 A. I don't recall.
 21 Q. Do you know why he is included on
 22 this email string?
 23 A. I didn't add Dustin. It looks like
 24 Lauren did. I don't know why she added him or
 25 not. You would have to ask her.

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 2 MS. DANDENEAU: Objection to form.
 3 A. That would be Jason as well.
 4 Q. Okay. Now, looking at your
 5 response, you noted initially that nothing was
 6 owed under shared services. Do I have that
 7 right in substance?
 8 A. Yeah. I think I'm being responsive
 9 to Lauren's question here, whether any of the
 10 shared service invoices are outstanding.
 11 Q. Right.
 12 A. Yes.
 13 Q. And that is because – and that is
 14 because the retail the retail board has asked
 15 for the disclosure of all material obligations
 16 that were owed to HCMLP either then or in the
 17 future; isn't that right?
 18 MS. DANDENEAU: Objection to form.
 19 Q. We can go back down and look.
 20 A. Look, I don't know if that's a
 21 material item, I mean, again, but sure.
 22 Q. Okay. But there were no shared
 23 services outstanding; correct?
 24 MS. DANDENEAU: Objection to form.
 25 A. That is what this email seems to

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 2 indicate.
 3 Q. And you wouldn't have written it if
 4 you didn't believe it to be true at the time;
 5 correct?
 6 A. Correct.
 7 Q. And when you referred to shared
 8 services outstanding, what you meant there was
 9 that neither NexPoint nor HCMFA owed Highland
 10 any money under the shared services agreements
 11 that they had with Highland as of October 6th,
 12 2020; right?
 13 A. I don't know if it is as of October
 14 6, 2020 or if it was from – like through the
 15 financials – through the date of the
 16 financials as of June 30.
 17 Q. Okay. And then you noted that
 18 HCMA – the HCMFA note is a demand note; right?
 19 A. Yes.
 20 Q. And then you referred Ms. Thedford
 21 to Kristin Hendrix for the term of the NexPoint
 22 note. Do I have that right?
 23 A. Yes.
 24 Q. And then you refer to that agreement
 25 that is referenced in the 2018 audited

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 2 actually, it may not even have been me. I say
 3 the attorneys in, you know, a lot of – like I
 4 talked about the team.
 5 It could have been someone on the
 6 team, like, hey, we need to run this down, and
 7 maybe they talked to attorneys again and
 8 relayed that information to me.
 9 So I really don't know if I spoke or
 10 someone else did or – or, I mean, and maybe it
 11 wasn't even from corporate accounting. Maybe
 12 it was, you know, other – I'm kind of
 13 summarizing, you know, again, so I don't really
 14 know – I can't really say for sure. I don't
 15 remember how I came about of this knowledge.
 16 Q. I appreciate your efforts,
 17 Mr. Waterhouse, but I will just tell you that
 18 if I ask a question and you don't know the
 19 answer or you don't recall, I'm happy to accept
 20 that. I don't – I don't want you to
 21 speculate, so I want to be clear about that.
 22 So I appreciate it.
 23 Let me just ask you simply: Do you
 24 know what attorneys – can you identify any of
 25 the attorneys who thought that the bankruptcy

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 2 financials about Highland's agreement not to
 3 make demand upon HCMFA until May 2021; correct?
 4 A. Correct.
 5 Q. And then – and then the next thing
 6 you write is that the attorneys think that BK
 7 doesn't change that, but don't know for sure at
 8 the end of the day.
 9 Do you see that sentence?
 10 A. Yes.
 11 Q. Which attorneys were you referring
 12 to?
 13 A. I don't remember.
 14 Q. Did you have a conversation with
 15 attorneys concerning whether the bankruptcy
 16 would change or alter in any way the agreement
 17 not to make a demand under the HCMFA note?
 18 A. Look, yeah, I mean, I don't
 19 specifically remember, but generally, I mean,
 20 it is in this email. I don't – I don't – I
 21 don't – I don't remember who I talked to or,
 22 you know, was it inside counsel, outside
 23 counsel, but obviously I talked to somebody.
 24 Q. Do you have any recollection –
 25 A. Well, I don't even know if it's –

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 2 process didn't change the agreement?
 3 A. I don't recall.
 4 Q. Okay. Perfect.
 5 And then let's look at the last
 6 sentence. It says, quote: The response should
 7 include, as I covered in the board meeting,
 8 that both entities have the full faith and
 9 backing from Jim Dondero, and to my knowledge
 10 that hasn't changed.
 11 Do you see that?
 12 A. Yes.
 13 Q. Okay. Prior to October 6th, 2020,
 14 had you told the retail board that HCMFA and
 15 NexPoint have the full faith and backing from
 16 Jim Dondero?
 17 A. Yes.
 18 Q. Do you remember in the context in
 19 which you told the retail board that?
 20 A. I mean, generally, yes.
 21 Q. Tell me what you recall.
 22 A. So we were walking through the
 23 financials from the advisors; right? So as I
 24 described to you, you have got HCMFA and NPA.
 25 And these – the financials, you know, show

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2 they have liabilities on them that exceed

3 assets.

4 So the retail board has asked, okay,

5 you know, how – you know, if – if these

6 liabilities come due or they're payable, you

7 know, how does that come about?

8 And, you know, the response is,

9 well, the advisors have the – the full faith

10 and backing from – from Jim Dondero.

11 Q. And how did you know that the

12 advisors had the full faith and backing from

13 Jim Dondero? What was the basis for that

14 statement that you made to the retail board?

15 A. I talked to Jim about it at some

16 point in the past.

17 Q. And did you tell Mr. Dondero that

18 you were going to inform the retail board that

19 the advisors had his full faith and backing

20 before you actually told that to the retail

21 board?

22 A. I don't recall having that

23 conversation.

24 Q. Do you recall if you ever informed

25 Mr. Dondero that you had disclosed or told the

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2 the call?

3 A. Other than the board members?

4 Q. Yes.

5 A. Lauren Thedford. I mean, there

6 are – there are many – my section is just one

7 of many sections that are just – you know, as

8 you can appreciate, this is a long board

9 meeting.

10 I can't recall specifically, really

11 even generally, or who was on when this was

12 discussed. But Lauren was typically on for the

13 entire time.

14 Q. I apologize if I asked you this, but

15 do either of Mr. Norris or Mr. Post hold any

16 positions relative to the retail funds?

17 A. I think you asked me this already,

18 John.

19 Q. Okay. I just don't recall. Can you

20 just refresh my recollection if I did, in fact,

21 ask you the question?

22 A. I don't believe – if we can go

23 back. I don't believe Mr. Norris has a title

24 at the retail funds. Mr. – and Mr. Post is

25 the CCO of the advisor, the advisors.

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2 retail board that the advisors had the full

3 faith and backing of Mr. – Mr. Dondero?

4 MS. DEITSCH-PEREZ: Object to the

5 form.

6 A. I don't recall discussing that with

7 him at the time.

8 Q. When you told this to the board, was

9 Mr. Dondero participating in the discussion?

10 A. Not that I recall.

11 Q. Withdrawn. Was it not – withdrawn.

12 Do you recall whether – when you

13 covered this issue with the board, was that in

14 a – a Zoom call or a Webex call? Was it a

15 telephone call? Was it in-person? Like where

16 were you physically in relation to the board?

17 A. I believe I was at home.

18 Q. Okay. Can you identify every person

19 that you recall who was present for this

20 disclosure other than – other than the board

21 members themselves?

22 MS. DEITSCH-PEREZ: Object to the

23 form.

24 A. I don't recall everyone on the call.

25 Q. Can you identify anybody who was on

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2 Q. Okay. Do you know if either of them

3 have a position with the retail board – with

4 the retail funds?

5 A. I don't believe Mr. Norris has a

6 position with the retail funds.

7 Q. All right. What about Mr. Post?

8 A. Mr. Post is the CCO of the advisors.

9 Q. Okay. Does he hold any position –

10 A. I don't believe so.

11 Q. – with the retail funds?

12 A. I don't believe so.

13 Q. Okay.

14 A. I don't know if being the CCO for

15 the advisor conveys something for the retail

16 funds. Again, I am not – that is the legal

17 compliance part of it. I don't know.

18 Q. Why did you tell the retail board

19 that the advisors have the full faith and

20 backing from Mr. Dondero?

21 MS. DANDENEAU: Objection to form.

22 A. It is – it is – it is what has

23 been discussed with them prior.

24 Q. And were you – were you trying to

25 give them comfort that even though the

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2 liabilities exceeded the assets that the

3 advisors would still be able to meet their

4 obligations as they become due?

5 MS. DANDENEAU: Objection to form.

6 MS. DEITSCH-PEREZ: Object form.

7 A. I – I can't – I don't remember

8 specifically the conversation, but generally –

9 you know, generally, yes. And that is why –

10 but, you know, again, in this email saying, you

11 know, I am sure I qualified it with the retail

12 board, you know, as I said I like – you know,

13 to my knowledge, that hasn't changed. But,

14 again, generally – generally that is what I

15 remember.

16 Q. Okay. Do you recall if in the

17 advisors' response to the retail board's

18 question if the response included any statement

19 concerning Mr. Dondero and – and the full

20 faith and backing that he was giving to the

21 advisors?

22 MS. DEITSCH-PEREZ: Object to the

23 form.

24 A. I don't – I don't remember

25 specifically what was provided.

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1 WATERHOUSE - 10-19-21

2 Q. Okay. And did the liabilities of

3 NexPoint exceed its assets in 2020?

4 MS. DEITSCH-PEREZ: Objection to

5 form.

6 A. I don't believe so.

7 Q. Okay. So – so it was only one of

8 the two advisors who had liabilities that

9 exceeded the value of the assets.

10 Do I have that right?

11 MS. DEITSCH-PEREZ: Objection to

12 form.

13 MS. DANDENEAU: Form.

14 A. Yes.

15 Q. And do you know, ballpark, the

16 amount by which the value of HCMFA's

17 liabilities exceeded their assets in 2020?

18 MS. DANDENEAU: Objection to form.

19 A. I don't – I don't recall.

20 MR. MORRIS: I had specifically

21 requested in discovery the audited

22 financial reports for both advisors and

23 NexPoint. I think I may have gotten one

24 for NexPoint but I'm still waiting for the

25 balance. And I'm going to renew my request

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2 Q. Okay.

3 A. And I don't really – I don't really

4 remember generally either.

5 Q. Okay.

6 MR. MORRIS: So – so, again, I'm

7 just going to ask Mr. Rukavina if your

8 clients can produce as soon as possible the

9 15(c) response, the written response that

10 the advisors made, if any, to the board's

11 Question No. 2.

12 I'm not looking for the whole

13 response, but I certainly want the response

14 to Question No. 2.

15 Q. Do you have a general understanding

16 as to the amount by which – withdrawn.

17 Did – did the assets of –

18 withdrawn.

19 Did the liabilities of HCMFA exceed

20 its assets in 2020?

21 MS. DANDENEAU: Objection to form.

22 MS. DEITSCH-PEREZ: Objection, form.

23 A. I believe I have already answered

24 that question earlier, I think. I believe I

25 said yes.

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2 for those documents too.

3 Q. Let's go to the next exhibit, which

4 is Number 10. So I think it is in your stack,

5 Mr. Waterhouse.

6 MR. MORRIS: And we can take the one

7 down from the screen and put up Number 10

8 for everybody.

9 (Exhibit 10 marked.)

10 Q. And I don't know if you have ever

11 seen this before, but I'm really putting it up

12 on the screen for purposes of turning to the

13 very last page of the document.

14 So this is a document that we have

15 been – that we premarked as Exhibit 10. And

16 we're turning to the last page of the document,

17 which is a document that was filed in the

18 adversary proceeding 21-3004. And – no, I

19 apologize, I think we – right there. Perfect.

20 And it is page 31 of 31.

21 MR. MORRIS: I think there may have

22 been some something erroneously stapled to

23 the hard copy that I gave you folks, but

24 I'm looking for page 31 of 31 in the

25 document that begins with the first page of

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1 WATERHOUSE - 10-19-21
 2 Exhibit 10.
 3 Q. Do you have that, Mr. Waterhouse?
 4 A. I don't have it yet. I'm looking.
 5 Q. All right. If you look at the top
 6 right-hand corner, you will see it says page
 7 hopefully something of 31?
 8 A. Yes, I've got it now.
 9 Q. Okay. You have got 31 of 31. You
 10 can take a moment to read that, if you would
 11 like.
 12 A. (Reviewing document.) Okay.
 13 Q. Have you ever seen this before?
 14 A. I don't know if I have seen this
 15 specific document, but, you know, I've --
 16 I'm -- I'm aware of it.
 17 Q. And is this the document that you
 18 had in mind when you sent that email to
 19 Ms. Thedford that we just looked at where you
 20 said that Highland had agreed not to make a
 21 demand upon HCMFA until May 2021?
 22 A. Honestly, I don't -- it wasn't this
 23 document. I mean, it's something like this,
 24 yes. I mean, yes.
 25 Q. Well --

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1 WATERHOUSE - 10-19-21
 2 A. I don't know.
 3 Q. All right. This document is dated
 4 April 15, 2019. Do you see that?
 5 A. I do.
 6 Q. And do you remember that the audit
 7 was completed on June 3rd, 2019?
 8 A. Yes.
 9 Q. And do you recall that the audited
 10 financials -- and I'm happy to pull them up if
 11 you would like, but do you recall that the
 12 audited financials included a reference to the
 13 agreement pursuant to which Highland agreed not
 14 to make a demand until May 31st, 2021?
 15 A. Yes, I remember.
 16 Q. And as part of the process, would
 17 you have expected the corporate accounting team
 18 to have provided a copy of this document to
 19 PwC?
 20 MS. DANDENEAU: Objection to form.
 21 A. Yes, I would have expected something
 22 like this, or again, you know, some document
 23 that basically states -- states the deferral
 24 till May 31 of 2020.
 25 Q. Okay.

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1 WATERHOUSE - 10-19-21
 2 A. It is something like this, but I
 3 don't think it was this specific document.
 4 Q. Well, but this document does say in
 5 the last sentence that Highland agreed not to
 6 seek -- not to demand payment from HCMFA prior
 7 to May 31, 2021; right?
 8 A. Yes.
 9 Q. And are you aware of any other
 10 document that was ever created pursuant to
 11 which Highland agreed not to demand payment on
 12 amounts owed by HCMFA before May 31, 2021?
 13 A. Hold on. Are you asking, am I aware
 14 of a document that by HCMFA that basically says
 15 otherwise?
 16 Q. No. Let me try again.
 17 Are you aware of any other document
 18 pursuant to which -- pursuant to which Highland
 19 agreed not to make a demand on HCMFA until May
 20 31st, 2021?
 21 A. I'm -- I think there was something
 22 in connection with -- with the -- with the
 23 audit that basically says the same thing.
 24 Q. Okay. And do you think that the
 25 audit is referring to this particular document?

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1 WATERHOUSE - 10-19-21
 2 A. May 31 of 2021, excuse me.
 3 Q. And this document states the
 4 deferral that you just described; correct?
 5 A. It does.
 6 Q. And this document states the
 7 deferral that was described in the audited
 8 financial statements that we looked at before;
 9 correct?
 10 A. It does.
 11 MR. MORRIS: Okay. Can we scroll
 12 down just a little bit to see who signed on
 13 behalf of the acknowledgment there.
 14 Q. Okay. So Mr. Dondero signed this
 15 document on behalf of both HCMFA and Highland;
 16 do you see that?
 17 A. I do.
 18 Q. Okay. Did you discuss this document
 19 or the -- withdrawn.
 20 Did you discuss the concept of the
 21 deferral with Mr. Dondero in the spring of
 22 2019?
 23 A. I think I testified I don't recall.
 24 Q. Okay. Do you know whose idea it was
 25 to issue the acknowledgment in this form?

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2 A. I don't recall.

3 MR. MORRIS: Can we scroll back up

4 to the document, please.

5 Q. Do you see in the beginning it says,

6 reference is made to certain outstanding

7 amounts loaned from Highland to HCMFA for

8 funding ongoing operations.

9 Do you see that?

10 A. Yes.

11 Q. And were you aware as the CFO of

12 Highland and as the treasurer of HCMFA that as

13 of April 15, 2019, Highland had made certain

14 loans to HCMFA to fund HCMFA's ongoing

15 operations?

16 A. Yes.

17 Q. And were you aware that those loans

18 were payable on demand and remained outstanding

19 as of December 31st, 2018?

20 A. Yes.

21 Q. And were you aware that those

22 amounts were payable on demand, and they

23 remained outstanding as of April 15, 2019?

24 MS. DEITSCH-PEREZ: Object to the

25 form.

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2 As the treasurer of HCMFA, did you

3 believe that – do you believe that statement

4 was true and accurate at the time it was

5 rendered?

6 A. I mean, it – it – the answer to

7 that is I really didn't have any – I didn't

8 have an opinion really.

9 Q. Did you do anything to educate

10 yourself in April of 2019 on the issue of

11 whether HCMFA could repay the amounts that it

12 owed to Highland should they become due?

13 A. I don't believe so.

14 Q. Did you at any time form any

15 opinions as to HCMFA's ability to repay all

16 amounts due to Highland should they become due?

17 A. Not really. I guess I don't...

18 Q. Well, you told the retail board that

19 HCMFA's liabilities exceeded their assets in

20 2020; correct?

21 A. Yes.

22 Q. Based on the work that you did to

23 prepare for the retail board, did you form any

24 view as to whether HCMFA would be unable to

25 repay the amounts that it owed to Highland

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1 WATERHOUSE - 10-19-21

2 A. Well, this – this document dated

3 April 15, 2019 says they have been deferred to

4 May 31, 2021.

5 Q. Right. But I'm just sticking to the

6 first paragraph where they refer to the

7 outstanding amounts. And in the end it says

8 the – it remained outstanding on December

9 31st, 2018, and I think you told me that you

10 understood that, and then I'm just trying to

11 capture the last piece of it.

12 Did you understand that there were

13 amounts outstanding from the loan that Highland

14 made to HCMFA to fund ongoing operations as of

15 April 15th, 2019?

16 A. Yes.

17 Q. Thank you. Let's look at the next

18 sentence. HCMFA expects that it may be unable

19 to repay such amounts should they become due

20 for the period commencing today and continuing

21 through May 31st, 2021.

22 Do you see that?

23 MS. DANDENEAU: Objection to form.

24 A. I do.

25 Q. As the CFO – withdrawn.

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1 WATERHOUSE - 10-19-21

2 should they become due?

3 MS. DANDENEAU: Objection to form.

4 A. I mean, I – when you look at that,

5 to answer you, completely, you know, again,

6 if – the response I gave the retail board was,

7 you know, the – the advice – HCMFA advisors

8 have the – have the full faith and backing of

9 Jim Dondero. So I didn't form an opinion of

10 whether the advisor could pay it or not.

11 Q. Did you form any view as to whether

12 the advisors could repay the amounts that it

13 owed to Highland should they become due without

14 the full faith and backing of Mr. Dondero?

15 MS. DANDENEAU: Objection to form.

16 MS. DEITSCH-PEREZ: Form.

17 A. I mean, if you – if you – if you

18 take that last statement out, I mean, it would

19 be difficult for HCMFA to pay back demand notes

20 at that time.

21 Q. And it was precisely for that reason

22 that you told the retail board that – that the

23 retail – that the advisors had the full faith

24 and backing of Mr. Dondero; correct?

25 MS. DANDENEAU: Objection to form.

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1 WATERHOUSE - 10-19-21

2 A. I mean, yes, as the mouthpiece, I

3 was relaying information.

4 Q. Okay. And you relayed that

5 information with the knowledge and approval of

6 Mr. Dondero; correct?

7 MS. DEITSCH-PEREZ: Object to the

8 form.

9 A. As I stated in the email, I don't

10 believe, and I think I testified I don't

11 believe I had conversations with Mr. Dondero at

12 the time of that board meeting.

13 Q. Did you tell the retail board that

14 the advisors had the full faith and backing of

15 Mr. Dondero without Mr. Dondero's prior

16 approval?

17 A. Yeah, I – I – yes, I'm – like I

18 said, I think I testified earlier, I'm sure I

19 qualified it as well.

20 Q. What do you mean by that?

21 MS. DANDENEAU: Objection to form.

22 A. Again – again, like I said in the

23 email, it has the full faith and backing of Jim

24 Dondero unless that has changed.

25 Q. Actually that is not what you said,

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1 WATERHOUSE - 10-19-21

2 something has changed – to my knowledge, it

3 hasn't changed, but it could have changed.

4 Q. When you say that the advisors have

5 the full faith and backing from Mr. Dondero,

6 did you intend to convey that, to the extent

7 the advisors were unable to satisfy their

8 obligations as they become due, Mr. Dondero

9 would do it for them?

10 MS. DANDENEAU: Object to the form.

11 MS. DEITSCH-PEREZ: Object to the

12 form.

13 And, John, we have given you a lot

14 of leeway here but this does not seem

15 relevant to this case. You seem sort of

16 taking a complete sort of diversion into

17 the allegations and the complaint just

18 filed on Friday, and so I would ask you to

19 move on because –

20 MR. MORRIS: And I will tell you –

21 I will tell you that I have never read that

22 complaint cover-to-cover. I have nothing

23 to do with the prosecution of those claims.

24 And this issue that we're talking about

25 right now is related solely to the

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2 so let's put the email back up.

3 A. It is – it is – it is in the

4 email.

5 Q. Let's put the email back up. You

6 didn't say unless it has changed. You said you

7 believe it hasn't changed; right?

8 A. Okay. And to my knowledge that

9 hasn't changed, that is what it says.

10 Q. That's right.

11 A. But, again, I mean, that is – I

12 don't know everything. And I'm not in every

13 conversation. I'm not – to presume that I am,

14 is – and you have to put myself – as you

15 started this out, Mr. Morris, I was at home in

16 October of 2020 with COVID – or, you know,

17 under these COVID times that we described is

18 very difficult.

19 We have all been working at home for

20 really the first time ever, undergoing

21 processes, procedures, control environments

22 that have been untested, and there is poor

23 communication.

24 So I am relaying, as I'm telling you

25 now, what is in the email. And unless

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2 promissory notes that your clients refuse

3 to pay.

4 So I'm going to continue to ask my

5 questions, and I would ask the court

6 reporter to read back my last question.

7 (Record read.)

8 MS. DEITSCH-PEREZ: And then I

9 believe there were objections to form.

10 Q. You can answer the question.

11 A. Yes.

12 Q. Thank you very much, sir.

13 MR. MORRIS: Can we go back to the

14 other document, please?

15 Q. Mr. Waterhouse, do you know if this

16 document was ever shared with the retail board?

17 A. I don't recall.

18 Q. Did you ever share it with the

19 retail board?

20 A. I don't recall.

21 Q. Did you ever tell the retail board

22 about the substance of this document?

23 A. I don't recall.

24 Q. Did you ever tell the retail board

25 that Highland had agreed not to make a demand

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1 WATERHOUSE - 10-19-21
 2 against HCMFA until May 2021?
 3 A. I don't recall.
 4 Q. Do you know whether anybody on
 5 behalf of the advisors ever informed the retail
 6 board that Highland had agreed on April 15,
 7 2019, not to make a demand against HCMFA under
 8 the promissory notes?
 9 A. I don't recall.
 10 Q. Did you instruct Ms. Thedford or
 11 anybody else responding to the retail board's
 12 15(c) inquiry to disclose this document?
 13 A. Did I instruct Ms. Thedford or
 14 anyone else to -- to -- to produce this, to
 15 disclose this document? Is that what you -- I
 16 just want to make sure.
 17 Q. Uh-huh.
 18 A. Yeah, I don't -- I don't recall.
 19 Q. Did you instruct anybody to inform
 20 the retail board, in response to their question
 21 as part of the 15(c) process, to -- to tell the
 22 retail board about Highland's agreement not to
 23 make a demand until 2021?
 24 MS. DANDENEAU: Objection to form.
 25 A. I don't recall.

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1 WATERHOUSE - 10-19-21
 2 A. Yes.
 3 Q. Do you recall looking in the
 4 document and seeing anything that was disclosed
 5 with respect to the sentence above that?
 6 A. No.
 7 Q. Do you know whether anybody on
 8 behalf of Highland ever informed
 9 PricewaterhouseCoopers that HCMFA expects that
 10 it may be unable to repay amounts due and owing
 11 to Highland should they become due?
 12 MS. DEITSCH-PEREZ: Object to the
 13 form. I think that is the third time.
 14 A. I don't recall. Again, as I said,
 15 we -- all of this was given to the auditors.
 16 Q. Do you know if Highland received
 17 anything of value in exchange for its agreement
 18 not to demand payment on amounts owed by HCMFA
 19 prior to May 31st, 2021?
 20 MS. DEITSCH-PEREZ: Object to the
 21 form. That is the second time.
 22 MS. DANDENEAU: Object to the form.
 23 A. I have answered this question.
 24 MR. RUKAVINA: Hold on. Object to
 25 legal conclusion. Go ahead.

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1 WATERHOUSE - 10-19-21
 2 Q. Did you ever inform PwC that HCMFA's
 3 liabilities exceeded its assets?
 4 MS. DANDENEAU: Object to the form.
 5 A. I don't -- I don't think I told
 6 them. I mean, they -- they audited the
 7 financial statements.
 8 Q. Did -- do you know if anybody on
 9 behalf of Highland ever informed
 10 PricewaterhouseCoopers that HCMFA may be unable
 11 to repay amounts owing to Highland, should they
 12 become due?
 13 MS. DANDENEAU: Objection to form.
 14 A. Yes. Again, I think I testified
 15 earlier that -- that this was communicated to
 16 the auditors.
 17 Q. Ideally --
 18 A. I don't know who exactly did that.
 19 I don't recall doing it, but, yeah, it was --
 20 it was communicated. And that is why -- I
 21 mean, there is a disclosure in the financial
 22 statements; right?
 23 Q. There is, and that disclosure
 24 relates to the last sentence of this document;
 25 correct?

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1 WATERHOUSE - 10-19-21
 2 A. I have answered this question
 3 before.
 4 Q. And the answer was no?
 5 A. I'm not aware.
 6 Q. Now, this acknowledgment can't
 7 possibly apply to the two notes that you signed
 8 on behalf of HCMFA because those notes were
 9 signed on May 2nd and May 3rd, 2019; is that
 10 right?
 11 MS. DANDENEAU: Objection to form.
 12 A. Unless there is a drafting error.
 13 Q. Okay. Are you aware of a drafting
 14 error?
 15 A. I'm not aware. I didn't -- I wasn't
 16 part of -- I didn't sign this note or this
 17 acknowledgment. I didn't draft it.
 18 Q. But you do see it is dated April 15,
 19 2019; right?
 20 A. Yes.
 21 Q. And this was a document that was
 22 actually included by the advisors in a pleading
 23 they filed with the Court; right?
 24 MR. RUKAVINA: Well, I don't know
 25 that so I object to form.

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2 Q. Okay. Let's go to the first page of

3 the document and just confirm that.

4 MR. AIGEN: Mr. Morris, I just note

5 that you already said there was some error

6 with the document that is listed as

7 exhibit –

8 MR. MORRIS: No. No, no, no.

9 MS. DEITSCH-PEREZ: Oh, okay.

10 MR. MORRIS: What I said is that

11 there is a few pages that were mistakenly

12 stapled to the end of the document.

13 MS. DEITSCH-PEREZ: Okay.

14 MR. MORRIS: There is no problem

15 with this document.

16 MS. DEITSCH-PEREZ: And just so

17 we're clear that the document – the pages

18 that start with defendant's amended answer

19 are not intended to be part of this

20 document?

21 MR. MORRIS: That's correct.

22 MS. DEITSCH-PEREZ: And that the –

23 but it is your representation that the rest

24 of the document is – is – is correct

25 because we don't – we don't have any way

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2 MS. DANDENEAU: I'm sorry, John, did

3 you say Exhibit 2 or Exhibit 1?

4 MR. MORRIS: It is Exhibit 2 in the

5 binders so it is premarked Exhibit 2. And

6 now I'm asking – right there – going to

7 Exhibit 1 to the document that was marked

8 as Exhibit 2.

9 MS. DANDENEAU: Got it. In the

10 binder there is no –

11 MS. DEITSCH-PEREZ: There is no

12 Exhibit 1.

13 MR. MORRIS: All right. So look at

14 the one on the screen.

15 Q. Do you see, Mr. Waterhouse, that

16 this is a promissory note dated May 31st, 2017,

17 in the approximate amount of \$30.7 million?

18 A. Yes.

19 Q. And do you see that the maker of the

20 note is NexPoint?

21 A. Yes.

22 Q. And that Highland is the payee; is

23 that right?

24 A. Yes.

25 Q. Okay. And do you see in Paragraph 2

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2 of verifying that, we're just –

3 MR. MORRIS: You do, actually. You

4 could just go to Docket No. 21-3004.

5 MS. DEITSCH-PEREZ: If you want to

6 stop this deposition so we can go and pull

7 that document up, we're happy to do it. So

8 I am just asking you for your

9 representation.

10 MR. MORRIS: Sure. I gave that.

11 MS. DEITSCH-PEREZ: Okay.

12 Q. So do you see that this is a

13 document that was actually filed with the Court

14 by Highland Capital Management Fund Advisors?

15 A. No. I get with the first page in

16 the section. Maybe I'm looking at the wrong

17 thing. It says, Highland Capital Management.

18 Q. Don't worry about it. Don't worry

19 about it.

20 A. Maybe I went back – okay.

21 MR. MORRIS: All right. Can we put

22 up on the screen Exhibit 2.

23 (Exhibit 2 marked.)

24 MR. MORRIS: I think it is

25 Exhibit 1.

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2 this is an annual installment note?

3 A. Can you scroll down.

4 Q. Sure.

5 MR. MORRIS: Can we scroll down –

6 yeah, there you go.

7 A. Right there, yeah. Yes.

8 MR. MORRIS: And can we scroll down

9 to the signature line.

10 Q. And do you recognize that as

11 Mr. Dondero's signature?

12 A. Yes.

13 Q. And is this the promissory note that

14 we talked about earlier where NexPoint had made

15 certain payments in the aggregate amount of

16 about 6 to \$7 million against principal and

17 interest?

18 A. I don't recall discussing the

19 aggregate principal amounts of 6 to \$7 million,

20 but – so I don't – I don't recall that prior

21 discussion with those amounts.

22 Q. All right. Let's take a look.

23 NexPoint always included this promissory note

24 as a liability on its audited financial

25 statements; right?

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2 A. Yes.

3 Q. And NexPoint had its financial

4 statements audited; isn't that correct?

5 A. Yes.

6 Q. And was the process of NexPoint's

7 audit similar to the process you described

8 earlier for Highland and HCMFA?

9 A. Yes, it is similar.

10 Q. Okay.

11 MR. MORRIS: Can we put up

12 NexPoint's audited financials and let

13 everybody know what exhibit number it is,

14 La Asia?

15 MS. CANTY: It is going to be

16 Exhibit 46.

17 (Exhibit 46 marked.)

18 Q. And do you see, sir, that we've put

19 up NexPoint Advisors' consolidated financial

20 statements and supplemental information for the

21 period ending December 31st, 2019?

22 A. Yes.

23 Q. Did you participate in the process

24 whereby these audited financial statements were

25 issued?

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2 balance sheet on page 3? Okay. Stop right

3 there.

4 Q. Do you see under the liabilities

5 section, the last item is note payable to

6 affiliate?

7 A. Yes.

8 Q. And is that the note that we just

9 looked at?

10 MS. DANDENEAU: Objection to form.

11 Q. Withdrawn.

12 Is that the approximately

13 \$30 million note that we just looked at that

14 was dated from 2017?

15 MS. DANDENEAU: Objection to form.

16 A. I believe no.

17 Q. Okay. You're not aware of any other

18 note that was outstanding from NexPoint to

19 Highland as of the end of the year 2019, other

20 than that one \$30 million note; right?

21 A. I don't recall.

22 Q. And as of the end of 2019, the

23 principal amount that was due on the note was

24 approximately \$23 million; right?

25 MS. DEITSCH-PEREZ: Object to the

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2 A. I didn't participate directly, as

3 I've described before, about the -- the team

4 performing the audit.

5 Q. Do you recall when the audit of

6 NexPoint's financial statements for the period

7 ending December 31st, 2019 was completed?

8 A. Yes.

9 Q. And when do you recall it being

10 completed?

11 A. In January of 2021.

12 Q. Do you know why the 2019 audit

13 report wasn't completed until January of 2021?

14 A. Yes.

15 Q. Why was the NexPoint audit report

16 for the period ending 12/31/19 not completed

17 until January 2021?

18 A. Because we had to deal with working

19 from home from -- with COVID, and on top of all

20 of our daily responsibilities and job duties

21 at -- at providing -- at Highland providing

22 services to NexPoint, we had to do all of this

23 extra work for a bankruptcy that was filed in

24 October of 2019.

25 MR. MORRIS: Can we go to the

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2 form.

3 A. Approximately.

4 Q. And does that refresh your

5 recollection that between the time the note was

6 executed and the end of 2019, that NexPoint had

7 paid down approximately \$7 million?

8 A. Yes. If we are just doing the math,

9 yes.

10 Q. Okay. Did NexPoint complete its

11 audit from 2020?

12 A. Sorry, you kind of broke up. Do

13 NexPoint complete?

14 Q. The audit of its financial

15 statements for the period ending December 31st,

16 2020?

17 A. No.

18 Q. No, it's not complete?

19 A. No, it is not complete.

20 Q. Did HCMFA complete its audit for the

21 year ending December 31st, 2020?

22 A. No.

23 MR. MORRIS: Can we go to page 15,

24 please, the paragraph at the bottom.

25 Q. Do you see that NexPoint has

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 2 included under notes payable to Highland a
 3 reference to the amounts that were outstanding
 4 as of the year-end 2019 under the note that we
 5 looked at just a moment ago?
 6 A. Yes. Are you talking about the
 7 second paragraph?
 8 Q. I'm actually talking about first
 9 paragraph. Do you understand that the first
 10 paragraph is a reference to the 2017 note, and
 11 the amounts that were – the principal amount
 12 that was outstanding as of the end of 2019?
 13 MS. DANDENEAU: Objection to form.
 14 John, do you mean the first paragraph of
 15 that page?
 16 MR. MORRIS: No, the first paragraph
 17 under notes payable to Highland.
 18 A. Yeah, I see the paragraph, and
 19 again, this is what I answered earlier. I
 20 believe so, just because I don't – again, this
 21 is a number in a balance sheet, and without
 22 matching it up and seeing the detail with the
 23 schedule like I kind of talked about for
 24 Highland's financial statements, it is a little
 25 bit more difficult to tie everything in

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 2 \$30 million 2017 note that we looked at a
 3 moment ago?
 4 A. Well, we're at the bottom of the
 5 page. Is there anything on page 16?
 6 Q. That is a fair question, sure. That
 7 is it.
 8 A. Okay. So it appears that that is
 9 the only note that is detailed in the notes in
 10 the financial statement.
 11 Q. And you don't have any memory of any
 12 other note other than the 2017 note, right,
 13 being outstanding as of the end of the year?
 14 A. I deal with thousands of
 15 transactions every year. I don't really have a
 16 very specific memory for what exactly was
 17 outstanding.
 18 MR. MORRIS: Why don't we take a
 19 break now. We've been going for a little
 20 while. It's 3:26. Let's come back at
 21 3:40.
 22 VIDEOGRAPHER: We're going off the
 23 record at 3:26 p.m.
 24 (Recess taken 3:26 p.m. to 3:39 p.m.)
 25 VIDEOGRAPHER: We are going back on

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 2 perfectly together.
 3 Q. Okay. But you're not aware of any
 4 note that was outstanding at the end of 2019
 5 from NexPoint to Highland other than whatever
 6 principal was still due and owing under the
 7 \$30 million note issued in 2017; correct?
 8 A. Well, it – I don't – there is
 9 reference in the second paragraph. I don't –
 10 I don't – I don't recall what that is
 11 referring to, so I don't – I don't know.
 12 Q. Well, if you listen carefully to my
 13 question, right, I'm asking about notes that
 14 were outstanding at the end of 2019, and if we
 15 look at the paragraph you just referred to, it
 16 says that during the year there were new notes
 17 issued totaling \$1.5 million, but by the end of
 18 the year, no principal or interest was
 19 outstanding on the notes.
 20 Do you see that?
 21 A. Oh, I do, yes.
 22 Q. So does that refresh your
 23 recollection that there were no notes
 24 outstanding from NexPoint to Highland other
 25 than the principal remaining under the original

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 2 the record at 3:39 p.m.
 3 Q. All right. Mr. Waterhouse, we – I
 4 don't think we have a lot more here.
 5 To the best of your knowledge and
 6 recollection, were all affiliate loans and all
 7 loans made to Mr. Dondero recorded on
 8 Highland's books and records as assets of
 9 Highland?
 10 MS. DANDENEAU: Object to the form,
 11 asked and answered.
 12 A. To my knowledge, yes.
 13 Q. Okay. Can you recall any loan to
 14 any affiliate or Mr. Dondero that was not
 15 recorded on Highland's books and records as an
 16 asset?
 17 A. Like during my time as CFO? I don't
 18 recall.
 19 Q. How about after the time that you
 20 were CFO? Did you recall that there was a loan
 21 by Highland to an affiliate or to Mr. Dondero
 22 that hadn't been previously recorded on
 23 Highland's books as an asset?
 24 MS. DANDENEAU: Objection to form.
 25 A. I guess I don't understand the

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 2 question. I left Highland as of – I'm not
 3 aware of – I left Highland in February –
 4 probably the last day of February of 2021.
 5 Q. Okay.
 6 A. I'm not – I'm not aware of any –
 7 I'm not aware of anything past that date.
 8 Q. Okay. While you were the CFO at
 9 Highland, did Highland prepare in the ordinary
 10 course of business a document that reported
 11 operating results on a monthly basis?
 12 A. Yes.
 13 Q. And are you generally familiar with
 14 the monthly operating reports?
 15 A. Yeah. You are referring to the
 16 reports that we filed to the Court every month?
 17 Q. I apologize, I'm not. I'm taking
 18 you back to the pre-petition period. There was
 19 a report that I have seen that I'm going to
 20 show you, but I'm just asking for your
 21 knowledge.
 22 MR. MORRIS: Let's put it up on the
 23 screen, Exhibit 39.
 24 (Exhibit 39 marked.)
 25 Q. Do you see this is a document that

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 2 Q. Okay. Do you see that this one
 3 is – is dated February 2018?
 4 A. Yes.
 5 Q. Do you have – do you believe –
 6 have you ever seen a document that was
 7 purporting to report operating results for
 8 Highland?
 9 MS. DANDENEAU: Objection to form.
 10 A. Yes.
 11 Q. Okay. And when you say that you
 12 don't believe it was produced on a monthly
 13 basis, was it produced on any periodic bases to
 14 the best of your recollection?
 15 A. I believe it was – it was prepared
 16 on an annual basis.
 17 Q. Okay.
 18 MR. MORRIS: Can we look at the next
 19 page.
 20 Q. Do you see that there is a statement
 21 here called: Significant items impacting
 22 HCMLP's balance sheet?
 23 And it is dated February 2018.
 24 A. Yes.
 25 Q. Do you recall that there was a

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 2 is called operating results?
 3 A. Yeah, that's the title of it.
 4 Q. Okay. And was a report of operating
 5 results prepared by Highland on a monthly basis
 6 during the time that you served as CFO?
 7 A. No.
 8 Q. Are you familiar with a document of
 9 this type? And we can certainly look at the
 10 next page or two to refresh your recollection.
 11 A. I'm just looking at the title. I
 12 don't really – again, as I discussed before, I
 13 don't have any records or documents or emails
 14 or appointments or anything that I was able to
 15 use prior to – prior to this deposition, so
 16 I'm doing the best I can.
 17 Q. Okay. You don't need to apologize.
 18 I'm just asking you if you are familiar with
 19 the document called Operating Results that was
 20 prepared on a monthly basis at Highland?
 21 MS. DEITSCH-PEREZ: Object to the
 22 form.
 23 Q. If you're not, you're not.
 24 A. I don't believe this was prepared on
 25 a monthly basis.

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 2 report that Highland prepared that identified
 3 significant items impacting the balance sheet?
 4 A. A report that was prepared.
 5 Q. Let me ask a better question: Did
 6 Highland prepare reports to the best of your
 7 recollection that identified significant items
 8 that impacted its balance sheet?
 9 A. Well, so Highland prepared a – a
 10 monthly close package. And maybe I'm
 11 getting – and – and maybe change names at one
 12 time or maybe I'm just – again, just
 13 misremembering – but in that, yes, there is a
 14 page that would detail just changes in – you
 15 know, just changes month over month on the
 16 balance sheet.
 17 Q. Okay. And maybe it is my fault.
 18 Maybe I didn't know the proper name for it.
 19 But let's use the phrase "monthly close
 20 package."
 21 Did Highland prepare a monthly close
 22 package in the ordinary course of business
 23 during the time that you served as CFO?
 24 MS. DANDENEAU: Objection to form.
 25 A. Yes.

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2 Q. And did the monthly close package

3 that Highland prepared include information

4 concerning significant items that impacted

5 Highland's balance sheet?

6 A. Yes, it had a page like that is –

7 that is on the screen that detailed items

8 like – of that nature.

9 Q. And do you know who – was there

10 anybody at Highland who was responsible for

11 overseeing the preparation of the monthly

12 reporting package?

13 A. That would have been – again, it

14 varies over time during my tenure as CFO.

15 It – it varied over – over time, but – but

16 typically a – a corporate accounting manager.

17 Q. And who were the corporate

18 accounting managers during your tenure as CFO?

19 A. It would have been Dave Klos and

20 Kristin Hendrix.

21 Q. And did the corporate accounting

22 manager deliver to you drafts of the monthly

23 close package before it was finalized?

24 A. Sometimes.

25 Q. Was that the practice even if there

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2 A. And, quite frankly, I don't even

3 know if these were – these were sent to me

4 even in any capacity.

5 Q. What was the purpose of preparing

6 the monthly reporting package – withdrawn.

7 What was the purpose of preparing

8 the monthly close package?

9 MS. DEITSCH-PEREZ: Object to the

10 form.

11 A. The – the original purpose was so

12 that it would just – it would be a report that

13 was reviewed monthly with senior management.

14 Q. Who was included in the idea of

15 senior management?

16 A. You know, I think originally when

17 this was conceived that would have been like

18 Jim Dondero and Mark Okada.

19 Q. Were monthly reporting – withdrawn.

20 Were monthly close packages prepared

21 to the best of your knowledge until the time

22 you left Highland?

23 A. To my knowledge – I don't know,

24 actually. I mean, to my knowledge, I believe

25 it was being – that was still being done. I

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2 were exceptions to the practice?

3 A. The practice meaning that they

4 sometimes lured them to me?

5 Q. That that was the expectation even

6 if circumstances prevented that from happening

7 from time to time.

8 MS. DEITSCH-PEREZ: Object to the

9 form.

10 A. I – I would say it started out that

11 way but over the years it – it was not

12 enforced.

13 Q. Okay. So you were – you reviewed

14 and approved monthly – monthly reporting

15 packages for a certain period of time and then

16 over time you stopped doing that.

17 Do I have that right?

18 MS. DANDENEAU: Objection to form.

19 A. Yes, I mean, if you're talking about

20 a formal meeting where we sit down and go

21 through and approve it. I would say that was

22 standard practice a decade – you know, early

23 on. And as time went on that – that – that

24 practice wasn't followed.

25 Q. Okay.

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2 don't know because, again, I wasn't reviewing

3 them. I hadn't reviewed a close package for –

4 for a long time. But I believe the standard

5 practice that was still being carried out.

6 Q. Did you ever have any discussions

7 with the debtor's independent board concerning

8 any promissory notes that were issued by any of

9 the affiliates or Mr. Dondero?

10 A. I can't – I can't – I can't recall

11 specifically.

12 Q. Did you speak with the independent

13 board from time to time?

14 A. Yes, from – from – from time to

15 time I had discussions with the independent

16 board members, you know, either – either, you

17 know, by themselves or wholly, you know, as –

18 as a – as a combined work.

19 Q. Okay. Before we talk about

20 Mr. Seery, do you recall ever having a

21 conversation with Mr. Nelms or Mr. Dubel

22 concerning any promissory note that was

23 rendered by one of the affiliates or

24 Mr. Dondero to Highland?

25 A. I don't recall any conversations

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2 specifically.

3 Q. Do you know if the topic was ever

4 discussed, even if you don't remember it

5 specifically?

6 MS. DANDENEAU: Objection to form.

7 A. It -- it -- it may have. I don't

8 know. I don't recall.

9 Q. Do you recall ever discussing any

10 promissory note issued by any of the affiliates

11 or Mr. Dondero with James Seery?

12 A. I don't -- I don't recall

13 specifically.

14 Q. Do you recall generally ever

15 discussing the topic of promissory notes issued

16 by any of the affiliates or Mr. Dondero to

17 Highland with Mr. Seery?

18 A. Nothing -- nothing is really jumping

19 out at me.

20 Q. Do you recall if you ever told

21 Mr. Seery that any of the affiliates or

22 Mr. Dondero didn't have an obligation to pay

23 all amounts due and owing under their notes?

24 A. I don't recall having that

25 conversation.

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2 anything that -- that said I have concerns over

3 these notes?

4 Q. No. Let me try again. Maybe it was

5 my question.

6 Did you ever give Mr. Seery any

7 information concerning any of the notes that

8 were issued by any of the affiliates or

9 Mr. Dondero?

10 MS. DANDENEAU: Objection to form.

11 A. I don't recall if I did or not. I

12 don't -- I don't remember. I mean, you have my

13 emails. You may have asked. Again, I don't --

14 I don't know.

15 MR. MORRIS: Can we put up the

16 document that has been premarked as Exhibit

17 39?

18 MS. DANDENEAU: John, that is this

19 document, isn't it?

20 MR. MORRIS: Oh, yeah, it might be,

21 as a matter of fact. Let's go to Number

22 40.

23 (Exhibit 40 marked.)

24 Q. During the bankruptcy,

25 Mr. Waterhouse, did you prepare documents that

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2 Q. Did you ever tell Mr. Seery that you

3 had any reason to believe that the amounts

4 reflected in the notes issued by the affiliates

5 and Mr. Dondero were invalid for any reason?

6 A. I don't -- I don't recall.

7 Q. Did you tell Mr. Dondero -- did you

8 tell Mr. Seery that you thought the promissory

9 notes issued by the advisors and Mr. Dondero

10 that were outstanding as of the petition date

11 were assets of the estate?

12 A. I don't recall having a specific

13 conversation about those -- you know, those

14 notes outstanding as -- as of the petition date

15 being assets on the estate. I mean, we put

16 together -- you know, they're in the books and

17 records of the financial statements. I don't

18 recall having a specific conversation.

19 Q. Did you ever prepare any documents

20 that were delivered to Mr. Seery that concerned

21 the promissory notes issued by any of the

22 affiliates or Mr. Dondero?

23 MS. DANDENEAU: Objection to form.

24 A. Did I produce any that concerned --

25 you mean did I just -- did I give Mr. Seery

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2 were filed with the bankruptcy court?

3 A. I didn't -- I didn't prepare them

4 personally.

5 Q. Did people prepare them under your

6 direction?

7 A. Yes. There were members of the team

8 that prepared them, and they worked in -- you

9 know, there were members of DSI that were

10 involved in the process as well.

11 Q. To the best of your knowledge, did

12 DSI rely on the employees of Highland for the

13 information that they used to prepare the

14 bankruptcy filings?

15 A. Yes. The books and records were

16 with the Highland personnel.

17 Q. Okay. And do you see on the screen

18 here, there is a document that we have marked

19 as Exhibit 40 that is -- that is titled Summary

20 of Assets and Liabilities?

21 A. Uh-huh.

22 Q. Okay. And do you recall reviewing

23 any summary of assets and liabilities before it

24 was filed with the bankruptcy court?

25 A. Yes, I recall reviewing this at a

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1 WATERHOUSE - 10-19-21
 2 high level.
 3 Q. And did you believe that it was
 4 accurate at the time it was filed?
 5 A. I didn't have any other reason to
 6 believe otherwise.
 7 Q. Okay. Do you see that the total
 8 value of all properties listed in Part 1 is
 9 approximately \$410 million?
 10 MS. DEITSCH-PEREZ: Objection to
 11 form.
 12 A. Yes, it is in 1c.
 13 Q. Yes.
 14 A. Yes, I see that.
 15 Q. Okay. If we go to the second page,
 16 now I think I may just have excerpts here, just
 17 so everybody is clear, but if we scroll down to
 18 the second page, you will see that there is
 19 a -- a little further. There you go. You will
 20 see there is a reference to Item 71, notes
 21 receivable.
 22 Do you see that?
 23 A. I do.
 24 Q. And that was a reference to the
 25 notes receivable from the affiliates and

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 2 Q. Okay.
 3 A. You know, but as of the time of this
 4 filing, that is what was put in this filing,
 5 right, but, you know, I mean, numbers --
 6 numbers change, facts and circumstances change.
 7 Q. But as the CFO of Highland, the
 8 debtor in bankruptcy, did you believe that this
 9 number accurately reflected the total amount
 10 due under the notes receivable?
 11 A. That is what we had in our books and
 12 records.
 13 Q. Okay. And did you believe as the
 14 CFO that the books and records accurately
 15 reported the then value of the debtor's assets?
 16 MS. DANDENEAU: Objection to form.
 17 A. We didn't -- as part of this filing,
 18 there was no fair value measurement or
 19 anything. These were just accounting entries
 20 for the promissory notes. There is no analysis
 21 for impairment or fair market value adjustments
 22 or anything of that nature. This is purely
 23 taking numbers and putting them in our form.
 24 Q. Did you do any impairment analysis
 25 at any time while you were employed by

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 2 Mr. Dondero, among others; is that right?
 3 MS. DANDENEAU: Objection to form.
 4 A. Yes. The affiliate notes and the
 5 Dondero notes were in this amount, but they
 6 weren't -- again, like you said, and among
 7 others.
 8 Q. Okay. We will look at the
 9 specificity because I'm not playing gaming
 10 here, but do you know if the \$150 million of
 11 notes receivable was included within the
 12 \$410 million of total value of the debtor's
 13 assets?
 14 MS. DANDENEAU: Objection to form.
 15 A. I -- I -- I believe so.
 16 Q. Right. And so is it fair to say
 17 that as of the date this document was prepared,
 18 the notes receivable were more than one-third
 19 of the value of the debtor's assets?
 20 MS. DEITSCH-PEREZ: Object to the
 21 form.
 22 MS. DANDENEAU: Object to the form.
 23 A. Again, if you are just taking the
 24 math, 150 divided by whatever the \$400 million
 25 number is above, then yes, you get there.

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 2 Highland?
 3 A. Yes, we did do impairment analysis
 4 on -- on assets.
 5 Q. Okay. Did you ever do an impairment
 6 analysis on any of the promissory notes that
 7 were given to Highland by any of the affiliates
 8 or Mr. Dondero?
 9 A. Not that I recall.
 10 Q. Under what circumstances do you
 11 prepare impairment analyses?
 12 A. As -- as -- if you're preparing
 13 financials in accordance with GAAP, generally
 14 accepted accounting principles, if you're
 15 preparing full GAAP financials, you should be
 16 preparing -- you should be undergoing on a
 17 periodic basis any fair market value
 18 adjustments to assets.
 19 As I was instructed at the time of
 20 the petition date, we weren't producing GAAP
 21 financials. So this wasn't something I was
 22 worried about nor concerned about.
 23 Q. Okay. Were NexPoint and HCMFA and
 24 Highland's audited financial statements
 25 prepared in accordance with GAAP?

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2 A. The audited financials – yes,

3 audited financial statements are prepared in

4 accordance with GAAP.

5 Q. Do you recall whether any of

6 Highland or HCMFA or NexPoint ever made a fair

7 market value adjustment to any of the notes

8 issued by any of the affiliates or Mr. Dondero

9 to Highland?

10 A. I do not recall that happening, but

11 the – it is because under – under GAAP,

12 the – the treatment of liabilities is

13 different than assets.

14 Q. Okay. So then let's just focus on

15 Highland's audited financial statements.

16 The last audited financial

17 statements were for the period ending December

18 31st, 2018; correct?

19 A. That is my understanding.

20 Q. And you had – you had an obligation

21 to disclose anything to PricewaterhouseCoopers

22 concerning any subsequent events between the

23 end of 2018 and June 3rd, 2019; correct?

24 MS. DANDENEAU: Objection to form.

25 MS. DEITSCH-PEREZ: Form.

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2 Q. Okay. So now let's look at that

3 schedule. So this was the face amount of all

4 of the promissory notes that Highland held at

5 the time this document was filed with the

6 bankruptcy court; right?

7 A. Yes.

8 Q. There is a footnote there that says,

9 doubtful or uncollectible accounts are

10 evaluated at year-end.

11 Do you see that?

12 A. I do.

13 Q. Okay. And is it fair to say that as

14 of the year-end 2018, the year before this,

15 that to the extent any of these notes were

16 outstanding at that time, they weren't deemed

17 to be doubtful or uncollectible?

18 A. Yeah. For the 2018 audit, there

19 weren't any – there weren't any adjustments to

20 fair value.

21 Q. Okay. And during the bankruptcy, do

22 you recall that Highland subsequently reserved

23 for the Hunter Mountain Investment Trust note?

24 A. Yes.

25 Q. Why did Highland – were you

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2 A. Correct.

3 Q. Okay. To the best of your

4 knowledge, as Highland's CFO, did Highland ever

5 make any fair market value adjustments to any

6 of the promissory notes that were carried on

7 its balance sheet and that were issued by any

8 of the affiliates or Mr. Dondero?

9 A. I think I answered that question

10 earlier. I don't recall doing that for any of

11 the – those – those notes. So it would have

12 included the audit for the – for the 2018

13 period.

14 Q. Okay.

15 MR. MORRIS: Can we go to the next

16 page.

17 Q. Do you see this is a note a list of

18 notes receivable? Do you see that?

19 A. Yes, I do.

20 Q. And do you see that this ties into

21 the page that we were just looking?

22 A. I'm sorry, can we go back to the

23 prior page? I mean, it was at 150,331,222. It

24 was on the prior page. Next page. Yes, it

25 agrees.

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2 involved in the decision to reserve the Hunter

3 Mountain Investment Trust note?

4 A. I was not.

5 Q. Do you know why Highland decided to

6 reserve for the Hunter Mountain Investment

7 Trust note?

8 A. I don't know yet decision was made.

9 I believe it was made by someone at DSI.

10 Q. Okay. I'm just asking if you know

11 why.

12 Did you ever ask anyone why they

13 reserved for that particular note?

14 A. I don't recall.

15 Q. Do you know whether the debtor

16 reserved for any other note on this list during

17 the bankruptcy?

18 A. Again, I don't recall. I wasn't

19 part of any process of – again, like any fair

20 value adjustments or anything to that degree.

21 Like I said, a lot of that was done by DSI and

22 it was kind of out of our court.

23 Q. Okay. Do you know if any note

24 receivable on this list was ever deemed by the

25 debtor to be doubtful or uncollectible?

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2 A. I don't – I don't have a

3 recollection of every filing, so I don't know.

4 Q. Did you ever have a discussion with

5 anybody at any time about whether any of the

6 notes receivable on this list should be deemed

7 to be doubtful or uncollectible?

8 A. No. As I previously stated, we were

9 told we didn't have to keep GAAP financials.

10 We weren't having – you know, there is no

11 underlying audits being performed, so I mean,

12 it wasn't something I worried about.

13 MR. MORRIS: I move to strike.

14 Q. Did you ever have a conversation

15 with anybody about any of the notes receivable

16 and whether they should be deemed to be

17 doubtful or uncollectible? Did you have the

18 conversation, yes or no?

19 MS. DANDENEAU: Objection to form.

20 A. I don't recall.

21 Q. Do you recall ever telling anybody

22 that you believed any of the notes receivable

23 on this list should be doubtful – should be

24 deemed to be doubtful or uncollectible?

25 MS. DANDENEAU: Objection to form.

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2 MS. DEITSCH-PEREZ: This is like the

3 fifth time you've asked it. Object to the

4 form.

5 MR. MORRIS: I'm moving to strike,

6 if you haven't noticed, because he's not

7 answering the question.

8 MS. DEITSCH-PEREZ: He was answering

9 the question, you just didn't like it, like

10 the answer.

11 MR. MORRIS: Good Lord.

12 Q. Go ahead, Mr. Waterhouse.

13 A. Again, I don't – we brought up a

14 myriad of issues at the start of the bankruptcy

15 case. I don't recall if this was one of them,

16 but, again, there are a lot of things we

17 couldn't change. Even, you know, I was told

18 status quo, blah, blah, blah, right, there is a

19 stay, you can't – you know, I don't recall

20 specifically, but that doesn't mean it didn't

21 happen.

22 MR. MORRIS: I move to strike.

23 Q. During the time that Highland was in

24 bankruptcy and you served as CFO, did you have

25 any reason to believe that any of the notes

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2 A. I don't recall. I mean, it may have

3 happened, you know, again, when we initially

4 getting DSI up to speed and going through

5 financials, it may have happened, but I don't

6 recall specifically.

7 Q. While you were the CFO of Highland

8 during the time that the company was in

9 bankruptcy, did you have any reason to believe

10 that any of the notes receivable on this list

11 other than Hunter Mountain Investment Trust

12 should have been characterized as doubtful or

13 uncollectible?

14 MS. DANDENEAU: Objection to form.

15 MS. DEITSCH-PEREZ: Form.

16 A. I didn't know. I didn't form an

17 opinion. Bankruptcy was new to me. It still

18 is new to me, even after going through this.

19 So I really didn't know what to expect nor

20 really – you know, I didn't know.

21 MR. MORRIS: I move to strike.

22 Q. During the period of Highland's

23 bankruptcy when you were serving as CFO, did

24 you have any reason to believe any of the notes

25 on this list were doubtful or uncollectible?

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2 receivable on this list were doubtful or

3 uncollectible?

4 MS. DEITSCH-PEREZ: Object to the

5 form.

6 A. Potentially.

7 Q. Did you ever tell anybody that?

8 A. As I just stated like five times,

9 yes, we – at the beginning after filing and we

10 were getting DSI and others up to speed, you

11 know, we had a myriad of discussions of a lot

12 of things and this was likely one of them. I

13 don't – but I don't recall specifically we

14 talked –

15 Q. I don't want to know – I don't want

16 to know what was –

17 MS. DEITSCH-PEREZ: Wait, wait.

18 Excuse me. Mr. Morris, you did not let him

19 finish his answer.

20 A. I spoke – we had – we were

21 bringing Fred Karesa and Brad Sharp (phonetic)

22 up to speed on all of these items, contracts,

23 and investments and going through – we had

24 hours and hours and hours of discussion. And

25 then not only do I have to repeat this not

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 2 once, twice, three, four times with – you
 3 know, I mean, we – I don't – I don't remember
 4 the sum culmination of all these discussions.
 5 They all kind of blend together.
 6 MR. MORRIS: Okay. I move to strike
 7 and I will try one more time.
 8 Q. Did you ever tell anybody at DSI
 9 that you believed any of the notes receivable
 10 on this list were doubtful or uncollectible?
 11 MS. DANDENEAU: Object to form.
 12 A. Potentially.
 13 Q. Potentially you told them or
 14 potentially they were doubtful or
 15 uncollectible?
 16 A. Potentially I told them that we
 17 needed to look at the value of these – of
 18 these assets.
 19 Q. Okay. Did you – okay. It is
 20 potential that you told them and it is
 21 potentially that you didn't; right?
 22 MS. DANDENEAU: Objection to form.
 23 A. I've gone through that. I don't
 24 recall specifically.
 25 Q. So you should just – I don't want

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 2 five times? I mean, really I thought you
 3 were – (overspeak.)
 4 MR. MORRIS: Because he never
 5 answered it.
 6 MS. DEITSCH-PEREZ: Are you
 7 listening to him?
 8 MR. MORRIS: You know –
 9 MS. DEITSCH-PEREZ: He basically
 10 said that he had a conversation with DSI
 11 that went over all of this stuff and that
 12 conversation could have included the notes
 13 but he doesn't recall specifically.
 14 What more do you want him – to ask
 15 of him?
 16 MR. MORRIS: I want him – I would
 17 love him to say – I would like him to
 18 testify to the truth, and that is he has no
 19 recollection.
 20 MS. DEITSCH-PEREZ: Well, the truth
 21 as you would like to see it, but – but he
 22 is testifying truthfully. And I – and, by
 23 the way, I move to strike that comment –
 24 MR. MORRIS: Okay.
 25 MS. DEITSCH-PEREZ: – because it

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 2 to tell what you to do. Do you have –
 3 MS. DANDENEAU: Good.
 4 Q. Other than – other than telling
 5 them that they should look at the values, do
 6 you have any recollection whatsoever of ever
 7 having told anybody at DSI that any of the
 8 notes receivable on this page were doubtful or
 9 uncollectible?
 10 MS. DEITSCH-PEREZ: Object to the
 11 form.
 12 MS. DANDENEAU: Objection.
 13 A. I recall having general discussions
 14 about everything on our balance sheet which
 15 would have included these – these notes
 16 receivable.
 17 Q. Okay.
 18 A. I don't recall specifically where
 19 those discussions delved into.
 20 Q. Do you recall any discussion at all
 21 on the topic of whether any of these notes on
 22 this list were doubtful or uncollectible?
 23 MR. AIGEN: Mr. Morris, how on earth
 24 is that question different from the
 25 question that you just asked for the last

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 2 suggests that he has not testified
 3 truthfully.
 4 MR. MORRIS: I will ask my question
 5 again. And if at any time you want to
 6 direct him not to answer, that is your
 7 prerogative.
 8 Q. Mr. Waterhouse, do you have any
 9 recollection at all of ever telling anybody
 10 from DSI that any of these notes were doubtful
 11 or uncollectible?
 12 MS. DANDENEAU: Object to form.
 13 A. I don't remember specifically.
 14 Q. Do you remember generally that
 15 specific topic?
 16 A. We generally talked about assets,
 17 values. If – we had discussions of that and
 18 collectability in nature. I mean, of Highland,
 19 the funds, the CLOs, the entire complex. We
 20 had discussions like that, which is, you know,
 21 as you look at a billion dollar consolidated
 22 balance sheet.
 23 So I generally remember – this is
 24 billions of dollars, including these assets –
 25 having discussions of this – of this type.

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2 Q. Do you believe that an affiliate

3 loan on this list was doubtful or

4 uncollectible? Would you have told that to

5 DSI?

6 MS. DANDENEAU: Objection to form.

7 MS. DEITSCH-PEREZ: Object to form.

8 A. If we had, like – again, if we –

9 if – if we weren't preparing financial

10 statements in accordance with GAAP, and – you

11 know, if DSI at that point – they were –

12 again, I was new to bankruptcy.

13 The CRO is – we are delegating

14 everything to the CRO. All the decisionmaking.

15 Remember – remember when you and I went into

16 Delaware Court and we were saying DSI basically

17 does everything, remember this, Mr. Morris?

18 You were my counsel at the time, and

19 basically we're running everything through DSI.

20 That was what this was like in the early part.

21 Everything was communicated through

22 DSI. So DSI says this. DSI says that. That

23 is what we're doing, and we're pointing out

24 things to them.

25 Now, they decide what direction this

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2 Q. But you signed them; correct?

3 A. My signature is on the MORs.

4 Q. And you signed them as the preparer

5 of the document; correct?

6 A. Yes, I did this pursuant to DSI's

7 instructions.

8 Q. Okay. You wouldn't have signed the

9 document if you didn't believe it to be

10 accurate; correct?

11 A. If I had reason to believe it

12 wasn't, presumably I wouldn't have signed it.

13 Q. Okay. And do you have any reason to

14 believe right now that any monthly operating

15 report that has your signature on it was

16 inaccurate in any way?

17 MS. DEITSCH-PEREZ: Object to the

18 form.

19 A. My understanding of the monthly

20 operating reports is we were filing them in

21 accordance with the standards set by the Court.

22 It wasn't – you know, again, I don't – you

23 know, it wasn't GAAP. It wasn't these other

24 standards, so I testified I didn't have

25 experience in this. The CRO was running the

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2 goes.

3 Q. Did you point out that any of

4 these –

5 A. I don't recall specifically.

6 Q. Okay. At any time that you served

7 as Highland's CFO, did you ever point out to

8 DSI that any of these loans were doubtful or

9 uncollectible?

10 MS. DEITSCH-PEREZ: Object to the

11 form.

12 MS. DANDENEAU: Objection.

13 A. If you're asking me if I had a

14 conversation with DSI, if any of these loans

15 were doubtful or uncollectible, I don't recall

16 specifically.

17 Q. Do you recall that the debtor filed

18 on the docket monthly operating reports?

19 A. Yes.

20 Q. You prepared those personally,

21 didn't you?

22 MS. DEITSCH-PEREZ: Objection to

23 form.

24 A. I didn't personally prepare them,

25 the team did with DSI.

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2 show. I followed their advice.

3 Q. But you assured yourself that

4 everything in the report was accurate before

5 you signed them; correct?

6 MS. DANDENEAU: Objection to form.

7 A. I trusted the guidance from the CRO

8 and their team and their experience and their

9 guidance for doing this for many, many, many

10 years to – to – to categorize and put things

11 in ways on the form.

12 You know, my team had – had not

13 filled out these forms before and needed all of

14 this guidance. I'm not an expert in this. I

15 have oversight of it. I signed the form. DSI

16 told me to.

17 Q. And you and your team are the source

18 of the information that DSI used to create the

19 reports; correct?

20 MS. DANDENEAU: Objection to form.

21 A. The books and records reside with

22 the – with – with the corporate accounting

23 team.

24 Q. Okay. And the corporate accounting

25 team was the corporate accounting team that was

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 2 under your direction; correct?
 3 A. Yes.
 4 Q. So – so your team was responsible
 5 for maintaining Highland's books and records;
 6 correct?
 7 A. I'm sorry, my team was responsible?
 8 Q. Correct.
 9 A. Yes. They – they – they were
 10 the – the – the general ledger of Highland,
 11 that responsibility was with the corporate
 12 accounting team.
 13 Q. The corporate accounting group
 14 reported to you; correct?
 15 A. Yes.
 16 MR. MORRIS: Can we put up 41,
 17 please.
 18 (Exhibit 41 marked.)
 19 Q. All right. You will see that this
 20 is a report that is dated January 31st, 2020,
 21 but it is for the month ending December 2019.
 22 Do you see that?
 23 A. I do.
 24 Q. And you signed this report in your
 25 capacity as the chief financial officer of

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 2 A. Again, I would have to see, just
 3 like we did with the financial statements of
 4 Highland and NexPoint, I would have to see a
 5 detailed build, but, you know, if you look at
 6 the other line items, you know, the only other
 7 place it could be would be in – in other
 8 assets.
 9 Q. Okay. And as a matter of
 10 arithmetic, is it fair to say that is the value
 11 of the assets due from affiliates was more than
 12 25 percent of the value of Highland's total
 13 assets as of 12/31/2019?
 14 MS. DANDENEAU: Objection to form.
 15 A. I'm really not doing the mental math
 16 right now, so I've been going at this depo for
 17 hours, so I'm really not – you know –
 18 Q. All right. No problem.
 19 A. – these are millions of dollars.
 20 Q. Let's look at the Footnote 1,
 21 please. Do you see there is a reference to the
 22 Hunter Mountain note?
 23 A. Yes, I see that in Footnote 1.
 24 Q. Okay. And that's the reserve that
 25 was taken against that note?

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 2 Highland; correct?
 3 A. Yes.
 4 Q. And you're the preparer – you're
 5 identified as the preparer of the report;
 6 correct?
 7 A. That is correct.
 8 Q. Do you recall participating in the
 9 preparation of monthly operating reports?
 10 A. As I testified earlier, it was put
 11 together, you know, with the team. The team
 12 worked with DSI to put these monthly operating
 13 reports together. We had no experience at this
 14 time of the monthly operating reports or things
 15 of this nature.
 16 MR. MORRIS: Can you turn to the
 17 next page, please.
 18 Q. Do you see a line item under assets
 19 due from affiliates?
 20 A. Yes, I do.
 21 Q. Okay. And to the best of your
 22 knowledge and understanding, as the person who
 23 is identified as the preparer of this report,
 24 does that line item include the affiliate loans
 25 that we've been talking about?

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 2 A. Yes, that is what this indicates.
 3 Q. Okay. And were you aware that the
 4 reserve was being taken on that it was?
 5 A. I was – I was aware, yeah, at some
 6 point, yes.
 7 Q. Okay. And are you aware of any
 8 reserve being taken with respect to any other
 9 note that was issued in favor of Highland?
 10 A. Again, as I testified, we didn't go
 11 through an analysis on – on – on the other
 12 notes.
 13 Q. Can we turn –
 14 A. I believe – I believe it says that
 15 in Footnote 1, fair value has not been
 16 determined with respect to any of the notes.
 17 So this footnote – footnotes, look,
 18 there has been no determination.
 19 Q. Okay. The determination was made in
 20 the audited financial statements just six
 21 months earlier; right? We saw that earlier?
 22 A. That was as of 12/31/18. I mean,
 23 things – circumstances – there's a bank –
 24 circumstances change, things change – things
 25 change over time, you know, facts and

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 2 circumstances change. Again, you have to do an
 3 analysis.
 4 Q. Okay. And you do recall that in
 5 Highland's 2018 financial statement, all of the
 6 notes issued by affiliates and Mr. Dondero that
 7 were due at year-end had a fair value equal to
 8 the carrying value; correct? We looked at
 9 that?
 10 A. Yes. That was in the -- in the
 11 disclosure for the -- for the affiliate notes,
 12 yes.
 13 Q. And -- and you were obligated to
 14 share with PwC any subsequent events between
 15 the end of 2018 and the date that you signed
 16 your management representation letter on June
 17 3rd, 2019; correct?
 18 MS. DEITSCH-PEREZ: Object to the
 19 form.
 20 A. Yes. I -- I -- I signed the
 21 management, you know, my signature is in the
 22 management representation letter -- I hope I'm
 23 answering your question -- that is dated in
 24 June with the representations made in that
 25 management representation letter.

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 2 you crazy, we're not auditing this. Values
 3 change, all these things change, bankruptcy
 4 changes the entire scenario. I mean -- and
 5 they're like, we're not -- we're not touching
 6 this.
 7 And so, you know, I was like, okay,
 8 sorry, I get it, okay, no an audit.
 9 I mean, it is -- you know, and --
 10 you know, and we weren't preparing GAAP
 11 financial statements.
 12 Again, I didn't know what we were
 13 doing in relation to our financial statements,
 14 but these were the discussions I was having at
 15 the time. And yeah, I mean, filing bankruptcy
 16 from what I got from outside auditors and
 17 others involved changed things dramatically.
 18 Q. Okay. Highland wasn't the obligor
 19 under any of the notes that we're talking
 20 about; correct?
 21 A. No.
 22 Q. So --
 23 A. That's right.
 24 Q. So can you identify any fact that
 25 would cause the fair value to deviate from the

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 2 Q. Okay. And there was nothing that
 3 caused PricewaterhouseCoopers to include in
 4 subsequent events any adjustment to the
 5 conclusion that the fair value of the affiliate
 6 notes and the notes issued by Mr. Dondero
 7 equaled the carrying value; correct?
 8 MS. DANDENEAU: Objection to the
 9 form.
 10 A. That is correct. That is what was
 11 in the -- in the -- in the footnotes.
 12 Q. Okay. So are you aware of anything
 13 that occurred between June 3rd, 2019 and
 14 December 31st, 2019 that would have caused the
 15 fair value of the notes to differ from the
 16 carrying value?
 17 A. Yeah. Highland filed for
 18 bankruptcy, things changed -- I mean, there was
 19 a bankruptcy filed in October of -- of -- of
 20 2019, right, the petition date that we've
 21 described earlier.
 22 I mean, I had a -- I guess looking
 23 back naively, I thought we were going to get an
 24 audit from PwC for year-ended 2019, and when we
 25 had discussions with PwC, they were like, are

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 2 carrying value during the seven-month period
 3 between June 3rd and the end of the year, 2019?
 4 MS. DANDENEAU: Objection to form.
 5 A. No. I mean, I'm putting myself back
 6 at that time, right. Hindsight is 2020, but we
 7 didn't do an analysis, but we would have done a
 8 fulsome analysis and looked at all of the facts
 9 and circumstances at the time, but asset values
 10 change. You know, there could have been a
 11 market crash in hindsight in 2020, which --
 12 which affected entities' abilities.
 13 There could have been all of these
 14 things, right, that -- that happen. It is --
 15 it is easy to look back in hindsight, but when
 16 you are looking at this in -- in realtime, the
 17 analysis is different, and again, we didn't do
 18 an analysis.
 19 Q. Okay. You didn't do an analysis.
 20 Do I have that right?
 21 A. I don't -- I don't recall doing one
 22 or maybe -- you know, I don't recall doing one.
 23 MR. MORRIS: Okay. I'm going to
 24 take a break. I may be done, so the time
 25 now is -- is 4:30 your time. Let's just

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 2 take a short break until 4:40 your time.
 3 MS. DANDENEAU: Okay.
 4 VIDEOGRAPHER: We're going off the
 5 record, 4:31 p.m.
 6 (Recess taken 4:31 p.m. to 4:43 p.m.)
 7 VIDEOGRAPHER: We are back on the
 8 record at 4:43 p.m.
 9 MR. MORRIS: I have no further
 10 questions.
 11 MR. RUKAVINA: Okay.
 12 Mr. Waterhouse, I will go next.
 13 EXAMINATION
 14 BY MR. RUKAVINA:
 15 Q. Sir, my name is Davor Rukavina. I'm
 16 the lawyer for –
 17 MR. MORRIS: Hey, Davor, just before
 18 you begin, I just want to put on the record
 19 Highland's objection to documents that were
 20 produced to me 10 minutes before the
 21 deposition began.
 22 MR. RUKAVINA: What the basis of
 23 your objection?
 24 MR. MORRIS: That they were due
 25 quite some time ago, and the fact that you

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 2 A. Yes.
 3 Q. You and I have never met or talked
 4 before today, have we?
 5 A. No, I have – I have heard your
 6 voice on calls before.
 7 Q. Okay.
 8 MR. RUKAVINA: Madam Court Reporter,
 9 I will use a few exhibits today. My
 10 associate, Mr. Nguyen, will find some way
 11 to get them to you. I don't know how to do
 12 that, but it looks like you guys do.
 13 I am going to use numbers as well.
 14 But to differentiate them from Mr. Morris
 15 we're going to mark mine with the prefix A
 16 for advisors.
 17 Do you understand?
 18 COURT REPORTER: Yes.
 19 MR. RUKAVINA: Okay. Perfect.
 20 Q. Okay. So, Mr. Waterhouse, let's
 21 start with those two HCMFA notes that you were
 22 asked about, one for 5 million and one for
 23 2.4 million.
 24 Do you recall those notes?
 25 A. Yes.

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 2 had – I just think it's appropriate to –
 3 to dump documents on somebody 10 minutes
 4 before the deposition. I just think
 5 that's –
 6 MR. RUKAVINA: Well, these are
 7 documents Highland produced. I'm not aware
 8 of any rule I have to give you advance
 9 documents when I know for the record that
 10 other than the exhibits that you sent to us
 11 last week, most of the exhibits you used
 12 today you did not provide to me prior to
 13 this deposition.
 14 MR. MORRIS: No, but the documents
 15 were produced by me in – in litigation,
 16 right?
 17 MR. RUKAVINA: I'm going to use
 18 primarily, John, the documents that you
 19 produced to me today, but you may.
 20 MR. MORRIS: Primarily. I've got –
 21 I've got my objection. You have got your
 22 response. Proceed.
 23 Q. Mr. Waterhouse, again, I represent
 24 the advisors, HCMFA and NexPoint Advisors.
 25 Do you understand that?

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 2 Q. Were you ever the CFO of HCMFA?
 3 A. I don't recall.
 4 Q. So to the best of your recollection,
 5 you were still an officer of HCMFA in 2019,
 6 just that your title was treasurer?
 7 MR. MORRIS: Object to the form of
 8 the question. There is no leading here.
 9 He works for your client.
 10 MS. DANDENEAU: That is not – that
 11 is not true.
 12 MR. MORRIS: He's the treasurer –
 13 he is the treasurer of your client. I
 14 don't – I'm going to object every time you
 15 try to lead, so...
 16 MR. RUKAVINA: Totally fine to
 17 object.
 18 MR. MORRIS: Okay.
 19 Q. Please answer my question,
 20 Mr. Waterhouse.
 21 A. I'm sorry, could you repeat? There
 22 was...
 23 Q. Yes. You were – you testified
 24 earlier that in 2019 you were an officer of
 25 HCMFA; correct?

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2 A. Yes, I testified that I was the

3 treasurer and I didn't know if that incumbency

4 certificate, you know, was one that appointed

5 me as a treasurer, but yes.

6 Q. I'm just trying to confirm that

7 sitting here today, to the best of your

8 recollection, at that time you were – your

9 title was treasurer. It was not chief

10 financial officer.

11 A. I don't recall that being my title.

12 Q. Okay. And in May of 2019, however,

13 I think you testified you were the chief

14 financial officer of the debtor; correct?

15 MR. MORRIS: Objection to the form

16 of the question.

17 A. Yes, I was – yes.

18 Q. Okay. As such, in May of 2019, did

19 you have the authority, to your understanding,

20 to unilaterally loan \$5 million or \$2.4 million

21 to anyone on behalf of the debtor?

22 MR. MORRIS: Objection to the form

23 of the question.

24 A. Sorry, can you repeat that?

25 Q. Yes. So in your capacity as the

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2 Q. Okay. Now, I'm going to ask you a

3 similar question but for a different entity.

4 In May of 2019, as the treasurer of

5 HCMFA, did you believe that you unilaterally

6 had the ability to cause HCMFA to become the

7 borrower of a \$5 million loan and a

8 \$2.4 million loan?

9 MR. MORRIS: Objection to the form

10 of the question.

11 A. No.

12 Q. What would – what would the

13 approval have taken place – strike that.

14 What would the approval process have

15 been like in May of 2019 at HCMFA for HCMFA to

16 take out a \$7.4 million loan?

17 MR. MORRIS: Objection to the form

18 of the question.

19 A. The process would have been similar

20 to what we just discussed on – for Highland to

21 make a loan to others. So, again, you know,

22 we – we would have – either myself or someone

23 on the team would have discussed this with

24 the – the president and owner of – of HCMFA.

25 Q. And who was that individual?

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2 chief financial officer of the debtor, Highland

3 Capital Management, L.P., in May of 2019, did

4 you believe that you unilaterally, just Frank

5 Waterhouse, had the authority to loan on behalf

6 of the debtor to anyone \$5 million and

7 \$2.4 million?

8 MR. MORRIS: Objection to the form

9 of the question.

10 A. No.

11 Q. Is it because loans of that amount

12 would have had to be approved by someone else?

13 A. Yes.

14 Q. Who in '20 – in May of 2019, if

15 Highland wanted to loan 5 million or

16 \$2.4 million to someone, what would have been

17 the internal approval procedure?

18 MR. MORRIS: Objection to the form

19 of the question.

20 A. If – if we had loans of that nature

21 that needed to be made due to their size, we

22 would have gotten approval from the – the

23 president of Highland.

24 Q. And who that was individual?

25 A. It was James Dondero.

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2 A. That was James – Jim Dondero.

3 Q. So do I understand that in May of

4 2019, on behalf of both the lender, Highland,

5 and the borrower, HCMFA, Mr. Dondero would have

6 had to approve \$7.4 million in loans?

7 MR. MORRIS: Objection to the form

8 of the question.

9 A. Yes.

10 Q. You mentioned when Mr. Morris was

11 asking you the NAV error, N-A-V error, with

12 respect to TerreStar, without writing us a

13 novel, unless you feel like you have to, can

14 you summarize what that NAV error was? What

15 happened?

16 A. There was a – in the Highland

17 Global Allocation Fund, it owned at the time an

18 equity interest in a company called TerreStar.

19 And TerreStar is – at the time was a private

20 company, and it may still be today. Again, I'm

21 putting myself back then as a private company.

22 We had – sorry, I don't mean we –

23 the fund and the advisor used Houlihan Lokey

24 to – to value that investment. And during

25 that time there was some trades that were

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 2 executed at market levels that were much lower
 3 than the Houlihan Lokey model.
 4 And based on information and
 5 discussions with the portfolio managers and,
 6 you know, principals that were very familiar
 7 with TerreStar, it was determined that those
 8 trades were non-orderly and they were not
 9 considered in the valuation as consulted with
 10 Houlihan Lokey and PricewaterhouseCoopers at
 11 the time.
 12 Subsequent to a – I can't remember
 13 the exact circumstances of why the SEC got
 14 involved. I think it was due to this – this
 15 investment became a material position in the
 16 fund. It triggered an SEC, kind of, inquiry.
 17 And as part of that inquiry, they questioned
 18 the valuation methodology. "They" meaning the
 19 SEC.
 20 And at the culmination of that
 21 process – this is all summarized – the value
 22 that was – that ultimately had to be used in
 23 the fund's NAV was different than – materially
 24 different than what the original valuation at
 25 Houlihan Lokey provided.

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 2 A. I believe Cliff Stoops. I'm trying
 3 to think. And maybe that is – that is – that
 4 is – that is all kind I can recall at the
 5 moment.
 6 Q. Do you recall whether it was
 7 determined that the fund suffered losses as a
 8 result of this error?
 9 A. The – the fund – the – the –
 10 because the open-ended nature of the fund,
 11 there were losses that were attributable to
 12 investors. Meaning they – they would have
 13 redeemed and got a less money or – or they
 14 subscribed in and maybe because they didn't get
 15 enough shares and then they later sold and then
 16 they were harmed in that fashion.
 17 And there is – there is – there
 18 were very – there were very detailed
 19 calculations and, you know, all these different
 20 scenarios that we had to – I'm sorry, I keep
 21 saying "we" – that the individuals involved
 22 had to calculate and quantify.
 23 Q. Well, do you recall whether HCMFA
 24 admitted certain fault and liability for this
 25 error?

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1 WATERHOUSE - 10-19-21
 2 And given that there was this fund
 3 was, as we discussed – I don't know if we
 4 discussed it, but it was an open-ended fund
 5 that was going – that was converting to a
 6 close-end fund.
 7 Due to the fact that it was an
 8 open-ended fund, you had to recalculate NAV and
 9 see what the impact was on people – on
 10 investors coming in and out of the fund and if
 11 there is a detrimental impact and to calculate
 12 what that – what that impact was and if there
 13 was any amounts owed to the fund pursuant to
 14 the error.
 15 Q. Were you personally involved
 16 internally at either Highland or HCMFA with
 17 these investigations and discussions with the
 18 SEC?
 19 A. I was.
 20 Q. Which other key people or senior
 21 people at Highland were involved, to your
 22 recollection?
 23 A. Myself, Thomas Surgent, David Klos,
 24 Lauren Thedford, Jason Post.
 25 Q. Mr. Dondero, was he –

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1 WATERHOUSE - 10-19-21
 2 A. I don't recall specifically.
 3 Q. Do you recall whether HCMFA caused
 4 any funds to be paid to the investors and the
 5 fund the subject of the NAV error?
 6 A. Yes.
 7 Q. Do you recall the approximate amount
 8 of funds, moneys paid to the investors and the
 9 fund?
 10 A. It was – it was approximately
 11 \$7 million.
 12 Q. If I was to suggest 7.8 million,
 13 would that ring more true or are you sticking
 14 with your original answer?
 15 A. It was – it was approximately 7 –
 16 7 to \$8 million. Again, I don't remember the
 17 exact number, but it was in that ballpark.
 18 Q. So regardless of whether HCMFA
 19 accepted fault or liability, it caused some
 20 \$7 million or more to be paid out to affected
 21 investors in the fund?
 22 MR. MORRIS: Objection to the form
 23 of the question.
 24 A. And I want to make sure I'm
 25 understanding your question because there is a

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1 WATERHOUSE - 10-19-21
 2 lot of different entities that are going on to
 3 my head.
 4 I think what you are saying is based
 5 on this error, shareholders were harmed by this
 6 approximately \$7.8 million – by approximately
 7 \$7.8 million. Is that what you are asking?
 8 Q. Yes, sir.
 9 A. Yes, that was – again, I don't have
 10 the exact numbers. If I take – it was – it
 11 was in that ballpark, and there is a detail
 12 calculation and write-up that could, that –
 13 that exists someplace.
 14 Q. Now, at that time, at the time that
 15 the NAV error occurred, was there a contract in
 16 place between HCMFA and the debtor pursuant to
 17 which the debtor was providing services to
 18 HCMFA?
 19 MR. MORRIS: Objection to the form
 20 of the question.
 21 A. Yes.
 22 Q. Was that contract generally called a
 23 shared services agreement?
 24 A. It was generally called that, but
 25 there were – there were – I mean, it – it –

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1 WATERHOUSE - 10-19-21
 2 Capital Management Fund Advisors and Highland
 3 Capital Management for back office services.
 4 Q. And can you summarize what you mean
 5 by back office services?
 6 A. Those services were for accounting,
 7 finance, tax, valuation, HR, IT, you know,
 8 legal compliance, things of – things of those
 9 nature – or things of that nature, excuse me.
 10 Q. So in the spring of 2019, do you
 11 recall whether HCMFA took the position that it
 12 was actually Highland that caused the NAV error
 13 to occur pursuant to the valuation services
 14 that Highland was providing?
 15 MR. MORRIS: Objection to the form
 16 of the question.
 17 A. I do not recall.
 18 Q. Did you ever have any discussions
 19 with anyone, Jim Dondero or anyone in the first
 20 half of 2019 as to whether Highland, the
 21 debtor, that is, had any liability to HCMFA
 22 related to the NAV error?
 23 MR. MORRIS: Objection to the form
 24 of the question.
 25 A. I do not recall.

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 2 it depends on who you talk to, but yes,
 3 generally, there were – there are multiple
 4 agreements.
 5 Q. Pursuant to one or more of those
 6 agreements, was the debtor providing certain
 7 services to HCMFA?
 8 MR. MORRIS: Objection to the form
 9 of the question.
 10 A. Yes.
 11 Q. And can you at a very high level
 12 summarize in 2018 and 2019 what those services
 13 were?
 14 A. Yes, there was a – yes.
 15 Q. Okay. Please – please go – go
 16 through a short summary.
 17 A. There was a – a cost reimbursement
 18 agreement between Highland Capital Management
 19 Fund Advisors and Highland Capital Management,
 20 L.P. That agreement was for what we referred
 21 to as front office services, so investment
 22 management, things of that nature.
 23 There was I think what most people
 24 refer to as the shared services agreement that
 25 was – that agreement was between Highland

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 2 Q. And then you mentioned that the fund
 3 was being closed and some compensation related
 4 to that. Can you – can you elaborate? What
 5 were you referring to?
 6 A. Right. So the advisor, pursuant to
 7 board approval, put a proposal in front of the
 8 shareholders of the Highland Global Allocation
 9 Fund to convert it from an open-ended fund to a
 10 closed-end fund.
 11 So an open-ended fund, when
 12 shareholders subscribe to the fund or redeem
 13 into the fund, they do it at NAV.
 14 When it is – when you have a
 15 closed-end fund, closed-end funds are – are
 16 publicly-traded, like on the New York Stock
 17 Exchange, exchanges like that, and – and
 18 shareholders or investors, they're not –
 19 they're – they're not subscribing and
 20 redeeming with the fund. They are like shares
 21 of Apple.
 22 Those shares of the Highland Global
 23 Allocation Fund trade on an exchange, and that
 24 is how you, you know, that is how, you know,
 25 you become an equity owner in the fund or you

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1 WATERHOUSE - 10-19-21
 2 sell your shares and you are no longer an
 3 equity owner.
 4 As part of that proposal, the
 5 advisor told shareholders if you – if you vote
 6 for this proposal to – to convert it from an
 7 open-ended fund to a closed-end fund, we will
 8 pay you some amounts of money. I forgot – a
 9 certain number of points. I think it was
 10 like – it was like two to three points or
 11 something – something like that.
 12 Q. Okay. You mentioned when Mr. Morris
 13 was asking you, going back to those two
 14 promissory notes, you will recall the 5 million
 15 and 2.4 million, you mentioned something to the
 16 effect that Mr. Dondero told – told you to pay
 17 some moneys out of Highland. Do you remember
 18 that discussion with Mr. Morris?
 19 A. I do.
 20 Q. So, to the best of your
 21 recollection, did you have a discussion with
 22 Mr. Dondero about making some payments in May
 23 of 2019 out of Highland?
 24 A. I recall, as I testified earlier,
 25 that I had a conversation with Mr. Dondero

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 2 yes, I would say it was – it was all related
 3 to that.
 4 Q. Did Mr. Dondero tell you that those
 5 funds would be a loan from Highland to HCMFA?
 6 A. I don't recall.
 7 MR. MORRIS: Objection to the form
 8 of the question.
 9 Q. Now, and forgive me, I'm probably
 10 the only non-American born here, but I speak
 11 reasonably well in English. I don't recall,
 12 does that mean you don't remember or does that
 13 mean it didn't happen?
 14 MR. MORRIS: Objection to the form
 15 of the question.
 16 A. It – it means I don't – I don't
 17 remember.
 18 Q. Did Mr. Dondero tell you to have
 19 those two promissory notes prepared?
 20 A. I don't recall.
 21 Q. When you – again, when you say, I
 22 don't recall today, that means that sitting
 23 here today, you just don't remember one way or
 24 the other. Is that accurate?
 25 A. Yes.

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1 WATERHOUSE - 10-19-21
 2 for – for these amounts attributable to – it
 3 was either the error – you know, the error,
 4 and in that conversation he said, go get the
 5 money from Highland. I believe that is what I
 6 testified earlier, and that – that is my
 7 recollection.
 8 Q. Do you recall if that was an
 9 in-person meeting or some other mode for the
 10 meeting?
 11 A. I – I – I recall that being
 12 in-person.
 13 Q. Do you recall if anyone else was
 14 present, or was it just you and Mr. Dondero?
 15 A. I recall just he and I.
 16 Q. And the moneys that he told you to
 17 find from – or get from Highland, was that in
 18 the amount of \$5 million and \$2.4 million?
 19 MR. MORRIS: Objection to the form
 20 of the question.
 21 A. I believe so, but I would have to go
 22 back and look and see when those moneys were
 23 actually paid into the – into the fund and,
 24 you know, when those transfers were done. If
 25 they were all done around that same time, then

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1 WATERHOUSE - 10-19-21
 2 Q. Is it possible that you, having
 3 heard what Mr. Dondero said and seeing funds
 4 being transferred, assumed that that would be a
 5 loan without him actually telling you that
 6 would be a loan?
 7 MR. MORRIS: Objection to the form
 8 of the question.
 9 A. Sorry, I want to make sure – did I
 10 ask the amounts that were transferred that I –
 11 that – that I assumed that that was a loan?
 12 Q. Well, let me – let me take – let
 13 me try again.
 14 So you have established already that
 15 there were quite a number of promissory notes
 16 back and forth – I'm sorry, quite a number of
 17 promissory notes with affiliated companies and
 18 individuals owing Highland money; right?
 19 A. Yes.
 20 Q. And you have established that there
 21 were many transactions and transfers going back
 22 and forth over the years; right?
 23 MS. DANDENEAU: Objection to form.
 24 A. In – yes, in my capacity as CFO and
 25 my employment, yes, that is – yes.

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2 Q. And that's part of the reason why

3 you just can't remember some of the details

4 today because this – this happened years ago,

5 and there were a number of transactions. Is

6 that accurate?

7 MS. DANDENEAU: Objection to the

8 form.

9 MR. MORRIS: Objection to the form

10 of the question.

11 A. I mean, I deal with thousands of –

12 of – of – of transactions, you know, whether

13 it has – the processing of transactions, you

14 know, if it has got, you know, more – more

15 zeros, you know, behind it than others.

16 When you look at thousands of

17 transactions over the years for funds and

18 advisors and – and, you know, financial

19 statements, I mean, it is – it is very hard

20 going back in – in – in my – you know,

21 14-ish year career at – at Highland to

22 remember a lot of those details, especially

23 when I don't have any records or books or

24 anything like that, and – and going back many

25 years.

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2 A. If – I don't know if I understand

3 your question. Those amounts would arise to my

4 level where I would be involved or...

5 Q. You would want to know what a

6 transfer for that amount, \$7.4 million, was all

7 about, as the CFO of Highland, wouldn't you?

8 MR. MORRIS: Objection to the form

9 of the question.

10 A. Yes, I make it – I mean, I – I

11 review all sorts of payments, I mean, even

12 smaller dollar payments on a periodic basis,

13 you know, to – to – to understand and to make

14 sure that we are paying things in a – you

15 know, in – in – in an informed way. And, you

16 know – and we're – and we're paying things

17 pursuant to vendor contracts and things like

18 that.

19 Q. So as part of that, is it possible

20 that seeing \$7.4 million go out you would have

21 promissory notes made in order to keep a paper

22 trail, assuming that those were loans, when

23 perhaps they were never intended to be loans by

24 Mr. Dondero?

25 MR. MORRIS: Objection to the form

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2 Q. And that is fine. That – that –

3 that is why I asked the question.

4 Is it possible in May of 2019 when

5 Mr. Dondero told you to transfer the funds from

6 Highland, you just assumed on your own that

7 those would be loans without him actually

8 telling you that those would be loans?

9 MR. MORRIS: Objection to the form

10 of the question.

11 A. I don't know.

12 Q. I'm sorry, you –

13 A. I said I don't know.

14 Q. Okay. Well, as the – as the CFO

15 for Highland, if you saw \$7.4 million going

16 out, you would feel some responsibility to

17 account for that, wouldn't you?

18 MR. MORRIS: Objection to the form

19 of the question.

20 A. Yes.

21 Q. Is it fair to say that those would

22 be in the range large enough to rise up to your

23 level?

24 MR. MORRIS: Objection to the form

25 of the question.

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1 WATERHOUSE - 10-19-21

2 of the question.

3 A. I don't know. As I testified

4 earlier, I had conversations with Mr. Dondero

5 about – about the – the – the moneys that

6 were needed for the NAV error. And I recall

7 him saying go get it from Highland – or get it

8 from Highland.

9 Q. Well, why did you sign those

10 promissory notes and why didn't you have him

11 sign them?

12 MR. MORRIS: Objection to the form

13 of the question.

14 A. I don't know. I don't know.

15 Q. You mentioned earlier that you

16 typically don't sign promissory notes. Am I

17 remembering your testimony correctly?

18 I mean, promissory notes on behalf

19 of the entities. Not yourself, obviously.

20 A. Yes, that is what I said earlier.

21 Q. Do you recall any other promissory

22 notes in the million-plus range that you had

23 ever signed before on behalf of any entity?

24 A. There is – there has been a lot of

25 transactions over the years. I don't – I

1 WATERHOUSE - 10-19-21
 2 don't – I don't recall generally. I don't –
 3 I don't recall.
 4 Q. So – but to the best of your
 5 recollection, it was on your initiative,
 6 following your discussion with Mr. Dondero,
 7 that you had someone draft those two promissory
 8 notes; is that correct?
 9 MR. MORRIS: Objection to the form
 10 of the question.
 11 A. Yes, we would have – the team, as I
 12 stated earlier, we don't draft promissory
 13 notes. "The team" meaning the accounting and
 14 finance team.
 15 So the team would have worked with
 16 the legal group at Highland to draft any notes.
 17 Q. Do you believe or do you have any
 18 recollection as to whether you would have done
 19 that pursuant to an email or telephone call or
 20 in-person meeting?
 21 MR. MORRIS: Objection to the form
 22 of the question.
 23 A. Are you asking if I would have – if
 24 those notes would have been drafted pursuant to
 25 an email or phone call?

1 WATERHOUSE - 10-19-21
 2 managers of the group. That would have been
 3 Dave Klos or Kristin Hendrix.
 4 Dave was the – one of his duties
 5 was managing the valuation team, and so he was
 6 intimately involved with this process. So, you
 7 know...
 8 Q. Okay.
 9 A. I don't recall specifically but, I
 10 mean, my general – you know, I – I – I
 11 likely would have talked to Dave first about it
 12 versus someone like Kristin who hadn't been
 13 intimately involved.
 14 Q. And – and do you have a view as to
 15 whether it is most likely that you would have
 16 done that by email or in-person or how would
 17 you believe you would have communicated that to
 18 Mr. Klos?
 19 MR. MORRIS: Objection to the form
 20 of the question.
 21 A. I likely would have done that in
 22 person. Again, if things of this nature
 23 that – again, you have to put ourselves back
 24 to, we have been working on this very stressful
 25 project for many, many months. And once the

1 WATERHOUSE - 10-19-21
 2 Q. Strike that.
 3 Do you recall whether you sent an
 4 email to anyone asking them to draft those two
 5 promissory notes?
 6 A. I don't recall because, again,
 7 once – I would have instructed – likely
 8 instructed the team to – to work with the
 9 legal group to draft these documents.
 10 I – I – I – yeah, I didn't – I
 11 mean, that is more an operational-type
 12 procedure. So, you know, a manager or a
 13 controller or working with legal. You know,
 14 they – they can certainly handle that task to
 15 get that – you know, to request that from
 16 legal.
 17 Q. And who on your team do you think
 18 you would have asked to do that?
 19 MR. MORRIS: Objection –
 20 Q. Who would have been the logical
 21 person or people, if you don't remember their
 22 name today?
 23 MR. MORRIS: Objection to the form
 24 of the question.
 25 A. It – it – there is only two

1 WATERHOUSE - 10-19-21
 2 go-ahead was to – you know, we see the light
 3 at the end of the tunnel with wrapping this up
 4 and making shareholders whole – sorry to say
 5 "we" – you know, the – so the folks that are
 6 involved in it.
 7 I like to talk to people
 8 face-to-face and – and – and go to – and go
 9 to their desk, because that shows if I'm going
 10 to their desk that – that is something that I
 11 want done, you know.
 12 Q. And do you remember, Mr. Waterhouse,
 13 getting those two promissory notes in paper
 14 format or by email before they were executed?
 15 MR. MORRIS: Objection to the form
 16 of the question.
 17 A. I don't recall.
 18 Q. For whatever was the ordinary course
 19 back then in May 2019, would you expect to have
 20 received them only on paper or would you have
 21 expected to have received them in Word document
 22 or PDF document by email?
 23 MR. MORRIS: Objection to the form
 24 of the question.
 25 A. I – I didn't sign – I signed very

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1 WATERHOUSE - 10-19-21
 2 few documents via email. I can't say that it
 3 never happened, but people either stopped by my
 4 office and physically walked in documents for
 5 signature that we discussed face-to-face.
 6 Or documents were – if – if –
 7 if – if – let's say I wasn't there or I
 8 wasn't available, documents were dropped off.
 9 I had – I had some in- and outboxes in front
 10 of my – my office there at the Crescent.
 11 Documents would be dropped off for
 12 signature. There would be a cover sheet that
 13 would be – have been applied to those
 14 documents detailing, you know, who dropped it
 15 off, the purpose, why, what time.
 16 And then, you know, as I stated, I
 17 don't draft documents and I always go to the
 18 legal group and the compliance group to make
 19 sure that they're in the loop. And there is
 20 a – a box or section that says, Has legal
 21 reviewed or approved, or something to that
 22 nature.
 23 Again, I don't – I don't have
 24 access to that cover sheet anymore, but it
 25 was – it was something to that effect.

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1 WATERHOUSE - 10-19-21
 2 Because I'm not in every
 3 conversation. They're not in every
 4 conversation – meaning legal compliance – and
 5 I just want to make sure that – that everyone
 6 is in sync to, you know, to – to the extent
 7 possible.
 8 Q. So if we summarize, you don't
 9 specifically remember signing these two notes,
 10 but most likely it would have been that they
 11 would have presented – been presented to you
 12 physically on paper?
 13 MR. MORRIS: Objection to the form
 14 of the question.
 15 A. They would – they would have been
 16 presented physically on paper most likely or
 17 someone would have left it. But, I mean,
 18 again, I don't – I don't recall.
 19 Q. I understand. Understand.
 20 When you signed – when you signed
 21 documents, when you personally signed
 22 documents, did you typically use a ink pen or
 23 did you use a stamp?
 24 A. No, I – I – I use a – an – an
 25 ink pen.

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1 WATERHOUSE - 10-19-21
 2 And my assistant, you know, if she
 3 was there, she would review that – you know,
 4 whatever was being dropped off. And if that
 5 has legal, you know, reviewed or – reviewed or
 6 approved it, if that wasn't – if that stuff
 7 hadn't been done, it was like she would just
 8 tell them like, go – go – go to the legal
 9 group, because –
 10 Q. Let me – let me pause –
 11 MS. DANDENEAU: Let him finish.
 12 MR. MORRIS: Thank you. Go ahead.
 13 A. I take – go to the legal group
 14 because that – that was my – you know, I
 15 didn't – I didn't review anything that – that
 16 they weren't – you know, or there wasn't some
 17 representation made to me that they had
 18 reviewed, approved in some capacity.
 19 Again, my – my – my goal, as CFO,
 20 is to provide transparency and make sure that
 21 groups like compliance and other things – and
 22 the other group in legal are – are in – you
 23 know, their – they're made aware of
 24 transactions of – you know, that are crossing
 25 my desk.

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1 WATERHOUSE - 10-19-21
 2 Q. Do you know – was there a file at
 3 Highland kept anywhere with ink-signed
 4 originals of a promissory notes in general or
 5 these two promissory notes specifically?
 6 MR. MORRIS: Objection to the form
 7 of the question.
 8 A. Sorry, I just want to make sure I
 9 understand your question. Are you saying is
 10 there a file somewhere that has ink-signed
 11 originals of these two promissory notes?
 12 Q. Yes.
 13 A. I would – I would assume they're
 14 some place. I mean –
 15 Q. Well, was there a – was there a
 16 place where Highland generally kept originals
 17 of promissory notes owed to it?
 18 A. I wouldn't – no.
 19 MR. RUKAVINA: Mr. Nguyen, would you
 20 please pull up my A7, alpha 7.
 21 Q. These are the two promissory notes,
 22 Mr. Waterhouse.
 23 (Exhibit A7 marked.)
 24 Q. And please – Mr. Waterhouse, please
 25 command my associate to scroll down as you need

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 2 to, but I want you to take a very close look at
 3 your two signatures here and tell me whether
 4 you believe, in fact, that you ink signed them
 5 or whether you –
 6 MS. DANDENEAU: Mr. Rukavina,
 7 Mr. Waterhouse has the copies.
 8 MR. RUKAVINA: Perfect. Then you
 9 can take this down, Mr. Nguyen.
 10 A. These – these – these signatures
 11 are identical, now that I stare at them, and I
 12 mean, they are so close – I mean, they're
 13 identical that, I mean, even with my chicken
 14 scratch signature, I don't know if I can – you
 15 know, I do this 100 times, could I do that
 16 as – as precisely as I see between the two
 17 notes.
 18 Q. Well, that is why I ask.
 19 Mr. Waterhouse, now that you have examined
 20 them, does it seem like it is more likely that
 21 you actually electronically signed these?
 22 MR. MORRIS: Objection to the form
 23 of the question.
 24 A. Is – I don't – I don't recall
 25 specifically. As I said before, my assistant

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1 WATERHOUSE - 10-19-21
 2 you know, I don't have any of these records is
 3 what I'm saying. I don't have any of those
 4 records.
 5 Q. That is why I'm asking you these
 6 questions in great detail because I don't have
 7 those emails. I'm trying to – I'm hoping that
 8 you will give me some names or some details so
 9 I can go look for more emails, but again, you
 10 don't remember any – any individual, other
 11 than Mr. Dondero that we've discussed, you
 12 don't remember any individual with whom you
 13 discussed these promissory notes prior to their
 14 execution?
 15 MR. MORRIS: Objection to the form
 16 of the question.
 17 A. I don't recall discussing it with
 18 anybody else.
 19 Q. Okay.
 20 A. I mean, prior –
 21 Q. I understand.
 22 A. You know, there was no one else –
 23 there was no one else in that meeting that I
 24 recall with Mr. Dondero.
 25 Q. Now, when you established that by

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1 WATERHOUSE - 10-19-21
 2 did have a – an electronic signature, and that
 3 was used from time to time. It wasn't as
 4 common practice back in 2019. It definitely
 5 was more common practice when we had to work
 6 from home and remotely for COVID because it
 7 that made it almost impossible to, right,
 8 provide wet signatures since we're all working
 9 from home remotely.
 10 Q. Well, going just for these two
 11 promissory notes, Mr. Waterhouse, in light of
 12 your inability to remember any details, are you
 13 sure you actually signed either or both of
 14 those notes?
 15 MS. DANDENEAU: Objection to form.
 16 A. I don't recall specifically
 17 signing – actually physically signing these
 18 notes. As I said before, I don't recall doing
 19 that. This – this looks like my signature,
 20 but yet these two signatures are identical.
 21 Q. So you don't recall physically
 22 signing them, and I take it you don't recall
 23 electronically signing them either?
 24 A. I don't recall. You know, Highland
 25 has all my emails. If that occurred, you know,

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1 WATERHOUSE - 10-19-21
 2 May of 2019 –
 3 A. And – and from what I recall, and
 4 the reason why I was by myself is – is, you
 5 know, I don't – I don't want to speculate, I'm
 6 sorry.
 7 Q. Okay. We have established that by
 8 May of 2019, in your view, the liabilities of
 9 HCMFA exceeded its assets; correct?
 10 A. Yeah. I mean, again, I don't have
 11 financial statements in front of me, but I
 12 think, if I recall, we'd have to go through the
 13 testimony with Mr. Morris, I believe that was
 14 the case.
 15 Q. In fact, you will recall that in
 16 April of 2019, Mr. Dondero signed a document
 17 that extended the demand feature of two prior
 18 notes to May 31, 2019. Do you recall that?
 19 MS. DEITSCH-PEREZ: I think you
 20 might – maybe have the court reporter read
 21 that back. You might have misspoke.
 22 (Record read.)
 23 MR. RUKAVINA: And I did misspeak.
 24 Q. I meant to say to May 31, 2021. Do
 25 you recall that, sir?

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1 WATERHOUSE - 10-19-21
 2 MR. MORRIS: Objection to the form
 3 of the question.
 4 A. Yes.
 5 MR. RUKAVINA: And, Mr. Nguyen, just
 6 so that the record is clear, will you please
 7 pull up my Exhibit Alpha 10, A10.
 8 (Exhibit A10 marked.)
 9 Q. You don't have this one in front of
 10 you, Mr. Waterhouse? This is the one that
 11 Mr. Morris used earlier. Do you see that
 12 document, sir?
 13 A. Yes, I do.
 14 Q. And this is what you were testifying
 15 about before when Mr. Morris was asking you.
 16 Do you remember that?
 17 A. Yes.
 18 Q. So here is my question for you,
 19 Mr. Waterhouse: As the chief financial officer
 20 of Highland, was it prudent for Highland less
 21 than three weeks later to be lending
 22 \$7.2 million to an insolvent entity that
 23 couldn't even then pay its debts back to
 24 Highland?
 25 MS. DANDENEAU: Objection to form.

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1 WATERHOUSE - 10-19-21
 2 Q. Did you even –
 3 MR. MORRIS: I didn't hear that
 4 question, sir.
 5 MR. RUKAVINA: The one that he
 6 answered, John, or my new one?
 7 MR. MORRIS: No, no, your question,
 8 Davor.
 9 MR. RUKAVINA: I had asked him
 10 whether he received any of the
 11 \$7.4 million. He said no.
 12 MR. MORRIS: Yeah. I thought there
 13 was a question after that. Maybe I was
 14 mistaken. I apologize.
 15 MR. RUKAVINA: I had started a new
 16 question, so here, let me start the new
 17 question again.
 18 Q. Did you personally receive any
 19 direct benefit from those two notes for
 20 \$7.4 million?
 21 A. No.
 22 Q. Did you ever personally consider
 23 yourself obligated to repay either or both of
 24 those notes?
 25 A. No.

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1 WATERHOUSE - 10-19-21
 2 MR. MORRIS: Objection to the form
 3 of the question.
 4 A. Sorry, I just want to make sure –
 5 are you asking me, did you say, was it prudent
 6 for Highland to loan \$7.4 million to HCMFA a
 7 few weeks after this document was executed?
 8 Q. Yes, and at a time when HCMFA's
 9 liabilities exceeded its assets.
 10 MR. MORRIS: Objection to the form
 11 of the question.
 12 A. I don't – it is odd. I don't know.
 13 MR. RUKAVINA: You can take this
 14 exhibit down, Mr. Nguyen.
 15 Q. Do you recall asking anyone,
 16 Mr. Dondero or – or anyone outside as to
 17 whether Highland ought to be lending
 18 \$7.4 million to HCMF regarding HCMF's
 19 creditworthiness?
 20 MR. MORRIS: Objection to the form
 21 of the question.
 22 A. I don't recall.
 23 Q. Did you receive personally any of
 24 that \$7.4 million?
 25 A. No.

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1 WATERHOUSE - 10-19-21
 2 MR. RUKAVINA: Pull up those notes
 3 again, Mr. Nguyen.
 4 Q. You can have them in front of you,
 5 Exhibit 7, Mr. Waterhouse, whatever is easier
 6 for you. If you go to your signature page, my
 7 question to you is, why did you not include
 8 your title as treasurer by your name, Frank
 9 Waterhouse?
 10 MS. DANDENEAU: Objection to form.
 11 A. I didn't – I didn't draft this
 12 document.
 13 Q. So you relied on whoever drafted it
 14 to draft it correctly?
 15 A. Yes.
 16 Q. Okay. But back then when you signed
 17 this, did it ever cross your mind that you were
 18 the maker on these notes?
 19 A. No.
 20 Q. Back then when you signed this
 21 document, did it ever cross your mind that you
 22 could be a co-obligor on these notes?
 23 A. No. I didn't receive \$7.4 million,
 24 I mean...
 25 Q. But can you say that HCMFA received

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1 WATERHOUSE - 10-19-21
 2 \$7.4 million?
 3 A. I would have to go back and look and
 4 check in, you know, the – the financial
 5 records and the bank statements.
 6 MR. RUKAVINA: You can take this
 7 exhibit down, Mr. Nguyen.
 8 Q. Mr. Waterhouse, I'm not trying to be
 9 a smart-ass, but if the law says that because
 10 of the way that you signed this promissory
 11 note, if that is what the law says, that that
 12 made you personally – personally liable, then
 13 you would agree with me that that was never
 14 your intent?
 15 MR. MORRIS: Objection to the form
 16 of the question.
 17 A. That was never – I wouldn't sign a
 18 note and not get consideration in return.
 19 Q. So putting all other issues aside,
 20 if the law – if the law says that you were
 21 liable for those notes because of how you
 22 signed them, then would you agree with me that
 23 these notes are a mistake?
 24 MR. MORRIS: Objection to the form
 25 of the question.

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1 WATERHOUSE - 10-19-21
 2 A. Yes.
 3 Q. Okay. And do you see an entry for
 4 Highland Capital Management Fund Advisors?
 5 MR. MORRIS: I'm sorry, hold on.
 6 Where are you looking?
 7 MR. RUKAVINA: Last page, John.
 8 MR. MORRIS: Is it the page on the
 9 screen?
 10 MR. RUKAVINA: Oh, I'm sorry.
 11 Mr. Nguyen just did it. Yes, the last page
 12 there.
 13 MR. MORRIS: Thank you.
 14 Q. Do you see an entry there for HCMFA?
 15 A. Yes.
 16 Q. About \$10.5 million.
 17 Do you see that?
 18 A. I do.
 19 Q. And, now, do you have any
 20 explanation for why if HCMFA owed \$7.4 million,
 21 plus the 5.3 million that had been extended,
 22 why that amount was only 10.5 million?
 23 A. I don't know. Okay.
 24 MR. RUKAVINA: Close this one and
 25 pull up, Mr. Nguyen, the schedules,

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1 WATERHOUSE - 10-19-21
 2 MS. DANDENEAU: Objection to the
 3 form.
 4 A. Yes.
 5 Q. So do you agree with me that it's
 6 odd – I think that is the word you used –
 7 that Highland would be loaning \$7.4 million a
 8 few weeks after that extension to an entity
 9 whose liabilities exceeded its assets, and you
 10 would agree with me that it was never your
 11 intention to be in any way liable for these two
 12 promissory notes; correct?
 13 MR. MORRIS: Objection to the form
 14 of the question.
 15 A. Sorry, you – you asked a lot there.
 16 MR. RUKAVINA: I will strike it and
 17 I will move on.
 18 Let's go to – pull up Exhibit 9,
 19 please Mr. Nguyen – Alpha 9, I'm sorry, Alpha
 20 9, A9.
 21 (Exhibit A9 marked.)
 22 Q. Sir, take a moment to look at this,
 23 but this is an email, and you will see attached
 24 July 31, 2020 affiliate notes.
 25 Do you see that attachment?

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1 WATERHOUSE - 10-19-21
 2 schedule of assets. What exhibit is this
 3 of ours, Mr. Nguyen?
 4 MR. NGUYEN: This is A11.
 5 MR. RUKAVINA: Oh, this will be A11.
 6 (Exhibit A11 marked.)
 7 Q. You don't have this in front of you,
 8 Mr. Waterhouse?
 9 A. Okay.
 10 Q. This is what Mr. Morris used
 11 earlier. Do you remember looking at this with
 12 Mr. Morris?
 13 A. Yes.
 14 MR. RUKAVINA: You might have to
 15 zoom in a little. Okay.
 16 Q. Now, I see Affiliate Note A, B, and
 17 C.
 18 Do you have any recollection as to
 19 why the names of the affiliates are omitted?
 20 A. I don't. I testified earlier that,
 21 you know, the team worked with DSI in providing
 22 these. I – I don't – I don't know.
 23 Q. Can we deduce – is it logical to
 24 deduce that Affiliate Note A would be NexPoint
 25 given its size of \$24.5 million?

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1 WATERHOUSE - 10-19-21

2 MR. MORRIS: Objection to the form

3 of the question.

4 A. I mean, it – it is a – it is – it

5 is approximate.

6 Q. Well, can we – can we deduce – or,

7 I'm sorry, strike that.

8 Can you, sitting here today,

9 logically conclude that Affiliate Note B or C

10 represents HCMFA?

11 MR. MORRIS: Objection to the form

12 of the question.

13 A. I don't know. I don't know. I

14 can't.

15 Q. Okay. As of the petition date, we

16 have established that HCMFA, under promissory

17 notes, owed \$7.4 million and \$5.3 million to

18 the debtor; correct?

19 MR. MORRIS: Objection to the form

20 of the question.

21 A. Yes.

22 Q. Okay. And by my reckoning, that

23 would be somewhere approaching \$13 million.

24 MR. MORRIS: Objection to the form

25 of the question.

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1 WATERHOUSE - 10-19-21

2 affiliates for Affiliate Note A, B, and C would

3 have been listed there?

4 A. Are you asking we provided the names

5 to the financial advisor? I don't – I don't

6 understand who the financial advisor is.

7 Q. I'm sorry, DSI.

8 Let me ask the question this way,

9 Mr. Waterhouse.

10 Whenever you provided information

11 about the affiliate notes to DSI, do you

12 believe that you would have included the actual

13 names of the affiliates, you or your team, or

14 that you would have done the Affiliate Note A,

15 Note B, Note C?

16 MR. MORRIS: Objection to the form

17 of the question.

18 MS. DANDENEAU: Objection to the

19 form.

20 A. We – like I testified earlier, when

21 we were – we gave everything to – to DSI. We

22 were giving all of our records, all of our

23 files, everything to DSI. We weren't redacting

24 information or saying, hey, here is a note,

25 here is Affiliate Note A or B.

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1 WATERHOUSE - 10-19-21

2 Q. It would be \$12.7 million. Is that

3 generally correct?

4 A. Sorry, the amounts were 7.4, 5.3.

5 Q. Yes.

6 A. Okay. Yeah, that – that – I can

7 do that math, yes.

8 Q. Do you have any explanation or any

9 understanding of why there is no similar entry

10 listed here on the schedule of assets filed

11 with the bankruptcy court?

12 MR. MORRIS: Objection to the form

13 of the question.

14 A. I don't know. We have to look at

15 the supporting schedules, like I talked about

16 other – presumably there is – there is a

17 build to the schedule that would provide the

18 detail.

19 Q. Well, that was going to be my next

20 question. You anticipated it.

21 MR. RUKAVINA: You can – you can

22 take this down, Mr. Nguyen.

23 Q. Do you believe that whenever you and

24 your team provided the underlying data to the

25 financial advisor that the actual names of the

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1 WATERHOUSE - 10-19-21

2 I mean, it was – our job and our

3 focus – and I testified in court back in 2019;

4 right – was – was to be transparent and, you

5 know, get DSI up to speed on – on the matters

6 at Highland. So I can't see us redacting at

7 that point.

8 MR. RUKAVINA: Mr. Nguyen, will you

9 please pull up Mr. Morris' Exhibit 36.

10 Just the very first page, the very top

11 email. You might zoom in a little bit.

12 Q. Now, you recall being asked about

13 this by Mr. Morris?

14 A. Yes, I do.

15 Q. And you wrote: The HCMFA note is a

16 demand note.

17 You wrote that; right?

18 A. Yes.

19 Q. And, in fact, weren't there by that

20 point in time several notes?

21 A. Yes, there were. Again, I don't –

22 I don't remember everything specifically. I

23 mean –

24 Q. I understand. I understand.

25 So this is an example where – where

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1 WATERHOUSE - 10-19-21

2 you might have made a mistake by referring to a

3 singular instead of a plural; right?

4 A. Yes.

5 Q. Okay. And you – you wrote – a

6 couple of sentences later, you wrote: There

7 was an agreement between HCMLP and HCMFA the

8 earliest they could demand is May 2021.

9 You wrote that; right?

10 A. Yes.

11 Q. But I think you – you agreed with

12 Mr. Morris that that can't possibly apply to

13 the May 2019 notes, can it?

14 MR. MORRIS: Objection to the form

15 of the question. That is not what he

16 testified to.

17 Q. Let me ask – let me ask a different

18 question.

19 Sitting here today – or if you can

20 answer me from your memory on October 6,

21 2020 – did the April acknowledgment that

22 extended the maturity date apply to the

23 May 2019 notes also?

24 A. I don't recall specifically.

25 Q. Well, you recall that the notes that

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1 WATERHOUSE - 10-19-21

2 putting language in those May notes. I don't

3 remember what language you are referring to.

4 Q. Well, let's read this again.

5 There was an agreement between HCMLP

6 and HCMFA the earliest they could demand is May

7 2021.

8 Do you recall that agreement?

9 A. Yes, that was the agreement we

10 looked at earlier; correct?

11 Q. Okay. Yes.

12 Do you – do you understand now that

13 that agreement that we looked at earlier also

14 applied to the May 2019 notes that you signed?

15 A. I don't – I don't know.

16 Q. But as of October 6, 2020, you're

17 writing that there is one demand note and

18 you're categorizing that demand note as not

19 being demandable on May 2021; correct?

20 A. Yes.

21 Q. And you know now that you made at

22 least one mistake in this email; correct?

23 MR. MORRIS: Objection to the form

24 of the question.

25 A. Yes.

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1 WATERHOUSE - 10-19-21

2 you signed were demand notes; right?

3 A. Yes.

4 Q. Do you find it logical, based on

5 your experience, that had they intended to have

6 a different or a set maturity date, you would

7 have instructed that that set maturity date be

8 included instead of a demand feature?

9 MR. MORRIS: Objection to the form

10 of the question.

11 A. Sorry, just want to make sure I

12 understand. You are saying that – that the

13 \$5 million note, the \$2.4 million note, if

14 those were supposed to be a term note, that I

15 would have made sure that those were a term

16 note?

17 Q. I'm saying – I'm saying,

18 Mr. Waterhouse, that on May the 2nd and May the

19 3rd, 2019, if you intended that those two

20 promissory notes could not be called until May

21 2021, would you have included such language in

22 those two promissory notes?

23 MR. MORRIS: Objection to the form

24 of the question.

25 A. I guess – I'm sorry, I don't recall

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1 WATERHOUSE - 10-19-21

2 MR. RUKAVINA: You can pull this

3 down, Mr. Nguyen.

4 Q. So, Mr. Waterhouse, you don't

5 remember Mr. Dondero telling you to make these

6 loans or not. HCMLP was loaning \$7.4 million

7 to someone that their assets were less than

8 their liabilities.

9 We don't see on the July list of

10 notes, where there is \$12.7 million of notes,

11 we don't see that on the bankruptcy schedules,

12 and we have this Exhibit 36 where you are

13 confused.

14 Are you prepared to tell me, sir,

15 today that you might have made a mistake in

16 executing those two promissory notes?

17 MR. MORRIS: Objection to the form

18 of the question.

19 A. I – I don't know.

20 Q. And if it turns out that you're

21 personally liable for those promissory notes,

22 it would certainly be a mistake, wouldn't it?

23 MS. DANDENEAU: Objection to the

24 form.

25 MR. MORRIS: Join.

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2 A. Yes.

3 Q. If Mr. Dondero testifies that he

4 never told you to make these loans, would you

5 disagree with his testimony?

6 MR. MORRIS: Objection to the form

7 of the question.

8 A. Like I testified earlier with my

9 conversation with Mr. Dondero, all I recall is

10 he said, get the money from Highland.

11 Q. And if Mr. Dondero testifies that

12 he, in consultation with other senior personnel

13 at Highland, decided that Highland needed to

14 pay HCMFA \$7.4 million as compensation for the

15 NAV error and not a loan, would you have any

16 reason to disagree with Mr. Dondero?

17 MR. MORRIS: Objection to the form

18 of the question.

19 A. If that was – if that was his

20 intent, yes, it would – I would –

21 Q. Do you have any reason to disagree

22 with him?

23 MR. MORRIS: Objection to the form

24 of the question.

25 A. If that was his intent, I don't

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1 WATERHOUSE - 10-19-21

2 Q. Again, the only thing you remember,

3 sitting here today, was Mr. Dondero said, get

4 the money from Highland, and that is it, that

5 is all you remember?

6 MR. MORRIS: Objection to the form

7 of the question.

8 A. I testified to that several times.

9 This was over two years ago. A lot has

10 happened. That is all I recall.

11 Q. And help me here. I'm not very

12 technologically astute. When you – and I – I

13 recognize that you do it rarely, but when you

14 sign a document electronically, do you believe

15 that there is an electronic record of you

16 having authorized or signed a document

17 electronically?

18 MR. MORRIS: Objection to the form

19 of the question.

20 A. I – I don't know the tech answer to

21 that, but, you know, since I don't have – I

22 don't ever attach my signature block

23 electronically, my assistant would have done

24 that, and if that is done over email like we

25 did several times – you know, multiple,

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1 WATERHOUSE - 10-19-21

2 know. I don't know how I disagree with that.

3 Q. And just to confirm, you don't

4 remember ever asking Mr. Dondero whether you

5 should have two promissory notes prepared?

6 A. No.

7 Q. And you don't remember discussing

8 with Mr. Dondero what the terms of those two

9 promissory notes should be?

10 A. I don't recall – I testified all I

11 recall is he said, get the money from Highland.

12 I don't – the – the terms of the note, I

13 don't recall ever having a discussion around

14 the terms of the note, but since I don't draft

15 the notes, that – there could have been a

16 conversation with other people later.

17 Q. Do you have any memory of whether

18 after the notes were drafted, but before you

19 signed them, that you communicated with

20 Mr. Dondero in any way to just confirm or – or

21 get his blessing or ratification to signing

22 those notes?

23 MR. MORRIS: Objection to the form

24 of the question.

25 A. I don't recall.

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2 multiple times over COVID, she would attach my

3 signature block and then email it out to

4 whatever party.

5 Q. What was your assistant's name in

6 May 2019?

7 A. It was Naomi Chisum.

8 Q. Is she the only one? I'm sorry, was

9 she your only assistant that would have maybe

10 facilitated logistically something like you

11 just described?

12 A. You know, she was out on maternity

13 leave at some point. I don't – I don't recall

14 those dates where she was out for maternity

15 leave. There was – there were folks backing

16 her up. I don't recall specifically who

17 those – who those, you know, administrative

18 assistants were, and I don't recall

19 specifically if she was out during this time on

20 maternity leave.

21 I do know that that she was out for

22 a period of time, or who knows, or she could

23 have been on vacation that day or, you know, I

24 don't know.

25 Q. Switching gears now, the two

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2 complaints that have been filed that is against

3 HCMFA and NexPoint, did you see any drafts of

4 those complaints before they were filed?

5 MR. MORRIS: Objection to the form

6 of the question, and to the extent that you

7 had any communications with counsel or you

8 were shown drafts of the complaints by

9 counsel while you were employed by

10 Highland, I direct you not to answer.

11 A. I – I reviewed documents yesterday

12 with counsel here. I believe that is the first

13 time I have ever seen those.

14 Q. Okay. Did you ever discuss with

15 Mr. Seery these two lawsuits before or after

16 they were filed?

17 A. I don't recall.

18 Q. Were you ever interviewed by legal

19 counsel, to your knowledge, about these

20 promissory notes before the complaints were

21 filed? Without going into what was said, were

22 you ever interviewed by legal counsel?

23 MR. MORRIS: Objection to the form

24 of the question.

25 A. I don't recall.

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2 A. The Zoom calls we had, I don't

3 recall having seen video or, you know, or if it

4 was on Zoom, I just remember it being – well,

5 no, you know what, there were some – you know,

6 I take that back.

7 So there were – there were some

8 times that I did remember seeing Mr. Seery

9 on – on some of the Zoom calls.

10 Q. Well, let me –

11 A. I don't – sorry, I'm thinking. I'm

12 thinking – I'm going back. I'm trying to

13 process this.

14 Q. I can make it much quicker,

15 Mr. Waterhouse. I have heard – I have heard

16 that Mr. Seery is a copious note taker.

17 Do you have any knowledge about

18 that?

19 A. No.

20 Q. Okay. Switching gears yet again,

21 and this will be last theme. Do you need a

22 restroom break, or are you good to go for

23 another half an hour?

24 MS. DEITSCH-PEREZ: I need a

25 restroom break.

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2 Q. Obviously with COVID, it changed,

3 but – but before COVID, did you used to meet

4 with Mr. Seery from time to time in-person?

5 A. Yeah, I mean, so before COVID – so

6 we're talking kind of late March, early April,

7 right, there was about – I don't remember the

8 specific date when the board for Highland was

9 appointed. I believe it was around February of

10 2020, so maybe there was a month-and-a-half,

11 two-month window where we were meeting

12 in-person or, you know, like we were actually

13 in the office, excuse me, we were in the

14 office.

15 And, you know, when they were first

16 appointed, the board members and Mr. Seery

17 were – were definitely down here more

18 in-person.

19 Q. Did you ever see Mr. Seery taking

20 written notes of – of his meetings with you or

21 others?

22 A. I don't recall.

23 Q. Do you recall on any Zoom or video

24 conference with Mr. Seery, seeing him take

25 notes, written notes?

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2 MR. RUKAVINA: Can we make it five

3 minutes?

4 THE WITNESS: Five minutes would be

5 great.

6 VIDEOGRAPHER: We're going off the

7 record at 5:53 p.m.

8 (Recess taken 5:53 p.m. to 5:59 p.m.)

9 VIDEOGRAPHER: We are back on the

10 record at 5:59 p.m.

11 Q. Mr. Waterhouse, I had asked you

12 earlier about contracts between HCMFA and the

13 debtor, and now I'm going to talk about

14 contracts between the debtor and NexPoint

15 Advisors. Okay?

16 A. Okay.

17 Q. Now, were there contracts similar to

18 the ones with HCMFA that NexPoint had in the

19 nature of employee reimbursement and shared

20 services?

21 A. Yes, they – NexPoint Advisors and

22 Highland Capital Management Fund Advisors had

23 cost reimbursement and shared services

24 agreements with Highland Capital Management,

25 L.P.

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2 Q. And was that shared services

3 agreement, to the best of your understanding,

4 in place as of December 31, 2020?

5 A. It was – it was terminated at some

6 point, and I remember the contracts had

7 different termination dates, but I think the –

8 the date of termination was January 31st of

9 2021, after the termination was put in.

10 So yeah, it would be in place at the

11 end of the year of December – it would be in

12 place at December 31st, 2020.

13 Q. And pursuant to that agreement as of

14 December 31st, 2020, was the debtor providing

15 what you would describe as back office services

16 to NexPoint?

17 A. Yes.

18 Q. Would those have included accounting

19 services?

20 A. Yes.

21 Q. And as part of those accounting

22 services, would the debtor have assisted

23 NexPoint with paying its bills?

24 MR. MORRIS: Objection to the form

25 of the question.

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2 Q. You answered yes?

3 A. Yes.

4 Q. And the payments, though, whose

5 funds would they be made from?

6 A. From the bank account of NexPoint

7 Advisors. If they were NexPoint advisor

8 obligations, it would be made from NexPoint

9 Advisors' bank account.

10 Q. So let's pull up Exhibit Alpha 1.

11 You should have that – it is my Tab 1 or my

12 Exhibit 1.

13 (Exhibit A1 marked.)

14 Q. So this is a – this is a series of

15 emails, Mr. Waterhouse. Let's look at the

16 first page here, November 25, 2020, between

17 Kristin Hendrix and yourself.

18 Do you see that, sir?

19 A. I do.

20 Q. And do you see where Ms. Hendrix

21 writes: NPA.

22 Do you know what NPA stood for?

23 A. Yes.

24 Q. And what does it stand for?

25 A. NexPoint Advisors.

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2 A. Yes.

3 Q. So let's break that up. You were a

4 treasurer of NexPoint as well in December of

5 2020?

6 MR. MORRIS: Objection to the form

7 of the question.

8 A. Yes.

9 Q. Okay. And in December of 2020, did

10 NexPoint have its own bank accounts?

11 A. Yes.

12 Q. And did it use those bank accounts

13 to pay various of its obligations?

14 A. Yes.

15 Q. Did employees of the debtor have the

16 ability to cause transfers to be made from

17 those bank accounts on behalf of NexPoint?

18 A. Yes.

19 Q. And is that one of services that the

20 debtor provided NexPoint, basically ensuring

21 that accounts payable and other obligations

22 would be paid?

23 A. Yes.

24 MR. MORRIS: Objection to the form

25 of the question.

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2 Q. And was that how you-all internally

3 at Highland refer to NexPoint Advisors, L.P.?

4 A. I mean, yes, amongst other things.

5 Q. And she writes at the bottom of her

6 email: Okay to release?

7 Do you see that?

8 A. Yes, I do.

9 Q. So what –

10 MR. MORRIS: Hold on one second.

11 Okay. Go ahead.

12 MR. RUKAVINA: Yeah.

13 Q. So what is – what is Ms. Hendrix

14 here on November 25 asking of you?

15 A. She is asking me – so she – these

16 are – these are payments – typically we would

17 do an accounts payable run every week at the

18 end of every Friday. But looking at this date,

19 it is Wednesday, November 25th, which means, to

20 me, it is likely Thanksgiving weekend.

21 So this is the day before

22 Thanksgiving, so this is the last kind of –

23 kind of day before the holidays and vacation

24 and things of that nature. So it is

25 effectively the Friday of that week.

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 2 So she is – she is putting in all
 3 the payments for the week because we batch
 4 payments weekly. And these are the payments
 5 that go out that week, and she is informing me
 6 of the payments and – you know, again, at the
 7 bottom of the email, she is asking for my okay
 8 to – to release these payments in the wire
 9 system.
 10 Q. So these would be accounts payable
 11 of NexPoint?
 12 A. I mean, it would be accounts payable
 13 for all of these entities listed on this email.
 14 Q. And who was Ms. Hendrix employed by
 15 in November and December of 2020?
 16 A. Highland Capital Management.
 17 Q. Okay. So – so part of the services
 18 that NexPoint had contracted with was for
 19 Highland to ensure that NexPoint timely paid
 20 its accounts payable; is that accurate?
 21 MR. MORRIS: Objection to the form
 22 of the question. You have got to be
 23 kidding me.
 24 Q. Is that accurate?
 25 A. Yes.

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 2 looking at – I'm – I'm looking at the date of
 3 this email. It is November 30th. It is the
 4 last day of the month.
 5 HCMFA has obligations it needs to
 6 pay to its broker-dealer, which is HCFD. And
 7 it likely was short funds to make those
 8 obligations under that – under its agreement,
 9 and so it provided a one-day loan because on
 10 the next business day on 12/1 – or the next
 11 business day in December, it would receive
 12 management fees from the underlying funds that
 13 it managed and it would be able to pay back
 14 that loan to NexPoint Advisors.
 15 Q. So – so here Ms. Hendrix was
 16 seeking your approval to transfer \$325,000 from
 17 NexPoint to HCMFA for a one-day loan; is that
 18 correct?
 19 A. That is correct.
 20 Q. Let's flip to the next page, sir.
 21 MR. RUKAVINA: And, Mr. Nguyen, if
 22 you will please scroll down.
 23 Q. Now we have as an entry for
 24 \$325,000, 11/30 loan payment.
 25 Do you see that, sir?

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 2 Q. And did NexPoint rely on employees
 3 of the debtor to ensure that NexPoint's
 4 accounts payable were timely paid?
 5 MR. MORRIS: Objection to the form
 6 of the question.
 7 A. Yes.
 8 MR. RUKAVINA: Let's flip to the
 9 next page, Mr. Nguyen, if you will please
 10 scroll to the next page.
 11 Q. So this is an email similar to the
 12 prior one, November 30th.
 13 Do you see where it says, NPA HCMFA,
 14 USD \$325,000 one-day loan?
 15 Do you see that, sir?
 16 A. I do.
 17 Q. Do you have any memory of what that
 18 was?
 19 A. I don't recall what that – what
 20 that payment was for.
 21 Q. Did it sometimes occur that one
 22 advisor would, on very short-terms, make loans
 23 to another advisor?
 24 A. Yes. This – this – this occurred
 25 from – from – from time to time. It actually

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 2 A. Yes.
 3 Q. And that is probably the loan that
 4 was approved on the prior page?
 5 A. Yes, most likely.
 6 Q. So is it also true, sir, that in
 7 addition to accounts payable debtor employees
 8 would be assisting NexPoint with respect to
 9 paying back its debt?
 10 MR. MORRIS: Objection to the form
 11 of the question.
 12 A. I mean, yes, for loans of this
 13 nature, yes.
 14 Q. Well, what about long term loans?
 15 Was it reasonable for NexPoint to expect debtor
 16 employees to ensure that NexPoint timely paid
 17 its obligations under long-term notes?
 18 MR. MORRIS: Objection to the form
 19 of the question.
 20 MS. DANDENEAU: Objection to form.
 21 A. I mean, that is one of the things
 22 that the Highland personnel did provide to the
 23 advisors. Yes, we would – we would – over
 24 the years, yes, we – we – we – we did do
 25 that generally. Again, I don't remember

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 2 specifically but, yes, generally we – you
 3 know, we did do that.
 4 Q. So do you recall – and we can pull
 5 it up, if need be – that under the NexPoint
 6 note that Mr. Morris asked you about earlier,
 7 the one for more than \$30 million, that
 8 NexPoint was obligated to make an annual
 9 payment of principal and interest?
 10 MR. MORRIS: Objection to the form
 11 of the question.
 12 A. Yes, it was – yes, it – it was an
 13 amortizing note. It was – you know, from what
 14 we reviewed earlier, it was payable by
 15 December 31st of each year. So – but are –
 16 are you asking me –
 17 Q. I'm just asking you, sir, if you
 18 recall the note.
 19 A. Yes, the \$30 million note, yes, we
 20 reviewed it earlier, yes.
 21 Q. And do you recall Mr. Morris had you
 22 go through the fact that NexPoint had made
 23 payments in years prior to 2020 on that note?
 24 A. I do.
 25 Q. And do you believe that employees of

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 2 Or, sorry, we – I say "we" – I
 3 keep saying "we" – I keep wearing my – again,
 4 my – my treasurer hat.
 5 But, yes, it is to – it is to
 6 inform Mr. Dondero of the obligations of the
 7 advisors in terms of cash and obligations that
 8 are – are upcoming and that – and that are –
 9 are scheduled to be paid.
 10 Q. And would those obligations that are
 11 upcoming and scheduled to be paid prior to 2020
 12 have incurred the annual payment on that
 13 NexPoint \$30 million note?
 14 MS. DANDENEAU: Objection to form.
 15 MS. DEITSCH-PEREZ: Davor, I think
 16 you misspoke. You might want to just
 17 repeat the question.
 18 Q. Okay. Let me repeat the question,
 19 sir.
 20 Prior to 2020, those services that
 21 you just described, would that – on behalf of
 22 the debtor, would that have included NexPoint's
 23 payments on the \$30 million note?
 24 A. Yes.
 25 Q. So someone at the debtor in treasury

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1 WATERHOUSE - 10-19-21
 2 the debtor would have played any role in
 3 NexPoint having made those prior payments?
 4 MR. MORRIS: Objection to the form
 5 of the question.
 6 A. Yes.
 7 Q. And what role in years prior to 2020
 8 would employees of the debtor have had with
 9 respect to NexPoint making that annual payment?
 10 A. We – we – we would have – I keep
 11 saying "we." The team would have calculated
 12 any amounts due under that loan and other
 13 loans, as – as standard course.
 14 We would – since we provided
 15 treasury services to the advisors, we would
 16 inform the – the – the – we informed
 17 Mr. Dondero of any cash obligations that are
 18 forthcoming, whether we do cash projections.
 19 If, you know, any of these payments
 20 would have – or, you know, the sum total of
 21 all of these payments, including any note
 22 payments, if there were any cash shortfalls, we
 23 would have informed Mr. Dondero of any cash
 24 shortfalls. We could adequately plan, you
 25 know, in instances like that.

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 2 or accounting would have sent some schedule or
 3 a reminder that a payment would be coming due
 4 in the future. Is that generally the practice?
 5 A. Yes, we would – you know, again, I
 6 didn't – I didn't micromanage the teams, but
 7 we had a – a corporate accounting calendar
 8 that we use as kind of a tickler file to keep
 9 track of payments.
 10 I actually, you know, don't know how
 11 actively they're using that in – in prior to
 12 2020, but it was actively used at some point.
 13 We did look at NexPoint cash
 14 periodically and cash for the other advisors as
 15 well and payments. You know, we – payments
 16 like this would have appeared in our cash
 17 projections, in the advisor's cash projections.
 18 And, again, as like I said earlier,
 19 they would have appeared there, so there would
 20 be time to plan for making any of these
 21 payments.
 22 Q. And based on your experience, would
 23 it have been reasonable for NexPoint to rely on
 24 the debtors' employees to inform NexPoint of an
 25 upcoming payment due on the \$30 million

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 2 promissory note?
 3 MR. MORRIS: Objection to form of
 4 the question.
 5 MS. DANDENEAU: Objection to form.
 6 A. Yes. Yes, they did. I mean, but I
 7 mean, but I don't think these -- these notes
 8 were any secret to anybody.
 9 Q. I understand, and I'm not suggesting
 10 otherwise.
 11 MR. RUKAVINA: Please pull up Alpha
 12 2, Mr. Nguyen.
 13 (Exhibit A2 marked.)
 14 Q. Now, this document is similar to the
 15 ones we've seen before as of December 31, 2020,
 16 and I don't see under NTA anything there for
 17 paying the promissory note to Highland.
 18 Do you see anything like that?
 19 A. I do not.
 20 MR. RUKAVINA: You can pull that --
 21 that exhibit down, Mr. Nguyen.
 22 Q. You are aware, of course, by now
 23 that, in fact, NexPoint failed to make the
 24 payment due December 31, 2020, are you not?
 25 A. I am aware, and yes, I do understand

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 2 borrower failed to make the required payment.
 3 Are you with me so far?
 4 A. I am.
 5 Q. Did anyone then ask you, what should
 6 we do with respect to our rights against the
 7 borrower that missed the payment?
 8 A. Not that I recall.
 9 Q. Did you play a role in the decision
 10 to accelerate that \$30 million promissory note?
 11 A. I did not.
 12 Q. Do you recall whether Mr. Seery ever
 13 asked you before the acceleration as to whether
 14 he should accelerate the note?
 15 A. I don't recall.
 16 Q. And you don't recall when you
 17 learned of the acceleration itself?
 18 MR. MORRIS: Objection to the form
 19 of that question.
 20 A. It was -- it was sometime in
 21 early -- in early 2021. I don't remember
 22 specifically.
 23 Q. But do you recall whether it was
 24 after the acceleration had already been
 25 transmitted?

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1 WATERHOUSE - 10-19-21
 2 it.
 3 Q. Were you aware that Highland
 4 accelerated that \$30 million promissory note?
 5 A. I am aware.
 6 Q. Were you aware of that acceleration
 7 at the time that it occurred?
 8 A. I don't remember specifically.
 9 Q. Do you recall whether anyone asked
 10 you -- prior to the acceleration, anyone asked
 11 you at Highland, what Highland should do with
 12 respect to the missed payment?
 13 A. Did anyone ask me what Highland
 14 should do about the missed payment?
 15 Q. Yes, before acceleration.
 16 MR. MORRIS: Objection to the form
 17 of the question.
 18 A. I mean, what -- what I recall is
 19 there was the -- sorry, are you asking me --
 20 MS. DANDENEAU: Why don't you just
 21 repeat the question, Mr. Rukavina.
 22 Q. Let me try again, Mr. Waterhouse,
 23 let me try again.
 24 I am saying you're the CFO of
 25 someone, in this case, Highland, and the

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 2 MS. DANDENEAU: Objection to the
 3 form of the question.
 4 A. I don't recall.
 5 Q. Do you recall in early to mid
 6 January of 2021, after the default, discussing
 7 the default with Mr. Dondero?
 8 A. I do recall discussing with
 9 Mr. Dondero after December 31, 2020?
 10 Q. Yes, the fact of the default.
 11 A. I don't recall.
 12 MR. RUKAVINA: Let's pull up my
 13 Exhibit 6, Alpha 6.
 14 (Exhibit A6 marked.)
 15 MR. RUKAVINA: And, Mr. Nguyen, if
 16 you will please scroll down.
 17 Q. This email chain begins with you
 18 writing to Ms. Hendrix on January the 12th:
 19 NexPoint note to HCMLP.
 20 Do you see that, sir?
 21 A. I do.
 22 Q. Were you discussing this same
 23 \$30 million note we're talking about right now
 24 with Ms. Hendrix?
 25 A. Yes.

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2 Q. Okay. Do you recall what prompted

3 you to send that email to her?

4 A. Yes, I had – I had a conversation

5 with Jim.

6 Q. Okay. And what – what did you

7 discuss with Jim that led to this email chain?

8 A. He – he called me and he said he

9 wanted to make payment on the NexPoint note,

10 and I didn't – I didn't know the – the amount

11 offhand, so I reached out to Kristin and got

12 the details and relayed that to him.

13 Q. And you see you sent that email to

14 her at 11:15 a.m. Does that help you remember

15 when you had this discussion with Mr. Dondero?

16 In other words, was it that morning or the day

17 before, or can you – can you –

18 A. No, it was – it was that morning.

19 Q. And do you recall how you had that

20 conversation with him?

21 MR. MORRIS: Objection to the form

22 of the question.

23 Q. By telephone, by email, in-person?

24 A. Yeah, he – he called me. I was at

25 home. We were working from home here in

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2 Mr. Dondero, was – was it also on January

3 12th?

4 A. Sorry, when I conveyed the

5 \$1.4 million number?

6 Q. Yes.

7 A. Yes, yes, it was that – it was –

8 Q. So you had –

9 A. It was that point.

10 Q. Well, to the best of your

11 recollection, you had a conference with

12 Mr. Dondero by the telephone in the morning,

13 and then another conference with him by

14 telephone after 11:40 a.m. that morning?

15 A. Yeah, I can't remember – yeah, it

16 was either that morning or it could have been,

17 you know, early afternoon, but again, I

18 remember calling him back, relaying this

19 information to him, and he said, okay, pay –

20 you know, make – make this payment.

21 Q. And during either of those two

22 calls, did you tell Mr. Dondero anything to the

23 effect that making those – I'm sorry, making

24 that payment would not de-accelerate the

25 promissory note?

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2 December of 2020. He called me from home. He

3 said he was in court. He wanted to – he asked

4 about, you know, making payment on the note and

5 the amount, and so I didn't have those numbers

6 in front of me, so I said I would get back to

7 him. I wanted all the details, so here is

8 this – so I reached out to Kristin.

9 Q. And then she gave you that

10 \$1,406,000 figure?

11 MR. RUKAVINA: Mr. Nguyen, if you

12 will scroll up, please.

13 A. Yes. Yeah, she – the \$1,406,112.

14 Q. And do you recall whether you

15 conveyed that amount to Mr. Dondero?

16 A. Yes. I – I called him back and

17 gave him – gave him this amount.

18 Q. Are you aware of whether NexPoint,

19 in fact, then made that 1 million 406 and

20 change payment?

21 A. Yes, they did.

22 Q. Did you discuss with Mr. Dondero at

23 that time, either the first conference or the

24 second conference that day – strike that.

25 When you conveyed the number to

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2 A. No.

3 Q. Did you tell him anything to the

4 effect that making that payment would not cure

5 the default?

6 A. No.

7 Q. Did you discuss that in any way with

8 him?

9 A. No, I did not.

10 Q. Did he say why he wanted to have

11 that \$1.4 million payment made?

12 MR. MORRIS: Objection to the form

13 of the question.

14 A. He – he – he didn't go into

15 specifics.

16 Q. Did he say anything to you to the

17 effect that if NexPoint makes that payment,

18 then the note will be de-accelerated?

19 MR. MORRIS: Objection to the form

20 of the question.

21 A. I don't recall.

22 MR. RUKAVINA: You can put this one

23 down, Mr. Nguyen.

24 Q. And, again, when you say you don't

25 recall, you mean you don't remember right now

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 2 either way; correct?
 3 A. Yeah, I don't remember. I don't
 4 remember us discussing that.
 5 Q. Now – and we're almost done, I
 6 promise. I'm just going to – I don't know how
 7 to ask this question, so I'm just going to try
 8 to do my best.
 9 Prior to the default on December 31,
 10 2020, did Mr. Seery ever tell you any words to
 11 the effect that you or someone at Highland
 12 should ensure that NexPoint doesn't make its
 13 payment?
 14 A. No.
 15 Q. Did you have any hint or any belief
 16 that anyone at NexPoint – I'm sorry, strike
 17 that.
 18 Did you have any reason to believe
 19 that anyone with Highland was actively trying
 20 to get NexPoint to make that default by not
 21 paying on December 31?
 22 MR. MORRIS: Objection to the form
 23 of the question.
 24 A. Are you asking, did any Highland
 25 employees actively work to make – to

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1 WATERHOUSE - 10-19-21
 2 given or taken at Highland by Mr. Seery, the
 3 independent board, DSI, that – that would have
 4 basically led Highland to ensure that NexPoint
 5 would fail to make that payment?
 6 A. I'm not aware.
 7 Q. In other words, there wasn't a trick
 8 or a settlement; right?
 9 MS. DEITSCH-PEREZ: Objection to
 10 form.
 11 MS. DANDENEAU: Object to form.
 12 MR. MORRIS: Object to form.
 13 A. I'm not aware.
 14 Look, I'm not aware. I'm not in
 15 every conversation. I mean, and I'm just –
 16 again, I'm sitting at home. It is the end of
 17 the year. Again, I'm not aware.
 18 Q. That is a perfectly legitimate
 19 answer. I don't know why – why you think
 20 otherwise.
 21 Okay. Just give me one second to
 22 compose my thoughts.
 23 MS. DEITSCH-PEREZ: While you're
 24 taking your one second, why don't we take
 25 three minutes. I will be right back.

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 2 somehow –
 3 Q. Yes. Let me take a step back. Let
 4 me take a step back.
 5 So you are aware now that as a
 6 result of that default, what was still some
 7 25-year note was accelerated and became
 8 immediately due. You are aware of that now;
 9 right?
 10 A. Yes.
 11 Q. And can you see how someone at
 12 Highland might actually have been pleased with
 13 that development?
 14 MR. MORRIS: Objection to the form.
 15 Q. Not that they were – not that they
 16 were pleased, but you can see how someone at
 17 Highland might have been pleased with that
 18 development?
 19 MR. MORRIS: Objection to the form
 20 of the question.
 21 MS. DANDENEAU: Object to form.
 22 A. I don't know how they would have
 23 reacted to that.
 24 Q. Okay. But you're not – you're not
 25 aware of any instructions or any actions being

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 2 VIDEOGRAPHER: Do we want to go off
 3 the record?
 4 MR. RUKAVINA: Yes.
 5 VIDEOGRAPHER: All right. We're
 6 going off the record at 6:27 p.m.
 7 (Recess taken 6:27 p.m. to 6:30 p.m.)
 8 VIDEOGRAPHER: We are back on the
 9 record at 6:30 p.m.
 10 MR. HORN: Is Deb back?
 11 MS. DANDENEAU: Are you asking about
 12 me? I'm here.
 13 MR. HORN: Oh, okay. I don't see
 14 you, sorry.
 15 Q. Actually, yeah, Mr. Waterhouse, so
 16 when you had –
 17 MS. DANDENEAU: Are you asking about
 18 Deb Dandeneau or Deborah? I mean, there
 19 are a lot – as we talked about, a lot of
 20 Debs. I'm here.
 21 MS. DEITSCH-PEREZ: I'm here.
 22 MR. HORN: Yes, I was asking about
 23 DDP.
 24 MS. DEITSCH-PEREZ: Oh, DDP is here.
 25 MR. HORN: Okay. Here we go. I'm

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 2 going back on mute.
 3 MS. DANDENEAU: Get the right
 4 nomenclature.
 5 Q. Mr. Waterhouse, on January 12th,
 6 2021, when you had those talks with Mr. Dondero
 7 about the \$1.4 million payment, did you have a
 8 communication or a conversation with Mr. Seery
 9 about that payment after January 12th, 2021?
 10 A. I don't recall.
 11 Q. Well, in response to Mr. Dondero
 12 reaching out to you, do you recall on that day,
 13 January 12th, talking to Mr. Seery or anyone at
 14 Highland other than the email chain we just saw
 15 about Mr. Dondero's call with you?
 16 A. Did I talk to – I spoke with
 17 Kristin – I don't know if I spoke to her. I
 18 likely spoke to Kristin Hendrix because we had
 19 to get the wire on NexPoint's behalf to make
 20 the payment to Highland.
 21 Q. So it is true, then, that – that
 22 employees of the debtor did actually cause that
 23 payment to be made when it was made after
 24 January 12th?
 25 A. Yes, I mean, we – we – as I

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1 WATERHOUSE - 10-19-21
 2 time.
 3 MR. RUKAVINA: Pass the witness.
 4 MR. MORRIS: I just have a few
 5 questions, if I may.
 6 MS. DEITSCH-PEREZ: Don't you go at
 7 the end?
 8 MR. MORRIS: Oh, I apologize. He is
 9 your witness. I'm surprised you want to
 10 ask him questions, but go right ahead.
 11 MS. DEITSCH-PEREZ: Just have a
 12 couple of things.
 13 MR. RUKAVINA: And I will just
 14 object to that, that he's our witness.
 15 That's not –
 16 MR. MORRIS: I'm not talking to you.
 17 I'm not talking to you.
 18 MS. DANDENEAU: Also, Mr. Morris, it
 19 is – it is –
 20 MS. DEITSCH-PEREZ: He is not my
 21 witness. He's been subpoenaed by you.
 22 Okay?
 23 That is no offense, Mr. Waterhouse,
 24 I'm – I'm not – okay. Anyway.
 25 EXAMINATION

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 2 testified earlier, we provided that accounting
 3 finance treasury function as – under the
 4 shared services agreement. And so once I
 5 got the – I talked to Jim, got the approval to
 6 make this payment, we have to then make the
 7 payment, or the team does, and so the payment
 8 was made.
 9 Q. Okay. But – okay. And – and
 10 sitting here right now, after Jim called you,
 11 you don't remember talking to anyone other than
 12 the – the couple of people you mentioned,
 13 talking to anyone about something to the effect
 14 that, hey, Jim wants to make this payment now?
 15 MR. MORRIS: Objection to the form
 16 of the question.
 17 A. I don't – I don't recall.
 18 Q. And does that include legal counsel?
 19 Without going into any detail, on
 20 January 12th or before that payment was made,
 21 did you consult with legal counsel about
 22 anything having to do with the \$1.4 million
 23 payment?
 24 A. I don't recall.
 25 Q. Okay. Thank you, sir, for your

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 2 BY MS. DEITSCH-PEREZ:
 3 Q. Good evening. I'm very sorry to be
 4 going last and I know you have had a long and
 5 taxing day, so I thank you for indulging me.
 6 The kinds of services that you
 7 describe that the – that Highland provided for
 8 NexPoint, did Highland also provide similar
 9 services to that to HCRE and HCMS?
 10 A. Yes.
 11 MR. MORRIS: Objection to the form
 12 of the question.
 13 Q. What kind of services did Highland
 14 provide to HCRE and HCMS?
 15 MR. MORRIS: Objection to the form
 16 of the question.
 17 MS. DEITSCH-PEREZ: What is your
 18 objection, John?
 19 MR. MORRIS: It is vague and
 20 ambiguous. Unlike the advisors and
 21 NexPoint, they actually had shared services
 22 agreements.
 23 MS. DEITSCH-PEREZ: I got – I
 24 understand your objection. That is fine.
 25 Q. Let's take them one at a time.

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1 WATERHOUSE - 10-19-21
 2 What kinds of services did Highland
 3 provide to HCRE?
 4 MR. MORRIS: Objection to the form
 5 of the question.
 6 A. HCMS, Highland employees provided
 7 accounting services, treasury management
 8 services, potentially legal services. I
 9 don't – but I wouldn't have been directly
 10 involved in that. But as far as the teams that
 11 I manage, it was accounting, treasury, things
 12 of that nature.
 13 Q. Okay. And that was for HCM, LLP –
 14 A. And – and, sorry, it would also be
 15 any asset valuation if needed as well.
 16 Q. Okay. We went back and forth on
 17 each other and I apologize, so just to clarify.
 18 You were talking about the services
 19 that Highland Capital Management provided to
 20 HCMS; is that right?
 21 A. HCMS. So, again, yes. And
 22 accounting, treasury, valuation, and also tax
 23 services too.
 24 Q. Okay.
 25 A. Tax services. Look, I'm expanding

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 2 HCMLP cause HCMS to pay its bills?
 3 MR. MORRIS: Objection to the form
 4 of the question.
 5 A. I mean, it – it – it depend – it
 6 depended on the nature of the payment and the
 7 vendor, but, you know, if there were – if
 8 there were larger scheduled payments, you know,
 9 I would like to give at least 30 days notice.
 10 And that is – that is kind of my
 11 rule of thumb so no one is surprised.
 12 Q. Okay. And was it generally HCMLP's
 13 practice to timely pay HCMS' bills?
 14 MR. MORRIS: Objection to the form
 15 of the question.
 16 A. It – it – it – that depended on
 17 the nature of the payment.
 18 Q. Okay. And can you explain what you
 19 mean by that?
 20 A. Yeah, I mean if – if it was – I
 21 mean – if there was some professional fees
 22 that weren't – you know, they were due but
 23 they weren't urgent, those fees may not be paid
 24 as timely as others that have a due date or –
 25 or things like that.

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 2 this, their HR services as well.
 3 Q. Okay. And did that include bill
 4 paying?
 5 MR. MORRIS: Objection to the form
 6 of the question.
 7 Q. Did the services that HCM provided
 8 to HCMS include bill paying?
 9 MR. MORRIS: Objection to the form
 10 of the question.
 11 A. Yes.
 12 Q. And did the services that HCMLP
 13 provided to HCMS include scheduling upcoming
 14 bills?
 15 MR. MORRIS: Objection to the form
 16 of the question.
 17 A. Yes.
 18 Q. And did HCMLP regularly pay – cause
 19 to be paid the payments on loans HCMS had from
 20 HCMLP?
 21 MR. MORRIS: Objection to the form
 22 of the question.
 23 A. Yes.
 24 Q. Typically – if there is a
 25 typically, how far in advance of due dates did

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 2 Q. Okay. Are loan payments the kinds
 3 of thing that HCMLP would pay on time because
 4 of potential consequences of not paying on
 5 time?
 6 MR. MORRIS: Objection to the form
 7 of the question.
 8 A. Yes. As I testified earlier, we
 9 would want to give, you know, notice on – on
 10 – on larger payments and – and things of that
 11 nature so we didn't miss due dates.
 12 Q. Okay. And over the course of time,
 13 did HCMLP generally pay HCMS' loan payments in
 14 a timely fashion?
 15 MR. MORRIS: Objection to the form
 16 of the question.
 17 A. I can't remember specifically, but
 18 generally, yes.
 19 Q. Okay. Now, did HCMLP provide
 20 similar services to HCRE that you have
 21 described it provided to HCMS?
 22 MR. MORRIS: Objection to the form
 23 of the question.
 24 A. Yes, but I don't think it – it
 25 provided – I don't think it provided HR

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 2 services.
 3 Q. Can you describe the accounting and
 4 treasury services that HCMLP provided for HCRE?
 5 A. Yeah, it – it would provide
 6 bookkeeping services on a – on a periodic
 7 basis. It would make payments, you know, as
 8 needed.
 9 Q. Okay. So did it provide –
 10 A. And – and I believe it – it – it
 11 provided tax services as well.
 12 Q. Okay. And so did it provide the
 13 same kind of bill – did HCMLP provide the same
 14 kind of bill-paying services for HCRE that it
 15 provided for HCMS and NexPoint?
 16 MR. MORRIS: Objection to the form
 17 of the question.
 18 A. Yes.
 19 Q. And over the course of time, did
 20 HCMLP generally cause to be made the loan
 21 payments that HCRE owed to HCMLP?
 22 MR. MORRIS: Objection to the form
 23 of the question.
 24 A. Yes.
 25 Q. Did HCMLP make loan payment – the

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 2 made?
 3 MR. MORRIS: Objection to the form
 4 of the question.
 5 A. It was – it was cash in HCRE's bank
 6 account that would be used to make payments to
 7 Highland Capital Management.
 8 Q. Okay. And so did Highland Capital
 9 Management have access to HCRE's funds in order
 10 to be able to make such payments?
 11 MR. MORRIS: Objection to the form
 12 of the question.
 13 A. Personnel at Highland Capital
 14 Management had access to HCRE's bank account to
 15 effectuate the payments.
 16 Q. Okay. And was the payment due from
 17 HCRE to HCMLP due in December of 2020 made?
 18 A. It –
 19 Q. In December of 2020.
 20 A. It was not.
 21 Q. Okay. And was there money in HCRE's
 22 account that would have enabled the payment to
 23 be made had HCM personnel attempted to make the
 24 payment?
 25 MR. MORRIS: Objection to the form

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 2 loan payment that was due from HCMS to HCMLP in
 3 December of 2020?
 4 MR. MORRIS: Objection to the form
 5 of the question.
 6 A. I don't believe that payment –
 7 payment was made.
 8 Q. Okay. And when HCMLP caused HCMS in
 9 the past to make loan payments, whose money did
 10 it use to make those payments?
 11 MR. MORRIS: Objection to the form
 12 of the question.
 13 A. It was the – the money in HCMS's
 14 operating account would be made to that –
 15 those moneys would be used to make payment to
 16 Highland Capital Management.
 17 Q. Okay. And Highland – is it correct
 18 that Highland Capital Management personnel had
 19 the access to HCMS's accounts to be able to
 20 cause such payments to be made?
 21 A. Yes, Highland personnel had access
 22 to those accounts.
 23 Q. Okay. And so now for HCRE, whose
 24 money was used when HCMLP caused HCRE
 25 payments – loan payments to Highland to be

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 2 of the question.
 3 A. I – I don't recall.
 4 Q. Do you have any reason to believe
 5 that either HCRE or HCMS simply didn't have the
 6 funds on hand to make the December 2020
 7 payments?
 8 A. I don't know.
 9 Q. I guess I'm asking, do you have any
 10 reason to believe that they didn't have the
 11 funds?
 12 A. We managed cash for so many
 13 different entities and funds, and I don't
 14 recall, you know, where the cash position was
 15 for HCRE and HCMS at 12/31/2020.
 16 Q. Okay.
 17 A. I just don't recall, and I don't –
 18 and I don't remember what the loan payment
 19 obligations were from HCRE to Highland, and
 20 from HCMS to Highland. I don't recall. I
 21 don't recall, I mean...
 22 Q. Let me come at it a different way.
 23 Were the – were the payments that would
 24 otherwise have been due in December of 2020
 25 made in January of 2021 for HCMS and HCRE?

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2 A. I believe the HCRE payment was made

3 in January of 2021. I don't recall any

4 payments being made from HCMS to Highland.

5 Q. If it -- how is it the HCRE payment

6 came to be made? Why did you make it -- why

7 did HCM make the payment in January of 2021?

8 A. Jim -- Jim called me and instructed

9 me to -- to make the payment on behalf of HCRE,

10 Jim Dondero -- Jim Dondero.

11 Q. Did he seem upset that -- that the

12 payment had not been made?

13 A. Yeah. On the note that was, you

14 know, that was the term note, yes, he -- he was

15 displeased that the -- that the payment had not

16 been made by year-end.

17 Q. Okay. And did you make the -- cause

18 the payment to be made as -- as requested?

19 A. Yes.

20 Q. And did anyone else from HCM

21 participate with you in causing the payment to

22 be made to -- on the HCRE loan?

23 A. Yes. It would have been Kristin

24 Hendrix. I -- again, I don't -- as I testified

25 earlier, I'm not an officer of HCRE. I don't

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2 Q. Do you know whether there was an

3 HCMS term loan that had a payment due in

4 December of 2020?

5 A. I don't recall.

6 Q. Okay. And so the reason you don't

7 recall whether or not there was a payment in

8 January of 2021 is because you just don't

9 remember whether there was such a loan at all?

10 MR. MORRIS: Objection to the form

11 of the question.

12 A. I don't remember. There is -- there

13 is so many notes, and I mean, demands, and I

14 don't -- I don't remember. It's a lot to keep

15 track in your head.

16 Q. I understand, and -- and I hear your

17 frustration when you have explained that the

18 debtor has your documents and you don't, and so

19 I fully appreciate it, and this is no knock on

20 you. It's a knock on somebody else on this

21 call.

22 MR. MORRIS: I move to strike. That

23 was pretty obnoxious, but go ahead.

24 Q. Okay. But so, Mr. Waterhouse, if --

25 if a payment on the HCMS loan was made in

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2 believe I'm an authorized signer. So I

3 can't -- other personnel have to make payment

4 from HCRE to -- to -- to -- to Highland.

5 Q. Okay. And in the conversation

6 that -- that you had with Mr. Dondero when he

7 requested the payment to be made, did you say

8 to him words to the effect, Jim, this loan is

9 going to stay in default, what are you making

10 the payment for, anything like that?

11 A. No.

12 Q. In fact, did you have the impression

13 from him that he thought that the loan would

14 be -- the default would be cured by making the

15 payment?

16 MR. MORRIS: Objection to the form

17 of the question.

18 A. Did I get the impression from Jim

19 Dondero that the loan would be cured if the

20 payment from HCRE --

21 Q. Yeah, if that is what he thought.

22 MR. MORRIS: Objection to the form

23 of the question.

24 A. I didn't get any impression from him

25 on that at the time.

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2 January of 2021, do you think it was part of

3 the same conversation where Jim Dondero said,

4 hey, why didn't that get paid, please make

5 that -- get that payment done?

6 MR. MORRIS: I object to the form of

7 the question.

8 A. Yes. Likely it would have been -- I

9 mean, again, I don't recall a payment being

10 made, but, you know, again, I don't remember

11 everything.

12 Q. Okay. Did -- at the time you were

13 communicating with Kristin Hendrix about the

14 payment being made, whichever payments were

15 made in January, did she say anything to you

16 about the payments not curing the loan

17 defaults?

18 A. No.

19 Q. Okay. All right. So I'm going to

20 take you back to very early in the deposition

21 when Mr. Morris was asking you about the --

22 the -- the -- the agreement with respect to

23 the -- the forgiveness element of the loans, so

24 that is just to orient you.

25 Do you remember that there was a

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 2 time that you and Mr. Dondero were
 3 communicating about potential means of
 4 resolving the Highland bankruptcy by what was
 5 colloquially referred to as a pot plan?
 6 A. Yes.
 7 Q. Okay. And can you tell me generally
 8 when that was?
 9 A. Like mid – mid 2020, sometime in
 10 2020, mid 2020.
 11 Q. Okay. And did the process of trying
 12 to figure out what the numbers should be
 13 involve looking at what one should pay for the
 14 Highland assets?
 15 MR. MORRIS: Objection to the form
 16 of the question.
 17 A. Yes.
 18 Q. Okay. And did there come a time
 19 when you were proposing some potential numbers
 20 and Mr. Dondero said something to you like,
 21 well, why are you including payment for the
 22 related party notes, those, you know, were
 23 likely to be forgiven as part of my deferred
 24 executive compensation?
 25 MR. MORRIS: Objection to the form

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 2 of the question.
 3 A. Yes, we – the team and myself put
 4 together, you know, asset summaries of Highland
 5 at various times for all the assets of
 6 Highland, and not including the notes.
 7 Q. Okay. And were those presentations
 8 communicated to – to Mr. Seery?
 9 A. No. Well, look, I didn't tell – I
 10 didn't tell Mr. Seery. I don't know what
 11 Mr. Dondero did with the information.
 12 Q. Okay.
 13 A. I did not have conversations with
 14 Mr. Seery.
 15 Q. Okay. Do you know who saw the
 16 presentations that you put together that didn't
 17 include the value of the related party notes?
 18 A. We're talking presentations – these
 19 are – these are Excel spreadsheets?
 20 Q. Uh-huh.
 21 A. I don't know who – these were given
 22 to – to Jim Dondero. I don't know what was
 23 done with them after that.
 24 Q. Okay. You also mentioned earlier
 25 that sometime during your tenure at Highland

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 2 of the question.
 3 A. Yes, we did have that conversation.
 4 Q. Okay. Was that conversation in
 5 connection with trying to figure out the right
 6 numbers for a pot plan?
 7 A. Yeah. I mean, it was – it was – I
 8 mean, Jim – Jim would ask for, you know,
 9 most – most recent asset values, you know, for
 10 Highland, and – and myself and the team
 11 provided those to him, so it was in that
 12 context.
 13 Q. Okay. And does that refresh your
 14 recollection that these communications were in
 15 2020 rather than 2021?
 16 MR. MORRIS: Objection to the form
 17 of the question.
 18 A. The – the – the executive
 19 compensation discussions were definitely in
 20 2020.
 21 Q. Okay. Now, did you ever make
 22 proposals that took into account Jim's comment
 23 that the notes were likely to end up forgiven
 24 as part of his compensation?
 25 MR. MORRIS: Objection to the form

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 2 you knew of the practice of giving forgivable
 3 loans to executives.
 4 MR. MORRIS: Objection to the form
 5 of the question.
 6 Q. Can you – can you tell me what you
 7 recall about that practice?
 8 MR. MORRIS: Objection to the form
 9 of the question.
 10 A. Yes, so there were – there were –
 11 during my tenure at Highland, there were loans
 12 or – given to employees that were later
 13 forgiven at a future date and time.
 14 Q. Okay. And when the loans were
 15 given, did the notes, to your recollection, say
 16 anything about the potential forgiveness term?
 17 MR. MORRIS: Objection to the form
 18 of the question.
 19 A. When you say "did the notes," did
 20 the promissory notes detail the forgiveness?
 21 Q. Yes.
 22 A. Not that I recall.
 23 Q. And until such time as whatever was
 24 to trigger the forgiveness occurred, were the
 25 notes bona fide notes as far as you were

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 2 concerned?
 3 MR. MORRIS: Objection to the form
 4 of the question.
 5 A. Yes, similar to – yes.
 6 Q. Okay. You were going to say similar
 7 to what?
 8 A. Mr. Morris earlier today showed
 9 notes of the financial statements about various
 10 affiliate loans. I – I – I do recall these
 11 notes because I – at that time personally
 12 worked on the – the financial statements of
 13 Highland. That was, you know, in my role as a
 14 corporate accountant.
 15 And there were – those loans
 16 were – to the partners were detailed in the
 17 notes to the financial statements, similar to
 18 what we went through earlier today in the prior
 19 testimony about what we saw with Highland
 20 and – and – and the – and HCMFA.
 21 Q. Is it fair to say that on Highland's
 22 balance sheet there were any number of assets
 23 that the value of which could be affected by
 24 subsequent events?
 25 MR. MORRIS: Objection to the form

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 2 of the question.
 3 A. The accounting standard is you have
 4 to estimate to the best – you know, to – to
 5 the best of your ability, the fair value of an
 6 asset as of the balance sheet date under –
 7 under GAAP.
 8 Q. Did – strike that.
 9 Okay. Give me a minute. I'm
 10 close – I'm close to done. Let me just go off
 11 and look at my notes for a second. So take two
 12 minutes.
 13 VIDEOGRAPHER: We're going off the
 14 record at 7:02 p.m.
 15 (Recess taken 7:02 p.m. to 7:03 p.m.)
 16 VIDEOGRAPHER: We are back on the
 17 record at 7:03 p.m.
 18 Q. Mr. Waterhouse, is it generally your
 19 understanding that people you work with now
 20 have been asking the debtor for full and
 21 unfettered access to their own former files?
 22 MR. MORRIS: Objection to the form
 23 of the question.
 24 A. Yes, I am – I am generally aware.
 25 Q. Okay. And do you think you could

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 2 of the question.
 3 A. Yes. I mean, yes, that – there
 4 are. And that is – yes.
 5 Q. Okay. And is it typical accounting
 6 practice that until there is some certainty
 7 about those potential future events, that asset
 8 value listed on – on the books doesn't take
 9 into account those potential future events?
 10 MR. MORRIS: Objection to the form
 11 of the question.
 12 A. Yeah, if those – yes. If – if
 13 those future events, you know, at the time of
 14 issuance are not known or knowable, like I
 15 discussed earlier with, like, market practice,
 16 asset dislocation, or, you know, I mean, things
 17 like that, you – I mean, it – it could affect
 18 its fair value –
 19 Q. Okay.
 20 A. – in the future.
 21 Q. And am I correct you wouldn't feel
 22 compelled to footnote in every possible change
 23 in – in an asset when those possibilities are
 24 still remote?
 25 MR. MORRIS: Objection to the form

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 2 have been better prepared for this deposition
 3 if the debtor had complied with those requests?
 4 MR. MORRIS: Objection to the form
 5 of the question.
 6 A. I – I – I most certainly – yes.
 7 I mean, again, these are multiple years,
 8 multiple years ago, lots and lots of
 9 transactions.
 10 You know, we asked about NAV errors
 11 and, you know, things like that and these
 12 are – it would make this process a lot more –
 13 a lot easier and if we had – if we had access
 14 to that.
 15 Q. Okay. And has the debtor – is the
 16 debtor suing you right now?
 17 A. Yes.
 18 Q. And is the debtor trying to renege
 19 on deals that it had previously made with you?
 20 MR. MORRIS: Objection to the form
 21 of the question.
 22 A. Sorry, I need to – it is my
 23 understanding that the litigation trust is
 24 suing me. And not being a lawyer, I don't
 25 know – is that the debtor?

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 2 Is that – I don't know the
 3 relationship. So, again, I'm not the lawyers.
 4 I've said many times. But my understanding is
 5 the litigation trust is suing me. I could be
 6 wrong there. I don't know.
 7 Q. Okay. I understand.
 8 Someone with some connection to the
 9 Highland debtor has brought a claim against
 10 you; is that fair?
 11 MR. MORRIS: Objection to the form
 12 of the question.
 13 A. Yes.
 14 Q. Okay. And is there also some motion
 15 practice in the bankruptcy where the debtor or
 16 someone associated with the debtor is
 17 attempting to undo something that was
 18 previously resolved with you?
 19 A. Yes.
 20 Q. And so in one action somebody is
 21 associated with the debtors trying to –
 22 threatening you with trying to take money from
 23 you, and then in the other – and trying to –
 24 and in the other they are threatening not to
 25 pay you things that had previously been agreed;

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 2 I really don't want to go – go
 3 afield –
 4 MS. DEITSCH-PEREZ: Yeah.
 5 MS. DANDENEAU: – and open up a
 6 whole new line of inquiry about the lawsuit
 7 or the – the motion and the bankruptcy
 8 court. We will be here all night.
 9 MS. DEITSCH-PEREZ: And I
 10 understand.
 11 Q. My – my point is: Do you feel
 12 like – like there is some effort by these
 13 parties related to the debtor to intimidate
 14 you – not that you – I'm not saying you are
 15 or you aren't.
 16 But do you feel like there is some
 17 effort to intimidate you and maybe an effort to
 18 deter you from being as prepared as you might
 19 be in this deposition?
 20 MR. MORRIS: Objection to the form
 21 of the question.
 22 A. I was – I was surprised by the
 23 lawsuit, by me being named, because, again, I
 24 don't own the asset and things like that.
 25 Yeah, I just – I want to move forward with my

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1 WATERHOUSE - 10-19-21
 2 is that correct?
 3 MR. MORRIS: Objection to the form
 4 of the question.
 5 A. I want to be – yes, I – there
 6 is – I'm being sued, again, on – on something
 7 that was agreed to with Mr. Seery and myself.
 8 I don't – I don't – I don't own that claim.
 9 Q. Okay.
 10 A. To be transparent, I don't own that
 11 claim. So it is not my personal property.
 12 Q. Okay.
 13 A. And – and being the nonlawyer, I
 14 don't know how I can get sued for something
 15 that I don't owe or, like, I don't own
 16 anything. I'm not the lawyer. But, I mean, if
 17 that is – if I'm understanding the facts
 18 correctly.
 19 Q. Okay. And the lawsuit that was
 20 filed that names you, that was just filed
 21 this – this past week; is that right?
 22 MS. DANDENEAU: Ms. Deitsch-Perez, I
 23 do want to interrupt at this point because
 24 just as I told Mr. Morris, that this is a
 25 deposition about the noticed litigation.

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 2 life at Skyview.
 3 MS. DEITSCH-PEREZ: Thank you.
 4 THE WITNESS: Thank you.
 5 FURTHER EXAMINATION
 6 BY MR. MORRIS:
 7 Q. If I may, I just have a few
 8 questions.
 9 Mr. Waterhouse, we saw a number of
 10 documents that Mr. Rukavina put up on the
 11 screen where Ms. Hendrix would send you a
 12 schedule of payments that were due on behalf of
 13 certain Highland affiliates.
 14 Do you remember that?
 15 A. Yes.
 16 Q. And in each instance she asked for
 17 your approval to make the payments; is that
 18 right?
 19 A. Yes, she did.
 20 Q. And was that the – was that the
 21 practice in the second half of 2020 whereby
 22 Ms. Hendrix would prepare a list of payments
 23 that were due on behalf of Highland associates
 24 and ask for approval?
 25 A. Yes.

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2 Q. And I think you said that there was

3 a - a -

4 A. It was - I think I testified to

5 this earlier when we talked about procedures

6 and policy, you know, again, I want to be

7 informed of - of - of - of - of any

8 payments that are going out. I want to be made

9 aware of these payments, and that was just a

10 general policy, not just for 2020.

11 Q. Okay. So it went beyond 2020?

12 A. Yes.

13 Q. Is that right?

14 A. Yes.

15 Q. Okay. And the corporate accounting

16 group would prepare a calendar that would set

17 forth all of the payments that were anticipated

18 in the - in the three weeks ahead; is that

19 right?

20 A. I - like I testified earlier, we

21 had a corporate calendar that was set up, you

22 know, to - to provide reminders or, you know,

23 of anything of any nature, whether it is

24 payments or - or financial statements or, you

25 know, whatever it is, you know, to meet

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2 to offset any obligations that the advisors

3 owed to Highland as offset to the overpayments

4 on these agreements.

5 Q. Okay. Did you participate in any of

6 those conversations?

7 A. I did not.

8 Q. Okay. Do you know - do you recall

9 that the - at the end of November, the debtor

10 did notice to the advisors of their intent to

11 terminate the shared services agreements?

12 A. Like I testified earlier, there

13 was - the agreements weren't identical, from

14 what I recall, and there is one that had a

15 longer notice period, which I think had a

16 60-day notice period. I don't recall which one

17 that was, so not all of them were - notice

18 hadn't been given as of November 30th, for all

19 of the agreements.

20 Q. Upon the receipt of the - the

21 termination notices that you recall, do you

22 know if the advisors decided at that point not

23 to make any further payments of any kind to

24 Highland?

25 MR. RUKAVINA: Objection, form.

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2 deadlines.

3 I don't know how, as I testified

4 earlier, how much they were using that

5 calendar.

6 Q. Okay. But - but you did get notice

7 and a request to approve the payments that were

8 coming due on behalf of Highland's affiliates.

9 Do I have that right?

10 MS. DANDENEAU: Objection to form.

11 A. I mean, generally, yes. I mean, you

12 know, as we saw with these emails, generally, I

13 mean, did that encompass everything, no.

14 Q. Okay. Do you know why the

15 payment - do you know why there was no payment

16 made by NexPoint at the end of 2020?

17 A. Yes. There was - there was - we

18 talked about these agreements between the

19 advisors and Highland, the shared services and

20 the cost reimbursement agreement.

21 And in late 2020, there were

22 overpayments, large overpayments that had been

23 made over the years on these agreements, and it

24 was my understanding that the advisors were -

25 were talking with - like Jim Seery and others

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2 A. No. The advisors - the advisors

3 had stopped making payments prior to that

4 notice.

5 Q. Okay. And how do you know that the

6 advisors stopped making - making payments

7 prior to the notice?

8 A. I had - I had a conversation

9 with - with Jim Dondero.

10 Q. And did Mr. Dondero tell you that

11 the advisors would no longer make payments to

12 Highland?

13 MS. DEITSCH-PEREZ: Object to the

14 form.

15 A. Yes, he - he - again, he said

16 they - they - the advisors have overpaid on

17 these agreements, to not make any future

18 payments, and that there needs to be offsets,

19 and they're working on getting offsets to these

20 overpayment.

21 Q. Do you know if anybody ever

22 instructed Highland's employees to make the

23 payment that was due by NexPoint at the end of

24 the year?

25 A. Did anyone instruct Highland's

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 2 employees to make that payment?
 3 Q. Correct.
 4 A. Anyone – not that I'm aware.
 5 Q. Were any of Highland's employees
 6 authorized to make the payments on behalf of
 7 its affiliates – withdrawn.
 8 Was any of Highland's employees
 9 authorized to effectuate the payment on behalf
 10 of NexPoint that was due at the end of the year
 11 without getting approval from either you or
 12 Mr. Dondero?
 13 A. They had the – they had the ability
 14 to make the payment, but they didn't – you
 15 know, that – that payment needed to be
 16 approved.
 17 Q. Okay. And it needed to be approved
 18 by you or Mr. Dondero; is that right?
 19 A. I mean, I'm not going to make the
 20 unilateral decision.
 21 Q. Is that a decision that you
 22 understood had to be made by Mr. Dondero?
 23 A. Yes. Sitting back in December of
 24 2020, the – that – there was this off –
 25 offset negotiation that – that was happening,

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 2 A. No. The two payments I recall were
 3 NexPoint and HCRE.
 4 Q. Okay. And those two payments –
 5 thank you for the correction. And those two
 6 payments were made because Mr. Dondero
 7 authorized those payments to be made; correct?
 8 A. Yes.
 9 Q. And they hadn't been made before
 10 that because Mr. Dondero had not authorized
 11 them to be made?
 12 MS. DEITSCH-PEREZ: Object to the
 13 form.
 14 A. Yes, because of these negotiations.
 15 Q. Okay. Just a couple of more
 16 questions.
 17 Did anybody, to the best of your
 18 knowledge, on behalf of HCMFA, ever tell the
 19 SEC that HCMLP was responsible for the mistakes
 20 that were made on the TerreStar valuation?
 21 A. Did anyone from Highland on HCMFA's
 22 behalf tell the SEC that Highland – that
 23 Highland was responsible for there – I just
 24 want to make sure –
 25 Q. It was a little bit different, so

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 2 so I mean, until those negotiations were
 3 resolved, you know, there wasn't any
 4 payments – there weren't any payments.
 5 Q. And – and there were no payments
 6 until the negotiations were resolved because
 7 that was the directive that you received from
 8 Mr. Dondero; correct?
 9 A. I don't think he said – I mean, I
 10 think – yeah, I mean – I'm trying to recall
 11 the conversation. It was – you know, there
 12 is – there is these negotiations. There's –
 13 there needs to be these offsets. They're
 14 talking with the debtor. So, you know, until
 15 this is resolved, right, I mean, depending on
 16 how, whatever that resolution was, were we to
 17 take any action.
 18 Q. Okay. How about with respect to
 19 HCMS, did HCMS have a term payment due at the
 20 end of the year?
 21 A. Again, I don't – I don't recall.
 22 Q. Okay. You discussed briefly two
 23 payments that were made in January of 2021, one
 24 on behalf of NexPoint, and one on behalf of
 25 HCMS. Do I have that right?

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 2 let me try again.
 3 A. These are very long questions, John.
 4 I'm not trying to be –
 5 Q. That is good. Do you know whether
 6 anybody – do you know whether anybody on
 7 behalf of HCMS – HCMFA ever told the SEC that
 8 Highland was the responsible party for the
 9 TerreStar valuation error?
 10 A. Not that I'm aware.
 11 Q. Okay. Did anybody on behalf of
 12 the – on behalf of HCMFA ever tell the retail
 13 board that Highland was responsible for the
 14 TerreStar valuation error?
 15 A. Not that I'm aware.
 16 Q. Do you know if HCMFA made an
 17 insurance claim with respect to the damages
 18 that were incurred in relation to the TerreStar
 19 valuation error?
 20 A. Yes.
 21 Q. And do you know why they made that
 22 insurance claim?
 23 A. Because there was an error. I
 24 mean –
 25 Q. Was the insured's claim made – was

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2 the insurance claim made under HCMFA's policy?

3 A. Yes.

4 Q. Did HCMFA at any time prior to the

5 petition date – withdrawn.

6 You were asked a couple of questions

7 where – where you said that Mr. Dondero told

8 you that he was ascribing zero value to the

9 notes as part of a pot plan because he believed

10 that the notes were part of executive

11 compensation.

12 Do I have that right?

13 MS. DEITSCH-PEREZ: Object to the

14 form.

15 A. Yes.

16 Q. Okay. Have you ever heard that

17 before the time that Mr. Dondero told you that

18 in the conversation about the pot plan?

19 A. Had I heard that prior to my

20 conversation with Mr. Dondero?

21 Q. Yes.

22 A. No, I had not heard that prior.

23 Q. Okay. And that was in the context

24 of his formulation of the settlement proposal;

25 is that right?

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2 A. Yes.

3 Q. Okay. And was that late November or

4 early December of 2020?

5 A. It was, I would say, first or second

6 week of November.

7 Q. Okay. Do you recall whether –

8 whenever you had that discussion, whether

9 Mr. Dondero had already been fired by the

10 debtor?

11 A. Yes, I – I believe he was not an

12 employee of the debtor anymore at that time.

13 Q. And when you were discussing this

14 with Mr. Dondero and he said no more payments,

15 you were discussing the two shared services

16 agreements and employee reimbursement

17 agreements we testified – you testified about

18 before; is that correct?

19 MR. MORRIS: Objection to the form

20 of the question.

21 A. That is correct.

22 Q. And had your office or you – and we

23 will talk at a future deposition about the

24 administrative claim.

25 But had – by that time that you

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2 A. I mean, generally, yes. You know,

3 we were asked to provide asset values, right,

4 and he was having settlement discussions.

5 Again, I don't know who those went to

6 ultimately. I don't recall.

7 MR. MORRIS: I have no further

8 questions. Thank you very much for your

9 patience. I apologize for the late hour.

10 MS. DEITSCH-PEREZ: John, you stay

11 on about your email when –

12 MR. RUKAVINA: Hold on, I'm not

13 done.

14 MS. DEITSCH-PEREZ: Oh, okay. Davor

15 still has questions. Sorry. I was going

16 to say both John and Davor, could you stay

17 on afterwards just to talk about the

18 requests.

19 FURTHER EXAMINATION

20 BY MR. RUKAVINA:

21 Q. Mr. Waterhouse, you were just now

22 testifying about a discussion you had with

23 Mr. Dondero where he said something like no

24 more payments.

25 Do you remember that testimony?

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2 talked to Mr. Dondero, had your office or you

3 done any estimate of what the alleged

4 overpayments were?

5 MR. MORRIS: Objection to the form

6 of the question.

7 A. Yes, we had – there was a – there

8 was a detailed analysis that was put together

9 by David Klos at the time.

10 Q. And do you recall just generally

11 what the total amount for both advisors of the

12 overpayments was?

13 A. It was in excess of \$10 million.

14 Q. Was it in excess of \$14 million?

15 MR. MORRIS: Objection to the form

16 of the question.

17 A. I – I remember it was an

18 eight-figure number. I don't remember

19 specifically.

20 Q. Okay. And did you convey that

21 number to Mr. Dondero when you had that

22 conversation?

23 A. Yes.

24 Q. What was his reaction?

25 A. I mean, he wasn't happy.

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 2 Q. Is it fair to say he was upset?
 3 A. Yes.
 4 Q. Did Mr. Dondero ever expressly tell
 5 you to not have NexPoint make the required
 6 December 31, 2020, payment?
 7 A. Yes, I recall him saying don't make
 8 the payment because it was being negotiated, as
 9 I discussed with Mr. Morris, this offset
 10 concept. So there were obligations due by the
 11 advisors to Highland, they should be offset
 12 that – you know, those obligations should be
 13 offset by this – by this overpayment.
 14 Q. And when did he tell you that?
 15 A. I would say – I would say around –
 16 probably December – December-ish.
 17 Q. Early December, late December?
 18 A. I don't recall with as much
 19 specificity as – as – as – as stopping the
 20 shared services payments, because we had
 21 actually made one shared services payment in
 22 November. So that is why I need to remember
 23 that one more clearly. I don't remember where
 24 exactly in December that conversation occurred.
 25 Q. Did Mr. Dondero expressly use the

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 2 A. I did not.
 3 Q. So sitting here today, you – you
 4 remember distinctly that Dondero in December of
 5 2020 expressly told you not to have NexPoint
 6 make that payment?
 7 MR. MORRIS: Objection, asked and
 8 answered three times.
 9 A. Yes.
 10 Q. Can you say categorically it wasn't
 11 just some general discussion where he told you
 12 not to make payments?
 13 MR. MORRIS: Objection, asked and
 14 answer four times.
 15 MR. HORN: Four times now. Go for
 16 five.
 17 A. Yes.
 18 Q. Did you tell Mr. Seery that?
 19 A. I don't believe I did. I don't
 20 recall.
 21 Q. And was this an in-person discussion
 22 or telephone or email? Do you remember?
 23 A. This was a phone – a phone
 24 conversation.
 25 Q. Okay. Would you have a record of –

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1 WATERHOUSE - 10-19-21
 2 word "NexPoint" when he was saying don't make
 3 these payments?
 4 MR. MORRIS: Objection to the form
 5 of the question, asked and answered.
 6 A. Yeah, we were – we were discussing
 7 advisor obligations. So it was – you know, it
 8 was just obligations from the advisors.
 9 And – and he specifically talked
 10 about the NexPoint payment as well.
 11 Q. Okay. And it is your testimony that
 12 he expressly told you not to make that NexPoint
 13 December 31 payment?
 14 MR. MORRIS: Objection, asked and
 15 answered twice.
 16 A. Yes, he – he did, during that
 17 conversation.
 18 Q. And did you ever follow up with him
 19 after that about whether NexPoint should or
 20 shouldn't make that payment?
 21 A. I did not.
 22 Q. Did you ever, on or about
 23 December 31, 2020, remind him and say, hey,
 24 this payment is due, what shall I – what
 25 should I do?

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1 WATERHOUSE - 10-19-21
 2 on your cell phone of when that conversation
 3 might have taken place?
 4 I'm sorry, strike that.
 5 Was that by cell phone?
 6 A. I believe – yes, because we – I
 7 was at home. I mean, I don't have a landline.
 8 All I have is my cell phone.
 9 Q. Do you know whether your cell phone
 10 still has records of conversations from
 11 December 2020 on it?
 12 A. My call log doesn't go back that
 13 far.
 14 Q. Okay. Thank you.
 15 MR. RUKAVINA: I will pass the
 16 witness.
 17 MS. DEITSCH-PEREZ: Just a couple
 18 quick questions.
 19 FURTHER EXAMINATION
 20 BY MS. DEITSCH-PEREZ:
 21 Q. With respect to HCRE and HCMS, am I
 22 correct there was – there was no direction not
 23 to pay those loan payments?
 24 MR. MORRIS: Objection to the form
 25 of the question.

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2 A. Yes, I don't recall having

3 conversations about, you know, those – those

4 entities.

5 Q. And, in fact, what was the tone that

6 Mr. Dondero had when he talked to you about the

7 fact that HCRE and HCMS payments hadn't been

8 made when he found out that they hadn't been

9 paid?

10 MS. DANDENEAU: Objection to form.

11 MR. MORRIS: Objection to form.

12 Q. What was the tone he took with you?

13 A. Oh, it was – it was – it was – it

14 was very negative. I mean, I think he cursed

15 at me and he doesn't usually curse.

16 Q. Okay. And in your mind, is that

17 consistent with the fact that he was surprised

18 that those payments hadn't been made?

19 MR. MORRIS: Objection to the form

20 of the question.

21 A. Yes.

22 Q. Okay. Thank you.

23 MR. MORRIS: I have nothing further.

24 Thank you so much, Mr. Waterhouse.

25 MR. HORN: I have no questions.

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2 C E R T I F I C A T E

3

4 I, SUSAN S. KLINGER, a certified shorthand

5 reporter within and for the State of Texas, do

6 hereby certify:

7 That FRANK WATERHOUSE, the witness whose

8 deposition is hereinbefore set forth, was duly

9 sworn by me and that such deposition is a true

10 record of the testimony given by such witness.

11 I further certify that I am not related to

12 any of the parties to this action by blood or

13 marriage; and that I am in no way interested in

14 the outcome of this matter.

15 IN WITNESS WHEREOF, I have hereunto set my

16 hand this 19th of October, 2021.

17

18 _____

19 Susan S. Klinger, RMR-CRR, CSR

20 Texas CSR# 6531

21

22

23

24

25

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2 Thank you, Mr. Waterhouse. We appreciate

3 your time. I am logging off the discussion

4 and I will talk to y'all tomorrow.

5 MR. MORRIS: Super.

6 VIDEOGRAPHER: If there are no

7 further questions, this ends the

8 deposition – excuse me. This ends the

9 deposition, and we are going off the record

10 at 7:30 p.m.

11 (Deposition concluded at 7:30 p.m.)

12

13 _____

14 FRANK WATERHOUSE

15

16 Subscribed and sworn to before me

17 this day of 2021.

18

19 _____

20

21

22

23

24

25

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1 WATERHOUSE - 10-19-21

2 NAME OF CASE: In re: Highland Capital

3 DATE OF DEPOSITION: October 19, 2021

4 NAME OF WITNESS: Frank Waterhouse

5 Reason Codes:

6 1. To clarify the record.

7 2. To conform to the facts.

8 3. To correct transcription errors.

9 Page ___ Line ___ Reason _____

10 From _____ to _____

11 Page ___ Line ___ Reason _____

12 From _____ to _____

13 Page ___ Line ___ Reason _____

14 From _____ to _____

15 Page ___ Line ___ Reason _____

16 From _____ to _____

17 Page ___ Line ___ Reason _____

18 From _____ to _____

19 Page ___ Line ___ Reason _____

20 From _____ to _____

21 Page ___ Line ___ Reason _____

22 From _____ to _____

23 Page ___ Line ___ Reason _____

24 From _____ to _____

25

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EXHIBIT 4

1 DONDERO - 10/29/21
2 IN THE UNITED STATES BANKRUPTCY COURT
3 FOR THE NORTHERN DISTRICT OF TEXAS
4 DALLAS DIVISION

5 -----
6 IN RE:

7 Chapter 11
8 HIGHLAND CAPITAL
9 MANAGEMENT, L.P., CASE NO.
10 19-34054-SGI11

11 Debtor.

12 -----
13 HIGHLAND CAPITAL MANAGEMENT, L.P.,

14 Plaintiff,

15 vs.

16 Adversary
17 Proceeding No.

18 JAMES D. DONDERO, 21-03003-sgi

19 Defendant.
20 -----
21

22 REMOTE VIDEOTAPED DEPOSITION OF

23 JAMES DONDERO - VOLUME 2

24 October 29, 2021

25 Reported by: Susan S. Klinger, RMR-CRR, CSR

Job No. 201874

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1 DONDERO - 10/29/21

2

3

4 October 29, 2021

5 10:21 a.m.

6

7

8

9 Remote Deposition of JAMES DONDERO, held

10 before Susan S. Klinger, a Registered Merit

11 Reporter and Certified Realtime Reporter of the

12 State of Texas.

13

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24

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1 DONDERO - 10/29/21

2 A P P E A R A N C E S:

3 (All appearances via Zoom.)

4 Attorneys for the Reorganized Highland Capital

5 Management:

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1 DONDERO - 10/29/21

2 Attorneys for Jim Dondero, Nancy Dondero, HCRA,

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21 New York, New York 10010

22 Also Present:

23 Dan Elms

24 Aaron Lawrence

25 Patricia Jeffries, Pachulski Stang

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1 DONDERO - 10/29/21

2 I N D E X

3 WITNESS PAGE

4 JAMES DONDERO

5 EXAMINATION BY MR. MORRIS 289

6 E X H I B I T S

7 No. Page

8 Exhibit 1 Original Complaint 466

9 Exhibit 2 NexPoint Complaint 408

10 Exhibit 3 HCMS Complaint 433

11 Exhibit 4 Letter, 12/3/20 464

12 Exhibit 6 Term note 446

13 Exhibit 15 NexPoint Advisors Answer 380

14 Exhibit 16 HCMS's Answer 362

15 Exhibit 17 HCRE's Answer 377

16 Exhibit 31 Answer to Complaint 354

17 Exhibit 35 Incumbency Certificate 309

18 Exhibit 37 Incumbency Certificate 323

19 Exhibit 47 NexPoint 30(b)(6) notice 345

20 Exhibit 48 HCMS 30(b)(6) notice 353

21 Exhibit 49 HCRE 30(b)(6) notice 354

22

23

24

25

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1 DONDERO - 10/29/21
 2 PROCEEDINGS
 3 VIDEOGRAPHER: This marks the
 4 beginning of Video 1 in Volume 2 of the
 5 deposition of James Dondero in the matter
 6 In Re: Highland Capital Management, L.P.
 7 Today's date is October 29, 2021. The time
 8 on the video monitor is 10:21 a.m.
 9 Will the court reporter please swear
 10 in the witness.
 11 JAMES DONDERO,
 12 having been first duly sworn, testified as
 13 follows:
 14 MR. MORRIS: Deborah, would you like
 15 to make a statement?
 16 MS. DEITSCH-PEREZ: I didn't know if
 17 you wanted appearances first. Sure. This
 18 is Deborah Deitsch-Perez from Stinson. I'm
 19 counsel for Mr. Dondero, Nancy Dondero,
 20 HCRE and HCMS in this deposition.
 21 I want to apologize for everybody
 22 that we're starting late. Mr. Dondero was
 23 under the weather. It is -- he has taken
 24 something, so he should not have to leave
 25 the deposition, but if at any point he

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1 DONDERO - 10/29/21
 2 A. Yes.
 3 Q. So if at any time you don't feel
 4 like you can continue, I would rather adjourn
 5 to one day next week to complete the deposition
 6 rather than forcing you to do something that
 7 you don't believe you're capable of doing.
 8 Okay?
 9 A. Yes. Yes. I did throw up twice
 10 last night.
 11 Q. Okay.
 12 A. I imagine we could go for -- let's
 13 shoot for four hours today, you know, maybe --
 14 maybe five, I don't know, but if we don't
 15 finish --
 16 Q. I don't want to --
 17 A. -- we will do the rest next week.
 18 Q. Okay. I don't want to put an
 19 arbitrary time on it. You tell me if you are
 20 unable to continue. Okay? Is that fair?
 21 A. Yes. That is my estimate at this
 22 point.
 23 Q. Okay. You founded Highland Capital
 24 Management, L.P.; correct?
 25 A. Yes.

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1 DONDERO - 10/29/21
 2 looks green to me, I will ask that we stop
 3 and reconvene when he is not feeling
 4 nauseous.
 5 MR. MORRIS: All right. I would
 6 like to just begin here. We have counsel
 7 on the line for all of the defendants, we
 8 have counsel for the plaintiff, and we have
 9 counsel for the Highland Litigation Trust,
 10 and I think that that is everybody who
 11 is -- is supposed to be here, so I would
 12 like to just begin.
 13 EXAMINATION
 14 BY MR. MORRIS:
 15 Q. Mr. Dondero, can you hear me okay?
 16 A. Yes.
 17 Q. Okay. And are you feeling well
 18 enough to begin today's deposition?
 19 A. Yes.
 20 Q. Okay. I understand that you are not
 21 feeling well. And I want you to know that I do
 22 not want to proceed with this deposition unless
 23 you believe that you are physically and
 24 mentally able to participate to the best of
 25 your ability. Okay? Do you understand that?

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1 DONDERO - 10/29/21
 2 Q. And we are going to refer to that
 3 entity and that entity only today as Highland;
 4 is that okay?
 5 A. Yes.
 6 Q. When did you found -- when did you
 7 create Highland?
 8 A. '94.
 9 Q. And did you serve as Highland's
 10 president from 1994 until on or around January
 11 9th, 2020?
 12 A. Yes.
 13 Q. Did -- can you describe in your own
 14 words what the business of Highland was while
 15 you were president?
 16 A. We were largely below investment
 17 grade, credit strap, and we diversified over
 18 the years to become more of an alternative
 19 asset manager in a variety of formats.
 20 Q. And --
 21 MS. DEITSCH-PEREZ: I'm sorry, John,
 22 one sec. This was set up by someone a lot
 23 shorter than Mr. Dondero. Let me just take
 24 one minute to adjust it.
 25 MR. MORRIS: May I proceed, Deborah?

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1 DONDERO - 10/29/21
 2 MS. DEITSCH-PEREZ: (Nods head.)
 3 Q. Okay. Mr. Dondero, at its peak,
 4 what is the – the largest value of assets that
 5 Highland had under management while you were
 6 president?
 7 A. 35 billion.
 8 Q. And do you recall what year that
 9 was?
 10 A. Not exactly.
 11 Q. Was it before the 2008 financial
 12 crisis?
 13 A. Yes.
 14 Q. Okay. So you were the president of
 15 Highland for about 25 years; is that right?
 16 A. Yes, 25, 26, whatever.
 17 Q. And do you consider yourself to be
 18 expert in the area of money management?
 19 A. Yeah, on the things that we focus
 20 on.
 21 Q. You are a sophisticated investor;
 22 right?
 23 A. Yes. I would believe I'm
 24 categorized as such.
 25 Q. And you are a sophisticated money

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1 DONDERO - 10/29/21
 2 \$200 million?
 3 MS. DEITSCH-PEREZ: Objection to the
 4 form.
 5 A. I don't have a basis for knowing
 6 that.
 7 Q. You do know that it is more than
 8 \$100 million, don't you?
 9 A. No.
 10 Q. Do you owe today Highland Capital
 11 Management Services more than \$75 million?
 12 A. I don't know what the amount is. I
 13 don't believe it is that much.
 14 Q. Are the obligations to Highland
 15 Capital –
 16 MS. DEITSCH-PEREZ: Hold on. Hold
 17 on. My connection just disappeared.
 18 MR. MORRIS: Okay.
 19 MS. DEITSCH-PEREZ: Okay, I'm back.
 20 Q. Okay. Did the – did the
 21 obligations that you have to Highland Capital
 22 Management Services, are they reflected in
 23 promissory notes?
 24 MS. DEITSCH-PEREZ: Could you repeat
 25 that question?

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1 DONDERO - 10/29/21
 2 manager; is that fair?
 3 A. Yes.
 4 Q. And you manage money on behalf of
 5 thousands of people; isn't that right?
 6 A. Yes.
 7 Q. And as a general matter, you know
 8 how to read and understand balance sheets,
 9 don't you?
 10 A. Yes.
 11 Q. You have signed promissory –
 12 promissory notes before, haven't you?
 13 A. Yes.
 14 Q. Is it fair to say you have signed
 15 hundreds of promissory notes during the 25-year
 16 period that you were the president of Highland?
 17 A. No.
 18 Q. Is it fair to say that you signed
 19 dozens of promissory notes during the time that
 20 you were president of Highland?
 21 A. Yeah, dozens is probably fair.
 22 Q. Okay. And is it fair to say that
 23 the aggregate principal amount of the
 24 promissory notes that you signed while you were
 25 president of Highland likely exceeded

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1 DONDERO - 10/29/21
 2 MR. MORRIS: Sure.
 3 Q. Mr. Dondero, you borrowed money from
 4 Highland Capital Management Services; correct?
 5 A. I'm sorry, it sounds like at first
 6 you were asking me, did Highland Capital
 7 Services borrow money from Highland. Now
 8 you're asking me if I borrowed money from
 9 Services?
 10 Q. Yeah, let me – let me rephrase the
 11 question, sir, because if it is not clear, that
 12 is my fault, and I apologize.
 13 Did you – have you borrowed money
 14 from Highland Capital Management Services?
 15 A. I believe so.
 16 Q. Okay. Do you know the aggregate
 17 principal amount that is outstanding today,
 18 ballpark?
 19 A. No.
 20 Q. Are the obligations that you have to
 21 Highland Capital Management Services reflected
 22 in promissory notes where you're the maker and
 23 Highland Capital Management Services is the
 24 payee?
 25 A. Please repeat that question.

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1 DONDERO - 10/29/21

2 Q. Are you the maker on promissory

3 notes in favor of Highland Capital Management

4 Services, Inc.?

5 A. I don't know. I believe – I

6 believe so, or I believe I have in the past,

7 but I don't know.

8 Q. Do you have any – any estimate as

9 to how much money you owe Highland Capital

10 Management Services, Inc. today?

11 MS. DEITSCH-PEREZ: Asked and

12 answered.

13 A. No.

14 Q. Can you say if it is more or less

15 than \$50 million?

16 A. I don't know.

17 Q. Can you say if it is more or less

18 than \$25 million?

19 A. I don't know.

20 Q. As a general matter, is it fair to

21 say that you know how to read and understand

22 promissory notes?

23 MS. DEITSCH-PEREZ: Object to the

24 form.

25 A. In general, yes.

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1 DONDERO - 10/29/21

2 Highland than now, at any time.

3 Q. It is your – it is your position

4 that the affiliate notes to Highland were de

5 minimis in amount?

6 A. Yes.

7 Q. And how do you define de minimus for

8 that purpose?

9 A. I believe the balance sheet of

10 Highland today for the last three years, four

11 years, five years has been between 5 and

12 \$600 million. I believe the notes have never

13 been more than 8 or 10 or 12 percent of that

14 number.

15 Q. And you believe that 8 or 10 or

16 12 percent of Highland's asset base you

17 would – you would define as de minimis?

18 A. Yes.

19 Q. Okay. As – as president of

20 Highland, did you ever do anything to

21 familiarize yourself with the number and amount

22 of affiliate loans that Highland carried on its

23 books and records?

24 A. Not that I can recall.

25 Q. Was there anybody at Highland who

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1 DONDERO - 10/29/21

2 Q. Okay. When you were in control of

3 Highland, you personally decided who was hired

4 at that company; is that fair?

5 A. Sometimes, in senior positions.

6 Q. Okay. Did your duties as president

7 of Highland include being familiar with the

8 debts and obligations that were owed to

9 Highland?

10 MS. DEITSCH-PEREZ: Object to the

11 form.

12 A. I mean, generally.

13 Q. Okay. Did you ever do anything to

14 familiarize yourself with the debts and

15 obligations that were owed to Highland?

16 A. Are you referring to the affiliated

17 notes or –

18 Q. Sure.

19 A. – or what – what are –

20 Q. I was – I was asking – I

21 apologize. I don't mean to step on your words.

22 A. No, you just – because I don't

23 think Highland had a lot of other obligations

24 due from other parties, and the affiliated

25 notes in aggregate were always de minimis to

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1 DONDERO - 10/29/21

2 was charged with the responsibility of knowing

3 the number and amount of affiliate loans that

4 Highland carried on its balance sheet?

5 A. Sure.

6 Q. Can you identify the people who were

7 responsible for that?

8 A. The people in accounting responsible

9 for tracking assets and liabilities in

10 preparing all the audited financial statements

11 every year and the quarterly unaudited

12 financial statements that were prepared and the

13 monthly operating reports.

14 Q. Can you – can you name any names of

15 the people who had the responsibilities that

16 you just described?

17 A. I think it changed regularly, but it

18 would have been people in Frank's group in

19 accounting.

20 Q. Did Frank have any responsibility

21 for knowing and understanding the affiliate

22 loans that Highland carried on its balance

23 sheet?

24 A. Sure. I – as CFO he had to sign

25 off on the audited financials and rep letters

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1 DONDERO - 10/29/21
 2 and – yes.
 3 Q. And can you – can you identify the
 4 name of any person in the accounting group in,
 5 let's say, the three years prior to the
 6 bankruptcy who had responsibility for knowing
 7 and understanding the scope of affiliate loans
 8 that Highland carried on its balance sheet?
 9 A. No, I would just be speculating but
 10 it would be – the senior people in Frank's
 11 group would be responsible for the financial
 12 statements.
 13 Q. Are you able to name the people, the
 14 senior people in Frank's group in the couple of
 15 years prior to the bankruptcy?
 16 A. Yes, but I don't know – like
 17 David Klos was a senior person, Cliff Stoops
 18 was a senior person. There were a couple
 19 up-and-comers below them, but who did the
 20 financials – how Frank assigned the work in
 21 his group, I have no idea.
 22 Q. Did you ever ask?
 23 A. No.
 24 Q. Do you have any knowledge as you sit
 25 here today who within Frank's group had

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1 DONDERO - 10/29/21
 2 the video. I don't know if it matters, but
 3 for a while Jim was frozen. And I know
 4 because – since there was voice and no –
 5 his mouth wasn't moving. So let's just –
 6 if the videographer sees there is a
 7 problem, please let us know.
 8 Q. I –
 9 A. Yes. I'm sorry, could you just
 10 repeat the question regarding Frank, please?
 11 Q. Sure.
 12 As the president of Highland, did
 13 you have the authority and did you exercise
 14 that authority to appoint him as Highland's
 15 CFO?
 16 A. Yes.
 17 Q. Okay. Do you recall when you
 18 appointed Mr. Waterhouse CFO of Highland?
 19 A. No.
 20 Q. Was it more than five years prior to
 21 the bankruptcy?
 22 A. Yes.
 23 Q. As the president – during the time
 24 that you served as president of Highland, did
 25 you believe that Mr. Waterhouse fulfilled his

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1 DONDERO - 10/29/21
 2 responsibility for knowing and understanding
 3 the affiliate loans that Highland carried on
 4 its balance sheets?
 5 A. No.
 6 Q. And to the best of your knowledge as
 7 you sit here today, you never personally did
 8 anything to know and understand the extent and
 9 scope of the affiliate loans that Highland
 10 carried on its balance sheet, is that right?
 11 A. Correct.
 12 Q. Okay. You appointed Mr. Waterhouse
 13 as Highland's CFO; is that right?
 14 A. I think it was appointed and
 15 recommended by Patrick Boyce, but I agreed with
 16 the selection.
 17 Q. And you –
 18 A. That – (speaking simultaneously.)
 19 Q. I apologize, are you done?
 20 A. I'm just saying that was a long time
 21 ago, but I don't remember the details exactly.
 22 Q. But you had the authority and you
 23 used that authority to appoint Frank as CFO;
 24 correct?
 25 MS. DEITSCH-PEREZ: There's a lag in

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1 DONDERO - 10/29/21
 2 duties as chief financial officer?
 3 A. Yes.
 4 Q. Can you recall anything that
 5 Mr. Waterhouse did in his capacity as
 6 Highland's CFO that did not comport with your
 7 expectations?
 8 A. I think we will talk about some of
 9 those today.
 10 Q. Okay. Do you have any reason to
 11 believe that Mr. Waterhouse ever breached his
 12 duties to Highland during the time that you
 13 served as president?
 14 COURT REPORTER: We can't hear you
 15 speaking.
 16 Q. We haven't heard any portion of your
 17 answer, Mr. Dondero.
 18 MR. MORRIS: I don't know if people
 19 can – can hear, but I cannot hear
 20 Mr. Dondero.
 21 COURT REPORTER: I can't either.
 22 MR. MORRIS: Yeah, Deborah, can you
 23 speak, please.
 24 COURT REPORTER: They're on the same
 25 speaker.

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1 DONDERO - 10/29/21
 2 VIDEOGRAPHER: Do we want to go off
 3 the record?
 4 MR. MORRIS: Yes, please.
 5 VIDEOGRAPHER: Off the record,
 6 10:41.
 7 (Recess taken 10:41 a.m. to 10:47 a.m.)
 8 VIDEOGRAPHER: Back on the record,
 9 10:47.
 10 Q. Okay. Let me just ask the question
 11 again so the record is clean, Mr. Dondero.
 12 Do you have any reason to believe as
 13 you sit here right now that Mr. Waterhouse ever
 14 breached his duties to Highland during the time
 15 that you served as president?
 16 MS. DEITSCH-PEREZ: Asked and
 17 answered.
 18 A. Yeah, I think I did ask and answer
 19 that. Again, not intentionally, not
 20 maliciously. I am -- I guess things we're
 21 going to talk about today are for periods of
 22 time after I was president, so...
 23 Q. Right. That is going to be the next
 24 question that I ask. But to be clear -- I just
 25 want to have a clear record -- during the time

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1 DONDERO - 10/29/21
 2 form of the question.
 3 A. I don't want to comment off the top
 4 of my head, but I've highlighted that we will
 5 discuss it around the note issue.
 6 Q. Okay. You are familiar with an
 7 entity called Highland Capital Management Fund
 8 Advisors, L.P.; is that correct?
 9 A. Yes.
 10 Q. And we're going to refer to that
 11 entity as HCMFA. Is that okay?
 12 A. Yes.
 13 Q. Do you know who owns HCMFA?
 14 A. I believe it is myself and
 15 Mark Okada.
 16 Q. Okay. And do you have an
 17 understanding as to -- as to the percentage of
 18 each of your interests, ownership interests in
 19 HCMFA?
 20 A. No, and I don't know the entities.
 21 I don't know if I own it directly or through
 22 Dugaboy. And I do believe Okada tends to use
 23 his trusts, but I don't know the percentages
 24 either.
 25 Q. Do you own a -- do you own a

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1 DONDERO - 10/29/21
 2 that you were president, do you have any reason
 3 to believe that Mr. Waterhouse breached his
 4 duties to Highland?
 5 MS. DEITSCH-PEREZ: Asked and
 6 answered. This is the third time.
 7 A. No.
 8 MR. MORRIS: It is actually not.
 9 Q. But thank you, Mr. Dondero. I
 10 appreciate that.
 11 After you ceased to be president of
 12 Highland, do you have any reason to believe
 13 that Mr. Waterhouse breached his duties to
 14 Highland?
 15 A. Breached his duties to -- I don't --
 16 I don't know if it is -- I don't want to -- I
 17 don't want to make a judgment overall. When we
 18 talk about the notes we can make conclusions
 19 then.
 20 Q. All right. But you're not able to
 21 tell me in response to my question whether you
 22 believe today that Mr. Waterhouse breached his
 23 duties to Highland after the time that you
 24 served as president?
 25 MS. DEITSCH-PEREZ: Object to the

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1 DONDERO - 10/29/21
 2 major- -- withdrawn.
 3 Do you directly or indirectly own a
 4 majority of the ownership interests in HCMFA?
 5 A. I believe so.
 6 Q. Okay. And do you control HCMFA?
 7 A. Yes.
 8 Q. And do you know when HCMFA was
 9 created?
 10 A. No, I do not.
 11 Q. Do you know if it was before or
 12 after 2010?
 13 A. I don't know.
 14 Q. Have you controlled HCMFA since the
 15 time it was created?
 16 A. I believe so, but I don't know for
 17 sure.
 18 Q. Can you think of any period of time
 19 when you didn't control HCMFA?
 20 A. I don't know. I don't remember the
 21 ownership structure prior and I don't remember
 22 when it started, so I don't know.
 23 Q. Okay. I'm asking about control and
 24 not ownership.
 25 Can you think of any period of time

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1 DONDERO - 10/29/21
 2 when you did not control HCMFA?
 3 A. I don't know.
 4 Q. Okay. Can you tell me what the
 5 nature of HCMFA's business is?
 6 A. It largely housed our mutual funds.
 7 Q. What does it mean to house mutual
 8 funds?
 9 A. It managed -- it managed the mutual
 10 funds from a portfolio asset side and captured
 11 the management fees as the advisor or sub
 12 advisor -- I can't remember the structure. I
 13 can't remember if it was the advisor and
 14 Highland was the sub advisor or vice versa, but
 15 in general, a good portion, or most of the
 16 portfolio team that managed the mutual funds
 17 was employed at HCMFA.
 18 Q. Do you have a title with HCMFA
 19 today?
 20 A. I don't know.
 21 Q. Do you know who the president of
 22 HCMFA is?
 23 A. I would believe -- I would -- I
 24 would think I am, but I don't know.
 25 Q. Do you know of any title that you

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1 DONDERO - 10/29/21
 2 certificate is?
 3 A. I'm reading it here for a second. I
 4 guess it is an officer statement or signature
 5 authority, or some combination thereof.
 6 Q. Is that your signature at the bottom
 7 of this document?
 8 A. Yes.
 9 Q. And do you see that this is an
 10 incumbency certificate for HCMFA that you
 11 signed effective as of April 11th, 2019?
 12 A. Yes.
 13 Q. Do you see that Frank Waterhouse is
 14 identified as the treasurer of HCMFA as of that
 15 date?
 16 A. Yes.
 17 Q. Does that refresh your recollection
 18 that Mr. Waterhouse served as the treasurer of
 19 HCMFA?
 20 A. It seems to be an authoritative
 21 document, but I didn't have a recollection.
 22 Q. Do you know of anybody else who has
 23 ever served as the treasurer of HCMFA other
 24 than Mr. Waterhouse?
 25 A. I don't recall.

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1 DONDERO - 10/29/21
 2 have at HCMFA today?
 3 A. I know I'm the portfolio manager on
 4 a bunch of the funds, one of usually two or
 5 three portfolio managers, and I believe I'm the
 6 president, but I don't know beyond that.
 7 Q. Okay. Did Frank Waterhouse serve as
 8 treasurer of HCMFA at any point in time?
 9 A. I don't know. I don't know. I
 10 just -- I don't know. I don't remember.
 11 MR. MORRIS: Can I ask my -- my
 12 colleague to please put up a document that
 13 was premarked as Exhibit 35 to see if I can
 14 refresh your recollection.
 15 MS. DEITSCH-PEREZ: Is that in the
 16 book that you sent over?
 17 MR. MORRIS: No. She will post it
 18 and she will put it in the chat room.
 19 Q. Are you able to see that,
 20 Mr. Dondero?
 21 A. Yes.
 22 Q. Can you see that this is an
 23 incumbency certificate?
 24 A. Yes.
 25 Q. Do you know what an incumbency

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1 DONDERO - 10/29/21
 2 Q. Did you, in your capacity as the
 3 person who was in control of HCMFA, appoint
 4 Mr. Waterhouse as the treasurer of that entity?
 5 MS. DEITSCH-PEREZ: Object to the
 6 form.
 7 A. It appears to me that that's what
 8 this incumbency certificate does, but...
 9 Q. Is it fair to say that you knew for
 10 at least a few years prior to the petition date
 11 that Mr. Waterhouse was simultaneously serving
 12 as Highland's CFO and HCMFA's treasurer?
 13 A. No. I mean, like I said, I don't
 14 remember, and a lot of the officers had
 15 multiple roles and multiple entities. I mean,
 16 it is not surprising, but I didn't have any
 17 recollection.
 18 Q. Are you aware that Mr. Waterhouse
 19 served in any capacity in the Highland universe
 20 of companies other than as CFO of Highland
 21 Capital Management, L.P.?
 22 A. I would -- I would assume he would
 23 have a position like this in multiple other
 24 entities, but I don't know which ones or what
 25 titles he would have off the top of my head.

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1 DONDERO - 10/29/21

2 Q. Is it fair to say, though, that he

3 wouldn't have obtained any of those titles

4 without your knowledge and approval?

5 A. It is – it is fair to say he was –

6 he had – the lawyers or whoever worked on

7 general corporate structuring, Frank was a

8 senior officer in good standing, so they would

9 have used him as appropriate in different

10 things.

11 So to that extent, I guess I approve

12 it, but I sign hundreds of things like this.

13 Would – you know, would I have been

14 specifically aware or remember – remember it

15 is a very low likelihood.

16 Q. Is there any position that

17 Mr. Waterhouse has ever held that you learned

18 about and you objected to on the grounds that

19 you hadn't approved it?

20 A. No, not that I recall.

21 Q. Okay. Do you know if Mr. Waterhouse

22 held any positions with any of the retail

23 funds?

24 A. I don't know.

25 Q. He may have, you just don't recall;

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1 DONDERO - 10/29/21

2 one role?

3 A. Yes.

4 Q. Okay. And in his capacity as CFO of

5 Highland, did he report directly to you?

6 A. Yes.

7 Q. In his capacity as treasurer of

8 HCMFA, did he report directly to you?

9 A. Yeah, it appears that, yes, that is

10 how it was structured.

11 Q. Can you think of any position that

12 Mr. Waterhouse ever held in the Highland family

13 of companies where he didn't report directly to

14 you?

15 A. I can't – I can't think of any.

16 Q. Is Mr. Waterhouse the treasurer of

17 HCMFA today?

18 A. I don't know. I'm not aware of any

19 changes, nor did I orchestrate any changes, but

20 I don't know for sure.

21 Q. Can you identify any position that

22 Mr. Waterhouse holds with any former affiliated

23 company of Highland today?

24 A. Again, I'm not aware of any changes,

25 nor did I orchestrate or precipitate any

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1 DONDERO - 10/29/21

2 is that right?

3 A. That is correct.

4 Q. And you can't identify any title

5 that Mr. Waterhouse held during the time that

6 you served as Highland's president other than

7 CFO of Highland. Do I have that right?

8 A. No, I don't think that is fair.

9 Q. Okay.

10 A. I mean – I mean, he was CFO, but he

11 was other things before he was CFO. And as we

12 were just saying, he's – he's treasurer on

13 this incumbency certificate, but I think he

14 might have been on other incumbency

15 certificates, so I think your – your summary

16 was too narrow.

17 Q. Okay. Can you identify any position

18 that Mr. Waterhouse held at the same time that

19 he is CFO of Highland other than treasurer of

20 HCMFA as reflected on this document?

21 A. I can't recall, but I imagine there

22 to be others.

23 Q. And to the extent there are others,

24 is it fair to say that you knew at the time

25 that Mr. Waterhouse was serving in more than

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1 DONDERO - 10/29/21

2 changes. With the formation of Skyview, I

3 don't know if there was changes. I'm not

4 aware.

5 Q. Have you considered firing

6 Mr. Waterhouse from any of the positions that

7 he holds with any of the companies that were

8 formerly affiliated with Highland?

9 A. No.

10 Q. As the president of HCMFA –

11 withdrawn.

12 As the person who was in control of

13 HCMFA, did you have any responsibility for

14 being familiar with HCMFA's debts and

15 obligations?

16 MS. DEITSCH-PEREZ: Object to the

17 form.

18 A. I don't know.

19 Q. Did you ever do anything in your

20 capacity as the person in control of HCMFA to

21 familiarize yourself with HCMFA's debts and

22 obligations?

23 A. Not during – I mean, not prior to

24 bankruptcy.

25 Q. So before the bankruptcy, you didn't

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1 DONDERO - 10/29/21
 2 take any steps to familiarize yourself with
 3 HCMFA's debts and obligations. Do I have that
 4 right?
 5 A. Correct, not specifically.
 6 Q. Okay. Who was responsible for
 7 knowing and understanding the scope and extent
 8 of HCMFA's debts and obligations?
 9 A. That would have fallen on Frank and
 10 his group.
 11 Q. Okay. Do you have an understanding
 12 as to who was authorized to incur obligations
 13 on behalf of HCMFA?
 14 A. I mean, beyond – beyond due course,
 15 I struggle to see why it would be anybody other
 16 than me, but I don't know.
 17 Q. Do you know if Mr. Waterhouse was
 18 authorized as the treasurer of HCMFA to incur
 19 obligations on its behalf?
 20 A. He wasn't the senior operating or
 21 executive positions there. So the answer is
 22 no, beyond, you know – beyond the normal
 23 course of operating expenses or whatever, but
 24 it would – he would never be the person on
 25 anything of significance.

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1 DONDERO - 10/29/21
 2 some point we have got to be able to get
 3 more than 10 minutes of testimony in a row.
 4 So let's take a short break.
 5 MS. DEITSCH-PEREZ: Thank you.
 6 VIDEOGRAPHER: Going off the record.
 7 The time is 11:08.
 8 (Recess taken 11:08 a.m. to 11:16 a.m.)
 9 VIDEOGRAPHER: Back on the record,
 10 11:16.
 11 Q. Mr. Dondero, did you communicate
 12 with anybody on the break about the substance
 13 of your testimony?
 14 A. No.
 15 Q. As treasurer of HCMFA, did
 16 Mr. Waterhouse's responsibilities include being
 17 familiar with HCMFA's debts and obligations?
 18 A. Yes.
 19 Q. Do you have any reason to believe as
 20 you sit here today that Mr. Waterhouse failed
 21 to fulfill his responsibilities as treasurer of
 22 HCMFA and familiarize himself with their debts
 23 and responsibilities?
 24 MS. DEITSCH-PEREZ: Object to the
 25 form.

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1 DONDERO - 10/29/21
 2 Q. How do you define "significance"?
 3 A. Like waiving fees on a mutual fund,
 4 purchasing another mutual fund, yeah, things
 5 like that.
 6 Q. Was there any document or policy
 7 that you are aware of that specifically
 8 identifies the scope of Mr. Waterhouse's
 9 authority as the treasurer of HCMFA?
 10 A. No.
 11 Q. Is there anything that you are aware
 12 of that specifically limits Mr. Waterhouse's
 13 authority other than what might be in your
 14 head?
 15 A. No, I would – I would say what is
 16 in my head is – would be typical industry
 17 practice. You wouldn't – you wouldn't have
 18 executive vice presidents or ownership defined
 19 if you were going to delegate everything to an
 20 employee three levels down, you know.
 21 MS. DEITSCH-PEREZ: Okay. John,
 22 I've had a request from Davor to take a
 23 quick restroom break, so –
 24 MR. MORRIS: You know, I really –
 25 Davor, I'm happy to accommodate, but at

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1 DONDERO - 10/29/21
 2 A. I don't know.
 3 Q. I appreciate that you don't know,
 4 but do you have any reason as you sit here
 5 today to believe that he failed to fulfill that
 6 particular responsibility?
 7 A. I don't know.
 8 Q. Okay. Are you an authorized
 9 signatory on HCMFA's bank accounts?
 10 A. I don't know.
 11 Q. Do you know who the authorized
 12 signatories are on HCMFA's bank accounts?
 13 A. No.
 14 Q. Do you know whether anybody now
 15 employed or previously employed by Highland was
 16 an authorized signatory with respect to any of
 17 HCMFA's bank accounts?
 18 A. I don't know.
 19 Q. Do you know whether Mr. Waterhouse
 20 was an authorized signatory on any of HCMFA's
 21 bank accounts?
 22 A. I don't know how he had – had it
 23 set up. There would have been, I imagine,
 24 checks and balances. We run, as far as I know,
 25 a compliant accounting group, you know, with

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1 DONDERO - 10/29/21
 2 the right audit controls, et cetera. So I
 3 would imagine there would have been somebody
 4 preparing it and multiple signatures or
 5 multiple sign-offs on wires, but I have no
 6 awareness of this. I mean, I would believe
 7 that it was done compliantly and correctly, but
 8 I don't have any specific awareness.
 9 Q. Okay. Do you know Lauren Thedford?
 10 A. Yes.
 11 Q. And was Ms. Thedford an employee of
 12 Highland at one time?
 13 A. Yes.
 14 Q. Do you recall what position she held
 15 at any particular point in time?
 16 A. I believe she held several different
 17 positions over the years, but I remember most
 18 as a corporate attorney working on document --
 19 documents when we -- we do new funds or amend
 20 old funds.
 21 Q. Okay. Do you recall whether she
 22 served as an officer of HCMFA?
 23 A. Wasn't her name on the incumbency
 24 certificate we had up earlier?
 25 Q. It was. We can put it back up if

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1 DONDERO - 10/29/21
 2 be clear, who was actually employed by both,
 3 who received, you know, income from both.
 4 A. I don't know regarding income, but
 5 some of that historic portfolio managers like
 6 Michael Gregory or Jonathan Lamensdorf, they
 7 did work for HCMFA primarily, but they also did
 8 other things for Highland. I don't know how
 9 their compensation or their bonuses were split.
 10 I just -- I wouldn't have awareness of that.
 11 Q. Let's move on to NexPoint. You're
 12 familiar with an entity called NexPoint
 13 Advisors, L.P.; correct?
 14 A. Yes.
 15 Q. We will refer to that as NexPoint,
 16 okay?
 17 A. Sure.
 18 Q. Do you know who owns NexPoint?
 19 A. Directly or indirectly, I believe I
 20 do.
 21 Q. Okay. And do you control NexPoint?
 22 A. Yes.
 23 Q. And do you know when NexPoint was
 24 created?
 25 A. More than five years ago, but I

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1 DONDERO - 10/29/21
 2 you want to look at that.
 3 A. No, but I think that is -- that is
 4 the answer, but that is my only awareness.
 5 Q. Okay. Do you have -- do you have --
 6 do you know whether she was ever appointed to
 7 any position within the Highland corporate
 8 family other than as an attorney with Highland
 9 and as the secretary of HCMFA?
 10 A. I don't know.
 11 Q. Other than Ms. Waterhouse --
 12 withdrawn.
 13 Other than Mr. Waterhouse and
 14 Ms. Thedford, can you identify any current or
 15 former employee of Highland that ever served as
 16 an officer of HCMFA?
 17 A. I don't know.
 18 Q. Okay. Can you identify any current
 19 or former employee of Highland who was
 20 simultaneously also an employee of HCMFA?
 21 MS. DEITSCH-PEREZ: Object to the
 22 form.
 23 A. You mean somebody who was a dual
 24 employee?
 25 Q. Yeah, who was actually -- yeah, to

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1 DONDERO - 10/29/21
 2 don't remember when.
 3 Q. Can you tell me generally the nature
 4 of NexPoint's business?
 5 A. It is generally real estate related.
 6 Q. Have you controlled NexPoint
 7 throughout its corporate existence, to the best
 8 of your knowledge?
 9 A. Yes.
 10 Q. Do you have a title with NexPoint
 11 today?
 12 A. I believe I'm president, but I don't
 13 know for sure.
 14 Q. Did you appoint Mr. Waterhouse to
 15 serve as treasurer of NexPoint?
 16 A. I don't know.
 17 MR. MORRIS: Please put up Exhibit
 18 37.
 19 Q. This is another incumbency
 20 certificate, sir?
 21 A. Yes.
 22 Q. And do you see, is that your
 23 signature at the bottom?
 24 A. Looks like it, yes.
 25 Q. And does that refresh your

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1 DONDERO - 10/29/21
 2 recollection that you personally identified
 3 Mr. Waterhouse as the treasurer of NexPoint
 4 Advisors, L.P. effective as of April 11th,
 5 2019?
 6 A. No, I mean, not – no.
 7 Q. Do you have any reason to doubt that
 8 Mr. Waterhouse served as the treasurer of
 9 NexPoint Advisors prior to the petition date?
 10 A. No, I don't have a reason to
 11 disagree with it. I just didn't have an
 12 awareness. And when you asked me earlier, the
 13 thing that was running through my mind is that
 14 it could have been, you know, Brian Mitts who
 15 has a strong accounting background at NexPoint.
 16 I just wasn't – I didn't know, based on
 17 recollection, who was treasurer.
 18 Q. Okay. Were you aware that – but
 19 you were aware, were you not, that
 20 Mr. Waterhouse wore multiple hats?
 21 MS. DEITSCH-PEREZ: Objection to
 22 form.
 23 Q. Withdrawn.
 24 You were aware, were you not, sir,
 25 that during the time that you served as

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1 DONDERO - 10/29/21
 2 of NexPoint Advisors?
 3 A. No.
 4 Q. Okay. As the president of NexPoint
 5 Advisors, do you believe that you had a
 6 responsibility to familiarize yourself with
 7 NexPoint's debts and obligations?
 8 MS. DEITSCH-PEREZ: Object to the
 9 form.
 10 A. Just generally.
 11 Q. Okay. Did you do anything to
 12 generally inform yourself of NexPoint's debts
 13 and obligations?
 14 A. Not – not specifically that I can
 15 recall.
 16 Q. Can you recall doing anything to
 17 familiarize yourself with NexPoint's debts and
 18 obligations at any time?
 19 MS. DEITSCH-PEREZ: Object to the
 20 form.
 21 A. Not that I recall.
 22 Q. Did you ever look at NexPoint's
 23 balance sheet?
 24 A. Not – not that I – not that I
 25 recall.

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1 DONDERO - 10/29/21
 2 president of Highland, that Mr. Waterhouse
 3 served in capacities with respect to affiliated
 4 companies?
 5 A. I was aware that multiple senior
 6 executives had multiple titles at multiple
 7 different entities, but I didn't have specific
 8 awareness whatsoever on entities that Frank was
 9 or was not involved in.
 10 Q. Okay. But to the extent that he
 11 held a title with one of the affiliated
 12 companies, those affiliated companies would
 13 have been managed or controlled by you;
 14 correct?
 15 A. Generally.
 16 Q. You can't think of any title that he
 17 held with an affiliated company that wasn't
 18 managed by you, can you?
 19 A. No, not off the top of my head.
 20 Q. And you knew and intended prior to
 21 the petition date to have Mr. Waterhouse serve
 22 in multiple roles; is that fair?
 23 A. Yes.
 24 Q. Have you ever considered firing
 25 Mr. Waterhouse from his position as treasurer

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1 DONDERO - 10/29/21
 2 Q. Do you know whether NexPoint's
 3 balance sheet reflected obligations that it
 4 carried as liabilities that were due and owing
 5 to Highland?
 6 A. I was aware generally of the notes,
 7 but I didn't study the NexPoint balance sheet.
 8 Q. Do you believe that Mr. Waterhouse
 9 had any responsibility as NexPoint's treasurer
 10 to familiarize himself with NexPoint's debts
 11 and obligations?
 12 A. Yeah. I mean, the role is different
 13 and the burden is different, and Frank and his
 14 team orchestrated all the audits and compliance
 15 statements and regulatory stuff for all of the
 16 funds managed by NexPoint.
 17 Q. Well, you personally were
 18 responsible for Highland's audited financial
 19 statements, weren't you?
 20 MS. DEITSCH-PEREZ: Objection, form.
 21 A. No. I mean, "responsible" is not
 22 the right word. I mean, we – I have to – as
 23 the senior most executive, I have to – to
 24 sign – sign statements regarding completeness
 25 and no known frauds and those kinds of things,

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1 DONDERO - 10/29/21
 2 but I am in no way involved in the preparation.
 3 Q. We will talk about that in a bit.
 4 Do you have any reason to believe
 5 today that Mr. Waterhouse failed to fulfill his
 6 responsibilities as treasurer of NexPoint to
 7 familiarize himself with NexPoint's debts and
 8 obligations?
 9 A. I don't know.
 10 Q. You can't identify any particular
 11 reason that you might have for concluding that
 12 Mr. Waterhouse failed to fulfill his duties as
 13 treasurer of NexPoint to familiarize himself
 14 with NexPoint's duties and respons -- duties
 15 and obligations; correct?
 16 A. Yes, I don't know.
 17 Q. Okay. Do you know who the
 18 authorized signatories are on NexPoint's bank
 19 accounts?
 20 A. No.
 21 Q. Do you know if you're an authorized
 22 signatory on NexPoint's bank accounts?
 23 A. I don't know.
 24 Q. Do you know if Mr. Waterhouse is an
 25 authorized signatory on NexPoint's bank

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1 DONDERO - 10/29/21
 2 Q. And do you own a majority of the
 3 interest directly or indirectly in HCMS?
 4 A. I believe so.
 5 Q. Do you control HCMS?
 6 A. I believe so.
 7 Q. Have you -- has there ever been a
 8 period of time in HCMS's corporate existence
 9 where you did not control that entity?
 10 A. Not that I'm aware of.
 11 Q. Do you recall when HCMS was created?
 12 A. More than five years ago, but I
 13 don't remember when.
 14 Q. Do you have an understanding of the
 15 nature of HCMS's business?
 16 A. It manages some assets, and it was
 17 trying to create track records that then could
 18 be marketed.
 19 Q. What does it mean to create a track
 20 record that could be marketed?
 21 A. You execute investments and
 22 investment strategy that you can refine and
 23 articulate and show good results to potential
 24 third-party investors as -- as evidence that
 25 you can do it. And then that track record is

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1 DONDERO - 10/29/21
 2 accounts?
 3 A. I don't know.
 4 Q. Do you know whether there is any
 5 current or former employee of Highland who did
 6 not hold an officer position at NexPoint who
 7 would have been an authorized signatory on
 8 NexPoint's bank accounts?
 9 MS. DEITSCH-PEREZ: Object to the
 10 form.
 11 A. I don't know.
 12 Q. Can you identify any current or
 13 former employee of Highland who served as an
 14 officer of NexPoint at any time other than
 15 Ms. Thedford and Mr. Waterhouse?
 16 A. I don't know.
 17 Q. Okay. Let's go to HCMS. Are you
 18 familiar with an entity called Highland Capital
 19 Management Services, Inc.?
 20 A. Generally, yes.
 21 Q. And can we refer to that as HCMS?
 22 A. Yes.
 23 Q. Do you have a direct or indirect
 24 ownership interest in HCMS?
 25 A. I believe so.

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1 DONDERO - 10/29/21
 2 something the investors are willing to take a
 3 chance on and then give you separate account
 4 money along those lines.
 5 Q. Do you have a title with HCMS today?
 6 A. I don't know.
 7 Q. But you do control the entity; is
 8 that fair?
 9 MS. DEITSCH-PEREZ: Object to the
 10 form, asked and answered.
 11 A. I believe so.
 12 Q. Okay. Do you know whether
 13 Mr. Waterhouse has ever served as an officer of
 14 HCMS?
 15 A. I have no idea.
 16 Q. Can you identify any person in the
 17 world who has ever served as an officer of
 18 HCMS?
 19 A. I don't know what the incumbency
 20 certificate would look like for services, but
 21 I'm willing to be refreshed.
 22 Q. Do you know if anybody ever served
 23 as the chief -- withdrawn.
 24 Did HCMF ever have anybody serve in
 25 the capacity of chief financial officer?

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 2 A. The subject of that question was
 3 HCMF. Is that what you meant to say, or did
 4 you mean Services?
 5 Q. No, I apologize. Thank you for the
 6 clarification. I did mean HCMS, so let me try
 7 again.
 8 Has anybody ever served in the
 9 capacity of chief financial officer of HCMS?
 10 A. HCMF.
 11 MS. DEITSCH-PEREZ: S.
 12 A. Not --
 13 Q. S.
 14 A. Not of Services -- not that --
 15 again, I don't know. I'm willing to be
 16 refreshed, but I -- I have no awareness.
 17 Q. Okay. As president -- as the person
 18 in control of HCMS, do you believe you had any
 19 responsibility to familiarize yourself with
 20 that entity's debts and obligations?
 21 A. Again, just generally, to the extent
 22 that they were material or an issue or
 23 whatever, but no more than generally.
 24 Q. Can you describe anything you ever
 25 did to generally familiarize yourself with

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1 DONDERO - 10/29/21
 2 Frank and his group were doing.
 3 From my perspective, I had to be
 4 aware about it -- aware of any obligations or
 5 notes or debt service costs, et cetera, but to
 6 the extent that I was aware and knew that it
 7 was de minimis, I didn't spend any time
 8 focusing on it, studying it, calculating it
 9 exactly, or anything like that.
 10 Having said that, we are highly
 11 compliant. We do -- we did audits every year
 12 with reputable accounting firms that were
 13 complete and in depth. And any obligations
 14 and/or assets, de minimis or not, in my view,
 15 would nonetheless have to be reflected or
 16 captured accurately and prepared for the
 17 auditors in supplying, you know, detail or
 18 source documents or whatever, whatever they do
 19 in accounting as part of the audit function.
 20 And all that would have done -- been
 21 done exactly and expertly, as far as I know,
 22 and it would have been done by Frank and his
 23 group.
 24 Q. Okay.
 25 A. That is -- I'm trying to give a

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1 DONDERO - 10/29/21
 2 HCMS's debts and obligations?
 3 A. I guess my answer, which would apply
 4 to all of these entities, is awareness to know
 5 that the amounts were de minimis relative to
 6 the value of the entity, and the debt service
 7 costs or issues were very de minimis relative
 8 to the entities, but beyond that, I didn't
 9 study them.
 10 Q. Well, did -- did HCMFA have
 11 obligations to HCMLP that you would
 12 characterize as di minimis from HCMFA's
 13 perspective?
 14 A. Yeah, or just -- it never had
 15 obligations that were more than de minimis.
 16 Q. As -- as the person in control of
 17 HCMFA, did you ever have any concern that HCMFA
 18 would not be able to satisfy its obligations to
 19 HCMLP if -- if a demand was made?
 20 A. No.
 21 Q. Okay. Was anybody charged with the
 22 responsibility of familiarizing themselves with
 23 HCMS's debts and obligations?
 24 A. Again, to differentiate or separate
 25 myself from the treasury function or from what

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1 DONDERO - 10/29/21
 2 complete answer regarding a myriad of ways
 3 you've asked me kind of the same structural
 4 questions.
 5 Q. I am, and just to be clear, I'm
 6 asking kind of the same structural questions
 7 with respect to each of the entities at issue.
 8 I think you picked up on that. I hope you
 9 don't think I'm being repetitive.
 10 You mentioned Frank and his group in
 11 the context of HCMS. Did I hear that
 12 correctly?
 13 A. Yes.
 14 Q. Okay. HCMS did not have a shared
 15 services agreement with Highland; correct?
 16 MS. DEITSCH-PEREZ: You mean a
 17 written shared services agreement, John?
 18 Q. Do you understand the question, sir?
 19 A. Yeah. My answer would be the
 20 advisors like NexPoint and HFAM that had to
 21 have by law and regulatory statute have to have
 22 formal sub advisors and shared services
 23 agreements had formal shared services
 24 agreement.
 25 Entities that didn't need to have

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1 DONDERO - 10/29/21
 2 formal written shared services agreements were
 3 often serviced similarly or – or exactly the
 4 same as those entities, but without a written
 5 agreement, but with a verbal shared services
 6 agreement providing, again, all the same
 7 similar services.
 8 And the entities that didn't have a
 9 written shared services agreement weren't
 10 getting shared services or support from any
 11 other entities other than Highland doing the
 12 same thing for them that it did for the mutual
 13 funds.
 14 Q. Okay. Can you tell me who entered
 15 into an oral shared services agreement between
 16 Highland and HCMS?
 17 A. Boy, I can imagine way back in the
 18 day it would have been myself and Frank, but he
 19 and his group understood and knew that they
 20 were doing it for all the new entities that
 21 came along, and I can't imagine it was even
 22 talked about much over the years.
 23 Q. Did – did HCMFA and NexPoint pay
 24 money to Highland under the shared services
 25 agreement until let's just say late 2020?

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1 DONDERO - 10/29/21
 2 the Highland entity.
 3 And then – and they prepared
 4 statements or did work for services, Frank and
 5 his group would have passed through those costs
 6 and expected services and/or Dugaboy or any of
 7 the other entities to pay for direct
 8 out-of-pocket costs. But it wouldn't have paid
 9 a supplemental fee or profit or anything to
 10 Highland.
 11 Q. Okay. To the best of your
 12 recollection, during the time that you were
 13 president of Highland, did Highland ever
 14 receive anything of value from HCMS on account
 15 of services other than the reimbursement of
 16 out-of-pocket expenses?
 17 A. Yeah, I'm going to go back to my
 18 comment in terms of building track record. And
 19 I would use – yeah, we had done it several
 20 times in the past and it had worked
 21 effectively. And that is – you know, yeah, I
 22 mean, the – the track record in CLO paper was
 23 what was used to track – (inaudible) – as an
 24 investor.
 25 And so, you know, to the extent that

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1 DONDERO - 10/29/21
 2 A. Yeah, yes, and early into '21, I
 3 believe also.
 4 Q. Okay. As – as part of the oral
 5 agreement that you referenced, was there – was
 6 there ever an agreement that HCMS would pay any
 7 money to Highland in exchange for the services
 8 that Highland provided to it?
 9 A. I do not believe there was a
 10 financial remuneration aspect of it.
 11 Q. Okay. And do you recall during your
 12 time as president of Highland whether Highland
 13 ever received payment from HCMS for services
 14 rendered?
 15 MS. DEITSCH-PEREZ: And are we just
 16 talking about money?
 17 MR. MORRIS: Correct.
 18 A. Yeah, I don't – I don't recall
 19 moneys being – well, you know what, let me –
 20 let me clarify that a little bit.
 21 If there were any direct costs that
 22 Highland would have incurred like getting the
 23 audits done, you know, like if Price Waterhouse
 24 said, okay, give us the details on, you know,
 25 all the different entities that roll up into

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1 DONDERO - 10/29/21
 2 the DAF wasn't paying a fee, along the way, to
 3 Highland for shared services, Highland got the
 4 benefit of the track record that was being
 5 built at the DAF to then market to third
 6 parties, which then created a revenue stream
 7 for Highland down the road.
 8 And I would say that was the same
 9 intent on Services.
 10 Q. Is there anything – anything else
 11 of value that you believe HCMS provided to
 12 Highland in exchange for the services that
 13 Highland rendered?
 14 A. That would be primarily it. I would
 15 say there is probably times where Services
 16 provided liquidity for Highland or helped on
 17 investments that Highland was involved in, but
 18 I would have to refresh myself on exactly what.
 19 Q. Is it fair to say that HCMF – HCMS
 20 never provided a revenue stream to Highland
 21 similar to the revenue stream that was provided
 22 by HCMFA and NexPoint under the shared services
 23 agreements?
 24 A. That is correct.
 25 Q. Okay. Did anybody at HCMF –

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1 DONDERO - 10/29/21
 2 withdrawn.
 3 Did anybody at HCMS ever have the
 4 responsibility for familiarizing themselves
 5 with HCMS' debts and obligations?
 6 MS. DEITSCH-PEREZ: Object to the
 7 form.
 8 A. Frank and his team, as part of
 9 preparing the audited financials for all the
 10 entities, would have definitively been aware of
 11 all of them. Who else on the services
 12 incumbency certificate or – would be aware or
 13 have knowledge, I don't know.
 14 Q. Okay. And when you refer to "Frank
 15 and his team," are any of them acting as an
 16 officer or employee of HCMS in what you are
 17 thinking about?
 18 A. I – I don't know. I don't know.
 19 Did – we haven't – have we looked at the
 20 incumbency certificate for services?
 21 Q. No.
 22 A. I don't know. I don't know off the
 23 top of my head.
 24 Q. Okay. Let's just finish this up.
 25 Can you identify any current or

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1 DONDERO - 10/29/21
 2 Q. Have you controlled HCRE throughout
 3 its corporate existence?
 4 A. Yes.
 5 Q. Can you tell me what the nature of
 6 HCRE's business is?
 7 A. It makes real estate investments.
 8 Q. Do you have a title with that
 9 entity?
 10 A. I don't know, but I'm willing to be
 11 refreshed. And I assume its incumbency
 12 certificate looks similar to the ones that you
 13 have put up.
 14 Q. Can you identify for me today
 15 anybody who has ever served as an officer of
 16 HCRE at any time?
 17 A. I would rather be refreshed. I
 18 would imagine myself and Matt McGraner are two
 19 of those people, but I don't know for sure.
 20 Q. Okay. Without the incumbency
 21 certificates or other documentation, you are
 22 not able to give me any names other than Mr. –
 23 other than you and Mr. McGraner, is that fair?
 24 A. That's correct.
 25 Q. Okay. Do you know whether anybody

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1 DONDERO - 10/29/21
 2 former Highland employee who served as an
 3 officer of HCMS at any time?
 4 A. No, I would need to be refreshed.
 5 Q. Okay. Can you identify –
 6 withdrawn. Let's go to the last one, HCRE.
 7 Are you familiar with an entity
 8 called HCRE Partners, LLC?
 9 A. Yes.
 10 Q. And is that entity now known as
 11 NexPoint Real Estate Partners, LLC?
 12 A. You know what, I do believe it had a
 13 name change. I don't know if that is the name
 14 change, but that would make sense.
 15 Q. Okay. Can we just refer to that
 16 entity as HCRE?
 17 A. That is fine.
 18 Q. Okay. Do you have any direct or
 19 indirect ownership interest in HCRE?
 20 A. Yes.
 21 Q. And is it a majority interest to the
 22 best of your knowledge?
 23 A. Yes.
 24 Q. Do you control HCRE?
 25 A. Yes.

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 2 has ever been given the responsibility –
 3 withdrawn.
 4 Do you know whether anybody has ever
 5 had the responsibility for familiarizing
 6 themselves with the debts and obligations of
 7 HCRE?
 8 A. It would be the same answer as given
 9 on the other entities. It would be the
 10 treasurer, which is probably Frank. And if not
 11 the treasurer it would be Frank in his role and
 12 his team of putting together the complete and
 13 accurate financials of HCRE.
 14 Q. Other than putting together the
 15 complete and accurate financials of HCRE, did
 16 Frank and his team have any other
 17 responsibility with respect to understanding
 18 the debts and obligations of HCRE?
 19 MS. DEITSCH-PEREZ: Objection, form.
 20 A. Again, just the general overlay
 21 being that they were de minimis and – de
 22 minimus, and the service obligations were de
 23 minimus relative to the value or operating
 24 income of the enterprise.
 25 In other words, had they been more

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1 DONDERO - 10/29/21
 2 material or material, they would have had more
 3 focus. But they didn't deserve more focus.
 4 Q. And so is it fair to say that you
 5 didn't do anything to familiarize yourself with
 6 HCRE's debts and obligations?
 7 MS. DEITSCH-PEREZ: Object to the
 8 form.
 9 A. Not on a regular detailed basis, you
 10 know, just a general awareness.
 11 Q. Did you ever take any steps to
 12 review the affiliate loans and obligations that
 13 were due between and among Highland and its
 14 affiliated companies?
 15 A. Again, just generally.
 16 Q. What did you do?
 17 A. Like I said, I had a general
 18 awareness of them.
 19 Q. And did you receive from time to
 20 time lists or information that specifically
 21 described the amounts that were due and owing
 22 from the affiliates to Highland?
 23 A. Yeah, from time to time the amounts,
 24 yes.
 25 Q. Let's just quickly go to the

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1 DONDERO - 10/29/21
 2 NexPoint?
 3 MS. DEITSCH-PEREZ: As qualified by
 4 the objections that we made.
 5 MR. MORRIS: Sure.
 6 A. I will do the best I can.
 7 Q. Thank you so much.
 8 MR. MORRIS: Can we go to the next
 9 page, please. The last page. The topics.
 10 Q. Okay. Have you seen these topics
 11 before, sir?
 12 A. Yes.
 13 Q. Okay. Do you see that we asked for
 14 somebody to testify as to NexPoint's answer?
 15 A. Yes.
 16 Q. Okay. Are you aware that
 17 NexPoint – are you aware that NexPoint filed
 18 an answer to Highland's amended complaint?
 19 A. Yes.
 20 Q. And did you review NexPoint's answer
 21 at any time before today's deposition?
 22 A. It was in the binder, I believe,
 23 that you guys sent over.
 24 Q. I think that's right. Are you
 25 prepared to answer questions today about

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1 DONDERO - 10/29/21
 2 30(b)(6) notices if we can.
 3 MR. MORRIS: Can we put up a
 4 document that has been marked as
 5 Exhibit 47.
 6 (Exhibit 47 marked.)
 7 Q. Do you understand, Mr. Dondero, that
 8 you are here today in your individual capacity
 9 and in your capacity as what is called a
 10 30(b)(6) witness for certain entities?
 11 A. Yes, a little bit to my chagrin.
 12 And I don't think you will see me again as a
 13 30(b)(6) witness, but yes.
 14 Q. All right. Well, it wasn't my
 15 choice, so let's just go through it quickly.
 16 Have you seen this document before,
 17 sir?
 18 A. Yes.
 19 Q. And do you understand that you are
 20 here today in your capacity as NexPoint's
 21 corporate representative?
 22 A. Yes.
 23 Q. And do you understand that your
 24 answers today in your capacity as NexPoint's
 25 corporate representative will be binding on

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1 DONDERO - 10/29/21
 2 NexPoint's answer?
 3 MS. DEITSCH-PEREZ: Again, subject
 4 to our objection, but...
 5 A. Yeah, to the best I can.
 6 Q. Okay. The next topic concerns
 7 affirmative defenses.
 8 Do you see that?
 9 A. Yes.
 10 Q. Do you have an understanding of what
 11 an affirmative defense is?
 12 A. Yes.
 13 Q. What is your understanding of an
 14 affirmative defense?
 15 A. I think it is those – phrase that
 16 you see in most of our answers, the
 17 justification, estoppel, waiver, and then –
 18 and then there is some specific answers beyond
 19 that, I guess.
 20 Q. Okay. Are you prepared –
 21 MS. DEITSCH-PEREZ: John, I take it
 22 you will show him. He doesn't have to have
 23 them memorized.
 24 MR. MORRIS: No, of course not.
 25 MS. DEITSCH-PEREZ: So if you are

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1 DONDERO - 10/29/21
 2 going to ask him, you will put it in front
 3 of him?
 4 MR. MORRIS: Of course.
 5 MS. DEITSCH-PEREZ: Thank you.
 6 Q. Are you prepared to testify today to
 7 the circumstances, communications, documents,
 8 and facts concerning NexPoint's affirmative
 9 defenses?
 10 A. Yeah, to the best that I can.
 11 Q. Okay. Do you see Topic 3 concerns
 12 the demand notes?
 13 A. Yes.
 14 Q. Okay. Are you prepared to testify
 15 about the demand notes, including with respect
 16 to the specific issues identified in that
 17 topic?
 18 MS. DEITSCH-PEREZ: Again, subject
 19 to the objections, particularly I think
 20 with respect to use of the proceeds.
 21 Q. We will get to that.
 22 Are you prepared to testify?
 23 A. I hope so.
 24 Q. And – and I know that there is an
 25 objection there, but just a simple yes or no,

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1 DONDERO - 10/29/21
 2 A. Yeah. There were a couple of phone
 3 calls too.
 4 Q. How many times did you communicate
 5 with Deborah in preparation for today's
 6 deposition?
 7 A. A half dozen, maybe, you know.
 8 Q. How many times –
 9 A. You know, in-person and phone calls,
 10 but...
 11 Q. How many times did you meet with her
 12 in-person?
 13 A. Two, maybe three.
 14 Q. And can you just tell me an estimate
 15 of the total time spent preparing for this
 16 deposition, inclusive of both the meetings and
 17 the phone calls?
 18 A. I don't know. Does it matter? I
 19 mean, I don't know. I don't know, four hours,
 20 four hours.
 21 Q. Okay. Did anybody participate in
 22 these meetings or phone calls other than your
 23 lawyers?
 24 A. No.
 25 Q. Did any lawyers participate in any

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1 DONDERO - 10/29/21
 2 are you – do you have knowledge of the – of
 3 NexPoint's use of the proceeds of the note?
 4 A. Not specifically.
 5 Q. All right. Maybe I will refresh
 6 your recollection later.
 7 And then the last topic is discovery
 8 requests.
 9 Do you see that?
 10 A. Yes.
 11 Q. Are you prepared to testify today on
 12 NexPoint's behalf concerning Highland's
 13 discovery requests?
 14 A. To the best of my knowledge.
 15 Q. Okay. Did you do anything to
 16 prepare for today's deposition?
 17 A. I met with Deborah.
 18 Q. When did you do that?
 19 A. A couple of days ago for a couple of
 20 hours, and a few days before that for a couple
 21 of hours.
 22 Q. How many times –
 23 MS. DEITSCH-PEREZ: Are you also
 24 asking about calls?
 25 MR. MORRIS: I appreciate that.

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1 DONDERO - 10/29/21
 2 of these meetings or phone calls who didn't
 3 represent you in your individual capacity?
 4 A. No. It was just – it was just
 5 Deborah and I.
 6 Q. Okay. Have you had a chance to
 7 review the transcript of Mr. Waterhouse's
 8 deposition?
 9 A. No. I haven't seen it yet.
 10 Q. You haven't seen any portion of that
 11 deposition?
 12 A. No.
 13 Q. Are you aware of anything that
 14 Mr. Waterhouse testified to in his deposition?
 15 A. No.
 16 Q. You have no knowledge of anything
 17 that Mr. Waterhouse said last week in his
 18 deposition; do I have that right?
 19 A. That's correct.
 20 Q. Okay. Do you have any knowledge as
 21 to anything your sister said in her deposition?
 22 A. No, other than she is glad it is
 23 over.
 24 Q. I hope – I hope – I hope she
 25 thinks at least I was respectful.

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1 DONDERO - 10/29/21
 2 Did – did you ever see her
 3 transcript – the transcript from her
 4 deposition?
 5 A. No.
 6 Q. How about Mr. Seery, did you see the
 7 transcript from Mr. Seery's deposition?
 8 A. I didn't even know that Seery was
 9 deposed, so the answer is no.
 10 Q. Okay. Are you aware that Dave Klos
 11 was deposed?
 12 A. You know what, I think I had
 13 awareness of that, but I haven't seen that
 14 deposition.
 15 Q. Do you know anything about anything
 16 that he testified to the other day?
 17 A. Nope.
 18 Q. How about Kristin – Kristin
 19 Hendrix, are you aware that she was deposed?
 20 A. I think I heard that she was also.
 21 Q. Do you know anything about anything
 22 that she testified to?
 23 A. No.
 24 Q. Did you look at any documents to
 25 refresh your recollection in advance of this

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1 DONDERO - 10/29/21
 2 would you be able to do so?
 3 A. Yes.
 4 MR. MORRIS: Let's put up Exhibit
 5 49, please.
 6 (Exhibit 49 marked.)
 7 Q. And this is the 30(b)(6) notice for
 8 HCRE. You're here today to testify on behalf
 9 of HCRE as its corporate representative. Do
 10 you understand that?
 11 A. Yes.
 12 Q. And did you review the list of
 13 topics that we included in our 30(b)(6) notice
 14 for HCRE?
 15 A. Yes.
 16 Q. And subject to your counsel's
 17 objections, are you prepared to testify to the
 18 topics that are listed on the page that is up
 19 on the screen?
 20 A. Yes.
 21 MR. MORRIS: Okay. Can we please
 22 put up Exhibit 31.
 23 (Exhibit 31 marked.)
 24 Q. Mr. Dondero, we're putting up on the
 25 screen now your answer to the – to Highland's

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1 DONDERO - 10/29/21
 2 deposition other than the stack that I provided
 3 and the deposition notices?
 4 A. I mean just – no, just a listing of
 5 the notes, but that is it.
 6 Q. Did you see any emails at all in
 7 connection with your preparation for today's
 8 deposition?
 9 A. No, not a single email.
 10 MR. MORRIS: Okay. Let's put up
 11 Exhibit 48, please.
 12 (Exhibit 48 marked.)
 13 Q. And I think you will see that this
 14 is the 30(b)(6) notice for HCMS. If we can go
 15 to the next page. And it is really the same –
 16 I will represent to you that the topics for
 17 HCMS are the same as the topics for NexPoint.
 18 Have you seen HCMS's 30(b)(6) notice
 19 that is up on the screen right now?
 20 A. Yes.
 21 Q. And if we took the time – if I took
 22 the time to ask you the same questions about
 23 your ability to answer on behalf of HCMS –
 24 HCMS with respect to the topics identified
 25 there and subject to your counsel's objections,

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1 DONDERO - 10/29/21
 2 amended complaint.
 3 MS. DEITSCH-PEREZ: Is that in the
 4 notebook?
 5 MR. MORRIS: No, no. This is one
 6 that we had – we had –
 7 MS. DEITSCH-PEREZ: All right. Hang
 8 on.
 9 MR. MORRIS: That's okay. That is
 10 why we're putting it up on the screen, and
 11 we will put it in the chat room. It is
 12 already in there, actually.
 13 MS. DEITSCH-PEREZ: Yeah, I think we
 14 have it here. Hold on. I think Nancy
 15 walked off with the duplicate of this, so
 16 if you need it, I will hand it to you.
 17 Q. Mr. Dondero, while we wait to see if
 18 your counsel has a hard copy, do you recall
 19 reviewing your answer to the plaintiff's
 20 amended complaint before it was filed?
 21 A. I don't know if I was involved at
 22 that juncture.
 23 Q. All right. So just to refresh your
 24 recollection, this is a document that was filed
 25 with the Court at the beginning of September.

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1 DONDERO - 10/29/21
 2 If you recall, Highland filed an original
 3 complaint, and after you amended your answer
 4 late in August pursuant to an agreement,
 5 Highland filed amended complaints against
 6 certain of the obligors in the notes
 7 litigation.
 8 Does that refresh your recollection
 9 that this document was prepared in early
 10 September?
 11 A. Okay.
 12 Q. Okay.
 13 A. I don't have specific memory.
 14 Q. Okay. So as always, Mr. Dondero, we
 15 have done this many times before, if there is
 16 anything in the document that you think that
 17 you need to see because it is a little bit of a
 18 lengthy document, will you let me know that?
 19 A. Sure.
 20 MS. DEITSCH-PEREZ: Yeah. And we
 21 have a copy if you need to stop and take a
 22 look. We did get a hard copy. We have a
 23 hard copy here.
 24 Q. Okay.
 25 A. All right.

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1 DONDERO - 10/29/21
 2 Can you just read that to yourself and tell me
 3 when you have done that?
 4 A. Yes.
 5 Q. Are you aware of any facts that
 6 concern this particular affirmative defense?
 7 A. Which notes are these again?
 8 Q. These would be your personal notes.
 9 A. The -- personal notes. I'm trying
 10 to remember. No, I -- well, if you read the
 11 question one more time.
 12 Q. Sure. Just so -- so to make sure
 13 that you understand, because I'm not here to
 14 trick you, this is your answer to Highland's
 15 complaint against you where Highland is trying
 16 to recover on the notes that you signed.
 17 Do you understand that?
 18 A. Right.
 19 Q. Okay. So in Paragraph 83 you have
 20 asserted an affirmative defense that the
 21 plaintiff's claims are barred in whole or in
 22 part due to waiver.
 23 Do you see that?
 24 A. Yes.
 25 Q. Do you have any facts that you can

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1 DONDERO - 10/29/21
 2 Q. So -- so let me ask the question
 3 again then: Do you recall, with that
 4 background, having reviewed and approved the
 5 filing of this document at the beginning of
 6 September 2021?
 7 A. Generally.
 8 Q. Okay. As you sit here today, are
 9 you aware of anything in this document that is
 10 inaccurate?
 11 A. Not that I'm aware of.
 12 Q. Okay. Are you aware of anything in
 13 the document that you believe should be
 14 modified or amended to make it more complete or
 15 more accurate?
 16 A. Not as of this moment.
 17 Q. Okay. Can we please go to Paragraph
 18 83. Okay. Right there.
 19 So do you see that on -- on page 13
 20 of the exhibit, we have in Paragraphs 82
 21 through 91 what are called your affirmative
 22 defenses?
 23 A. Yes.
 24 Q. All right. I'm going to skip the
 25 one in 82 for the moment, but focusing on 83.

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1 DONDERO - 10/29/21
 2 share with me that concern that particular
 3 affirmative defense?
 4 MS. DEITSCH-PEREZ: And, again, just
 5 in this particular answer.
 6 MR. MORRIS: That is all I'm asking
 7 about.
 8 Q. We're going to go through the answer
 9 for each one of them. So just one at a time.
 10 We're only talking about your -- your notes.
 11 A. No, not the moment.
 12 Q. Let's go to Paragraph 84.
 13 Do you see Paragraph 84 states,
 14 among other things, that plaintiff's claims are
 15 barred, in whole or in part, due to estoppel?
 16 A. Yes.
 17 Q. Can you share with me any facts that
 18 you are aware of that concern that particular
 19 affirmative defense?
 20 A. No.
 21 Q. Okay. I'm going to skip over 85
 22 because I've gotten that answer elsewhere. If
 23 we can go to 86, do you see that Paragraph 86
 24 asserts as an affirmative defense, among other
 25 things, that, quote: Plaintiff's claims may be

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1 DONDERO - 10/29/21
 2 barred, in whole or in part, due to failure of
 3 consideration, closed quote?
 4 A. Right, I see that.
 5 Q. Do you – do you – do you
 6 acknowledge that Highland transferred to you an
 7 amount of money equal to the principal amount
 8 on each of the notes that are at issue?
 9 A. I believe – yes.
 10 Q. Okay. I appreciate that.
 11 Do you have any facts that would
 12 support the affirmative defense that is set
 13 forth in Paragraph 86?
 14 A. No.
 15 Q. Okay. And then, finally,
 16 Paragraph 88 asserts, among other things, that
 17 the fraudulent transfer claim should be barred,
 18 in whole or in part, because the alleged
 19 fraudulent transfer – and I'm summarizing
 20 here – was taken in good faith and for
 21 reasonably equivalent value.
 22 Do you see that?
 23 A. Yes.
 24 Q. Okay. Do you have any facts that
 25 concern that particular affirmative defense?

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1 DONDERO - 10/29/21
 2 A. – regarding that, yeah.
 3 Q. It is the same thing. Do I have
 4 that right?
 5 A. Yes.
 6 Q. Okay. Thank you very much.
 7 Is there anything else you can share
 8 with me about the facts that concern the
 9 affirmative defense in Paragraph 88?
 10 A. I think that is – that is – that
 11 is it.
 12 Q. Okay. Can we change now to
 13 Exhibit 16, which you should have in your pile,
 14 which is the answer that was filed by the HCMS
 15 to Highland's amended complaint.
 16 (Exhibit 16 marked.)
 17 A. Which number is this?
 18 Q. It is number 16.
 19 A. 16 in the binder?
 20 Q. It should be, yeah.
 21 A. Yes. Okay. I got it.
 22 Q. Okay. And is the first page titled
 23 Defendant, Highland Capital Management
 24 Services, Inc.'s Answer to Amended Complaint?
 25 A. Yes.

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1 DONDERO - 10/29/21
 2 A. Let me read that one more time.
 3 Q. Take your time.
 4 A. I think that one is – I'm trying –
 5 I'm trying to remember if that one – if the
 6 partner defense is on alternative comp that
 7 could have been taken or forgiveness that was
 8 in lieu of other comp – I'm trying to remember
 9 if that falls under this category. I think it
 10 does.
 11 Q. Okay. Is there anything else that
 12 you can – any other facts that you can think
 13 of that concern the affirmative defense in
 14 Paragraph 88?
 15 A. I mean, the – yes. Okay. To the
 16 extent that the – in lieu of additional comp
 17 falls under there, so does the incentives to –
 18 the incentive to me to help monetize illiquid
 19 investments better faster.
 20 Q. And does that relate to the three
 21 portfolio companies that are the subject of the
 22 oral agreement between you and your sister or
 23 to something else?
 24 A. It is –
 25 MS. DEITSCH-PEREZ: Objection, form.

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1 DONDERO - 10/29/21
 2 Q. Okay. So these questions I'm asking
 3 in your capacity as HCMS' 30(b)(6) witness.
 4 Okay?
 5 A. Okay.
 6 Q. And you recall that one of the
 7 topics under the deposition notice was HCMS'
 8 answer; right?
 9 Are you prepared to answer questions
 10 about this document?
 11 A. Yep, to the best I can.
 12 Q. Okay. Have you seen it before?
 13 A. Yes.
 14 Q. And do you know whether HCMS
 15 authorized this Stinson firm to file this
 16 document on its behalf at the beginning of
 17 2021?
 18 A. Yes.
 19 Q. Did you personally have any role in
 20 reviewing and preparing this document?
 21 A. I mean, just generally that the
 22 transition of former Judge Lynn passing and
 23 Bonds Ellis not being able to handle
 24 complexity – maybe I shouldn't say it like
 25 that – or handle this aspect of the case

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1 DONDERO - 10/29/21
 2 and/or – I think it was – yeah, just
 3 whatever. He moved to Stinson from – I think
 4 maybe it started at Bonds Ellis and then maybe
 5 it went to Wick Phillips and then it went to
 6 Stinson, but, you know, there was a migration
 7 of these notes in general.
 8 Q. Was there a particular person who
 9 was charged with the responsibility of
 10 approving and authorizing the filing of this
 11 document on behalf of HCMS?
 12 A. Like I said, I think generally that
 13 was myself.
 14 Q. Okay. Are you aware of anything in
 15 this document today that is inaccurate in any
 16 way?
 17 A. Not specifically.
 18 Q. Are you aware of anything generally
 19 in this document that is inaccurate in any way?
 20 A. Not at the moment.
 21 Q. Are you aware of anything in this
 22 document that you believe should be modified or
 23 amended to make it more complete or more
 24 accurate?
 25 A. Not yet.

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1 DONDERO - 10/29/21
 2 was – that is incorporated into that defense.
 3 Q. Okay. We will talk about the – the
 4 details of that in a moment, but are there any
 5 other kind of broad statements that you can
 6 give me that identify facts related to this
 7 particular affirmative defense?
 8 MS. DEITSCH-PEREZ: Object to the
 9 form.
 10 A. That is all I have at the moment.
 11 Q. Okay. Do you know whether any
 12 document that HCMS ever filed with the
 13 bankruptcy court ever asserted, as in a
 14 defense, that they didn't have to pay because
 15 they had prepaid any obligations that were due
 16 and owing?
 17 MS. DEITSCH-PEREZ: Object to the
 18 form.
 19 A. I don't have awareness.
 20 Q. And this document doesn't – doesn't
 21 use the word "prepayment" anywhere, does it?
 22 MS. DEITSCH-PEREZ: Object to the
 23 form.
 24 A. I don't know.
 25 Q. Do you know of anything that HCMS

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1 DONDERO - 10/29/21
 2 Q. Let's go to Paragraph 40 – 94,
 3 please.
 4 MS. DEITSCH-PEREZ: We may be
 5 imperfect creatures as lawyers.
 6 A. Yes.
 7 Q. Okay.
 8 A. Yes.
 9 Q. Okay. I was just going to say, do
 10 you see from Paragraphs 94 through 102 HCMS has
 11 set forth its affirmative defenses?
 12 A. Yes.
 13 Q. Okay. Let's – let's start with the
 14 first one.
 15 Do you see in Paragraph 94 HCMS
 16 asserts that, quote: Plaintiff's claims are
 17 barred, in whole or in part, by the doctrine of
 18 justification and/or repudiation?
 19 A. Yes.
 20 Q. Are you aware of any facts that
 21 concern that particular defense?
 22 A. I believe this – they were material
 23 prepayments of the loan. I believe that is –
 24 those are the – they were material and
 25 numerous prepayments of the loan, which I think

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1 DONDERO - 10/29/21
 2 ever did before this week to put Highland on
 3 notice that it contended that it didn't have to
 4 pay its obligations under the notes because of
 5 a prepayment defense?
 6 MS. DEITSCH-PEREZ: Object to the
 7 form.
 8 A. We have no records. I'm not sure we
 9 would have ever been in a position to – to do
 10 that. The – you know, we were relying on
 11 shared services from Highland, and Highland had
 12 all the records regarding the amounts and
 13 prepayments, et cetera.
 14 Q. When did you learn that HCMS had
 15 made a prepayment to Highland?
 16 A. I don't know, but I – I imagine –
 17 I imagine it was – if you are asking why it
 18 wasn't mentioned earlier but then mentioned
 19 later, it is because somewhere in that time
 20 period we became aware.
 21 Q. So you didn't – you didn't have
 22 knowledge of the prepayment until the debtor
 23 produced documents. Do I have that right?
 24 Withdrawn.
 25 How did you learn that HCMS made a

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1 DONDERO - 10/29/21
 2 prepayment?
 3 A. I don't know. I just know that we
 4 became aware of that being a material fact
 5 somewhere along the line.
 6 Q. Do you remember when you learned
 7 that material fact?
 8 A. No.
 9 Q. Do you have any facts that you can
 10 share with me concerning the prepayment?
 11 A. Eventually there was a spreadsheet
 12 that summarized it, but I don't – I don't
 13 know – I don't know when that occurred.
 14 Q. Does – does this defense of
 15 prepayment apply to demand notes or a term
 16 note?
 17 A. I would – I would – I would say,
 18 you know, primarily a term note, but – yeah, I
 19 think primarily the term note because I think
 20 that was the one that was declared to be in
 21 default of share, you know, whatever, so I
 22 think it was regarding the term note.
 23 Q. Do you recall – do you have any
 24 knowledge as to when the prepayment was made?
 25 A. I believe there were numerous and

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1 DONDERO - 10/29/21
 2 form.
 3 A. I wouldn't say it like that.
 4 Q. We will look – we will look at the
 5 documents in a few minutes.
 6 Are you aware of any facts that
 7 support the justification or repudiation
 8 defense in Paragraph 94 other than what you
 9 have testified to so far?
 10 A. I think it is largely the prepayment
 11 aspect of it that is captured there.
 12 Q. Okay. And – and – all right. I
 13 will leave it at that.
 14 Let's go to Paragraph 95. Do you
 15 see the affirmative defense in 95 is that,
 16 quote, plaintiff's claims are barred in whole
 17 or in part by the doctrine of estoppel.
 18 Do you see that?
 19 A. Yes.
 20 Q. Do you have any facts as the
 21 30(b)(6) witness of HCMS that concern that
 22 particular affirmative defense?
 23 A. You know, I think for both 95 and
 24 96, the way I understand it is that was
 25 reliance on Highland's and Highland's screw-up,

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1 DONDERO - 10/29/21
 2 material prepayments, but I don't know exactly
 3 when they were made.
 4 Q. Do you know what year they were
 5 made?
 6 A. No, but – no, but – no, I don't.
 7 MS. DEITSCH-PEREZ: If you want,
 8 John, if you would like for him to give you
 9 dates, he could probably dig up the
 10 spreadsheet and give you dates, but you
 11 have it also.
 12 MR. MORRIS: Thank you. Okay. I
 13 think we're doing just fine here.
 14 Q. Do you know if there were any
 15 prepayments made by HCMS in 2018?
 16 A. I don't know the specifics off the
 17 top of my head.
 18 Q. Do you know if HCMS made any
 19 prepayments in 2019?
 20 A. I don't know the specifics off the
 21 top of my head.
 22 Q. Are you aware that under the term
 23 note, HCMS was required to pay annual
 24 installment payments at the end of each year?
 25 MS. DEITSCH-PEREZ: Object to the

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1 DONDERO - 10/29/21
 2 to the extent that there was a screw-up, on the
 3 term loans.
 4 Q. What screw-up are you referring to?
 5 A. Well, we didn't have accountants or
 6 employees at Services, you know, and Services
 7 was relying on Highland and shared services to
 8 stay in compliance or to – on the various
 9 loans.
 10 Q. Did you ever personally instruct
 11 anybody in December of 2020 to make a payment
 12 on behalf of HCMS under the term note?
 13 A. To make – I'm sorry, is this –
 14 what was the timeframe again?
 15 Q. December 2020 – let's just say
 16 anytime in 2020. Did you, in your capacity as
 17 the person in control of HCMS, ever direct or
 18 authorize any person in the world to make a
 19 payment from HCMS to Highland in satisfaction
 20 of the obligation that was due under the term
 21 note at the end of the year?
 22 A. Not that – not that I recall.
 23 Q. Okay. Do you know whether anybody
 24 acting on behalf of HCMS ever instructed or
 25 authorized Highland to make a payment on

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1 DONDERO - 10/29/21
 2 account of HCMS's term note to Highland?
 3 A. Well, again, and maybe I didn't say
 4 it clearly enough. I think there was a
 5 reliance in the due course aspect, especially
 6 on small amounts, and it would have been done
 7 by Highland personnel on behalf of Services.
 8 MR. MORRIS: Okay. Move to strike.
 9 Q. And I'm going to ask you,
 10 Mr. Dondero, to be patient with me and to
 11 listen carefully to my question.
 12 Are you aware of anybody acting on
 13 behalf of HCMS, whoever instructed Highland to
 14 make a payment in satisfaction of any payment
 15 that was due at the year-end of 2020 under the
 16 term note?
 17 A. Not specifically, but I'm saying I
 18 don't think it needed to be made specifically.
 19 Q. Okay. So you are not aware of any
 20 instruction that was ever given to Highland by
 21 HCMS to make the payment; is that fair? You
 22 relied on the course of dealing?
 23 A. Right. I relied on ordinary course.
 24 I don't believe there was a specific – I'm not
 25 aware of a specific request.

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1 DONDERO - 10/29/21
 2 and everybody. He was trying to steal the
 3 estate, you know, so yes.
 4 MR. MORRIS: I move to strike.
 5 Q. You were asked to resign from
 6 Highland in late September of 2020; correct?
 7 A. Yes.
 8 Q. And you did resign as of October
 9 9th, 2020; correct?
 10 A. Yes.
 11 Q. And do you recall that in early
 12 December, Highland sought a temporary
 13 restraining order against you?
 14 A. Yes.
 15 Q. And do you recall that Highland
 16 obtained a temporary restraining order against
 17 you in early December?
 18 A. Yes.
 19 Q. Okay. Do you recall that the
 20 advisors that you controlled filed a motion
 21 against the debtor in mid December 2020?
 22 A. Yes.
 23 Q. Okay. And do you recall that that
 24 motion was curved by the Court in the middle of
 25 December?

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1 DONDERO - 10/29/21
 2 Q. Okay. And you were aware that the
 3 payment was due at the end of the year; isn't
 4 that right?
 5 MS. DEITSCH-PEREZ: Object to the
 6 form.
 7 A. Not – not specifically. There
 8 is – to be bona fide notes, there is – I know
 9 there is – there is tax structuring and things
 10 that the auditors want to see in terms of – of
 11 regular payment that everything just doesn't
 12 accrue indefinitely, but what those roles are
 13 and when and if it needs to be paid and whether
 14 it was by the end of the year or not.
 15 I'm generally not specifically
 16 knowledgeable of or involved in, and nor do I
 17 have an awareness that was it or could it have
 18 been satisfied by other payments throughout the
 19 year. I'm not – I'm not the person for that
 20 knowledge.
 21 Q. Now, do you recall in December of
 22 2020 there was some tension between you and
 23 Mr. Seery?
 24 A. Tension between me and Mr. Seery. I
 25 would say there was tension between Mr. Seery

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1 DONDERO - 10/29/21
 2 A. Yes, roughly.
 3 Q. And do you recall that at the end of
 4 November, Highland had given notice of
 5 termination of the shared services agreements
 6 with the advisors?
 7 A. I believe they did that multiple
 8 times or extended it multiple times. I can't
 9 remember if that was – if it was done then or
 10 not.
 11 Q. Okay. And it is your testimony that
 12 notwithstanding those facts and circumstances,
 13 you relied on Highland to make the payment that
 14 HCMS owed at the end of the year?
 15 A. Yes, absolutely. We were still
 16 deluded in terms of thinking that Seery was
 17 working to resolve the estate, not to steal the
 18 estate.
 19 MR. MORRIS: I move to strike.
 20 Q. Do you have any other facts and
 21 circumstances that relate to the affirmative
 22 defenses in Paragraphs 95 and 96?
 23 A. I mean, not at the moment, not that
 24 I want to volunteer. When you ask more
 25 questions about the specifics, I guess we will

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1 DONDERO - 10/29/21
 2 get to some of it.
 3 Q. Well, I'm asking you questions now.
 4 You are the 30(b)(6) witness. This is one of
 5 the topics that you were supposed to be
 6 prepared to answer questions about, and I would
 7 just like to know everything that you have in
 8 your head as to facts that relate to these two
 9 affirmative defenses.
 10 MS. DEITSCH-PEREZ: Object to the
 11 form.
 12 Q. Because if I don't ask the right
 13 question later, you know, we can't do that,
 14 right?
 15 So do you have any other facts that
 16 you are aware of that relate to these two
 17 particular affirmative defenses?
 18 MS. DEITSCH-PEREZ: John, the fact
 19 that it's a 30(b)(6) deposition doesn't
 20 absolve you of the necessity to ask
 21 questions.
 22 MR. MORRIS: I asked the question.
 23 Q. Can I please have an answer?
 24 A. Again, the notes in general are de
 25 minimis relative to asset values of Highland or

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1 DONDERO - 10/29/21
 2 Q. And I'm going to ask these questions
 3 in your capacity as the 30(b)(6) representative
 4 of HCRE. Do you understand that?
 5 A. Yes.
 6 Q. Have you seen this document before?
 7 A. Yes.
 8 Q. Are you aware of anything in this
 9 document that is inaccurate today?
 10 A. I mean, I think 96 we put in there
 11 similar to the other affirmative defenses in
 12 case there was a prepayment. But, again, we
 13 have been so blocked from getting information
 14 and detail we didn't know it at the time
 15 regarding, you know, prepayments.
 16 So I don't think the prepayment
 17 defense works for 96. So that would be my
 18 clarification of an inaccuracy.
 19 Q. Why do you believe that the
 20 prepayment defense doesn't work in Paragraph 96
 21 for HCRE?
 22 A. Because I don't think there were any
 23 prepayments.
 24 Q. All right. I appreciate that.
 25 A. We didn't -- we didn't know it at

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1 DONDERO - 10/29/21
 2 the counterparties. So the annual obligations
 3 are even more de minimis or a million bucks or
 4 less than a million bucks.
 5 There was never an intent, nor would
 6 there be a logical intent to -- from my
 7 perspective or any of the entities that had
 8 notice to Highland to be in default. And it is
 9 not logical that they would do that for any
 10 purpose.
 11 And the facts around the curing
 12 quickly of the notes and getting the curing
 13 amounts from Highland and making the payments
 14 and Highland accepting them as they're defining
 15 what it took to cure it, I think, are all, you
 16 know, the key facts that make any, you know,
 17 acceleration argument, you know, ridiculous.
 18 Q. Okay. Anything else?
 19 A. That's it at this point.
 20 MR. MORRIS: Okay. Let's go to
 21 Exhibit 17, please.
 22 (Exhibit 17 marked.)
 23 Q. This is HCRE's answer. Do you see
 24 that, sir?
 25 A. Yes.

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1 DONDERO - 10/29/21
 2 the time --
 3 Q. Okay.
 4 A. -- we put this together.
 5 Q. Is there any other aspect of this
 6 document that you believe is inaccurate today?
 7 A. Not as far as I know.
 8 Q. Is there anything in this document
 9 that you believe should be modified or amended
 10 to make it more accurate or more complete?
 11 MS. DEITSCH-PEREZ: Object to the
 12 form.
 13 A. Not yet.
 14 Q. Okay. Looking at Paragraph 96, I
 15 believe you just testified that,
 16 notwithstanding the assertion of the defense
 17 therein, you are not aware of any facts
 18 concerning the prepayment defense that you
 19 described earlier for HCMS.
 20 Do I have that right?
 21 A. Yes.
 22 Q. Okay. Do you have any facts at all
 23 that relate to the affirmative defense in
 24 Paragraph 96?
 25 A. I don't believe so at this moment.

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1 DONDERO - 10/29/21

2 Q. Okay. How about Paragraphs 97 and

3 98? Do you have any facts that relate to those

4 affirmative defenses?

5 A. It would be the same answer as on

6 the last one.

7 Q. Okay. I appreciate that. And so –

8 but we don't have to go over it again. I will

9 just leave it at that.

10 Let's go to Exhibit 15, please.

11 (Exhibit 15 marked.)

12 MR. MORRIS: This is the next –

13 MS. DEITSCH-PEREZ: Hey, John.

14 John, can we take a – like a very quick

15 restroom break?

16 MR. MORRIS: You know, if we could

17 just get through this document, which

18 shouldn't take long, then perhaps we can

19 take a short half-hour lunch break.

20 MS. DEITSCH-PEREZ: Well, we can

21 take a short half-hour lunch break after we

22 get through this, but I just need to run to

23 the restroom.

24 MR. MORRIS: Okay.

25 MS. DEITSCH-PEREZ: So you can leave

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1 DONDERO - 10/29/21

2 A. I would give the same answer I gave

3 before where it was just – it was just

4 understood that we supported all the related

5 entities or entrepreneurial efforts and it was,

6 you know, modest amounts of work.

7 There wasn't specific financial

8 remuneration, but – and NexPoint is a good

9 example, too. There was a significant track

10 record gulf that was able to be used to raise

11 other money.

12 Q. I'm just asking you who entered into

13 the agreement between Highland and – and HCRE

14 for the provision of services by Highland?

15 MS. DEITSCH-PEREZ: Asked and

16 answered.

17 A. Yeah, again, same answer as before.

18 I don't think anybody specifically, formally

19 did it.

20 Q. Okay. Is it – are the terms of the

21 agreement written down anywhere?

22 A. No, like I said, it is just

23 understood the accounting department and tax

24 department would handle the accounting and tax

25 for all entities.

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1 DONDERO - 10/29/21

2 the screen on if you want so that we can

3 get back fast.

4 MR. MORRIS: My pleasure, Deborah.

5 No problem.

6 MS. DEITSCH-PEREZ: Thank you.

7 VIDEOGRAPHER: Off the record,

8 12:40.

9 (Recess taken 12:40 p.m. to 12:51 p.m.)

10 Q. Before we go on to this document,

11 sir, did HCRE have a shared services agreement

12 with Highland?

13 VIDEOGRAPHER: We're back on the

14 record.

15 MR. MORRIS: Oh, do I need to read

16 the question again?

17 COURT REPORTER: No, I've got it.

18 A. I – I don't believe it is a formal

19 written one. I think it is just a verbal one.

20 Q. And who is the verbal agreement

21 between?

22 A. It was between Highland and HCRE.

23 Now it is between NexPoint and HCRE.

24 Q. And who entered into the agreement

25 between Highland and HCRE?

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1 DONDERO - 10/29/21

2 Q. Did the legal department also

3 provide services to HCRE?

4 A. It would depend on the specific

5 entity. In the case of HCRE I think they used

6 the – the two lawyers that worked at NexPoint.

7 I don't think they used the legal

8 staff per se. I think they – the shared

9 services that they relied on were accounting

10 and tax primarily.

11 Q. Did Mark Patrick do work for HCRE

12 while he was employed by Highland?

13 A. Boy, I don't know. I imagine

14 probably tax-related stuff.

15 Q. Did HCRE ever pay Highland anything

16 for the services that it received?

17 MS. DEITSCH-PEREZ: Are you talking

18 about cash or –

19 MR. MORRIS: Please, please, please.

20 – I'm trying to be really patient,

21 Deborah, but please no speaking objections.

22 Mr. Dondero is a very sophisticated man.

23 We have done this many times

24 together. He will ask me if he doesn't

25 understand the question. And if you would

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1 DONDERO - 10/29/21
 2 like to object, by all means. I don't have
 3 a problem with that. I don't.
 4 MS. DEITSCH-PEREZ: But I asked –
 5 (speaking simultaneously.)
 6 Q. Mr. Dondero – Mr. Dondero –
 7 Mr. Dondero, did HCRE ever pay anything to
 8 Highland for services rendered?
 9 MS. DEITSCH-PEREZ: Asked and
 10 answered.
 11 A. Yeah, that is what I was going to
 12 say. Same answer. You know, not – not a
 13 formal cash remuneration, but, you know, a –
 14 which wouldn't have been much anyway. But –
 15 but more in terms of track record and presence
 16 in the market that then Highland or NexPoint
 17 could use to further its business.
 18 Q. Are you saying that – that all of
 19 the entities were working kind of as a unified
 20 unit and got synergistic benefits from the work
 21 that it did?
 22 MS. DEITSCH-PEREZ: Object to the
 23 form.
 24 A. I don't want to over generalize and
 25 say yes to that, but – but there were

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1 DONDERO - 10/29/21
 2 A. My recollection on the services and
 3 the HCRE is that the dollar value of the
 4 services provided was – was small and nominal.
 5 With regard to the DAF, it was more
 6 complicated. There is rules – there is
 7 charging rules in terms of fees and then there
 8 is also – I wasn't the one that decided that.
 9 And there are other issues there other than
 10 just the value for services argument.
 11 And so I don't – the short answer
 12 is, I don't know and I'm not involved in that,
 13 and I don't understand why sometimes there is
 14 one and sometimes there isn't one. Even to
 15 this day I don't know the answer to that.
 16 Q. Did – did – did you decide on
 17 behalf of Highland that Highland would provide
 18 services to DAF without receiving a stream of
 19 income in return?
 20 MS. DEITSCH-PEREZ: John, I think
 21 we're really far outside of either any of
 22 the 30(b)(6)s or the permissible topics for
 23 Mr. Dondero's personal deposition.
 24 So could you move on?
 25 MR. MORRIS: Okay. I will after I

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1 DONDERO - 10/29/21
 2 definitely – you know, when I use the DAF
 3 example, you know, we would have never got the
 4 Harvard vest as an investor if it wasn't for
 5 the track record that the DAF had in CLO
 6 equity.
 7 I think there is business that
 8 NexPoint got in the real estate space
 9 benefiting from the HCRE performance. So I do
 10 believe there was specific definable benefit
 11 gained for the modest amount of cost of
 12 services provided.
 13 Q. And you –
 14 A. There wasn't specific remuneration.
 15 Q. And you controlled all of these
 16 entities; right?
 17 MS. DEITSCH-PEREZ: Object to the
 18 form.
 19 A. Well, the DAF is independent and
 20 separate, but the – the HCRE-type entity, yes.
 21 Q. And did you decide that HCRE and
 22 HCMS and the DAF wouldn't be required to pay
 23 for services rendered to Highland?
 24 MS. DEITSCH-PEREZ: Object to the
 25 form.

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1 DONDERO - 10/29/21
 2 get an answer to this question.
 3 A. Can you repeat the question?
 4 Q. Sure.
 5 Did you make the decision on behalf
 6 of Highland to provide services to the DAF
 7 without receiving a stream of income in return?
 8 MS. DEITSCH-PEREZ: Same objection.
 9 A. Yeah, I think I answered it with my
 10 rambling a few minutes ago, but the short
 11 answer is no.
 12 Q. Who made that decision? Who made
 13 that decision?
 14 MS. DEITSCH-PEREZ: Was that Mike's
 15 dog or yours?
 16 MR. MORRIS: That was my dog. I
 17 apologize.
 18 MS. DEITSCH-PEREZ: Okay.
 19 Q. Who made that decision, sir?
 20 A. I wasn't sure –
 21 MS. DEITSCH-PEREZ: Again – again,
 22 John, this is well beyond the scope of the
 23 30(b)(6)s or even anything permissible for
 24 Mr. Dondero's personal. And, in fact, you
 25 said last time that is it, that was my last

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1 DONDERO - 10/29/21
 2 question. So...
 3 MR. MORRIS: That is – that is
 4 because I thought that he would say as the
 5 control person at the enterprise that he
 6 made the decision, but he said that he
 7 didn't.
 8 So I'm just asking one follow-up
 9 question. I just want to know – Deborah,
 10 please.
 11 Q. I just want to know who made the
 12 decision on behalf of Highland to render
 13 services to the DAF without receiving a stream
 14 of income in return.
 15 MS. DEITSCH-PEREZ: Object to the
 16 form of the question for all of the reasons
 17 I stated before.
 18 A. And I don't know the answer.
 19 Q. Okay. So looking back at the
 20 document on the screen, we're going to ask –
 21 I'm going to ask these questions in your
 22 capacity as NexPoint's 30(b)(6) representative,
 23 okay?
 24 A. Sure.
 25 Q. And do you understand that the

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1 DONDERO - 10/29/21
 2 that jumps out at me between the two.
 3 MR. MORRIS: Okay. Can we go to
 4 Paragraph 80, and let's see if we can see
 5 what Mr. Dondero is talking about.
 6 Q. Okay. So I'm just going to focus on
 7 the first three paragraphs, 80, 81, and 82, and
 8 ask you whether – whether you are aware of any
 9 facts that concern the affirmative defenses set
 10 forth in those paragraphs. And I think they're
 11 related, and that is why I'm asking you to do
 12 it all together, but we can do it one at a
 13 time, whatever you are comfortable with.
 14 MS. DEITSCH-PEREZ: Object to the
 15 form. I mean, other than the facts in
 16 those paragraphs?
 17 MR. MORRIS: You are doing it again,
 18 Deborah.
 19 MS. DEITSCH-PEREZ: It –
 20 MR. MORRIS: Please, please.
 21 MS. DEITSCH-PEREZ: John, when you
 22 ask questions – I understand Mr. Dondero
 23 is sophisticated, but he's also not a
 24 lawyer, and when you ask questions that are
 25 misleading, I'm going to interject

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1 DONDERO - 10/29/21
 2 document on the screen is NexPoint's answer to
 3 Highland's amended complaint?
 4 A. Yes.
 5 Q. Did you review this document before?
 6 A. Just generally.
 7 Q. And did you authorize the filing of
 8 this document on behalf of NexPoint?
 9 A. Yes, yes.
 10 Q. Are you aware of anything in this
 11 document today that you believe to be
 12 inaccurate?
 13 A. I think the – on the affirmative
 14 defenses on the – do you remember on the prior
 15 one we had the – I think it was called
 16 justification as the first one, but there
 17 wasn't a prepay in that one?
 18 Q. Correct.
 19 A. I think this one there were prepays,
 20 but the justification defense is missing from
 21 the front here. And I think that is – I think
 22 if that were to continue – I think that is
 23 partly due to different law firms and what was
 24 known at the time, et cetera, but I would say
 25 that is – that is the – that is the one thing

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1 DONDERO - 10/29/21
 2 something.
 3 MR. MORRIS: It is completely
 4 improper. He doesn't need to be a lawyer.
 5 He's a 30(b)(6) witness, and I'm asking
 6 such a simple question, what facts do you
 7 have that support the affirmative defense.
 8 A. Okay. Is it okay if I repeat some
 9 of them from the prior one?
 10 Q. Sure. Whatever you are comfortable
 11 with.
 12 A. The – to the extent that – to the
 13 extent that the notes were prepaid – prepaid
 14 significantly, it is a real question on whether
 15 or not there could have been a breach at the
 16 end of the year, even if there wasn't a payment
 17 at the end of the year.
 18 There is no logical reason, nor
 19 would I have ever authorized or suggested no
 20 payment to put us on – in default due to a de
 21 minimis amount of money, like a few hundred
 22 thousand dollars, even if I was highly annoyed
 23 with Seery, even if we knew that Seery and
 24 Highland had overcharged NexPoint by whatever
 25 it was, 14, 16 million bucks, I would not have

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1 DONDERO - 10/29/21
 2 let a small amount cause a – cause a breach.
 3 You know, the – how would I – how
 4 would I add to that now. The overpayment on
 5 the \$14 million, holding back additional shared
 6 services amount, made an inordinate amount of
 7 sense.
 8 There was supposed to be at that
 9 time – there was another netting from Seery in
 10 terms of wanting to be fair and reasonable, you
 11 know, with employees and with the transition of
 12 the estate, et cetera, and everything was going
 13 to get trued up.
 14 So I do believe there was an
 15 expectation of a netting, et cetera, but
 16 overall, Highland should have paid it. It
 17 shouldn't have let it breach the cause, but at
 18 least when I found out about it and they knew I
 19 was annoyed. And I told them I didn't want it
 20 to be in default, they gave me the numbers and
 21 the amounts to cure it in their mind, and they
 22 accepted it.
 23 Now, I think they should have gone
 24 back and incorporated prepays and said that no
 25 amounts were due because of the prepays, et

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1 DONDERO - 10/29/21
 2 due at the end of 2020?
 3 MS. DEITSCH-PEREZ: Asked and
 4 answered.
 5 A. Yes, I would like to repeat my same
 6 answer.
 7 Q. Did you tell anybody to make the
 8 payment on behalf of NexPoint at the end of
 9 2020?
 10 MS. DEITSCH-PEREZ: Asked and
 11 answered.
 12 A. I would like to give the same answer
 13 that you – you – you struck.
 14 Q. Can you just say yes or no, sir, did
 15 you tell anybody to make the payment at the end
 16 of 2020 on behalf of NexPoint?
 17 MS. DEITSCH-PEREZ: Asked and
 18 answered.
 19 A. I don't want to give anything beyond
 20 the answer that I gave.
 21 Q. Okay.
 22 A. I get myself in trouble because I
 23 paraphrase. I don't want to answer yes – I
 24 don't think yes or no would be an appropriate
 25 answer. I want to stay with the answer that I

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1 DONDERO - 10/29/21
 2 cetera, but the calculation that they came up
 3 to get it in compliance in good standing was a
 4 million 4. And just like we relied on them to
 5 pay it and keep us out of default, we relied on
 6 them to set the amount to cure.
 7 But I guess I would make the
 8 argument that it shouldn't have been, but
 9 again, I didn't want to mince – I didn't want
 10 to on small dollars make an argument that could
 11 get us in bigger trouble – bigger trouble. So
 12 it was easier to – to pay the million bucks
 13 than it was to argue that it wasn't due.
 14 Q. Did you at any time in your capacity
 15 as the person in control of NexPoint instruct
 16 anybody at Highland to make the payment that
 17 was due at the end of 2020?
 18 A. Not specifically to pay it or not
 19 specifically not to pay it. It was something,
 20 again, small and de minimis that I expected to
 21 be done in due course.
 22 MR. MORRIS: I move to strike.
 23 Q. It's a very simple question.
 24 Did you personally take any steps to
 25 ensure that NexPoint made the payment that was

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1 DONDERO - 10/29/21
 2 gave.
 3 Q. Okay. I'm going to say the word
 4 "Yankees," and every time I say the word
 5 "Yankees" today, everybody should know that
 6 that is the question that I'm going to bring to
 7 the Court on a motion to compel, okay?
 8 It's a very simple question. It's a
 9 very simple question. I will ask one more
 10 time, and if you don't want to answer, that is
 11 fine.
 12 MS. DEITSCH-PEREZ: What –
 13 Q. Mr. Dondero – Mr. Dondero, in
 14 December of 2020, did you give anybody any
 15 instructions at Highland to make sure that
 16 NexPoint made the payment that was due at the
 17 end of the year?
 18 MS. DEITSCH-PEREZ: Asked and
 19 answered.
 20 A. I think that means I'm supposed to
 21 stick with the answer that I gave.
 22 MS. DEITSCH-PEREZ: You're on mute,
 23 John. John, you're on mute. John, you're
 24 on mute. John, we can't hear you.
 25 THE WITNESS: I do like it better

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1 DONDERO - 10/29/21
 2 when he yells at me on mute.
 3 MS. DEITSCH-PEREZ: John, we can't
 4 hear you.
 5 COURT REPORTER: We can't hear you,
 6 John.
 7 MR. MORRIS: You can't hear me?
 8 COURT REPORTER: Now we can.
 9 MS. DEITSCH-PEREZ: Now we can hear
 10 you, but we couldn't hear you. It looks
 11 like you were yelling, but we couldn't hear
 12 you.
 13 A. I do like it better when you yell at
 14 me on mute.
 15 Q. I try not to yell at you, and I hope
 16 that you haven't perceived this – we do have a
 17 videotape this time. So to the extent that
 18 anybody perceives your comment as suggesting
 19 that I have yelled at you, I would invite them
 20 to look at the video.
 21 MS. DEITSCH-PEREZ: Well, we said we
 22 couldn't hear you, but your animation
 23 looked like that.
 24 Q. Sir, can you identify any person in
 25 the world acting on behalf of NexPoint who

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1 DONDERO - 10/29/21
 2 correct?
 3 A. I think he was very much viewing his
 4 responsibilities as Highland related and as an
 5 employee of Highland. But yes, based on that
 6 incumbency certificate, but that is your –
 7 your question to ask Frank if he was taking
 8 that seriously, but NexPoint was relying on
 9 Highland.
 10 Q. Do you have any other facts that you
 11 are aware of that relate to the affirmative
 12 defenses set forth in Paragraphs 81 through 82?
 13 A. I think I – I think I've said them
 14 all.
 15 MR. MORRIS: Okay. It is 2:13
 16 Eastern time. Let's just take a short
 17 half-hour lunch break, and let's return at
 18 2:45, or 1:45 Central.
 19 VIDEOGRAPHER: Off the record, 1:13.
 20 (Recess taken 1:13 p.m. to 1:48 p.m.)
 21 VIDEOGRAPHER: Back on the record,
 22 1:48.
 23 Q. Mr. Dondero, are you comfortable?
 24 A. Yes.
 25 Q. And are you able to proceed?

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1 DONDERO - 10/29/21
 2 instructed Highland to make the payment that
 3 was due on the NexPoint term note in December
 4 of 2020?
 5 MS. DEITSCH-PEREZ: John, that is
 6 the fifth or sixth time.
 7 MR. MORRIS: It is a completely
 8 different question. Please.
 9 MS. DEITSCH-PEREZ: Could you read
 10 it back, if I was mistaken. So read it
 11 back.
 12 (Record read.)
 13 A. NexPoint did not have the accounting
 14 staff or the systems or the records or the
 15 knowledge to have any person in the world at
 16 NexPoint to give that instruction.
 17 So the long answer – the short
 18 answer is no, but the long answer is we had
 19 been kept away from our books and records. I
 20 think we largely still don't have them, and
 21 there would – I am not aware of anybody who –
 22 anybody in the world at NexPoint who made that
 23 request.
 24 Q. Frank Waterhouse was the treasurer
 25 of NexPoint in December of 2020; is that

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1 DONDERO - 10/29/21
 2 A. Yes.
 3 Q. Okay. Did you speak with anybody
 4 during the break about the substance of this
 5 deposition?
 6 A. No.
 7 Q. You entered into certain oral
 8 agreements with your sister concerning some of
 9 the notes at issue in these lawsuits.
 10 Do I have that right?
 11 MS. DEITSCH-PEREZ: Object to the
 12 form.
 13 A. Can you rephrase or repeat, please?
 14 Q. Sure.
 15 You entered into certain oral
 16 agreements with your sister concerning certain
 17 of the notes at issue in these lawsuits.
 18 Do I have that right?
 19 MS. DEITSCH-PEREZ: Object –
 20 A. Yes.
 21 MS. DEITSCH-PEREZ: Object to the
 22 form. And I'm going to object – object
 23 every time because it just – just so it is
 24 on the record because you are saying "your
 25 sister" without giving her – her capacity.

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1 DONDERO - 10/29/21
 2 A. Okay.
 3 MS. DEITSCH-PEREZ: But I don't want
 4 to disrupt the deposition, so I'm just
 5 telling you why I'm doing it and he can
 6 continue to answer thereafter. That is why
 7 I'm doing it.
 8 Q. Okay. Can we – can we agree,
 9 Mr. Dondero, when I refer to your sister in the
 10 context of oral agreements that she was
 11 entering into those agreements with you as a
 12 representative of Dugaboy – as Dugaboy
 13 trustee, as representative for a majority of
 14 the class A interest holders of Highland?
 15 A. Yeah. How about just to make it
 16 simple let's just call it the Dugaboy trustee,
 17 and everybody will know that it is my sister
 18 and everybody will know that it is the majority
 19 of the class A unit holders.
 20 Q. Okay. Okay. I appreciate that and
 21 I will do just that.
 22 You entered into certain oral
 23 agreements with the Dugaboy trustee concerning
 24 certain of the notes at issue in these
 25 lawsuits; is that right?

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1 DONDERO - 10/29/21
 2 called trustees but they're not trustees per
 3 se. But I think I'm over thinking it. But I'm
 4 not aware of anybody I've interacted with,
 5 other than her, as trustee with regard to the
 6 notes.
 7 Q. Okay. So up on the screen we
 8 have – no, that is the wrong document.
 9 MR. MORRIS: We need Exhibit 31,
 10 please.
 11 Yeah, there you go. That one.
 12 Perfect. Okay.
 13 MS. DEITSCH-PEREZ: 31 is not – oh,
 14 is that the '03 answer?
 15 MR. MORRIS: Correct, that is
 16 Mr. Dondero's answer.
 17 Q. Do you see that, sir, on the screen?
 18 MS. DEITSCH-PEREZ: Hang on. I'm
 19 going to get it again.
 20 Okay. If you want a hard copy, I
 21 have one here but he's got it up.
 22 Q. Do you see on the screen,
 23 Mr. Dondero, marked as Exhibit 31 is your
 24 answer to Highland's amended complaint?
 25 A. Yes.

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1 DONDERO - 10/29/21
 2 A. Yes.
 3 Q. Okay. Let's discuss the purpose of
 4 those oral agreements.
 5 MR. MORRIS: Can we put back up on
 6 the screen Mr. Dondero's answer.
 7 Q. And while we're doing that,
 8 Mr. Dondero, can you confirm that your sister
 9 is the only trustee of the Dugaboy Investment
 10 Trust?
 11 MS. DEITSCH-PEREZ: Object to the
 12 form.
 13 A. For what period of time are we
 14 talking about?
 15 Q. During the period of time at which
 16 you entered into the oral agreements with the
 17 Dugaboy trustee.
 18 MS. DEITSCH-PEREZ: Object to the
 19 form.
 20 A. Yeah, I believe she has been the
 21 trustee since 2015 and remains so today. I
 22 don't have an awareness of – I don't have an
 23 awareness of another functional trustee.
 24 So some of these – sometimes
 25 complex trusts have other layers that are

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1 DONDERO - 10/29/21
 2 Q. Okay.
 3 MR. MORRIS: Can we go to
 4 Paragraph 82, please.
 5 Q. Is it your understanding that
 6 Paragraph 82 describes, among other things, in
 7 general terms your oral agreements with –
 8 between you and the Dugaboy trustee?
 9 A. Yes.
 10 Q. Is it your position that the oral
 11 agreements that you entered into with your
 12 sister – withdrawn.
 13 Is it your contention that the oral
 14 agreements you entered into with the Dugaboy
 15 trustee applied to each of the notes that were
 16 executed by NexPoint and that are the subject
 17 of Highland's lawsuit against NexPoint?
 18 A. Yes.
 19 Q. Is it your contention that the oral
 20 agreements that were entered into with the
 21 Dugaboy trustee apply to the notes executed by
 22 HCMS that are the subject of Highland's lawsuit
 23 against HCMS?
 24 A. Yes.
 25 Q. Is it your contention that the oral

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1 DONDERO - 10/29/21
 2 agreements between you and the Dugaboy trustee
 3 apply to the notes that were executed by HCRE
 4 that are the subject of the lawsuit that
 5 Highland has commenced against HCRE?
 6 A. Yes.
 7 Q. Okay. Do I understand correctly
 8 that your oral agreements with your sister do
 9 not apply to the notes that were executed on
 10 behalf of HCMFA that are the subject of the
 11 lawsuit that Highland commenced against HCMFA?
 12 A. Correct.
 13 Q. Okay. I appreciate that.
 14 Do you see in this paragraph towards
 15 the middle it says, quote: The purpose of this
 16 agreement was to provide compensation to
 17 defendant, James Dondero, who was otherwise
 18 underpaid, compared to reasonable compensation
 19 levels in the industry through the use of
 20 forgivable loans, a practice that was standard
 21 at HCMLP in the industry.
 22 Have I read that correctly?
 23 A. Yes.
 24 Q. Is that the purpose of the agreement
 25 that you entered into with your sister –

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1 DONDERO - 10/29/21
 2 HCRE.
 3 And I'm happy to walk you through to
 4 show you. And I just want to know in your
 5 capacity as a 30(b)(6) witness for those
 6 entities, if you know why that statement of
 7 purpose was omitted.
 8 A. Well, we talked about it earlier. I
 9 think there is some cleanup. There has been
 10 multiple lawyers involved. We didn't know
 11 which loans were prepaid, which loans weren't.
 12 But, you know, I don't know why it was omitted
 13 but it applies to all of them.
 14 MS. DEITSCH-PEREZ: I think that is
 15 the first time that I've noticed that. So,
 16 John, I'm going to take a mea culpa. I
 17 think that is a cut-and-paste error.
 18 MR. MORRIS: All right. Well, I
 19 will – I will just point out that the
 20 affirmative defense concerning the oral
 21 agreements is the exact same in all four
 22 answers, except for the omission of the
 23 statement of purpose for the three
 24 corporate entities.
 25 Q. And so, Mr. Dondero, is it fair to

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1 DONDERO - 10/29/21
 2 withdrawn.
 3 Is that the purpose of the agreement
 4 that you entered into with the Dugaboy trustee
 5 concerning the notes at issue in the lawsuits
 6 that were commenced against you personally?
 7 Withdrawn. That was a bad question.
 8 Does that purpose apply only to the
 9 notes that you executed or does it apply to the
 10 corporate notes as well?
 11 MS. DEITSCH-PEREZ: Object to the
 12 form.
 13 Other than HCMFA?
 14 MR. MORRIS: Correct. I think we've
 15 established the scope of the agreements.
 16 A. To give a complete answer, from my
 17 perspective it is about 50 million of notes
 18 between – current balance between NexPoint,
 19 Services, myself, and HCRE.
 20 Q. And HCMS; right?
 21 A. Yes, Services, Highland Capital
 22 Management, yes.
 23 Q. Okay. So I just want to know, that
 24 sentence there concerning the purpose was
 25 omitted from the answers of NexPoint, HCMS,

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1 DONDERO - 10/29/21
 2 say that you don't know why that statement of
 3 purpose was omitted from the corporate
 4 entities' answers?
 5 A. Yeah, I don't know why it is omitted
 6 or why the complaints aren't consistent with
 7 that regard.
 8 Q. Okay. But it is your – it is your
 9 position as the purpose – as one of the people
 10 who entered into this oral agreement that the
 11 purpose for the – for the condition subsequent
 12 agreement is the same as for the corporate
 13 entities as it is for you, as stated in this
 14 paragraph; is that right?
 15 A. Yes.
 16 Q. Okay. We talked a little bit about
 17 the NexPoint term note.
 18 Do you remember that?
 19 A. Yes.
 20 Q. And do you recall that in its
 21 original form the NexPoint term note was for a
 22 principal amount of approximately \$30 million?
 23 A. Yes.
 24 Q. And do you recall that the NexPoint
 25 term note was a rollup of the outstanding

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1 DONDERO - 10/29/21
 2 principal and interest then due on certain
 3 promissory notes that had previously been given
 4 by NexPoint to Highland?
 5 A. Yes.
 6 Q. Okay.
 7 MR. MORRIS: Can we put up, please,
 8 Exhibit Number 2, which I believe is the
 9 complaint against NexPoint.
 10 (Exhibit 2 marked.)
 11 MR. MORRIS: And if we can go to
 12 Exhibit Number 1 of Deposition Exhibit
 13 Number 2.
 14 Q. Okay. And do you see – I'm sorry,
 15 sir, do you see that Exhibit Number 1 to the
 16 complaint is a promissory note dated May 31st,
 17 2017 in the approximate amount of
 18 \$30.75 million?
 19 A. Yes.
 20 Q. Okay. And is that your signature on
 21 page 2?
 22 A. Looks like it.
 23 Q. Okay. And did you sign this note on
 24 behalf of NexPoint on or around May 31st, 2017?
 25 A. I assume so.

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1 DONDERO - 10/29/21
 2 form.
 3 A. I never read it that closely.
 4 Q. So as the control person of
 5 NexPoint, is it fair to say then that you don't
 6 recall having an understanding when you signed
 7 this note that NexPoint would be required to
 8 make annual payments at the end of each year?
 9 MS. DEITSCH-PEREZ: Object to the
 10 form.
 11 A. I didn't have knowledge of the
 12 specifics, and again, I would describe those
 13 specifics as de minimis.
 14 Q. Okay. Do you see – do you have any
 15 idea who drafted this note?
 16 A. It would have come from accounting.
 17 I think they have boilerplate – I don't know
 18 if they work with legal at all. I have no
 19 idea, but it would have come through
 20 accounting.
 21 Q. Do you recall that all three of the
 22 term notes at issue were signed on the same
 23 day, May 31st, 2017?
 24 A. That doesn't surprise me. I think
 25 there was an accounting reason, if I remember

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1 DONDERO - 10/29/21
 2 Q. Do you know if you read the note
 3 before you signed it?
 4 A. Not likely.
 5 Q. Do you recall whether there was
 6 anything about the note that you didn't
 7 understand before you signed it on behalf of
 8 NexPoint?
 9 MS. DEITSCH-PEREZ: Object to the
 10 form.
 11 A. Yeah, I'm not – I doubt I read it,
 12 so I don't remember objecting to anything.
 13 Q. Okay. Looking at Paragraph 2.1, am
 14 I characterizing that section fairly when I say
 15 that the borrower was required to make an
 16 annual installment payment at the end of each
 17 calendar year?
 18 MS. DEITSCH-PEREZ: Object to the
 19 form.
 20 A. I see that paragraph, yes.
 21 Q. Okay. And did you understand when
 22 you signed it that an annual installment
 23 payment would be due at the end of each year by
 24 NexPoint?
 25 MS. DEITSCH-PEREZ: Object to the

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1 DONDERO - 10/29/21
 2 correctly. I think it had something to do with
 3 either the audit or the financials or if we had
 4 a credit facility at the time. I think that is
 5 probably why, but I don't remember exactly.
 6 Q. Do you have any other recollection
 7 as to why all three notes were executed at the
 8 end of May 2017?
 9 A. Again, I believe they're – the –
 10 aggregating or solidifying them into one
 11 defined note I think was required by the
 12 auditors or the – the accounting department as
 13 best practices. I don't think – it wasn't a
 14 regulatory reason and it wasn't a compliance
 15 reason. I believe it was just an accounting or
 16 an audit reason.
 17 Q. Did you ever make sure on behalf of
 18 NexPoint that the terms of the promissory note
 19 were fair and reasonable?
 20 MS. DEITSCH-PEREZ: Object to the
 21 form.
 22 A. Yeah, I don't remember ever
 23 negotiating or reading it that closely. And
 24 again, I think the view from all concerned is
 25 that it was relatively de minimis from the

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1 DONDERO - 10/29/21
 2 balance sheet at Highland then or now and/or de
 3 minimis relevant to NexPoint's value.
 4 Q. It is a \$30 million note. Do I have
 5 that right?
 6 A. Yes.
 7 Q. Okay. And it was material enough to
 8 be included in Highland's financial statements;
 9 is that correct?
 10 A. Anything material or not as part of
 11 doing proper audited financials needs to be
 12 properly included.
 13 Q. Okay. And you know, because you
 14 signed the management representation letter,
 15 that this note was specifically disclosed to
 16 PwC and included in both Highland's and
 17 NexPoint's audited financial statements;
 18 correct?
 19 A. I would – I would have been shocked
 20 if it wasn't, if it is an asset and a liability
 21 respectively of the companies.
 22 Q. Okay. Do you see the section on
 23 acceleration upon default, Paragraph 4?
 24 A. Yes.
 25 Q. Have you ever seen that section

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1 DONDERO - 10/29/21
 2 Do I have that right?
 3 A. Right.
 4 MR. MORRIS: Okay. Can we go to the
 5 next page, please.
 6 Q. Do you see Paragraph 5? There is a
 7 paragraph entitled Waiver.
 8 A. Yes.
 9 Q. And I will read it out loud: Maker
 10 hereby waives grace, demand, presentment for
 11 payment, notice of non-payment, protest, notice
 12 of protest, notice of intent to accelerate,
 13 notice of acceleration, and all other notices
 14 of any kind hereunder.
 15 Have I read that correctly?
 16 A. Yes.
 17 Q. Do you know that that paragraph is
 18 included in every single note that you signed
 19 that is part of the litigation that we're here
 20 to talk about today?
 21 A. You have to – you have to define
 22 when. You know, like today I know that it
 23 is – it is in those notes.
 24 At the end of '20, Seery and DSI
 25 were withholding all notes, all information,

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1 DONDERO - 10/29/21
 2 before?
 3 A. No.
 4 Q. Do you think a prudent executive
 5 signing a \$30 million note should take the time
 6 to read the terms and conditions of the note?
 7 A. Not necessarily.
 8 Q. Under what circumstances do you
 9 think that an executive shouldn't take the time
 10 to read the terms and conditions of a
 11 \$30 million promissory note?
 12 A. When it is between affiliates,
 13 between friendly affiliates with no even
 14 inkling that bankruptcy or the parties could be
 15 at odds create a note, when it is a soft note
 16 with limited collateral and limited other
 17 protections. And then the servicing or value
 18 of the note is de minimis relative to the
 19 balance sheets of each entity I think is a good
 20 reason or logical reason for the executives on
 21 both sides not to spend much time focusing on
 22 it.
 23 Q. All right. So you thought it was
 24 reasonable not to read this particular note for
 25 the reasons you just gave.

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1 DONDERO - 10/29/21
 2 anything regarding the company from any of the
 3 other subsidiaries, and Frank was administering
 4 the notes on behalf of both the related parties
 5 and Highland.
 6 So at the time – at the time I
 7 would have – I would have never known that at
 8 the end of 2020. And it is crazy to think I
 9 would have remembered a clause in a soft note
 10 from three years earlier.
 11 Q. Okay. Is it fair to say that – do
 12 you understand today that that provision is
 13 included in every note that you signed?
 14 MS. DEITSCH-PEREZ: Object to the
 15 form.
 16 A. You're saying it, so I believe you.
 17 I'm not asking you to go show me all the other
 18 notes, but –
 19 Q. Thank you.
 20 A. – I'm assuming it is in all the
 21 other notes. I will take your word for it.
 22 Q. And is it fair to say that at the
 23 time you signed these notes you didn't take the
 24 time to read that particular provision?
 25 MS. DEITSCH-PEREZ: Object to the

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1 DONDERO - 10/29/21
 2 form.
 3 A. That is correct. A lot of it is
 4 boilerplate. And, again, treasury or
 5 accounting would have put in what was necessary
 6 for regulatory, tax, audit purposes. Maybe the
 7 auditors put that in. I have no idea.
 8 But the content and the bullet
 9 points here, the nine paragraphs on a soft note
 10 would have been put in by other people and
 11 administered by other people other than me.
 12 Q. What is a soft note?
 13 A. You know, like a secured – I mean,
 14 a note that isn't a hard note, like a note that
 15 isn't secured, deed in lieu, UCC filed,
 16 guaranteed, you know, performance and bad boy
 17 clauses and all of that other stuff.
 18 A soft note is an unsecured loan
 19 that has basic terms to it, but it is likely
 20 subject to renegotiation over time.
 21 Q. Were any of the notes that you
 22 signed subject to negotiation?
 23 A. Well, I'm saying by definition that
 24 is what a soft note is.
 25 Q. One that – that is not subject to

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1 DONDERO - 10/29/21
 2 took to be compliant from an accounting
 3 regulatory-wise standpoint, but wasn't – they
 4 were trying to come up with a balance note,
 5 which I think this is, such that it wouldn't
 6 have to be negotiated or haggled by any of the
 7 parties.
 8 And there is no evidence of any of
 9 the notes ever being haggled or ever being
 10 negotiated.
 11 Q. Okay. I appreciate that.
 12 At the time you signed each of the
 13 notes on behalf of the obligors, did the
 14 obligors have an intention at the time you put
 15 your signature on the page of repaying the
 16 notes in accordance with their terms?
 17 A. Yes. They're all – soft note
 18 doesn't mean it's not a bona fide note. They
 19 were all intended to be bona fide notes, and
 20 they all are bona fide notes that were intended
 21 to be paid and for the – virtually most part,
 22 were always paid or prepaid and, you know, paid
 23 in accordance.
 24 Q. Do you see to the right there is a
 25 list of prior notes?

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1 DONDERO - 10/29/21
 2 the negotiation – to negotiations?
 3 A. No, one that is over time subject to
 4 negotiation or modification.
 5 Q. Okay.
 6 A. Because there is – there is
 7 limited – there is limited, team collateral,
 8 guarantee, bad boy features in – in a soft
 9 note.
 10 Q. Okay. Perhaps my question wasn't
 11 clear.
 12 Did the notes that you signed – did
 13 you negotiate them with anybody, the terms of
 14 each note?
 15 A. No.
 16 Q. Okay. Did you personally decide on
 17 the terms of each note?
 18 A. No. Again, they were two highly
 19 solvent, highly well-capitalized subsidiaries,
 20 and the amount of the notes was de minimis and
 21 friendly, and they were soft notes administered
 22 by a centralized treasury shared services
 23 department.
 24
 25 They were the ones deciding what it

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1 DONDERO - 10/29/21
 2 A. Yes.
 3 Q. And is it your understanding that
 4 this note substituted and superseded the
 5 promissory notes that are listed on Exhibit A
 6 on the page there?
 7 A. Yeah. I mean, effectively pay those
 8 off and reestablish an aggregate note.
 9 Q. Right. And Exhibit A actually set
 10 forth the outstanding principal and interest
 11 that NexPoint owed Highland under the prior
 12 notes as defined there as of May 31st, 2017;
 13 right?
 14 A. Yeah, that is what it looks like.
 15 Q. Okay. And – and so the initial
 16 principal amount of the prior notes was what is
 17 stated there, approximately \$27.675 million?
 18 A. Right.
 19 Q. Okay. You wouldn't have signed this
 20 note on behalf of NexPoint if you didn't
 21 believe at the time you signed it that NexPoint
 22 owed Highland that amount of money; correct?
 23 A. Yeah, it is a bona fide note,
 24 consistent with my testimony.
 25 Q. Okay. Do you know why NexPoint

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1 DONDERO - 10/29/21
 2 borrowed the money from Highland at the times
 3 and in the amounts listed on Exhibit A?
 4 A. No.
 5 Q. Did you authorize NexPoint to borrow
 6 the money that is reflected in the prior note
 7 set forth on Exhibit A?
 8 A. I don't know. Probably some of
 9 them, yes.
 10 Q. Okay. And you have no recollection
 11 at all as to why NexPoint borrowed over
 12 \$27 million from Highland in the 12-month
 13 period from August 2014 to July 2015?
 14 A. Not without being refreshed.
 15 Q. Okay. Do you have any knowledge as
 16 to what NexPoint did with the proceeds from
 17 these loans?
 18 A. Not without being refreshed.
 19 Q. Okay. And you contend that this
 20 note is subject to – subject to one of your
 21 oral agreements with the Dugaboy trustee;
 22 correct?
 23 A. Yes.
 24 Q. Who decided to include this
 25 particular note in your agreement with the

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1 DONDERO - 10/29/21
 2 Q. Can you identify any moment in the
 3 25 or 26 year history that you were president
 4 of Highland where Highland forgave an
 5 intercompany loan for the purpose of providing
 6 compensation to you or any other employee
 7 except for the agreements that are described in
 8 Paragraph 82 of your answer?
 9 A. Boy, I know we have masked it. I
 10 don't know if we – it sounds like we may not
 11 have sent it to you, but we have done it for a
 12 dozen employees over the years in – in fairly
 13 significant amount –
 14 Q. I'm going to interrupt you, sir,
 15 because it's not responsive to my question. I
 16 apologize for that. I'm just focusing on
 17 intercompany loans.
 18 Can you identify any loan in the 25
 19 or 26 years that you were president, an
 20 intercompany loan where – where Highland was
 21 the payee that was forgiven for purposes of
 22 giving you or any employee compensation, other
 23 than – other than the agreements that you
 24 struck with the Dugaboy trustee?
 25 A. It is an odd question because I'm

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1 DONDERO - 10/29/21
 2 Dugaboy trustee?
 3 A. Me, myself.
 4 Q. Okay. What was the purpose of
 5 including this note in your agreement with the
 6 Dugaboy trustee?
 7 Was it to provide you with a
 8 compensation?
 9 A. Yeah. I mean, in fact, I think it
 10 was articulated in that big paragraph
 11 reasonably well that my cash compensation, I
 12 believe through any lens, people would look at
 13 it as de minimis from the standpoint of
 14 Highland as asset manager.
 15 I don't think it was more than a
 16 couple million bucks in a year and it went
 17 down, I think, in the '15 through '20 period.
 18 So I think it is common in private
 19 companies to loan money that is bona fide debt
 20 and then forgive it at different times to
 21 manage compensation and incentives to managers
 22 of private companies.
 23 This is a – we're in – we each
 24 have experts talking about it, but I think this
 25 is, you know, typical.

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 2 the only one at the compensation level with the
 3 interrelated entities who could possibly get
 4 intercompany loans forgiven as part of the
 5 comp, but it –
 6 Q. Okay. So let me ask a cleaner –
 7 let me ask a cleaner question. I appreciate
 8 that clarification.
 9 Other than the agreements described
 10 in Paragraph 82, can you think of any other
 11 intercompany loan that was ever forgiven while
 12 you were president of Highland for the purpose
 13 of giving you compensation?
 14 A. I don't – I don't know.
 15 Q. This is an important issue; right?
 16 The notion of a prior practice. It is your
 17 contention that there was a prior practice at
 18 Highland – hold on one second. I apologize.
 19 Sorry about that. Somebody almost
 20 dropped an air conditioner out the window.
 21 MS. DEITSCH-PEREZ: That would not
 22 be good.
 23 MR. MORRIS: No.
 24 Q. All right. Apologies.
 25 MR. MORRIS: May I have the last

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1 DONDERO - 10/29/21
 2 question read back?
 3 (Record read.)
 4 Q. I'm going to start all over here.
 5 Mr. Dondero, do you contend that
 6 there was a practice at Highland of forgiving
 7 loans; is that correct?
 8 A. Yes.
 9 Q. And do you recall that we talked
 10 about that issue back in May?
 11 A. Yes.
 12 Q. Okay. And since -- since that time
 13 have you made any effort to gather any
 14 information that would demonstrate that there
 15 was a prior practice at Highland of forgiving
 16 loans?
 17 A. Yes.
 18 Q. And what efforts have you made?
 19 A. Like I said, we amassed a list, and
 20 not insignificant list and not insignificant
 21 amounts, proportionate to the people's
 22 compensation where it was a practice.
 23 You know, for some people for
 24 relocation, for some people for bonuses, for
 25 house purposes, for senior executives, senior

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1 DONDERO - 10/29/21
 2 Highland's server. The only thing I can
 3 think of that we might owe you is there
 4 might be a few additional names to list in
 5 the interrogatory, and I will check whether
 6 that has been done.
 7 MR. MORRIS: Okay.
 8 Q. Mr. Dondero, you sign management
 9 representation letters in connection with
 10 Highland's audit each year; is that right?
 11 A. Yes.
 12 Q. Do you understand that you have an
 13 obligation when you sign the management
 14 representation to disclose to the auditor all
 15 agreements with affiliated entities and people
 16 that are deemed to be material?
 17 MS. DEITSCH-PEREZ: Object to the
 18 form.
 19 A. Generally, yes.
 20 Q. Okay. And is it your understanding
 21 that at least since 2008 Highland has disclosed
 22 to its auditors all agreements with affiliates
 23 that are material, as defined in the management
 24 representation letter?
 25 A. Yes.

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1 DONDERO - 10/29/21
 2 executives at the bank and board members at the
 3 bank in the seven-figure kind of numbers that
 4 were then subsequently forgiven.
 5 It is -- I know we amassed more than
 6 a dozen examples that were significant and
 7 material.
 8 MR. MORRIS: Deborah, I apologize.
 9 It is certainly possible I missed it, but I
 10 don't recall seeing any list or any
 11 documents of any kind that Mr. Dondero has
 12 described.
 13 Have they been produced?
 14 MS. DEITSCH-PEREZ: I think so. I
 15 will double-check, but I believe that
 16 they're listed --
 17 MR. MORRIS: I know there is a list
 18 of -- I apologize. I know there is a list
 19 of names in one of the discovery responses.
 20 But other than the list of names in the
 21 discovery response, I don't recall
 22 receiving any documents at all.
 23 MS. DEITSCH-PEREZ: No. And I think
 24 we asked you for the documents because we
 25 don't have access to the documents on

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1 DONDERO - 10/29/21
 2 Q. And would that include any
 3 agreements to forgive loans that were deemed to
 4 be material amounts?
 5 A. No, because it is contingent in long
 6 term and speculative.
 7 Q. But at some point if it is forgiven
 8 would that be -- would that be an event that
 9 would be disclosed to the auditor?
 10 A. Sure.
 11 Q. Okay. So is it fair to say that all
 12 loans that were deemed to be material to the
 13 extent they were forgiven were disclosed to the
 14 auditors?
 15 A. Yes.
 16 Q. Okay.
 17 A. But, yeah, the only caveat I would
 18 put on it is we have such limited information
 19 regarding Cornerstone and Trust Life, which is
 20 part of my agreement with the Dugaboy trustee
 21 or with the majority of class A holders.
 22 They could have been sold in
 23 secrecy, without disclosure to us, such that
 24 the notes are all forgiven at this point, but
 25 we -- we -- we may never know.

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1 DONDERO - 10/29/21

2 Q. So you can't rely on anything that

3 you don't know; is that fair?

4 A. Yeah.

5 MS. DEITSCH-PEREZ: Objection to

6 form.

7 A. Yeah, we can't rely on things we

8 don't know and we can't rely on the debtor to

9 be honorable.

10 Q. Well, the debtor has produced to

11 you, sir, every single audited financial

12 statement without redaction since 2008. Are

13 you aware of that?

14 A. That is actually news to me because

15 we were asking for them a couple of months ago.

16 That must be – that must be a new production.

17 Q. No. Actually, it was produced to

18 you way back in July. You are not aware of

19 that?

20 A. No, I'm looking –

21 MS. DEITSCH-PEREZ: Hang on.

22 A. I'm looking at Deborah. She'll –

23 MS. DEITSCH-PEREZ: I will get the

24 date.

25 A. Yeah. I would love to see them.

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2 Q. Okay. So – so I just want to go

3 back and focus on your assertion that there was

4 this practice of loan forgiveness. I think you

5 have agreed with me that any loan that was

6 forgiven in a material amount would be

7 contained within the Highland audited financial

8 statements; right?

9 A. I believe they – material or not,

10 they were all included in the Highland

11 financials. Now, they might not have been

12 specifically footnoted, you know.

13 Like in other words, if we gave

14 somebody half a million bucks to relocate and

15 then forgave the loan, it might just be mixed

16 with all other compensation in the line item.

17 It might not have been listed separately

18 because it would have been small relative to

19 the overall financial statement.

20 Q. But you're just speculating right

21 now because, in fact, you haven't read the

22 audited financial statements for the purpose of

23 seeing whether or not there were loan – loans

24 that were forgiven and disclosed; right?

25 MS. DEITSCH-PEREZ: Object to the

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1 DONDERO - 10/29/21

2 Q. So then – so then it – so is it

3 fair to say, sir, that when you are describing

4 this practice of forgiveness of loans, you are

5 doing so without having reviewed any of the

6 audited financial statements that Highland

7 provided to your attorneys going back to 2008?

8 MS. DEITSCH-PEREZ: Object to the

9 form.

10 A. What I'm saying, I guess, is that we

11 haven't treated the loans as forgiven yet

12 because if the condition precedent has been

13 satisfied, we're not aware of it yet.

14 Now, if there is something in those

15 financial statements that will show that the

16 condition precedent is satisfied, then we have

17 a decision to make about the – or figure out

18 what the mechanism is for forgiving the loans.

19 Q. Are you saying that there are loans

20 out there subject to forgiveness where the

21 maker is somebody other than you or an entity

22 that you control?

23 A. No, I'm just – I'm talking about

24 the 50 million of loans that we've been talking

25 about.

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2 form.

3 A. Well, what I'm saying, just to be

4 clear, is I haven't looked at the presentation

5 of forgiven loans in the historic financials

6 because I was unaware that we had gotten

7 historic financials, but I am testifying that

8 we had amassed at least a dozen, 15 material

9 examples of material loan forgiveness amounts

10 to different executives.

11 Q. All right. Do you have any

12 documentation to support your assertion of the

13 practice of forgiving loans at Highland?

14 A. Again, we have very, very little

15 access to anything, and we didn't take anything

16 with us that we weren't supposed to take, so we

17 don't have any of that documentation.

18 At NexBank, one of the sister

19 companies that we still have full control over

20 our records, we could show seven-figure-plus

21 loans to senior management and the entire board

22 of directors and forgiveness thereof as an

23 example, but that – that is the only

24 documentation that we would be able to present

25 without having access to the records that you

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1 DONDERO - 10/29/21
 2 guys are keeping from us.
 3 MR. MORRIS: I move to strike the
 4 last comment, and I take offense to it,
 5 sir. We're not withholding anything, okay.
 6 Q. Would the NexBank audited financial
 7 statements include a disclosure of the loans
 8 that you are describing?
 9 A. Yes.
 10 Q. Okay. So is it fair to say that if
 11 Highland forgave loans, it would be disclosed
 12 in its audited financial statements?
 13 MS. DEITSCH-PEREZ: Object, asked
 14 and answered.
 15 A. Well, just to be clear, these loans
 16 like the one up on the sheet, those were
 17 included in Highland's financials, those loans,
 18 just like the NexBank loans, when they were
 19 made to senior executives were included. But
 20 there wasn't a -- at NexBank there wasn't any
 21 kind of disclosure that said, these might be
 22 forgiven, or these are the terms that they
 23 would be forgiven under, just like there was no
 24 disclosure in the Highland financials that
 25 these are the terms that it might be forgiven

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 2 A. Yeah. This is the \$150,000
 3 promissory note; is that what that is?
 4 Q. Yes, sir.
 5 A. Okay. As long as I can see it on
 6 the screen, I don't need to find it in hard
 7 copy, do I?
 8 MS. DEITSCH-PEREZ: Yeah.
 9 MR. MORRIS: Can you scroll to the
 10 second page, PJ.
 11 Q. Is that your signature, sir?
 12 A. Close.
 13 Q. Are you aware that your signature is
 14 affixed to a \$150,000 promissory note that was
 15 made by HCMS to Highland Capital Management?
 16 A. Like I said --
 17 MS. DEITSCH-PEREZ: Objection, form.
 18 A. Like I said, it's close. I don't
 19 know if that is mine, but it's close.
 20 Q. Do you have any reason to believe
 21 that either you or somebody you authorized
 22 didn't sign this particular promissory note?
 23 A. Not specifically.
 24 MR. MORRIS: Okay. Can we go to the
 25 first page, please.

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1 DONDERO - 10/29/21
 2 under, et cetera, et cetera.
 3 Q. It's certainly disclosed in the
 4 financials when it was forgiven. Will you --
 5 will you concede that point?
 6 A. Yes, sure.
 7 Q. Okay. Let's move on.
 8 Let's go to HCMS. Are you familiar
 9 with the notes at issue in the lawsuit that was
 10 commenced by Highland against HCMS?
 11 MS. DEITSCH-PEREZ: S or --
 12 A. S as in Services. Yes.
 13 MR. MORRIS: Okay. Can we please
 14 put up Exhibit 3.
 15 (Exhibit 3 marked.)
 16 MS. DEITSCH-PEREZ: Is that in the
 17 binder that you sent?
 18 MR. MORRIS: Yes, as Exhibit 3.
 19 MS. DEITSCH-PEREZ: Okay.
 20 MR. MORRIS: And if we could go to
 21 the Exhibits 1 through 4, okay.
 22 Q. Sir, we've put up on the screen
 23 Exhibit 1 to Exhibit 3, which is the complaint
 24 against HCMS. Do you see Exhibit 1 up on your
 25 screen?

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1 DONDERO - 10/29/21
 2 Q. Did HCMS receive a loan from
 3 Highland in the amount of \$150,000 on March
 4 28th, 2018?
 5 A. I assume so.
 6 Q. Okay. You wouldn't have either
 7 signed or allowed your signature to be affixed
 8 to this document if you didn't understand that
 9 HCMS had received from Highland \$150,000;
 10 correct?
 11 A. This is one of the many things I
 12 would have signed on a given day.
 13 Q. Okay. And -- and are you aware that
 14 this note was given to Highland's auditors?
 15 A. It could. I'm not aware
 16 specifically, but it should be.
 17 Q. Okay. Do you have any recollection
 18 as to why HCMS obtained this loan from
 19 Highland?
 20 A. Unless it says it on these two
 21 pages, I have no idea.
 22 Q. Okay. Do you have any recollection
 23 as to what HCMS did with the proceeds of this
 24 loan?
 25 A. No.

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2 Q. Okay. Let's just flip through the

3 Exhibits 2, 3, and 4, if we could.

4 Looking at Exhibit 2, is that your

5 signature on Exhibit 2, sir?

6 A. Again, it is close.

7 Q. Okay. And do you have any reason to

8 believe that that is either not your signature

9 or that you did not authorize somebody to sign

10 this on behalf of HCMS in June of 2018?

11 A. No.

12 Q. Okay.

13 MR. MORRIS: Can we go to Exhibit 3,

14 please, and if we can go to the signature

15 line.

16 Q. Do you see that that is Frank

17 Waterhouse?

18 A. Yes.

19 MR. MORRIS: Okay. And can we go to

20 the page before that, the first page.

21 Q. Frank Waterhouse was the treasurer

22 of HCMS in May 2019; correct?

23 A. That is what it said right on that

24 thing we saw earlier; right?

25 Q. Incumbency certificate.

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2 is an authorized signatory, although if you

3 look at Frank's, it looks like an automated

4 signature versus, you know, an actual

5 signature, but I assume you went over this with

6 him, but I don't have specific knowledge of

7 these at all.

8 Q. And do you know that Mr. Waterhouse

9 from time to time used an electronic signature?

10 MS. DEITSCH-PEREZ: Object to the

11 form.

12 A. I believe he did.

13 Q. And you saw -- you have seen his

14 electronic signature on other documents; is

15 that right?

16 A. Yes.

17 Q. So it doesn't surprise you to see

18 his electronic signature on a note; correct?

19 A. Yeah. Yeah, okay. Yeah, I don't

20 know. But whether or not he did it or somebody

21 else did it or -- we're just getting a little

22 far afoot from me signing it; right? That is

23 all.

24 Q. Right.

25 A. To -- Frank -- Frank may have signed

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2 A. Yes.

3 Q. Do you recall that HCMS borrowed

4 \$400,000 from Highland in or around May 2019?

5 A. Not specifically.

6 Q. Do you have any reason to believe

7 that it didn't?

8 A. I have no knowledge -- I have no

9 knowledge of what it was used for and whether

10 it did or didn't.

11 MR. MORRIS: Okay. Let's go to the

12 next exhibit, please.

13 Q. Do you see Frank Waterhouse signed

14 here on behalf of the maker, HCMS Services?

15 A. Yes.

16 Q. Okay. Are you aware that HCMS

17 borrowed \$150,000 from Highland in June 2019?

18 A. No.

19 Q. Okay. Do you have --

20 A. I'm not aware and --

21 Q. Do you have --

22 A. I didn't -- I'm sorry, go ahead. I

23 was just saying, looking at Frank's signature,

24 you know, we're switching from me signing to

25 Frank signing. And I guess we're saying Frank

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1 DONDERO - 10/29/21

2 it. He may have done it electronically or

3 somebody may have done it electronically for

4 him. Those are just different answers than me

5 signing it; right?

6 Q. Okay. And -- and that is fair.

7 Are you aware that on December 3rd,

8 2020, Highland made a demand upon HCMS for

9 payment under these four notes that we have

10 just looked at?

11 A. I knew there was a demand on the

12 NexPoint one. Can you refresh me on this one?

13 Q. Sure.

14 MR. MORRIS: Can we go to the next

15 exhibit in Exhibit 3. Exhibit 5.

16 Q. You will see that there is a letter

17 dated December 3rd, 2020, from Mr. Seery to

18 HCMS?

19 A. Yep.

20 Q. And do you see that it was sent to

21 the attention of Mr. Waterhouse?

22 Do you see that, sir?

23 A. Yes, yep.

24 Q. And, again, Mr. Waterhouse at that

25 time was the treasurer of HCMS to the best of

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1 DONDERO - 10/29/21
 2 your recollection; correct?
 3 A. He primarily was the CFO of
 4 Highland. But, yes, I mean, I do see that.
 5 Q. Okay. And did you learn on or
 6 around December 3rd that Highland had made
 7 demand upon HCMS for payment of all outstanding
 8 principal and interest due under the four
 9 demand notes that are listed on the page there?
 10 A. Yes, yep.
 11 Q. So you knew that at the time; right?
 12 A. Well, more importantly I knew they
 13 were all subject to the same forgiveness
 14 provisions as the other note.
 15 Q. Okay. So I move to strike.
 16 You knew in December 3rd, 2020, that
 17 Highland made demand; correct?
 18 A. Yes.
 19 Q. Okay. And do you see that Highland
 20 gave HCMS an eight-day grace period or until
 21 December 11th, 2020, to make payment?
 22 A. Yes.
 23 Q. Under the demand note do you have
 24 any understanding that Highland was required to
 25 give any grace period at all?

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 2 were aware that Highland made a demand for
 3 payment on these four notes; correct?
 4 A. Yes.
 5 Q. Okay. Did you have any
 6 non-privileged communications at any time after
 7 Highland sent this letter about whether and how
 8 HCMS should respond?
 9 A. You know, let me just – let me
 10 adjust the prior answer for a second.
 11 I'm aware that this letter was sent.
 12 I'm not sure I knew contemporaneously or when I
 13 knew the letter was sent. I can't – I have no
 14 recollection of receiving it at the time.
 15 And to answer your question, I can't
 16 recollect talking to Frank or anybody else
 17 about it at the time. I'm not sure I knew
 18 about it at the time. But I have – I don't
 19 have any recollection of discussing it with
 20 anybody at or around the time.
 21 Q. Did you ever instruct anybody at any
 22 time to respond to this letter, whenever it is
 23 you learned about it?
 24 A. No.
 25 Q. Do you know if anyone acting on

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1 DONDERO - 10/29/21
 2 A. I don't know.
 3 MS. DEITSCH-PEREZ: Object to the
 4 form.
 5 Q. Do you know whether HCMS ever
 6 responded to this demand letter prior to the
 7 commencement of litigation?
 8 A. I don't know.
 9 Q. Prior to the commencement of
 10 litigation, did you discuss with anyone whether
 11 HCMS should respond to Highland's demand
 12 letter?
 13 A. Did I discuss with anyone? No, I
 14 don't remember – I don't remember talking
 15 about this with Frank at all where –
 16 MS. DEITSCH-PEREZ: And I'm just
 17 going to stop you to make sure you don't
 18 blurt out any privileged communications, if
 19 there are any.
 20 We object to the disclosure. But
 21 with that caveat, go ahead.
 22 A. I'm sorry, repeat the question
 23 again. Let me try and keep it simple here.
 24 Q. Sure. It may be my fault.
 25 Mr. Dondero, you testified that you

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 2 behalf of HCMS ever informed Highland of HCMS'
 3 defenses to the – to the demand letter prior
 4 to the commencement of litigation?
 5 A. Yeah, Frank would be the person to
 6 ask there. I don't know.
 7 Q. I'm just asking you. Prior to the
 8 commencement of litigation, did you ever
 9 instruct anyone to inform Highland that the
 10 HCMS notes were subject to oral agreements with
 11 the Dugaboy trustee?
 12 A. I believe former Judge Lynn sent a
 13 letter in that regard. But other than that, I
 14 don't remember talking to anybody – I don't
 15 remember talking to the debtor about it per se.
 16 Q. It is your recollection that
 17 Judge Lynn sent a letter to Highland before the
 18 commencement of litigation, putting Highland on
 19 notice that the HCMS notes were the subject of
 20 oral agreements between you and the Dugaboy
 21 trust.
 22 Do I have that right?
 23 A. Yeah, that they were part of
 24 forgiveness or compensation or something. He
 25 sent a letter in that regard.

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2 Q. And was this part of a settlement

3 discussion or was this in response to this

4 demand letter?

5 A. I don't know.

6 Q. Have you produced that letter in

7 discovery?

8 MS. DEITSCH-PEREZ: I'm aware that

9 you have the letter. I don't know if it

10 was attached to something, but I know you

11 have it.

12 MR. MORRIS: Because you produced it

13 in discovery or because Mr. Dondero is

14 testifying that his recollection was that

15 Mr. Dondero sent this letter to the debtor?

16 MS. DEITSCH-PEREZ: The -- the

17 letter has either been produced or was

18 attached to something or was used in a

19 deposition, but I am aware that you have

20 it. If you need it to be Bates stamped, we

21 could do that.

22 MR. MORRIS: I definitely need it to

23 be Bates stamped, I do, because I'm not

24 aware of this particular letter. But I

25 appreciate that.

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2 MR. MORRIS: Yes.

3 A. Yes, not that I recall.

4 Q. Did you ever instruct anyone in

5 December 2020 not to make the payments that

6 Highland demanded that are listed in this

7 exhibit?

8 A. No.

9 Q. Do you know why HCMS did not make

10 the payments that Highland demanded under the

11 notes?

12 A. Again, beyond compensation

13 forgiveness argument, no.

14 MR. MORRIS: Okay. Let's go to the

15 next exhibit, 6.

16 (Exhibit 6 marked.)

17 Q. And this is another one of the term

18 notes; right?

19 A. Yes.

20 MR. MORRIS: And can we just go to

21 the signature line, please.

22 Q. Is that your signature, sir?

23 A. That looks more like it.

24 Q. And do you -- are you willing to

25 agree that you signed this promissory note in

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1 DONDERO - 10/29/21

2 MR. RUKAVINA: This is Davor.

3 Couple things, John -- and I apologize for

4 interjecting. I have not made an

5 appearance yet today. Deborah has been

6 objecting for everyone.

7 Thomas Berghman will take over

8 around 3:00 o'clock. Is that okay with

9 you, John?

10 He is probably just going to sit

11 here and not object.

12 MR. MORRIS: I will miss you and I

13 hope you have safe travels.

14 MR. RUKAVINA: Okay. Thank you very

15 much.

16 And, second, I think that the letter

17 that is being referred to is the email

18 letter, so I have produced it to you.

19 With that, thank you everyone.

20 MR. MORRIS: Okay. Take care.

21 Q. Did anyone -- did you ever instruct

22 anyone in December 2020 to make the payments

23 that Highland demanded under the HCMS notes?

24 MS. DEITSCH-PEREZ: The demand notes

25 that are listed here on the Exhibit 5?

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1 DONDERO - 10/29/21

2 favor of Highland on May 31st, 2017?

3 A. Yes.

4 Q. And is it fair to say you didn't

5 read this note before you signed it?

6 A. Correct. No reason to, really.

7 Q. Okay. So it is fair to say that

8 there is not a provision of this note that you

9 didn't understand before you signed it;

10 correct?

11 MS. DEITSCH-PEREZ: Object to the

12 form.

13 A. That I didn't review it, so

14 therefore I didn't have a opinion one way or

15 the other.

16 Q. Okay. This note substituted and

17 superseded for the promissory notes that are

18 set forth on Exhibit A to this document;

19 correct?

20 A. Yes.

21 Q. So just like NexPoint and HCMS, HCRE

22 also consolidated their outstanding demand

23 notes into one term notes at the end of

24 May 2017; right?

25 A. Yep.

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1 DONDERO - 10/29/21

2 Q. Okay. Let's go to HCRE, if we can

3 take this down and put up Exhibit 4.

4 Actually, before we go to that, do

5 you have any recollection as to why HCRE

6 borrowed money from Highland in the amounts

7 equal to the prior notes as set forth to the

8 exhibit to the term note?

9 A. Nope.

10 Q. Do you have any recollection at all

11 as to what HCRE did with the proceeds of the

12 loans that it obtained from Highland?

13 A. No.

14 Q. This is Exhibit 4, so this is the

15 complaint – this is actually the complaint

16 against HCRE.

17 MR. MORRIS: Can we go to Exhibit 6,

18 please.

19 MS. DEITSCH-PEREZ: Exhibit 6 of

20 Exhibit 4?

21 MR. MORRIS: No, I apologize. That

22 was my mistake. Yes, Exhibit 6 to Exhibit

23 4.

24 MS. DEITSCH-PEREZ: Okay. If you

25 want the hard copy, it is in a booklet.

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1 DONDERO - 10/29/21

2 didn't review it.

3 Q. Okay. This note substituted and

4 superseded for the promissory notes that are

5 listed on Exhibit A on the right side of the

6 page; correct?

7 A. Yes.

8 Q. And Exhibit A set forth the

9 outstanding principal and interest that HCRE

10 owed to Highland under the prior notes as of

11 May 31st, 2017; correct?

12 A. Uh-huh.

13 Q. That is a yes, sir; correct?

14 A. Yes.

15 Q. Okay. Do you know why HCRE borrowed

16 the money from Highland at the times and – and

17 in the amounts set forth on Exhibit A to the

18 promissory note?

19 A. No.

20 Q. Do you have any recollection as to

21 what HCRE did with the proceeds of the loans

22 that they had obtained from Highland between

23 January 2014 and April 2015?

24 A. No.

25 Q. Can we call the three term notes

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1 DONDERO - 10/29/21

2 Otherwise, she is pulling it up.

3 Q. So this is the last of the three

4 term notes. Do you see that?

5 A. Yes.

6 Q. Also signed on May 31st, 2017;

7 correct?

8 A. Yes.

9 Q. And if we could look at the

10 signature line, is that your signature, sir?

11 A. Yes.

12 Q. And did you sign this note on behalf

13 of HCRE on or about May 31st, 2017?

14 A. Yes.

15 Q. Did you read this note before you

16 signed it?

17 A. No.

18 Q. And since you didn't read it, is it

19 fair to say that there wasn't a provision of

20 this agreement that you didn't understand at

21 the time that you signed it?

22 MS. DEITSCH-PEREZ: Object to the

23 form.

24 A. There is – there wasn't a

25 provisions I did or didn't understand because I

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1 DONDERO - 10/29/21

2 that were signed by NexPoint, HCRE, and HCMS on

3 May 31st, 2017 collectively as the term notes?

4 A. Yes.

5 Q. Okay. You had the authority to sign

6 each of the term notes on behalf of each of the

7 respective makers; correct?

8 A. Yes.

9 Q. Each of the term notes was for a

10 30-year term; correct?

11 A. I believe so.

12 Q. Okay. Who decided to give each note

13 a 30-year term, if you know?

14 A. The auditors, the accountants, not

15 me.

16 Q. But you knew that each of the notes

17 was for a 30-year term; is that fair?

18 A. Yes, I guess, yes.

19 Q. Notes were unsecured; right?

20 A. Yes.

21 Q. And the notes were not the product

22 of any negotiations; correct?

23 A. Correct.

24 Q. Is it fair to say that none of the

25 makers of the term notes ever sought financing

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1 DONDERO - 10/29/21
 2 from a third party as an alternative to the
 3 Highland notes?
 4 A. That's correct.
 5 Q. Okay. You don't have any reason to
 6 believe that an unrelated third party would
 7 have loaned money to NexPoint, HCRE, and HCMS
 8 on the terms set forth in each of the term
 9 notes, do you?
 10 MS. DEITSCH-PEREZ: Object to the
 11 form.
 12 A. I -- it is not fair to draw that
 13 conclusion. You know, particularly NexPoint
 14 has borrowed a lot of money at much lower rates
 15 at or around 2017 and later, and to this day.
 16 Q. So then why --
 17 A. The same thing with HCRE.
 18 Q. So then why would HCRE and NexPoint
 19 enter into these loans rather than obtaining
 20 loans at lower interest rates if they were
 21 available?
 22 A. These are soft loans, again, so
 23 they're -- especially affiliate soft loans to
 24 other creditors are viewed almost as equity or
 25 subordinated to senior secured mortgages or

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1 DONDERO - 10/29/21
 2 A. I knew there was more required
 3 periodic payments than historically, and that
 4 was part of -- partly driven by the -- the
 5 auditors, I believe.
 6 THE WITNESS: You know what, can
 7 we -- can we take a break for like five or
 8 10 minutes, and then, you know, at most --
 9 at most I've got another hour in me today,
 10 and then so we could just work on when it
 11 fits on everybody else's calendar if we
 12 can't wrap up in an hour; okay?
 13 MR. MORRIS: No problem,
 14 Mr. Dondero. So the time now is what --
 15 what time do we have?
 16 VIDEOGRAPHER: Off the record, 2:56.
 17 (Recess taken 2:56 p.m. to 3:19 p.m.)
 18 VIDEOGRAPHER: Back on the record,
 19 3:19.
 20 Q. Are you ready to proceed, sir?
 21 A. Yes.
 22 Q. Okay. Did you speak with anybody
 23 during the break about the substance of this
 24 deposition?
 25 A. No.

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1 DONDERO - 10/29/21
 2 other financings that NexPoint and HCRE did.
 3 So I would say that is -- that is the reason.
 4 Q. Are you saying that Highland today
 5 really has equity interests in NexPoint, HCRE,
 6 and HCMS?
 7 MS. DEITSCH-PEREZ: Object to the
 8 form.
 9 A. Yeah, no, I didn't say that. I'm
 10 saying it has subordinated debt interest, but
 11 they are soft notes, so they're viewed as
 12 deeply subordinated equity-ish, so to speak, as
 13 far as the senior secured debtholders are
 14 concerned.
 15 Q. Well, that would be true of any
 16 senior secured debt relative to unsecured debt;
 17 isn't that right?
 18 A. Yes, but again, these are
 19 particularly soft notes, you know.
 20 Q. Okay. At the time you signed these
 21 notes, were you aware that each of the term
 22 notes required payment of an annual installment
 23 on December 31st of each year?
 24 MS. DEITSCH-PEREZ: Object to the
 25 form.

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1 DONDERO - 10/29/21
 2 Q. So we were just looking at the third
 3 in the series of term notes, and if we can go
 4 to the -- I apologize, the first page of this
 5 one, just to refresh your recollection after
 6 the break that this is the term note that was
 7 executed by you on behalf of HCRE Partners on
 8 May 31st, 2017.
 9 Do you see that?
 10 A. Yes.
 11 Q. Okay. And I looked at Paragraph 5
 12 before, but I just want to make sure, you're
 13 telling me that you didn't read this before you
 14 signed it, do I have that right, Paragraph 5?
 15 A. Yes.
 16 Q. And so you are unaware -- when did
 17 you first -- when did you first become aware of
 18 the provision that is set forth in Paragraph 5?
 19 MS. DEITSCH-PEREZ: Object to the
 20 form.
 21 A. I don't know.
 22 Q. Okay. Was it before or after the
 23 commencement of the litigation?
 24 A. I don't know.
 25 Q. Okay. NexPoint didn't make the

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1 DONDERO - 10/29/21
 2 installment payment that was due at the end of
 3 2020; correct?
 4 MS. DEITSCH-PEREZ: Object to – are
 5 you still talking – have you left HCRE?
 6 MR. MORRIS: No. I said what I
 7 meant to. So we can take down the exhibit
 8 if that's the part that is confusing you.
 9 I appreciate that.
 10 MS. DEITSCH-PEREZ: Okay.
 11 Q. Okay. NexPoint didn't make the
 12 installment payment that was due at the end of
 13 2020; correct?
 14 MS. DEITSCH-PEREZ: Object to the
 15 form.
 16 A. Yeah. I mean, I think maybe the
 17 right way to describe it is Highland or –
 18 yeah, Highland or Frank Waterhouse on behalf of
 19 NexPoint didn't make the payment.
 20 Q. Okay. And HCRE didn't make the
 21 installment payment that was due at the end of
 22 2020; correct?
 23 A. I don't – I guess – okay, if they
 24 missed it too, I – I did not have specific
 25 awareness to that, I guess, but if you are

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1 DONDERO - 10/29/21
 2 Q. Sure. All right. So from now on, I
 3 will try and use the word "Services" and you
 4 will know that that means Highland Management
 5 Services, Inc.; is that fair?
 6 A. Yes, okay.
 7 Q. Okay. So Services didn't make the
 8 installment payment that was due at year-end;
 9 correct?
 10 A. Yes.
 11 Q. Okay. And I just want to make sure
 12 that I have this right. Is it – is it the
 13 corporate obligors' – those three corporate
 14 obligors' contention that one of the reasons
 15 they didn't make the payments at the end of the
 16 year is that they were relying on Highland to
 17 make the payment for them?
 18 A. Absolutely.
 19 Q. Okay.
 20 A. It was due course de minimis, and
 21 those entities didn't have a single employee or
 22 capable financial person other than the people
 23 at Highland that were doing the shared services
 24 for them.
 25 Q. NexPoint didn't have any employees

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1 DONDERO - 10/29/21
 2 suing under it, I guess they did.
 3 Q. Right. And HCMS didn't make the
 4 payment that was due at the end of the year, to
 5 the best of your knowledge; correct?
 6 MS. DEITSCH-PEREZ: Object to the
 7 form.
 8 A. Yeah. I mean, what I'd just
 9 separate in my notes here is the HCMFA was just
 10 not – it wasn't a bona fide note, I guess,
 11 is – that is – which I guess is a
 12 different – a different conversation.
 13 Q. Yeah. Do you understand that the
 14 question was about HCMS? Let me restate the
 15 question.
 16 MS. DEITSCH-PEREZ: Yes.
 17 Q. HCMS –
 18 A. Oh, I'm sorry.
 19 MS. DEITSCH-PEREZ: John, I'm sorry,
 20 it is really hard on the video to
 21 distinguish between HCMF and HCMS, so if
 22 you could just –
 23 A. How about just say Services for
 24 Highland Capital Management Services, just
 25 say – instead of S, just say Services.

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1 DONDERO - 10/29/21
 2 in December 2020. Is that your testimony?
 3 A. I was thinking about HCRE and
 4 Services had zero employees. NexPoint had
 5 employees but none that were involved in basic
 6 accounting functions.
 7 Q. Okay. And – and there are people,
 8 including yourself, who were officers or
 9 employees of NexPoint in December 2020;
 10 correct?
 11 A. Yes.
 12 Q. And HCRE had officers in December
 13 2020, including you; correct?
 14 A. Yes. Officers, yes.
 15 Q. And Services had officers in
 16 December 2020, including you; correct?
 17 A. Yes.
 18 Q. Okay. I think in summary form, to
 19 be fair, I think we have identified one of the
 20 defenses for these three corporate obligors.
 21 Two of them have the defense of
 22 prepayment; right?
 23 A. Yes.
 24 Q. And one of them is NexPoint,
 25 NexPoint has the defense of prepayment.

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1 DONDERO - 10/29/21
 2 Do you have that – do I have that
 3 right?
 4 A. Yes.
 5 Q. Which of the other two, remind me?
 6 A. Services.
 7 Q. Okay. So NexPoint and Services have
 8 the defense of prepayment. Are there any other
 9 reasons that you know of that these three
 10 corporate obligors didn't make the annual
 11 installment payment that was due at the end of
 12 the year?
 13 MS. DEITSCH-PEREZ: Object to the
 14 form.
 15 A. Again, they – they should have been
 16 in regular course. Those payments – using the
 17 word "payment" is almost like an overstatement
 18 of the significance or the amount. If the
 19 amounts were small in all cases, they should
 20 have been made or they should have been paid,
 21 even in the context of contention and even in
 22 the context of the larger amounts of money that
 23 Highland owed us.
 24 Q. I'm just – I'm just asking a pretty
 25 simple question, sir. I don't mean to be

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1 DONDERO - 10/29/21
 2 Q. Okay. Did you take any steps to
 3 confirm that Highland would make the payments
 4 that were due under these three term notes at
 5 the end of the year?
 6 MS. DEITSCH-PEREZ: Object to the
 7 form.
 8 A. No. I testified already the first I
 9 heard about it was a week or two later. And I
 10 called up Frank and confirmed with him to make
 11 sure they got paid and make sure they were back
 12 in compliance.
 13 Q. Okay.
 14 MR. MORRIS: I move to strike
 15 everything after the word "no."
 16 Q. Do you know whether anybody on
 17 behalf of any of the three corporate obligors
 18 under the term notes ever directed Highland to
 19 make the payments under them at the end of the
 20 year?
 21 MS. DEITSCH-PEREZ: Object to the
 22 form.
 23 A. Not before the end of the year, no.
 24 Q. Okay. And do you know whether
 25 anybody acting on behalf of any of the three

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1 DONDERO - 10/29/21
 2 contentious with you. We have identified one
 3 defense that these corporate obligors contends
 4 exists; and that is, Highland was supposed to
 5 make the payment. Fair?
 6 A. Yes.
 7 Q. And then we have identified a second
 8 defense for NexPoint and HCMS, and that is
 9 their defense that they prepaid.
 10 Do I have that generally right?
 11 A. Yes.
 12 Q. Can you describe for me any other
 13 defenses that these three corporate obligors
 14 have for not making the payment that was due at
 15 the end of the year?
 16 MS. DEITSCH-PEREZ: Object to the
 17 form.
 18 A. I'm thinking. Not at the moment.
 19 Q. Okay. Did you instruct anyone in
 20 December of 2020 to make the installment
 21 payments that were due on December 31st under
 22 these three term notes?
 23 MS. DEITSCH-PEREZ: Object to the
 24 form, asked and answered.
 25 A. No.

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1 DONDERO - 10/29/21
 2 corporate obligors under the term notes ever
 3 took any steps in December 2020 to make sure
 4 that Highland would, in fact, make the payments
 5 that were due at year-end?
 6 MS. DEITSCH-PEREZ: Object to the
 7 form.
 8 A. No, there was a reliance on
 9 Highland.
 10 Q. Okay. Is it your testimony that
 11 Highland was authorized to make the payments
 12 under the notes at year-end without being
 13 directed by a representative of the three
 14 corporate obligors?
 15 A. Yes. It is my contention that that
 16 is how it worked in prior years also.
 17 Q. And so you believe that nobody on
 18 behalf of any of the corporate obligors ever
 19 authorized or directed Highland to make the
 20 payments but that Highland did it without –
 21 without direction?
 22 MS. DEITSCH-PEREZ: Object to the
 23 form.
 24 A. Yes, typically. And in 2017 or
 25 2018, 2019, for sure.

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1 DONDERO - 10/29/21

2 Q. Okay. We have looked at one – at

3 one December 3rd letter. I mean, do you

4 remember that you also received a number of

5 letters on December 3rd demanding payment on

6 certain promissory notes?

7 A. No.

8 Q. All right.

9 MR. MORRIS: Can we call up

10 Exhibit 2, please. No, I apologize. Not

11 Exhibit 2, Exhibit 4.

12 (Exhibit 4 marked.)

13 MS. DEITSCH-PEREZ: Exhibit 4 in the

14 notebook?

15 MR. MORRIS: Yes, ma'am.

16 Okay. And now let's – let's go to

17 the exhibits. Exhibit 2, Exhibit 3,

18 Exhibit 4, Exhibit 5.

19 Q. Do you see, sir, that this is a

20 letter addressed to you on behalf of HCRE

21 Partners that is also dated December 3rd, 2020?

22 A. Yes.

23 Q. Does that refresh your recollection

24 that you also received notices, demand notices

25 on or around December 3rd, 2020, with respect

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1 DONDERO - 10/29/21

2 form.

3 A. HCMFA or Services?

4 Q. HCMFA?

5 A. I – I don't know. I don't have any

6 knowledge.

7 MR. MORRIS: Can we put up

8 Exhibit 1, please.

9 (Exhibit 1 marked.)

10 MR. MORRIS: We probably want to go

11 to Exhibit 3 of that document.

12 Q. This one was sent to Mr. Waterhouse.

13 Do you see that?

14 A. Yes.

15 Q. Okay. And did you become aware on

16 or around December 3rd, 2020, that Highland

17 made demand under the two notes listed in this

18 letter?

19 A. Yes. Why would this one go to

20 Frank Waterhouse?

21 Q. Was he the treasurer – was he the

22 treasurer of Highland Capital Management Fund

23 Advisors at the time?

24 A. Right.

25 Q. So does it make sense that the payee

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1 DONDERO - 10/29/21

2 to notes that were held by Highland?

3 A. No.

4 Q. Do you recall this letter at all?

5 A. No, if I – if I had, I would have

6 made the forgiveness argument or I would have

7 told someone to make the forgiveness argument,

8 but I don't remember this at all.

9 Q. Okay. Is it fair to say that

10 neither you nor anyone acting on behalf of

11 yourself, HCMS, or HCRE ever responded to any

12 of the demand letters at the beginning of

13 December 2020?

14 MS. DEITSCH-PEREZ: Object to the

15 form.

16 A. Yes, I don't – I don't know.

17 Q. You don't have any knowledge of

18 that; is that fair?

19 MS. DEITSCH-PEREZ: Object to the

20 form.

21 A. I don't know.

22 Q. And you don't have any knowledge of

23 anybody responding to any demand letter that

24 was sent to HCMFA; correct?

25 MS. DEITSCH-PEREZ: Object to the

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1 DONDERO - 10/29/21

2 on a note might send a demand letter to the

3 treasurer of the maker of the note?

4 MS. DEITSCH-PEREZ: Object to form.

5 A. I'm just saying they could have sent

6 the NexPoint letter or the Services letter to

7 him also; right?

8 Q. I don't – I think the NexPoint is

9 only a term note; right? So there is no demand

10 letter.

11 A. No, I know that. But whatever –

12 whatever the other one we were just looking at,

13 the Services one could have gone to him, too.

14 Anyway, whatever. It doesn't

15 matter. But, no, I don't have a specific

16 recollection of this, if that was your

17 question.

18 Q. You don't have – you don't have any

19 recollection of Highland making demand under

20 promissory notes that were issued by you and

21 certain of your affiliates in early December

22 2020. You don't remember that at all?

23 A. There was a lot going on then. And,

24 again, it wasn't something that we either

25 thought was legitimate based on forgiveness or

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1 DONDERO - 10/29/21
 2 other issues or it wasn't things that we
 3 thought were legitimate as part of the overall
 4 settlement.
 5 You've got to remember we didn't
 6 realize Seery betrayed the estate at this
 7 point. We thought we were moving towards, you
 8 know, resolution or a pot plan.
 9 Q. Okay.
 10 MR. MORRIS: I move to strike.
 11 Q. And please listen carefully to my
 12 question.
 13 Did you have any knowledge in early
 14 December 2020 that Highland made demand for
 15 payment under demand notes that were issued by
 16 you and certain of your affiliates?
 17 A. Same answer.
 18 Q. Were you aware or you were not
 19 aware?
 20 A. Well, no specific knowledge for the
 21 reasons articulated in the answer that you –
 22 you moved to strike.
 23 Q. Okay. So – so you had – you had
 24 no particularized knowledge of the demands in
 25 December 2020, correct?

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1 DONDERO - 10/29/21
 2 these are frivolous obligations, does it?
 3 MS. DEITSCH-PEREZ: Object to the
 4 form.
 5 A. PricewaterhouseCoopers doesn't –
 6 Q. PricewaterhouseCoopers specifically
 7 included a disclosure of all of these
 8 promissory notes in the audited financial
 9 statements; correct?
 10 MS. DEITSCH-PEREZ: Object to the
 11 form.
 12 A. I mean, as they should have with the
 13 information they had at the time, but I think
 14 what has come out since then is that they – it
 15 was moneys that moved from Highland to HFAM for
 16 things that were caused by Highland and people,
 17 not me, not even Frank, I think, but other
 18 people assumed it was a note and made notes out
 19 of it. And that is what PricewaterhouseCoopers
 20 put into the financials, but I think what
 21 everybody acknowledges is that they were
 22 never – they were never notes.
 23 Q. Is there a document that you have
 24 ever seen in your life that supports what you
 25 just said?

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1 DONDERO - 10/29/21
 2 A. Right.
 3 Q. Okay. And so it is fair to say that
 4 you never directed anybody to respond to these
 5 demands because you didn't have knowledge of
 6 them; correct?
 7 A. Right.
 8 Q. Okay. Do you know whether anybody
 9 responded on behalf – on your behalf or any of
 10 the corporate obligors' behalf to any of the
 11 demand letters that were – that you now know
 12 were sent in early December 2020?
 13 A. Well, yes. I mean, I know
 14 eventually. I don't know when, but I don't
 15 think anybody believes these – these HVIN
 16 notes are legitimate notes.
 17 I know the response was more around
 18 it being payments for the TerreStar regulatory
 19 obligations for all the things that Highland
 20 had mucked up in the TerreStar situation.
 21 Q. While you were president of that
 22 entity; right?
 23 A. Yes.
 24 Q. Okay. And – and
 25 PricewaterhouseCoopers certainly doesn't think

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1 DONDERO - 10/29/21
 2 MS. DEITSCH-PEREZ: Object to the
 3 form.
 4 A. Yes.
 5 Q. Can you identify that document for
 6 me?
 7 A. Yeah. It is a – it is a settlement
 8 with the SEC in terms of what they said the
 9 breaches were, and why they were finding HFAM,
 10 the rationale that they had in the regulatory
 11 breaches and in the settlement, and all of the
 12 breaches in the settlement were things that
 13 Highland did, not that HFAM did.
 14 It was all valuation, it was all –
 15 it was all services that HFAM had contracted
 16 with Highland that were performed deficiently
 17 in the eyes of the SEC.
 18 Q. Okay. We will – we will get to
 19 that in more detail, but I just would like to
 20 know if you believe that any correspondence to
 21 the SEC specifically stated that Highland
 22 Capital Management, L.P. and not Highland
 23 Capital Management Fund Advisors, L.P. was
 24 responsible for the TerreStar valuation error.
 25 A. The SEC would not have parsed

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1 DONDERO - 10/29/21
 2 between the different players in the entities.
 3 They would have said what they thought the
 4 breaches were overall in their letter, and what
 5 would govern the split is the shared services
 6 agreement and where were the employees that
 7 performed the activities that they cited.
 8 Q. Okay. We will get to that at a
 9 later time.
 10 All right. Let's go back to the
 11 oral agreements that you entered into with the
 12 Dugaboy trustee.
 13 MR. MORRIS: And let's start by
 14 putting back up Exhibit 31, Paragraph 82.
 15 MS. JEFFRIES: I'm sorry, can you
 16 repeat that?
 17 MR. MORRIS: Yes. Exhibit 31,
 18 Paragraph 82, yes.
 19 Q. And, again, Mr. Dondero, I think you
 20 have testified already that you believe
 21 Paragraph 82 generally describes the oral
 22 agreement that you entered into with the
 23 Dugaboy trustee with respect to the promissory
 24 notes that we've described; right?
 25 A. Yes.

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1 DONDERO - 10/29/21
 2 MS. DEITSCH-PEREZ: Object to the
 3 form.
 4 A. It was meant to condition the
 5 forgiveness.
 6 Q. Did it change --
 7 A. I would like to use those words
 8 versus modified the agreement.
 9 Q. Did it -- did it alter the parties'
 10 rights and obligations?
 11 MS. DEITSCH-PEREZ: Object to the
 12 form.
 13 Q. I'm not trying to play a game with
 14 you. I just --
 15 MS. DEITSCH-PEREZ: That is exactly
 16 what you are doing. Why don't you just ask
 17 him --
 18 MR. MORRIS: Please stop talking.
 19 Please stop talking.
 20 Q. Mr. Dondero, is it fair to say that
 21 the promissory notes that are the subject of
 22 your oral agreements with the Dugaboy --
 23 Dugaboy trustee set forth the parties' rights
 24 and obligations thereunder, both the maker and
 25 the payee?

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1 DONDERO - 10/29/21
 2 Q. And -- and it is -- and that
 3 includes the promissory notes that you signed
 4 that Highland is suing on as well as the
 5 promissory notes that HCRE, HCMS, and NexPoint
 6 signed that Highland is suing on; correct?
 7 A. Yes.
 8 Q. Okay. Do you contend that the oral
 9 agreements that you entered into with the
 10 Dugaboy trustee modified the parties' rights
 11 under the original promissory notes?
 12 MS. DEITSCH-PEREZ: Object to the
 13 form.
 14 A. Modify, boy, sounds like a legal
 15 term. It said conditions by which they could
 16 be forgiven.
 17 Q. And there were no such conditions in
 18 the original notes; right?
 19 A. That is correct.
 20 Q. Okay. So I'm just asking you from
 21 your perspective whether the oral agreements
 22 that you entered into with the Dugaboy trustee
 23 were intended to modify the parties' rights and
 24 obligations under the original promissory
 25 notes.

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1 DONDERO - 10/29/21
 2 MS. DEITSCH-PEREZ: Can you read
 3 that back again.
 4 Q. Is it fair to say that the original
 5 promissory notes that are the subject of the
 6 oral agreements between you and the Dugaboy --
 7 withdrawn.
 8 Is it fair to say that the original
 9 promissory notes that Highland is suing under
 10 set forth the maker and the payees' rights and
 11 obligations under those notes?
 12 MS. DEITSCH-PEREZ: Object to the
 13 form. Object to the form.
 14 A. Yeah, I -- again, I want to -- I
 15 want to avoid using the term "modification" or
 16 implying modification because, again, the notes
 17 are soft, and they really just talk about a
 18 rate and/or payment or amortizations, but
 19 they're soft notes. Something in the agreement
 20 that lays out the conditions for forgiveness
 21 aren't necessarily a modification of the note,
 22 and I'd like that to be --
 23 Q. Let me --
 24 A. -- my testimony.
 25 Q. Let me ask it this way: Under each

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1 DONDERO - 10/29/21
 2 of the demand notes, Highland as the payee had
 3 the unfettered right to demand payment at any
 4 time; correct? Did you understand that?
 5 MS. DEITSCH-PEREZ: At the time that
 6 the notes were first signed?
 7 MR. MORRIS: Yes, ma'am.
 8 A. Yeah. I mean, at the -- at the time
 9 that they were first put in place, but by the
 10 time the demand was made, they had already been
 11 subject to the conditions present or the
 12 conditions for forgiveness.
 13 Q. Okay. So this is exactly what I'm
 14 trying to get at. At the time the notes were
 15 signed, Highland had the right to make demand
 16 for payment at any time; correct?
 17 A. Yes.
 18 Q. And when you entered into the oral
 19 agreements with the Dugaboy trustee, Highland's
 20 right to make a demand -- pick your word,
 21 modified, altered, amended, changed -- it
 22 was -- your oral agreement had an impact on
 23 Highland's rights under the promissory notes;
 24 correct?
 25 MS. DEITSCH-PEREZ: Object to form

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1 DONDERO - 10/29/21
 2 loans that were the subject of the promissory
 3 notes; correct?
 4 A. Yeah, I -- I -- I am just not
 5 understanding the nuance enough to answer that
 6 question.
 7 Q. Did the oral agreements relate to
 8 the loans that were the subject of the
 9 promissory notes?
 10 A. The oral agreements affected the
 11 term loans and the demand notes.
 12 Q. Okay.
 13 A. Does that answer your question?
 14 Q. And so -- and so is it fair to say
 15 that the oral agreements related to -- to
 16 the -- to the -- to the loans that were the
 17 subject of the notes?
 18 A. I don't know.
 19 Q. Okay.
 20 A. I'm not -- I'm not sure what you are
 21 asking, but I don't know the answer.
 22 Q. Okay. It is your --
 23 MS. DEITSCH-PEREZ: John, just
 24 how -- I just think the witness is lagging
 25 a little. So how much longer do you think

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1 DONDERO - 10/29/21
 2 of the question.
 3 Q. You can answer.
 4 A. The conditions subsequent -- the
 5 condition precedent -- precedence for
 6 forgiveness changed the ability for the demand
 7 notes to be demanded.
 8 Q. Okay. And -- and each of the oral
 9 agreements that you entered into with the
 10 Dugaboy trustee was related to the loans that
 11 were reflected in the promissory notes;
 12 correct?
 13 A. Well, it was related to the
 14 promissory notes themselves.
 15 Q. Correct. And the promissory notes
 16 reflect notes that were made from the payee to
 17 the maker; correct?
 18 A. Yeah. Most of them were roll-ups
 19 from prior.
 20 Q. No. Those are the term notes. I'm
 21 only talking about the demand notes.
 22 A. Okay.
 23 Q. Okay. So with respect to the demand
 24 notes, the oral agreements that you entered
 25 into with the Dugaboy trustee related to the

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1 DONDERO - 10/29/21
 2 you have?
 3 MR. MORRIS: Oh, I've got probably
 4 four hours, so I don't expect to finish
 5 today. If Mr. Dondero -- if Mr. Dondero
 6 wants to stop --
 7 Q. Are you unable to continue right
 8 now, Mr. Dondero?
 9 A. Well, if we have four more hours, I
 10 would rather do it a day next -- next week, one
 11 afternoon.
 12 MR. MORRIS: Okay. Can we check our
 13 calendars before we go off the record?
 14 We have a deposition on Tuesday.
 15 I'm not available on Monday. I can make
 16 myself free on Wednesday, Thursday, or
 17 Friday. And I think that we should expect,
 18 you know, a substantial period of time,
 19 perhaps as long as a full day.
 20 I mean, with all due respect --
 21 MS. DEITSCH-PEREZ: How do you have
 22 a full day? You have already gone -- you
 23 have already gone more than half a day.
 24 MR. MORRIS: Yeah. And just -- just
 25 to be clear -- and I'm happy, you know,

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1 DONDERO - 10/29/21
 2 to – to discuss this with you offline, but
 3 I didn't decide that Mr. Dondero would
 4 appear in his personal capacity and on
 5 behalf of three separate 30(b)(6)
 6 witnesses.
 7 If you had given me a different
 8 witness for each, I would have a total of
 9 28 hours. I don't expect to use anything
 10 remotely close to that time, but I am
 11 examining four witnesses here and I
 12 would – I would appreciate –
 13 MS. DEITSCH-PEREZ: But we also –
 14 MR. MORRIS: I would appreciate it.
 15 And, look, you can stop me at any time. If
 16 I haven't finished asking the questions
 17 that I believe I'm entitled to, I will, you
 18 know, take it to the judge. I'm just
 19 putting you on notice. I have – I'm on
 20 page 27 of a 57-page outline, so...
 21 MS. DEITSCH-PEREZ: Oh, geez.
 22 MR. MORRIS: Yeah, so I do have a
 23 fair amount more to cover. Okay?
 24 MS. DEITSCH-PEREZ: All right.
 25 MR. MORRIS: So Wednesday, Thursday,

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1 DONDERO - 10/29/21
 2 my time?
 3 MR. MORRIS: Okay. I appreciate it.
 4 Thank you very much. 1:00 o'clock Central,
 5 it is, next Thursday for the continuation
 6 of this.
 7 And hopefully I will finish that
 8 day, you know, if we can go without a lot
 9 of breaks and the rest of it. Hopefully I
 10 can finish that day. My intention is to do
 11 that. Okay?
 12 THE WITNESS: Perfect. Thank you.
 13 MS. DEITSCH-PEREZ: Can – can I get
 14 the rough?
 15 COURT REPORTER: Yes. Yes.
 16 MR. MORRIS: All right. We can go
 17 off the record.
 18 MS. DEITSCH-PEREZ: Thank you.
 19 COURT REPORTER: Thank you.
 20 VIDEOGRAPHER: Off the record, 3:53.
 21 (Deposition adjourned at 3:53 p.m.)
 22
 23
 24
 25

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1 DONDERO - 10/29/21
 2 or Friday, Mr. Dondero, I will make myself
 3 available at your convenience.
 4 THE WITNESS: I have all day board
 5 meetings on Wednesday.
 6 MR. MORRIS: Okay.
 7 THE WITNESS: I could do Thursday
 8 afternoon or I can do Friday afternoon.
 9 Hold on.
 10 MS. DEITSCH-PEREZ: Let me put this
 11 on mute and we will look at our calendars.
 12 MR. MORRIS: Thank you.
 13 VIDEOGRAPHER: Do you want to stay
 14 on the record?
 15 MR. MORRIS: Yes, please.
 16 THE WITNESS: Hello. All right. I
 17 can do Thursday afternoon for four hours.
 18 And if we need more time than that we can
 19 either do Friday afternoon or sometime
 20 the – the week after that, but I have – I
 21 have got –
 22 MR. MORRIS: Thank you very much.
 23 What time on Thursday works for you,
 24 sir?
 25 THE WITNESS: How about 1:00 o'clock

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1 DONDERO - 10/29/21
 2 _____
 3 JAMES DONDERO
 4
 5 Subscribed and sworn to before me
 6 this day of 2021.
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1 DONDERO - 10/29/21
 2 C E R T I F I C A T E
 3
 4 I, SUSAN S. KLINGER, a certified shorthand
 5 reporter within and for the State of Texas, do
 6 hereby certify:
 7 That JAMES DONDERO, the witness whose
 8 deposition is hereinbefore set forth, was duly
 9 sworn by me and that such deposition is a true
 10 record of the testimony given by such witness.
 11 I further certify that I am not related to
 12 any of the parties to this action by blood or
 13 marriage; and that I am in no way interested in
 14 the outcome of this matter.
 15 IN WITNESS WHEREOF, I have hereunto set my
 16 hand this 29th of October, 2021.
 17
 18 _____
 19 Susan S. Klinger, RMR-CRR, CSR
 20 Texas CSR# 6531
 21
 22
 23
 24
 25

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1 DONDERO - 10/29/21
 2 NAME OF CASE: In re: Highland Capital
 3 DATE OF DEPOSITION: October 29, 2021
 4 NAME OF WITNESS: James Dondero
 5 Reason Codes:
 6 1. To clarify the record.
 7 2. To conform to the facts.
 8 3. To correct transcription errors.
 9 Page ___ Line ___ Reason _____
 10 From _____ to _____
 11 Page ___ Line ___ Reason _____
 12 From _____ to _____
 13 Page ___ Line ___ Reason _____
 14 From _____ to _____
 15 Page ___ Line ___ Reason _____
 16 From _____ to _____
 17 Page ___ Line ___ Reason _____
 18 From _____ to _____
 19 Page ___ Line ___ Reason _____
 20 From _____ to _____
 21 Page ___ Line ___ Reason _____
 22 From _____ to _____
 23 Page ___ Line ___ Reason _____
 24 From _____ to _____
 25

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CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

Signed December 3, 2021

Henry G. C. Gammage
United States Bankruptcy Judge

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

<p>In re: HIGHLAND CAPITAL MANAGEMENT, L.P. Reorganized Debtor.</p>	<p>Case No. 19-34054-sgj 11 Chapter 11</p>
<p>HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff. v. JAMES D. DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.</p>	<p>Adversary No. 21-03003-sgj</p>
<p>HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff. v. NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.</p>	<p>Adversary No.: 21-03005-sgj</p>
<p>HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff.</p>	

<p>v. HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.</p>	<p>Adversary No.: 21-03006-sgj</p>
<p>HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff. v. HCRE PARTNERS, LLC (n/k/a NEXPOINT REAL ESTATE PARTNERS, LLC), JAMES DONDERO, NANCY DONDERO AND THE DUGABOY INVESTMENT TRUST, Defendants.</p>	<p>Adversary No.: 21-03007-sgj</p>

MEMORANDUM OPINION AND ORDER DENYING ARBITRATION REQUEST AND RELATED RELIEF

I. Introduction and Background

The four above-referenced adversary proceedings, Adversary Proceeding Nos. 21-3003, 21-3005, 21-3006, and 21-3007, started out as what seemed like simple suits by a Chapter 11 Debtor to collect on large promissory notes owed to it (collectively, the “Note Adversary Proceedings”). The court held a hearing on November 9, 2021 (“Hearing”) on various motions filed by certain defendants in the Note Adversary Proceedings. This Memorandum Opinion and Order addresses certain motions to compel arbitration and to stay these Note Adversary Proceedings while arbitration would be proceeding.¹ For the reasons set forth below, the court will not compel arbitration or stay these Note Adversary Proceedings.

The Note Adversary Proceedings were originally brought many months ago by Plaintiff Highland Capital Management L.P., now a reorganized debtor (“Highland” or “Reorganized Debtor”), again, as simple suits on notes—that is, alleging breach of contract and seeking turnover of amounts owed from the various obligors under the notes (the “Note Obligor Defendants”). Each Note Obligor Defendant was closely related to Highland’s former president, James Dondero (“Mr. Dondero”),² and collectively borrowed tens of millions of dollars from Highland prepetition. The

¹ Certain defendants herein earlier filed a motion to withdraw the reference in these Note Adversary Proceedings (arguing that the claims were statutory noncore claims or that the bankruptcy court otherwise did not have Constitutional authority to enter final orders). The District Court accepted the bankruptcy court’s report and recommendation that the reference should be withdrawn when these Note Adversary Proceedings are trial-ready with the bankruptcy court acting essentially in the position of a magistrate judge for the District Court prior to trial, presiding over all pretrial matters.

² In fact, Mr. Dondero personally was an obligor on three notes.

indebtedness was memorialized in a series of demand and term notes. The indebtedness represented by those notes remains unpaid.

The Note Adversary Proceedings morphed, so to speak, when the Note Obligor Defendants defended the Note Adversary Proceedings by alleging that an oral agreement existed such that the underlying notes would be forgiven by Highland as compensation to Highland’s former president, Mr. Dondero, if certain conditions subsequent occurred. The oral agreement was allegedly made on behalf of Highland, acting through one of its largest limited partners, Dugaboy Investment Trust (“Dugaboy”), which is a family trust of Mr. Dondero, on which the trustee is his sister Nancy Dondero (“Ms. Dondero”).

When this “oral agreement” defense was articulated, this court granted Highland’s request for leave to amend its original complaints in each of the Note Adversary Proceedings to allege alternative theories of liability and add Mr. Dondero,³ Dugaboy, and Ms. Dondero as additional defendants on new counts—the theories being that, if such an oral agreement was made, it may have given rise other causes of action on the part of the actors involved. Highland amended its complaints in each of the Note Adversary Proceedings, adding new Counts III, IV, V, VI, and VII alleging, among other things, fraudulent transfers (Counts III and IV), declaratory judgment as to certain provisions of Highland’s limited partnership agreement (Count V), breach of fiduciary duty (Count VI), and aiding and abetting breach of fiduciary duty (Count VII) (the “Amended Complaints”).

Presently before the court are a set of virtually identical motions filed by Mr. Dondero, Dugaboy, and Ms. Dondero in each of the four Note Adversary Proceedings seeking to compel arbitration as to Counts V, VI, and VII of, and stay litigation altogether in, the Note Adversary Proceedings, pending the arbitration of Counts V, VI, and VII (the *Motion to Compel Arbitration and Stay Litigation* [Doc. 85, 66, 74, and 65, respectively, in each sequentially-numbered Note Adversary Proceeding⁴], the “Arbitration Motions”). Highland timely filed objections to the motions [Doc. 92, 76, 81, and 77] and replies were filed by Mr. Dondero, Dugaboy and Ms. Dondero [Doc. 107, 88, 93, and 88].⁵

As set forth below, Mr. Dondero, Dugaboy, and Ms. Dondero (hereinafter the “Dondero/Dugaboy Defendants”) rely on a mandatory arbitration clause in Highland’s Limited Partnership Agreement as the basis for their arbitration request. To be clear, there are no arbitration clauses in the underlying promissory notes. And the Note Obligor Defendants are not seeking arbitration of the breach of contract claims, turnover claims, or fraudulent transfer claims. It is

³ Mr. Dondero was actually already a Note Obligor Defendant in Adv. Proc. No. 21-3003, as he is an obligor on three notes.

⁴ All subsequent “Doc.” references in this Memorandum Opinion and Order follow this convention.

⁵ The court considered these replies despite the lateness of their filing, less than two business days before the Hearing. At the Hearing, Highland noted its displeasure with these replies being filed 37 days after Highland filed its objections but did expressly did not ask the court to strike the replies. The court reminds the parties, as Highland correctly pointed out, that the Local Civil Rules for the Northern District of Texas, and not the Local Bankruptcy Rules, apply to these adversary proceedings in all respects, since the reference to the Bankruptcy Court was withdrawn and this court is conducting all proceedings in the position of a magistrate judge for the District Court. The replies here were required to be filed no later than 14 days following the filing of Highland’s objections. *See* Local Civil Rule 7.1(f).

only the Dondero/Dugaboy Defendants seeking arbitration as to Count V (seeking declaratory judgment as to provisions of the Highland limited partnership agreement) and Counts VI and VII (the fiduciary duty claims). The court denies the Arbitration Motions for the reasons stated below.

II. The Agreement Containing the Arbitration Clause

First, a word about what is and is not in dispute regarding the Arbitration Motions. The parties agree that Highland’s *Fourth Amended and Restated Agreement of Limited Partnership* (the “LPA”)⁶ contained Section 6.14, a typical mandatory arbitration provision that requires parties to the LPA to arbitrate certain disputes under certain circumstances (the “Arbitration Clause”):

In the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act ...

The Arbitration Clause also significantly limited discovery that could occur in arbitration:

The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each, each deposition to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admissions; (v) ten request for production (in response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents, including electronic documents); and (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure.

The parties further agree that the LPA, as an executory contract, was rejected under 11 U.S.C. § 365 in connection with the court’s order confirming Highland’s plan of reorganization in February 2021.

The Dondero/Dugaboy Defendants acknowledge that Counts I–IV of the Amended Complaints (Breach of Contract; Turnover; Fraudulent Transfers under 11 U.S.C. § 548; and Fraudulent Transfers under 11 U.S.C. § 544 and the Texas Uniform Fraudulent Transfer Act) are not subject to the Arbitration Clause.

The Dondero/Dugaboy Defendants argue in the Arbitration Motions, however, that Counts V, VI, and VII of the Amended Complaints (seeking a declaratory judgment as to provisions of LPA and claiming breach of fiduciary duty and aiding and abetting of breach of fiduciary duty—

⁶ The LPA was executed by Highland’s then-general partner, Strand Advisors, Inc., through the individual James Dondero, who was also then Highland’s CEO and Highland’s majority limited partner, The Dugaboy Investment Trust, James Dondero’s family trust, through its trustee, the individual Nancy Dondero, James Dondero’s sister. (Various other limited partners also signed the LPA, but they are not Note Obligor Defendants.) The “oral agreement” defense alleges that The Dugaboy Investment Trust, through Nancy Dondero as trustee, as the holder of a Majority Interest (as defined in the LPA), entered into oral agreements on behalf of Highland with James Dondero to forgive the demand notes at the center of these Note Adversary Proceedings if certain conditions subsequent were met.

all counts that, notably, Highland only added after the Note Obligor Defendants articulated their “oral agreement” defense) *are* subject to the Arbitration Clause. Highland counters that: (a) the rejection of the LPA excuses Highland from being forced to submit to mandatory arbitration of Counts V, VI, and VII; (b) the Dondero/Dugaboy Defendants have waived the Arbitration Clause by not invoking it at any earlier point in these Note Adversary Proceedings; and (c) the Dondero/Dugaboy Defendants should be judicially estopped from invoking the Arbitration Clause now. Highland also argues that arbitration of some but not all the counts of the Amended Complaints would be inefficient and wasteful, and that any stay of proceedings in this court would do a disservice to the resolution of the admittedly non-arbitrable issues in Counts I–IV.

III. The Significance of the Rejection of the Executory Contract (*i.e.*, the LPA) that Contained the Arbitration Clause

The court acknowledges that there is a wealth of federal case law dictating the strong federal policy undergirding the Federal Arbitration Act (“FAA”). *See, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) (describing the FAA as “a congressional declaration of a liberal federal policy favoring arbitration agreements”). The FAA was enacted by Congress in 1925 and became effective in 1926. It is codified at Title 9 of the United States Code and is predicated upon Congress’s exercise of the Commerce Clause powers granted in the Constitution. The FAA contemplates the judiciary’s respect for and enforcement of private parties’ agreements to resolve disputes through arbitration. The FAA provides:

A written provision in ... a contract ... to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁷

Thus, arbitration, pursuant to the FAA, is entirely a matter of contract. And, where a contract contains a provision in which parties agreed to submit future disputes thereunder to arbitration, these provisions should be enforced according to their terms. Section 4 of the FAA specifically directs a court to order parties to arbitrate upon a request by a party that is entitled to demand arbitration in a written contract. The courts have often stated that the FAA reflects a liberal federal policy favoring arbitration and requires arbitration agreements to be rigorously enforced according to their terms.⁸

The court also notes that some courts have grappled with whether a bankruptcy court needs to treat an arbitration provision in a contract any “less mandatory” than other courts. After all, bankruptcy cases are not like other lawsuits; they are multi-faceted, multi-party, and fast-moving. It has often been stated that the underlying purposes of the Bankruptcy Code are to: (a) provide debtors and creditors with orderly and effective administration of bankruptcy estates; and (b) *centralize disputes over debtors’ assets and obligations in one forum*. But there is *no* “bankruptcy exception” to an arbitration agreement *per se*—not in any statute and not according

⁷ 9 U.S.C. § 2.

⁸ *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citations omitted).

to any court so far. Some courts have opined or suggested that a bankruptcy court, when presiding over a proceeding involving “non-core” disputes pursuant to 28 U.S.C. § 157(b)—*i.e.*, disputes that are merely related to a bankruptcy case and would have been litigated elsewhere but for the broad nexus created by the debtor’s bankruptcy filing—**generally** must abstain from adjudication and direct the parties to arbitration when presented with an applicable arbitration provision.⁹ But when a bankruptcy court is presented with a “core” dispute—*i.e.*, one which derives from the provisions of the Bankruptcy Code—it *may* be permissible for the bankruptcy court to decline to order arbitration; after determining that “core” disputes are involved, courts tend to employ a framework for analysis derived from a nonbankruptcy Supreme Court case called *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987). In a nutshell, the *McMahon* Court held that a party seeking to avoid arbitration pursuant to an otherwise applicable agreement must show that Congress—in enacting whatever statute is involved (*i.e.*, the Bankruptcy Code) intended to preclude arbitration and that intent must be deducible from: (1) the statute’s text; (2) its legislative history; or (3) “an inherent conflict between arbitration and the statute’s underlying purposes.”¹⁰ Thus, courts—after finding “core” disputes are involved—tend to plow down a complicated trail of considering whether there is an “inherent conflict” between arbitration and the Bankruptcy Code in whatever dispute happens to be before the court.

The Fifth Circuit has addressed the topic of enforceability of arbitration clauses in bankruptcy in the cases of *In re Gandy* and *In re Nat’l Gypsum*.¹¹ In those cases, the Fifth Circuit instructed that a bankruptcy court may refuse to enforce arbitration clauses and may itself adjudicate a dispute when it finds that: (a) a matter is core or derives from rights under the Bankruptcy Code; **and** (b) enforcement of the arbitration provision would irreconcilably conflict with the purposes or goals of the Bankruptcy Code.¹²

While this is all somewhat enlightening, a slightly different argument is presented to this court by Highland in its argument that the bankruptcy court should not compel arbitration. Highland does not deny the existence of any of the above case law nor the fact that Counts V, VI, and VII involve non-core matters that do not derive from rights under the Bankruptcy Code. Rather, Highland argues, these Note Adversary Proceedings present a circumstance that very few courts have addressed. ***The LPA (or at least the Arbitration Clause) was an executory contract that Highland rejected in its confirmed Chapter 11 plan.*** As noted above, no one disputes that the LPA was rejected pursuant to Bankruptcy Code section 365. The result, argues Highland, is

⁹ At least one court has suggested that there is a “presumption in favor of arbitration [that] usually trumps the lesser interest of bankruptcy courts in adjudicating non-core proceedings.” *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006). *But see Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1156-1158 (3d Cir. 1989) (determining there is no discretion to deny arbitration in non-core matters). *See also Gandy v. Gandy (In re Gandy)*, 299 F.3d 489, 496 (5th Cir. 2002) (“it is generally accepted that a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving ‘core’ bankruptcy proceedings under 28 U.S.C. § 157(b)"); *Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat’l Gypsum Co.)*, 118 F.3d 1056 (5th Cir. 1997) (same).

¹⁰ *McMahon*, 482 U.S. at 227.

¹¹ *Gandy*, 299 F.3d at 489; *Nat’l Gypsum Co.*, 118 F.3d at 1056.

¹² *In re Nat’l Gypsum Co.*, 118 F.3d at 1068-69.

that Highland is no longer bound by the LPA's provisions that impose *specific performance* obligations on it—provisions such as the Arbitration Clause. A counterparty to a rejected executory contract can merely seek monetary damages, Highland argues, but it cannot force a debtor to *perform* under a rejected executory contract.

Highland's argument finds support in a both lengthy and well-reasoned opinion by District Judge David Godbey of this District — *Janvey v. Alguire*, 2014 U.S. Dist. LEXIS 193394 (N.D. Tex. Jul. 20, 2014), *aff'd on different grounds* at 847 F.3d 231 (5th Cir. 2017), dealing with federal receiverships (in which the court made analogies to the bankruptcy process)—as well as in an old law review article written by renowned University of Texas Law School Professor Jay Westbrook (often considered the modern-day expert on executory contracts in bankruptcy). See Jay Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 UNIV. OF MINN. LAW SCHOOL 595 (1983).

The *Janvey* opinion arose in the context of a federal receivership commenced at the request of the Securities and Exchange Commission in response to the massive R. Allen Stanford Ponzi scheme. Ralph S. Janvey was the receiver (“Receiver”) who took possession of all receivership assets and records. Pursuant to those powers, the Receiver filed suit against former employees (the “Employee Defendants”) who previously worked in various capacities for the Stanford enterprises (“Stanford Entities”) and received salary, commissions, bonuses, or later forgiven loans from the Stanford Entities. The Receiver's suit alleged that the Employee Defendants received fraudulent transfers in violation of the Texas Uniform Fraudulent Transfer Act (TUFTA) or, in the alternative, were unjustly enriched at the expense of the creditors of the Receivership Estate. Some of the Employee Defendants filed motions to compel arbitration. According to a later Fifth Circuit opinion, the arbitration agreements were contained in: (1) promissory notes between the Employee Defendants and the company that governed the upfront loan payments that the company awarded to the Employee Defendants when they joined Stanford; (2) the broker-dealer forms that the company submitted to the Financial Industry Regulation Authority (FINRA) when registering the Employee Defendants as brokers; (3) FINRA's internal rules governing disputes between brokers and their employers; and (4) the company's Performance Appreciation Rights plan. The arbitration clauses provided that “any controversy arising out of or relating to this Note, or default on this Note, shall be submitted to and settled by arbitration pursuant to the constitution, bylaws, rules and regulations of the National Association of Securities Dealers (NASD).” *Janvey v. Alguire*, 847 F.3d 231, 237 (5th Cir. 2017).

The issue of whether arbitration was required went back and forth between Judge Godbey and the Fifth Circuit and, ultimately, the precise issue pending before Judge Godbey was whether to deny or grant the motions to compel arbitration based on the question of “whether the Receiver is bound by the arbitration clauses if he sues, as he must, on behalf of the Stanford Entities.”

Judge Godbey declined to order arbitration because the Receiver had not adopted the arbitration agreements at issue and because arbitration of the Receiver's claims would frustrate a central purpose of federal equity receiverships. Judge Godbey noted that, before a general requirement to arbitrate exists, a party must first be bound to an arbitration agreement — either as a signatory or through a principle of law or equity. Judge Godbey stated that discussions of

possible exceptions to this general requirement to arbitrate, like *McMahon*'s contrary congressional command, ***are only necessary after such an initial determination***. Judge Godbey opined that equity receivers, as non-signatories to an arbitration agreement, can, in fact, be bound to the arbitration agreement to the same extent receivership entities would be bound. But there remained a significant resultant question: whether the Employee Defendants' arbitration agreements were contracts that the Receiver could ***reject***, "an ability that has deep historical roots for both federal equity receivers and bankruptcy trustees and that continues to be an important tool for both."

Applying Professor Vern Countryman's material breach test, Judge Godbey concluded that arbitration agreements must be analyzed as separate executory contracts, based on the nature of the agreement as well as arbitration caselaw regarding severability. Citing Professor Westbrook, he noted that, "[v]iewed as an independent contractual obligation of the parties, an arbitration agreement is a classic executory contract, since neither side has substantially performed the arbitration agreement at the time enforcement is sought." *Westbrook, supra note 26, at 623* (footnote omitted). Furthermore, the appropriate remedy in this circumstance cannot be for the Court to require specific performance by the trustee — *i.e.*, to compel arbitration — because "injured part[ies] cannot insist on specific performance by the trustee." *See id. at 619* (collecting cases)." *Janvey*, 2014 U.S. Dist. LEXIS 193394 at *113.

Judge Godbey went on to opine that the Receiver had rejected the arbitration agreement, that the rejection was proper, and that the Receiver was not bound to arbitrate—further noting that if the court required the Receiver to adopt the arbitration agreements, it would greatly burden and deplete the receivership estate. Such a result, weighed in the balance, would be unjust and inequitable.

The Fifth Circuit ultimately affirmed, 847 F.3d 231 (5th Cir. 2017), but applied a different analysis. It determined that the Stanford entity in whose shoes the Receiver had stepped, for purposes of bringing the TUFTA claims (*i.e.*, Stanford International Bank), was not a signatory to the arbitration agreements and was not otherwise bound by them. The Fifth Circuit also determined that, with regard to one Employee Defendant (Giusti) who stood in a unique position (in that there was an arbitration agreement that the Receiver's predecessor was party to and bound), that Giusti waived the right to arbitrate by substantially invoking the judicial process (through the filing of a motion to dismiss, an answer, serving written discovery and answering discovery—which had caused delay and expense). As for Judge Godbey's "broader policy argument" that the federal receivership statutes were at odds with the FAA's mandate in favor of arbitration, noting that these were "important concerns," the Fifth Circuit stated that "we are wary of endorsing these broad policy arguments in the absence of specific direction from the Supreme Court." *Id. at 245*. But the Fifth Circuit did not otherwise address the arguments.

While the *Janvey* case involved a federal receiver, Judge Godbey looked almost entirely to bankruptcy law and to Bankruptcy Code section 365 to reach his ruling. This court finds *Janvey* to be persuasive (and possibly binding) on this court. Moreover, just as a federal receiver is analogous to a bankruptcy trustee, a debtor-in-possession is, of course, statutorily the same as a bankruptcy trustee. *See, e.g.*, 11 U.S.C. § 1107.

To be clear, if a bankruptcy trustee rejects an executory contract, the rejection, of course, constitutes a breach of the contract and subjects the estate to a claim for money damages on behalf of the injured party. 11 U.S.C. § 365(g). Significantly, however, ***the injured party cannot insist on specific performance by the trustee.*** See Westbrook, *The Coming Encounter*, at 619 (and numerous cases cited therein). Instead, the injured party is treated as having a prepetition claim for damages arising as if the breach occurred immediately before the filing of the bankruptcy petition. Professor Westbrook notes that the issue then becomes whether such a prepetition claim, including a claim arising from rejection, must be liquidated pursuant to the arbitration clause. ***Most jurisprudence in the bankruptcy context dealing with arbitration clauses does not analyze this as a traditional executory contract conundrum.*** And yet, to use Professor Westbrook’s words, an arbitration agreement is a classic executory contract, since neither side has substantially performed the arbitration agreement at the time enforcement is sought. *Id.* at 623. And although “arbitration survives the contract” ***as a matter of contract law***, “executory obligations may be avoided by the trustee as a matter of bankruptcy law through the exercise of the trustee’s power to reject executory contracts.” *Id.* “If specific performance is not available against a trustee, it follows that an arbitration agreement is like any other executory contract which the trustee may reject.” *Id.* at 624.

The *Janvey* decision is not the only case to have addressed the effect of rejection on the viability of an arbitration clause within a rejected executory contract. The Dondero/Dugaboy Defendants cite the court to *In re Fleming Companies, Inc.*, 325 B.R. 687 (Bankr. D. Del. 2005), a case from another bankruptcy court that predates *Janvey* by almost a decade, for the proposition that rejection of an executory contract does not prevent a party from invoking an arbitration clause in that contract. With due respect, the court believes the reasoning in *Janvey* to be more persuasive than the bankruptcy court’s in *Fleming Cos.* (and *Janvey* is potentially binding precedent on this court). It also bears noting that it was the debtor in *Fleming Cos.*, not the executory contract’s counterparty, who was invoking the arbitration clause in the contract the debtor had previously rejected. That distinction is not without significance.

In summary, this court accepts Highland’s argument that the LPA was an executory contract duly rejected pursuant to Bankruptcy Code section 365, and that the Arbitration Clause should likewise be considered a separate executory agreement that was rejected. Accordingly, Highland cannot be forced to specifically perform under the Arbitration Clause or the LPA by mandatorily participating in arbitration of Counts V, VI, and VII. The court defers to the compelling reasoning of Judge Godbey in *Janvey* on this point. The court, like Judge Godbey, also finds as a matter of fact that requiring arbitration in this case would impose undue and unwarranted burdens and expenses on the parties to the detriment of Highland’s creditors.

IV. Waiver

Even if this court is in error in determining that the Arbitration Clause is no longer binding on Highland because it was rejected pursuant to Bankruptcy Code section 365, the court finds as a matter of fact that the Dondero/Dugaboy Defendants have waived any right to invoke the Arbitration Clause. The court has taken judicial notice of its own docket, both in these Note Adversary Proceedings and in the administrative Chapter 11 case, and has considered the entire

record of both proceedings, as well as the *Declaration of John A. Morris in Support of Debtor's Objection to Motion to Compel Arbitration and Stay Litigation* [Doc. 94, 78, 83, and 78], and the exhibits annexed thereto, in making the following findings of fact.

The Note Adversary Proceedings were filed in January 2021 (after Highland earlier made demands on the Note Obligor Defendants or otherwise declared events of default). One of the Note Obligor Defendants (Mr. Dondero) timely answered, pleading an affirmative defense that Highland agreed not collect on the underlying notes—but that answer contained nothing more specific than this, nor any mention of arbitration. Amended Answers were later filed by the Note Obligor Defendants, elaborating on and/or adopting the affirmative defense that, through the oral agreement, Highland agreed to forgive the obligations under the notes as compensation to Mr. Dondero “upon fulfillment of conditions precedent.” Roughly 90 days after the filing of the Note Adversary Proceedings, the Note Obligor Defendants filed motions to withdraw the reference, which this court spent significant time addressing in making a report and recommendation to the District Court in each Note Adversary Proceeding. No mention of arbitration was made to this court during those proceedings. During a hearing before the court on June 10, 2021, Highland announced its intention to add claims against the Dondero/Dugaboy Defendants for breach of fiduciary duty, yet the issue of arbitration was not raised at that point, or a month later when the Dondero/Dugaboy Defendants received a draft of the Amended Complaint adding Counts V, VI, and VII. Pursuant to the parties’ agreement, Highland filed that Amended Complaint on August 27, 2021, as the Dondero/Dugaboy Defendants’ “oral agreement” defense became clearer. Only on September 1, 2021, did the Dondero/Dugaboy Defendants file their Arbitration Motions and raise the issue of arbitration under the Arbitration Clause for the first time in these proceedings, more than seven months after the litigation began. At the same time, the Dondero/Dugaboy Defendants also pursued extensive discovery, seeking and obtaining responses to interrogatories and documents requests in scope and number ***significantly more than the Arbitration Clause permitted***, all in accordance with pre-trial stipulations the defendants both negotiated with Highland and then asked this court to approve, which the court did.

Although courts in the Fifth Circuit sometimes apply a presumption against waiver of an arbitration right, the right can certainly be waived.¹³ “Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.”¹⁴ In this context, prejudice “refers to the inherent unfairness—in terms of delay, expense, or damage to a party’s legal position—that occurs when the party’s opponent forces it to litigate an issue and later seeks to arbitrate that same issue.”¹⁵ A party waives arbitration when it “engage[s] in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration.”¹⁶

¹³ *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 661 (5th Cir. 1995).

¹⁴ *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986).

¹⁵ *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 327 (5th Cir. 1999) (quoting *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 134 (2d Cir. 1997)).

¹⁶ *Keytrade USA v. Ain Temouchent M/V*, 404 F.3d 891, 897 (5th Cir. 2005) (quoting *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 344 (5th Cir. 2004)). See also *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d

While every situation is unique, here the court finds that the Dondero/Dugaboy Defendants waived their right (if any still remained) to demand arbitration, due to their multiple answers, their motions to withdraw the reference, extensive discovery that far exceeded what the Arbitration Clause permitted, and complete silence about the possibility of arbitration for more than eight months. Even though Counts V, VI, and VII were not added by Highland until more than seven months after the Note Adversary Proceedings were filed, the Dondero/Dugaboy Defendants had reason to know that their “oral agreement” affirmative defense might implicate the LPA and the Arbitration Clause, and yet they didn’t raise the subject of arbitration until many months of litigation activity in the Note Adversary Proceedings had occurred in this court.¹⁷ The resulting delay and expense warrant this court’s applying waiver as permitted by the Fifth Circuit authority cited above. This court finds as a matter of fact that the Dondero/Dugaboy Defendants waived the relief they seek in the Arbitration Motions.

V. Judicial Estoppel, Waste and Inefficiency

Highland also asked the court: (a) to judicially estop the Dondero/Dugaboy Defendants from arguing entitlement to arbitration in light of prior contradictory positions these defendants took in earlier pleadings and arguments before this court, and (b) to decline to order arbitration because of the waste and inefficiency arbitration would represent for these proceedings. Because the court rules that rejection of the Arbitration Clause precludes Highland’s being forced to submit to arbitration, and because the court finds that the Dondero/Dugaboy Defendants waived the relief they sought in the Arbitration Motions, the court need not and does not address Highland’s arguments pertaining to judicial estoppel or the practical implications of ordering arbitration.

VI. Stay of Counts I–IV

Finally, because the court denies the arbitration requested in the Arbitration Motions, there is no good cause to stay litigation in the entire Note Adversary Proceedings. Even if the court has erred in its ruling on the Arbitration Motions, there still exists no good cause to stay the Note Adversary Proceeding as to Counts I-IV. The Dondero/Dugaboy Defendants acknowledge that Counts I-IV are non-arbitrable claims and, moreover, in the event Plaintiff were to prevail on them, it is likely that Plaintiff would not even pursue Counts V–VII. To clarify, if Plaintiff prevails on Counts I and II (*i.e.*, the breach of contract claims and turnover)—which would involve a finding that there was no oral agreement for nonpayment—then all other counts would become moot. And, if the court were to find that there *were* such an agreement, Plaintiff could potentially still prevail on Counts III and IV (the claims that such an agreement would constitute a fraudulent transfer—also non-arbitrable). It would seem that only if Plaintiff loses on all of these non-arbitrable claims would it have any interest in pursuing Counts V-VII (*i.e.*, an interest in arguing that the oral agreements amounted to breach of fiduciary duty and aiding and abetting breach of fiduciary duty).

1156, 1162 (5th Cir. 1986) (party waived arbitration because it “initiated extensive discovery, answered twice, filed motions to dismiss and for summary judgment, filed and obtained two extensions of pre-trial deadlines, all without demanding arbitration”).

¹⁷ The court notes that all Note Obligor Defendants consist of either Mr. Dondero or entities he controls.

The requested stay would also be illogical in this context. The “oral agreement” defense relies on the existence of an oral contract between Highland (via Dugaboy, through its trustee, Ms. Dondero) and Mr. Dondero. The existence of that contract is *not* an arbitrable issue. The implications of that contract’s existence are what would potentially be arbitrable. If litigation on Counts I–IV demonstrates that there was no such “oral agreement,” then there would be nothing to arbitrate because Counts V–VII would be rendered moot. Staying the litigated determination regarding the existence of the “oral agreement” in favor of arbitrating issues that only arise if there ever were such an agreement strikes the court as backwards. Arbitration should await that determination, not the other way around.

Accordingly, the Dondero/Dugaboy Defendants’ requests to stay the Note Adversary Proceedings have no merit and are denied.

ORDER

For the reasons stated in the above Memorandum Opinion and Order, the Arbitration Motions and Stay Motions related thereto are DENIED.

End of Order

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ATTORNEYS FOR NEXPOINT ADVISORS, 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.,	§	
Debtor.	§	Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	21-03005-sgj
NEXPOINT ADVISORS, L.P., JAMES	§	
DONDERO, NANCY DONDERO, AND THE	§	
DUGABOY INVESTMENT TRUST,	§	
Defendants.	§	

REPLY OF DEFENDANT NEXPOINT ADVISORS, L.P. IN SUPPORT OF MOTION TO EXTEND EXPERT DISCLOSURE AND DISCOVERY DEADLINES

TO THE HONORABLE STACEY G.C. JERNIGAN, U.S. BANKRUPTCY JUDGE:

COMES NOW NexPoint Advisors, L.P. (“NexPoint”), one of the defendants in the above styled and numbered Adversary Proceeding initiated by Highland Capital Management, L.P. as the plaintiff (the “Debtor”), and files this its *Reply* (the “Reply”) in support of its *Motion to Extend Expert Disclosure and Discovery Deadlines* (the “Motion”), and replying to the *Objection to Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines* (the “Objection”), filed by the Debtor, respectfully stating as follows:

I. SUMMARY

1. The Shared Services Agreement required the Debtor to assist and *advise* with payments, including on notes. That is in the contract. The Debtor’s former CFO confirmed it. The Shared Services Agreement contains a standard of care that the Debtor had to follow. That is also in the contract. And the Fifth Circuit confirms that expert testimony is appropriate, and potentially *required*, when the standard of care is not obvious. Here, it was obvious until it wasn’t. Before Mr. Waterhouse’s deposition, the standard of care was not at issue *per se*. The Defendant simply alleged the Debtor was obligated to facilitate the December payment but did not. That came down to simple contract interpretation. No expert was needed because any lay juror could understand that the Debtor breached its duties by doing nothing to facilitate the payment. But things changed after Mr. Waterhouse’s testimony in late October, when he testified that Mr. Dondero allegedly *told* him not to pay this note. The question then became what the Debtor was obligated to do next under the contractual standard of care. The answer is not obvious. And it is the type of issue on which a jury could only benefit from expert opinion testimony. This is precisely the type of case where the Fifth Circuit finds expert testimony appropriate, if not required. Nor is there prejudice to the Debtor: there is no trial setting, the Debtor can contest the admission of the expert’s testimony and present its own rebuttal, and, if the Debtor prevails, it also can also seek to recover all collection costs.

II. THE EXPERT TESTIMONY IS APPROPRIATE

2. The Shared Services Agreement, in place during November and December, 2020, provides as follows:

Section 6.01. Standard of Care. Except as otherwise expressly provided herein, each Covered Person shall discharge its duties under this Agreement with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. To the extent not

inconsistent with the foregoing, each Covered Person shall follow its customary standards, policies, and procedures in performing its duties hereunder.

See Rukavina Declaration, Exh. A at § 6.01.

3. “Covered Person” includes the “Staff and Services Provider,” *i.e.* the Debtor, and its managers, directors, officers, and shareholders. *See id.* at p 2. There can be no dispute that section 6.01 applied to the Debtor itself, to Mr. Waterhouse, and to the other employees involved (David Kloss, the controller, and Kristin Hendrix, the senior accountant).

4. The Debtor argues that section 6.01 applies only to duties specifically set forth in the Shared Services Agreement, and that the duty to facilitate payments on NexPoint’s behalf is not among those duties. This argument is wrong. The Shared Services Agreement identifies at least three services that the Debtor was required to provide that are directly on point:

(a) *Back- and Middle Office.* Assistance and advice with respect to back- and middle-office functions including, but not limited to . . . finance and accounting, payments, operation, book keeping, cash management . . . accounts payable . . .

(k) *Ancillary Services.* Assistance and advice on all things ancillary or incidental to the foregoing.

(l) *Other.* Assistance and advice relating to such other back- and middle-office services in connection with the day-to-day business of [NexPoint] as [NexPoint] and [the Debtor] may from time to time agree.

See id. at § 2.02 (emphasis added).

5. Assistance and advice—again, *advice*—with respect to “payments” is expressly included. And, should there be any doubt, the Debtor’s own Chief Financial Officer at the time confirmed that it was “reasonable for NexPoint to rely on the debtors’ employees to inform NexPoint of an upcoming payment due on the \$30 million promissory note.” *See* Rukavina Declaration at Exh. C, 337:22-338:8. That is why NexPoint was paying millions of dollars to the Debtor, to assist and *advise* NexPoint with respect to NexPoint’s payment obligations. Advice would include advising NexPoint of the consequences of a potential default, especially given the

Debtor's conflict-of-interest at the time between being NexPoint's creditor as well as its accounting, payment, and legal professional. This is especially the case if Mr. Dondero in fact instructed Mr. Waterhouse not to make the payment on the belief that the payment was not due, or would be netted against NexPoint's overpayments to the Debtor.

6. Next, the Debtor argues that expert testimony is not proper on the scope of a party's legal duty, because that is a legal conclusion for the Court. NexPoint agrees. The Debtor also argues that whether the Debtor owed or breached a legal duty is for the jury to decide. NexPoint agrees in part: whether duties are *breached* is an issue for the jury; not whether duties were owed. *See Askanese v. Fajto*, 130 F.3d 657, 673 (5th Cir. 1997). None of these issues are present here: the Court will construe the Shared Services Agreement as a matter of law; that agreement contains section 6.01, and the Court will construe that section. But, the standard of care in that section is:

the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

See Rukavina Declaration, Exh. A at § 6.01.

7. The issue is simple: if the jury finds that Mr. Dondero did in fact instruct Mr. Waterhouse not to make the payment, then did the Debtor fail to act with "the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims" by failing to do anything to advise NexPoint as to the consequences of a default, failing to confirm that Mr. Waterhouse correctly understood the instruction, or not even trying to dissuade Mr. Dondero from his alleged instruction? As simple as this issue appears to sophisticated bankruptcy professionals, it is not one a lay juror could resolve from personal experience or common sense.

8. “Expert testimony is generally required to prove the applicable standard of care.” *Quijano v. United States*, 325 F.3d 564, 567 (5th Cir. 2003) (emphasis added); *Streber v. Hunter*, 221 F.3d 701, 724 (5th Cir. 2000) (“Breach of the standard of care must generally be proven by expert testimony”). [E]xpert testimony is necessary to establish the standard of care . . . Similarly, breach of a fiduciary duty or a conflict of interest requires proof of expert testimony.” *Geiserman v. MacDonald*, 893 F.2d 787, 793-94 (5th Cir. 1990) (internal quotations removed) (emphasis added). An expert is appropriate, and potentially needed, for the jury to understand whether the Debtor employed “the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” That should not be a controversial proposition.

9. The Debtor cites the Fifth Circuit’s opinion in *Askanese v. Fajto* as support for its argument. 130 F.3d 657 (5th Cir. 1997). In that opinion, the Fifth Circuit affirmed the exclusion of an expert because “[i]t is not for [the expert] to tell the trier of fact what to decide.” *Id.* at 1997. Here, NexPoint’s expert would not be telling the jury what to decide; only whether, in his opinion, the Debtor’s actions and inactions breached the duties as otherwise specified in the Shared Services Agreement and construed by the Court. The Debtor would have the ability to have a rebuttal expert, and the jury would be free to disregard the expert’s testimony. NexPoint’s expert would not be telling the jury how to decide, only his opinion as to whether the standard of care as specified in the agreement and construed by the Court was met. Conversely, if NexPoint’s lay witnesses purported to present evidence on these duties at trial, the Debtor would certainly object to any such evidence because it would *not* be expert testimony.

III. REPLY REGARDING “GOOD CAUSE”

A. NEXPOINT’S NEED AND GOOD CAUSE FOR LEAVE

10. The Debtor argues that NexPoint seeks leave because the testimony of its witness, Mr. Waterhouse, allegedly did not go well. But the Debtor takes some liberties in its argument. For one thing, Mr. Waterhouse is not one of NexPoint’s witnesses. In fact, the Debtor took his deposition and he is not NexPoint’s witness. Also, his deposition did not go badly for NexPoint. On the contrary, other than his unexpected testimony regarding Mr. Dondero’s alleged instruction not to pay the note, his testimony was not harmful to NexPoint and was, objectively, neither helpful nor harmful to either side. The Debtor makes these wrong allegations solely to shoehorn its argument into a case that it cites. *See* Objection at ¶ 43.

11. But the more pertinent objection is that, as NexPoint has always argued that the Debtor caused the alleged default, NexPoint should have retained an expert months ago: “[i]f NexPoint wanted to offer ‘expert testimony’ concerning Highland’s duties under the SSA, it had nine months to do so, and Mr. Waterhouse’s testimony, expected or not, does nothing to change that.” Objection at ¶ 44. This argument is wrong as a matter of Fifth Circuit law.

12. Prior to Mr. Waterhouse’s deposition, NexPoint did not know that Mr. Dondero allegedly instructed Mr. Waterhouse not to make the payment. NexPoint understood that the Debtor’s employees simply dropped the ball on ensuring that the payment was made. Under those facts, expert testimony would not have been needed because anyone, using common sense, can determine whether the Debtor in that case breached its duties. But the situation changed when Mr. Waterhouse gave his deposition testimony because, if the jury believes that Mr. Dondero gave the instruction, now the situation is much more complicated; *i.e.* whether, in light of such an alleged instruction, the Debtor nevertheless breached its duties. This important distinction has been aptly explained by the Fifth Circuit in a case where the issue was whether a trustee breached his duties:

Finders of fact are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn. Accordingly, we have explained that, as a general rule, expert testimony is not needed in many if not most cases. Moreover, although expert testimony may be necessary in a professional negligence case to establish the standard of care for the industry, an exception applies in instances of negligence that are a matter of common knowledge comprehensible to laymen.

Although Liberty Mutual contends that expert testimony was required in this case, Lamesa suggests that inasmuch as the Trustee failed to act in the face of obvious danger posed by Mrs. Schooler's ready access to the bankruptcy estate's assets, and in the face of repeated warnings and inquiries by a concerned creditor, a layperson could discern that the standard of care was not met in this case.

We agree with Lamesa that, under the facts of this case, expert testimony was not required to establish that the Trustee breached her duties. While the precise course of action the Trustee should have taken may be subject to reasonable debate, it requires no technical or expert knowledge to recognize that she affirmatively should have undertaken *some* form of action to acquire for the bankruptcy estate the assets to which it was entitled. As the bankruptcy court explained, by doing nothing, the Trustee ignored basic human nature.

In re Schooler, 725 F.3d 498, 514-15 (5th Cir. 2013) (internal citations and quotations omitted).

13. So too, here, NexPoint did not need an expert for the jury to conclude that the Debtor breached its duties by doing *nothing* in light of the upcoming payment, without Mr. Dondero's alleged instruction. But if the jury finds that that instruction occurred, the situation is more complicated: did the Debtor have an affirmative duty after receiving such instruction to seek confirmation, advise as to the potential consequences of a default, or try to dissuade Mr. Dondero? These issues are not within a lay person's common knowledge or common sense. And this is all the more important because, at the same time, the Debtor was providing legal services to NexPoint; *i.e.* the Debtor was NexPoint's law firm.

14. By analogy, it is one thing for a lawyer to fail to inform his client of an upcoming deposition, which leads to a "death penalty" order. Anyone can know, using common sense, that the lawyer committed professional negligence. But what if the lawyer advises the client of the

deadline, but the client tells the lawyer he does not feel like attending the deposition? Can the lawyer sit on his hands and do nothing, or must the lawyer take affirmative steps, for example, to inform the client of the potential consequences, try to reschedule the deposition, or try to dissuade the client from his decision? That is a much more difficult question. Here again:

the general rule is that expert testimony is required to establish the standard of care in a legal malpractice action; an exception to the general rule is recognized where the attorney's lack of care and skill is so evident that the jury can find negligence as a matter of common knowledge, e.g., when an attorney allows the statute of limitations to run on a client's claim.

Floyd v. Hefner, 556 F. Supp. 2d 617, 643 (S.D. Tex. 2008).

15. The Debtor's objection that the expert testimony is irrelevant is likewise wrong. NexPoint has explained above why expert testimony is appropriate, and arguably required, to address the standard of care in the Shared Services Agreement. NexPoint has likewise demonstrated that the Shared Services Agreement expressly provides for assistance and advice with respect to "payments." Here, the Debtor attempts misdirection:

NexPoint does not and cannot identify any provision in the SSA that imposes a duty on Highland to make Annual Installment payments on NexPoint's behalf without direction from an authorized NexPoint representative.

Objection at ¶ 49.

16. NexPoint has never argued that the Debtor should have made the payment "on NexPoint's behalf," in the sense that the Debtor would do so from its funds. And, the issue is not whether the payment should have been made without direction from an authorized NexPoint representative—itsself a disputed question of fact made much more complicated by the fact that it was the same individual responsible for the payment on both sides, who was also an officer of both parties. Even if the Debtor is correct, though, the point is that the Debtor failed in its duties to *seek* such authorization.

17. The Debtor also argues that, as NexPoint should always have known that Mr. Dondero did not authorize the payment, Mr. Waterhouse’s testimony that Mr. Dondero instructed him not to make the payment does not change the situation such that NexPoint’s delay is unreasonable. First, the issue is not whether NexPoint instructed the Debtor to make the payment; that is merely the Debtor’s interpretation of its duties under the Shared Services Agreement and the Court or the jury will have to decide whether that is correct. NexPoint does not agree that is the correct standard (and its expert has not been asked to opine on that issue). Second, the issue is the Debtor’s failure to *advise* NexPoint on the issue—and *advice* is an express duty under the contract. Third, the Debtor fails to recount the whole of Mr. Dondero’s testimony on the “authorization” issue:

Q. Okay. And do you know whether anybody acting on behalf of any of the three corporate obligors under the term notes ever took any steps in December 2020 to make sure that Highland would, in fact, make the payments that were due at year-end?

MS. DEITSCH-PEREZ: Object to the form.

A. No, there was a reliance on Highland.

Q. Okay. Is it your testimony that Highland was authorized to make the payments under the notes at year-end without being directed by a representative of the three corporate obligors?

A. Yes. It is my contention that that is how it worked in prior years also.

Q. And so you believe that nobody on behalf of any of the corporate obligors ever authorized or directed Highland to make the payments but that Highland did it without -- without direction?

MS. DEITSCH-PEREZ: Object to the form.

A. Yes, typically. And in 2017 or 2018, 2019, for sure.

Morris Declaration Exh. 4 at: 462:24-463:25.

18. And contrary to the Debtor’s characterization of Mr. Waterhouse’s testimony, Mr.

Waterhouse testified as follows:

Q. Well, what about long term loans? Was it reasonable for NexPoint to expect debtor employees to ensure that NexPoint timely paid its obligations under long-term notes?

MR. MORRIS: Objection to the form of the question.

MS. DANDENEAU: Objection to form.

A. I mean, that is one of the things that the Highland personnel did provide to the advisors. Yes, we would -- we would -- over the years, yes, we -- we -- we -- we did do that generally. Again, I don’t remember specifically but, yes, generally we -- you know, we did do that.

* * *

Q. And what role in years prior to 2020 would employees of the debtor have had with respect to NexPoint making that annual payment?

A. We -- we -- we would have -- I keep saying “we.” The team would have calculated any amounts due under that loan and other loans, as -- as standard course. We would -- since we provided treasury services to the advisors, we would inform the -- the -- the -- we informed Mr. Dondero of any cash obligations that are forthcoming, whether we do cash projections. If, you know, any of these payments would have -- or, you know, the sum total of all of these payments, including any note payments, if there were any cash shortfalls, we would have informed Mr. Dondero of any cash shortfalls. We could adequately plan, you know, in instances like that.

Or, sorry, we -- I say “we” -- I keep saying “we” -- I keep wearing my -- again, my -- my treasurer hat. But, yes, it is to -- it is to inform Mr. Dondero of the obligations of the advisors in terms of cash and obligations that are -- are upcoming and that -- and that are -- are scheduled to be paid.

* * *

Q. And based on your experience, would it have been reasonable for NexPoint to rely on the debtors’ employees to inform NexPoint of an upcoming payment due on the \$30 million promissory note?

MR. MORRIS: Objection to form of the question.

MS. DANDENEAU: Objection to form.

A. Yes. Yes, they did. I mean, but I mean, but I don't think these -- these notes were any secret to anybody

Rukavina Declaration at Exh. C: 333:14-338:8.

19. The situation was not, therefore, as the Debtor construes it; that the Debtor could sit around and do nothing until an instruction to pay was issued. On the contrary, as the Shared Services Agreement requires, it was to *advise* NexPoint: “to inform Mr. Dondero of the obligations of the advisors in terms of cash and obligations that are [] upcoming . . . [and] scheduled to be paid.” Whatever else can be said about what happened, and whether the jury will believe Mr. Dondero or Mr. Waterhouse, one thing is clear: the course that had been followed for years was not followed here, because the Debtor failed to inform Mr. Dondero of the upcoming alleged obligation, whether outright or because of Mr. Dondero’s alleged instruction not to pay.

20. On the issue of timing, NexPoint has already explained that, while it understood that Mr. Dondero instructed Mr. Waterhouse to make no further payments on the Shared Services Agreement, Mr. Dondero never made a similar instruction regarding the Note. *See* Rukavina Declaration at ¶ 10. Mr. Waterhouse’s counsel prevented NexPoint’s counsel from discussing the matter with Mr. Waterhouse, due to ongoing litigation between the Debtor and Mr. Waterhouse. *See id.* at ¶ 11. If the Court questions the truthfulness of this, the Court need only review the transcript of Mr. Waterhouse’ deposition, where NexPoint’s attorney asked four (4) times whether Mr. Waterhouse was sure of the instruction, as evidence of counsel’s surprise at the answer. *See* Rukavina Declaration a Exh. C: 390:4-392:17.

21. At the same time, it appears that the Debtor knew what Mr. Waterhouse’s answer would be well ahead of time—an issue also relevant below to prejudice. On May 11, 2021, the Debtor served its amended responses to NexPoint’s discovery. *See* Supplemental Rukavina

Declaration [filed concurrently herewith] at Exh. “A.” In those, the Debtor answered the following interrogatory:

INTERROGATORY NO. 2:

If the Debtor contends that it was not responsible for causing payments to be made under the Note on NexPoint’s behalf pursuant to the Shared Services Agreement, explain the legal and factual basis for such contention.

RESPONSE TO INTERROGATORY NO. 2:

The Debtor objects to Interrogatory No. 2 on the ground that it seeks a legal conclusion or legal analysis. Subject to its objection, the Shared Services Agreement did not provide that the Debtor was responsible for causing payments to be made under the Note. The Debtor further states that after the Debtor sent NexPoint the Default Letters, NexPoint did not contend that the Debtor was required to make payments under the Note on NexPoint’s behalf. The Debtor’s personnel caused the January Payment to be processed upon instruction from NexPoint.

See Supplemental Rukavina Declaration at Exh. “B” at p. 7.

22. Even though NexPoint asked the Debtor to explain, factually, why the Debtor was not responsible for causing payments to be made, rather than including in its answer that Mr. Dondero gave Mr. Waterhouse the alleged instruction, the Debtor merely answered (as it does now, despite the clear language of the Shared Services Agreement) that the contract did not impose this responsibility on the Debtor. Yet, the Debtor’s answer to the following request for production strongly suggests that the Debtor knew of the alleged instruction, yet did not include it in the interrogatory answer:

REQUEST FOR PRODUCTION NO. 1:

All Communications pursuant to which any director, officer, or employee of the Debtor was advised or instructed not to make the December Payment or to cause the December Payment to be made.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

Subject to the General Objections, the Debtor is unaware of any documents responsive to Request for Production No. 1. Any Communications responsive to Request for Production No. 1 were verbal.

See id. at p. 10 (emphasis added).

23. The Debtor could and should have stated what these verbal communications were in May, 2021. Instead, NexPoint was forced to wait until Mr. Waterhouse’s deposition to learn of the alleged verbal communication. Alternatively, the Debtor too did not know ahead of time how Mr. Waterhouse would answer, but then it can hardly accuse NexPoint of any delay.

B. EXPERT TESTIMONY IS RELEVANT

24. NexPoint has already addressed above why expert testimony is appropriate, why it may even be required, and why, both pursuant to the language of the contract and the Debtor’s CFO’s testimony, the Debtor had *some* level of duties with respect to the payment.

25. The Debtor argues that the agreement exculpates the Debtor for “any acts or omissions unless it is determined by a court of competent jurisdiction to ‘be the result of gross negligence or to constitute fraud or willful misconduct.’” Objection at p. 13, n. 8. That is not true. That exculpation provision applies only to the “conduct of the business of [NexPoint].” Rukavina Declaration Exh. A at § 6.02. The payment of a note is not the “business” of NexPoint; its business is managing and advising funds and investments. Even so, if the Debtor argues otherwise, then that is a matter for the jury, and the issue is not one appropriate to the present Motion.

26. The Debtor’s reliance on the Shared Service Agreement’s indemnification provision is likewise unavailing: “an indemnity provision does not apply to claims between the parties to the agreement.” *Derr Constr. Co. v. Houston*, 846 S.W.2d 854, 858 (Tex. App. – Houston [14th Dist.] 1992). *Accord In re 1701 Commerce LLC*, 2014 Bankr. LEXIS 3962 at *40 (Bankr. N.D. Tex. 2014) (“[u]nder Texas law, indemnity agreements do not generally apply to

claims between the parties to an agreement”). There is an exception if the agreement expressly provides that the indemnification applies to a claim brought by one party against the other, *see In re 1701 Commerce LLC*, 2014 Bankr. LEXIS at *40, but the language in the Shared Services Agreement does not so provide.

C. THE DEBTOR WILL NOT BE PREJUDICED

27. The Debtor will not suffer prejudice if the Motion is granted. If the Debtor hires a rebuttal expert and prevails at trial, then it will be entitled to the costs of that expert. The scheduling order provided for expert designations by October 29, 2021. NexPoint filed its motion on that day. The Debtor cannot credibly argue prejudice with respect to added costs when the Debtor would have incurred those costs anyway had NexPoint provided an expert report on that day. In this respect:

any additional costs incurred from an extension would not be unreasonable. Here, Plaintiffs seek an extension so they can offer an expert witness for their products liability claims. Defendants have been aware of these claims since this case’s inception. Because expert witnesses are crucial for Plaintiffs’ prima facie case, Defendants have known they would need to prepare rebuttal evidence since this case began on October 14, 2019. These facts do not present an instance in which a party adds an additional claim, or introduces an eleventh-hour witness, to foist additional litigation costs without warning.

Adams v. Medtronics Inc., 2021 U.S. Dist. LEXIS 47246 at *12 (E.D. Tex. 2021).

28. Likewise here, the Debtor always knew of NexPoint’s defense. And, as discussed above, it appears that the Debtor (but not NexPoint) knew what Mr. Waterhouse’s testimony would be in May, 2021. Again, had NexPoint provided an expert report on October 29, the Debtor would have incurred whatever costs it would have incurred anyway, except that, in that instance, the Debtor would likely be moving to extend the expert deadline, since the scheduling order does not provide for a separate rebuttal expert deadline. Moreover, the Debtor will have every opportunity

to contest the expert's admission at trial; the Court's approval of the Motion does not mean that the expert's testimony is admissible.

29. The Debtor's discussion of a "continuance" is irrelevant, as trial has not been set and likely will not be set for a long time given the Debtor's own desire to pursue summary judgment practice. In that respect, assuming the Court grants the Motion on December 13, 2021, and the Debtor needs one month for a rebuttal expert, and the parties need two weeks for expert depositions, that would still mean that this case would be trial ready by the end of February, 2022—thirteen (13) months after being filed. This is not unreasonable and is faster than many cases are declared trial ready. In fact, the Debtor has indicated that it will move for summary judgment by December 17, 2021, with responses due on January 17, 2022, with the Debtor's reply on January 31, 2022—a schedule the Court accepted. And, on December 7, 2021, the Debtor apparently filed motions seeking to consolidate for trial various note cases, including this one, which motion alone will likely take significant time to decide as several District Court judges are involved. In other words, this Adversary Proceeding is not going to be certified as trial ready for a few months at least. Nor would granting this Motion affect the timing of the summary judgment proceedings; whether the Debtor breached the standard of care is a question of fact outside the scope of summary judgment.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, NexPoint respectfully requests that the Court overrule the Debtor's objection and grant the Motion.

RESPECTFULLY SUBMITTED this 8th day of December, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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**ATTORNEYS FOR NEXPOINT ADVISORS,
L.P.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on December 8th, 2021, a true and correct copy of the foregoing document, including the exhibit thereto, was served via the Court's CM/ECF system on parties entitled to notice thereof, including on counsel for the Debtor.

/s/ Davor Rukavina

Davor Rukavina

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DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

SUPPLEMENTAL DECLARATION OF DAVOR RUKAVINA

The undersigned, Davor Rukavina, hereby declares under penalty of perjury pursuant to the laws of the United States of America the following:

1. My name is Davor Rukavina. I am over the age of 21, have never been convicted of a felony or crime of moral turpitude, and am otherwise qualified to give this Declaration.
2. I am an attorney duly licensed to practice law in the State of Texas. I am lead counsel for NexPoint Advisors, L.P. (“NexPoint”), in the above styled and numbered Adversary Proceeding. As such, I directly supervised discovery served by NexPoint in this Adversary Proceeding and the receipt of responses to the same from Highland Capital Management, LP (the “Debtor”), and I have personal knowledge of the same (although not the underlying facts).
3. Attached to this Declaration as Exhibit “A” is a true and correct copy of discovery served by NexPoint on the Debtor on or about March 31, 2021.

4. Attached to this Declaration as Exhibit “B” is a true and correct copy of the Debtor’s amended responses to said discovery.

5. I hereby swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge and ability.

Executed: December 8, 2021.

/s/ Davor Rukavina
DAVOR RUKAVINA

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HIGHLAND CAPITAL MANAGEMENT,	§	
L.P.,	§	
	§	
Plaintiff,	§	
	§	Adv. No. 21-03005
v.	§	
	§	
NEXPOINT ADVISORS, L.P.	§	
	§	
Defendant.	§	

**DEFENDANT’S REQUESTS FOR ADMISSIONS, INTERROGATORIES,
AND REQUESTS FOR PRODUCTION TO PLAINTIFF**

TO: Highland Capital Management, L.P. through its counsel of record, Jeffrey Pomerantz and John Morris, Pachulski Stang Ziehl & Jones LLP, 10100 Santa Monica Blvd., 13th Floor, Los Angeles, CA 90067, jpomerantz@pszjlaw.com; jmorris@pszjlaw.com; Zachery Annable, Hayward PLLC, 10501 N. Central Expy., Ste. 106, Dallas, TX 75231, zannable@haywardfirm.com

NexPoint Advisors, L.P., the defendant in the above-styled and numbered adversary proceeding, hereby serves these *Requests for Admissions, Interrogatories, and Requests for*

Production pursuant to Rules 33, 34, and 36 of the Federal Rules of Civil Procedure and Rules 7033, 7034, and 7036 of the Federal Rules of Bankruptcy Procedure.

Highland Capital Management, L.P. is instructed to serve its responses to these requests and interrogatories, along with all documents responsive to these requests, no later than **April 30, 2021**, by delivering them to Julian Vasek, Munsch Hardt Kopf & Harr P.C., 500 N. Akard St., Ste. 3800, Dallas, Texas 75201, jvasek@munsch.com.

Pursuant to Federal Rule of Civil Procedure 34(b)(1)(C), made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7034, electronically stored information should be produced in native format.

I. **DEFINITIONS**

1. “Adversary Proceeding” means the above-captioned adversary proceeding.
2. “Committee” means the Official Committee of Unsecured Creditors appointed in the Debtor’s bankruptcy case, including its officers, directors, employees, agents, and representatives.
3. “Communication” or “Communications” means every kind of written, recorded, or oral transmission of information.
4. “Complaint” means the *Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor’s Estate* filed at Dkt. No. 1 in the Adversary Proceeding.
5. “Debtor” means Highland Capital Management, L.P., including its officers, directors, employees, agents, and representatives.
6. “December Payment” means the payment that was allegedly due on December 31, 2020 under the Note.

7. “Default Letters” means the letters sent from the Debtor to NexPoint dated January 7, 2021 and January 15, 2021 that are attached as exhibits to the Complaint.

8. “Document” or “Documents” means writings of every type and from any source, including e-mail and electronic documents and including originals and nonidentical copies thereof that are in your possession, custody, or control or known by you to exist.

The term also includes communications not only in words, but in symbols, pictures, sound recordings, film, tapes, and information stored in, or accessible through, computer or other information storage or retrieval systems. If the information is kept in a computer or informational storage or retrieval system, the term also includes codes and programming instructions and other materials necessary to understand such systems.

The term includes, but is not limited to: the original and all copies (regardless of origin and whether or not including additional writing thereon or attached thereto) of pictures, loan agreements, memoranda, reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, contracts, cables, electronic mails, deleted electronic mails, text messages, notations or memoranda of any sort of any conversation, telephone calls, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes and amendments of any of the foregoing), graphic or oral records or representations of any kind, (including, without limitation, tapes, cassettes, discs and records)

and other written, printed, typed, photographed, or other graphic recorded matter of any kind or nature, however reproduced and whether preserved in writing, phono record, film, photograph, type or video tape.

9. “January Payment” means the payment made by NexPoint under the Note on January 14, 2021 in the amount of \$1,406,111.92.

10. “NexPoint” means NexPoint Advisors, L.P., including its officers, directors, employees, agents, and representatives.

11. “Note” means that certain *Promissory Note* attached to the Complaint as Exhibit 1.

12. “Shared Services Agreement” means that certain *Amended and Restated Shared Services Agreement* between NexPoint and the Debtor, dated effective as of January 1, 2018.

II. REQUESTS FOR ADMISSIONS

1. Admit that the Debtor was responsible for making payments under the Note on NexPoint’s behalf pursuant to the Shared Services Agreement.

2. Admit that the Debtor was responsible for causing payments to be made under the Note on NexPoint’s behalf pursuant to the Shared Services Agreement.

3. Admit that the Debtor did not make the December Payment on NexPoint’s behalf.

4. Admit that the Debtor did not cause the December Payment to be made on NexPoint’s behalf.

5. Admit that, pursuant to the Shared Services Agreement, the Debtor made a payment on the Debtor’s behalf under the Note on or about December 31, 2018.

6. Admit that, pursuant to the Shared Services Agreement, the Debtor caused a payment to be made on the Debtor’s behalf under the Note on or about December 31, 2018.

7. Admit that, pursuant to the Shared Services Agreement, the Debtor made a payment on the Debtor's behalf under the Note on or about December 31, 2019.

8. Admit that, pursuant to the Shared Services Agreement, the Debtor caused a payment to be made on the Debtor's behalf under the Note on or about December 31, 2019.

9. Admit that, prior to the alleged default on December 31, 2020, NexPoint never defaulted under the Note.

III. INTERROGATORIES

1. If the Debtor contends that it was not responsible for making payments under the Note on NexPoint's behalf pursuant to the Shared Services Agreement, explain the legal and factual basis for such contention.

2. If the Debtor contends that it was not responsible for causing payments to be made under the Note on NexPoint's behalf pursuant to the Shared Services Agreement, explain the legal and factual basis for such contention.

3. Provide the following information with respect to each payment made under the Note since its inception: (a) the date such payment was made; (b) the amount of such payment; (c) the individuals involved in making such payment or causing such payment to be made; (d) the account from which such payment was made; and (e) the method by which such payment was made.

4. Describe in detail all steps the Debtor took, including by identifying every individual involved, to evaluate the Note, the December Payment, the January Payment, and/or the alleged default.

5. Describe in detail all steps the Debtor took, including by identifying every individual involved, to evaluate the Debtor's obligations to make a payment or cause a payment to be made under the Note on NexPoint's behalf.

6. Identify all records the Debtor kept regarding services the Debtor provided to NexPoint under the Shared Services Agreement with respect to the Note, and indicate whether such records identify what employee(s) provided services, when such services were provided, and how much time was spent providing such services.

7. For each request for admission above that the Debtor did not unequivocally admit, explain the factual and legal basis for not doing so.

IV. REQUESTS FOR PRODUCTION

1. All Communications pursuant to which any director, officer, or employee of the Debtor was advised or instructed not to make the December Payment or to cause the December Payment to be made.

2. All Communications between directors, officers, and/or employees of the Debtor related to the Note.

3. All Communications between directors, officers, and/or employees of the Debtor related to any and all defaults under the Note.

4. All Communications between directors, officers, and/or employees of the Debtor related to the December Payment.

5. All Communications between directors, officers, and/or employees of the Debtor related to prior payments the Debtor made or caused to be made on NexPoint's behalf under the Note.

6. All Communications between directors, officers, and/or employees of the Debtor related to the January Payment.

7. All Communications with third parties related to the Note.

8. All Communications with third parties related to the December Payment.

9. All Communications with third parties related to the January Payment.

10. All Communications with third parties related to prior payments the Debtor made or caused to be made on NexPoint's behalf under the Note.

11. All Communications with third parties related to any and all defaults under the Note.

12. All Communications with the Committee (including, but not limited to, Communications solely between counsel for the Debtor and the Committee) related to the Note, any and all defaults under the Note, the December Payment, the January Payment, and/or the Default Letters.

13. All ledgers, statements, and accounting records related to payments made under the Note to date.

14. All Documents pursuant to which the Debtor was authorized and/or required to make payments or cause payments to be made on NexPoint's behalf under the Note.

15. All Documents and Communications pursuant to which the Debtor contends it was relieved of its obligation to make payments or cause payments to be made under the Note on NexPoint's behalf pursuant to the Shared Services Agreement.

16. All Communications related to potentially marketing and/or selling the Note.

17. The Shared Services Agreement, including all amendments and supplements thereto, whether informal or formal, regardless of how documented.

18. All Documents and Communications construing the Debtor's obligations to NexPoint under the Shared Services Agreement.

19. All Documents and Communications related to the scope of the Debtor's obligations to NexPoint under the Shared Services Agreement.

20. All Documents and Communications identified in connection with Interrogatory 6 above.

21. All billing statements from Pachulski Stang Ziehl & Jones LLP and Hayward PLLC related to fees the Debtor seeks to collect in the Adversary Proceeding.

RESPECTFULLY SUBMITTED this 31st day of March, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Julian P. Vasek

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**COUNSEL FOR NEXPOINT
ADVISORS, L.P.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 31st day of March, 2021, a true and correct copy of this document was electronically served via email on counsel for the Debtor (jpomerantz@pszjlaw.com; jmorris@pszjlaw.com; zannable@haywardfirm.com), as well as by first class U.S. mail, postage prepaid to the following recipients:

Zachery Z. Annable
HAYWARD PLLC
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231

Jeffrey N. Pomerantz
PACHULSKI STANG ZIEHL & JONES LLP
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067

/s/ Julian P. Vasek

Julian P. Vasek, Esq.

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*)
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Counsel for the Debtor and Debtor-in-Possession

**IN THE UNITED STATES DISTRICT 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.,	§	
Plaintiff,	§	Adv. Proc. No. 21-03005
v.	§	
NEXPOINT ADVISORS, L.P.,	§	
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.

**DEBTOR’S AMENDED RESPONSES AND OBJECTIONS TO NEXPOINT ADVISORS,
L.P.’S REQUESTS FOR ADMISSIONS, INTERROGATORIES,
AND REQUESTS FOR PRODUCTION**

Highland Capital Management, L.P., (“Plaintiff” or the “Debtor”) hereby responds to *Defendant’s Requests for Admissions, Interrogatories, and Requests for Production to Plaintiff* (the “Requests”)² served by NexPoint Advisors, L.P. (“NexPoint” or “Defendant”) in the above-captioned adversary proceeding (the “Adversary Proceeding”). The Debtor’s amended responses and objections to the Requests (the “Amended Responses”) are made pursuant to Federal Rules of Civil Procedure (“FRCP”) 26, 33, and 34 as made applicable in bankruptcy cases pursuant to Federal Rules of Bankruptcy Procedure 7026, 7033, and 7034.

GENERAL OBJECTIONS

Unless otherwise specified, the following general objections and caveats are applicable to each and every Response and are incorporated into each Response as though set forth in full:

1. The Responses contained herein are based upon information presently known and ascertained by the Debtor.
2. The Debtor objects to the Requests to the extent they seek information or documents that are protected from discovery by the attorney-client privilege, the attorney work product doctrine or any other privilege or immunity. The inadvertent disclosure or production of any document that is protected from discovery by any privilege or immunity shall not constitute a waiver of any such privilege or immunity. All references in these objections and responses to the Debtor’s agreement to produce documents shall be construed to mean non-privileged documents.
3. The Debtor objects to the Requests to the extent they request information that is not reasonably or readily available to it, in its possession, custody or control, or is more

² Capitalized terms not defined herein shall have the meanings set forth in the Requests.

readily available to NexPoint from another source or for which the burden of obtaining such information is not substantially greater for NexPoint than it is for the Debtor.

4. The Debtor objects to the Requests to the extent they call for legal conclusions and/or legal analyses.

5. All specific responses to the Requests are provided without waiver of, and with express reservation of (a) all objections as to competency, relevancy, materiality, and admissibility of the responses and the subject matter thereof as evidence for any purpose in any further proceedings in this matter; (b) all privileges, including the attorney-client privilege and work product doctrine; (c) the right to object to the use of such responses, or the subject matter thereof, on any ground in any further proceeding in this action; and (d) the right to object on any ground at any time to a demand or request for further responses to these or any other discovery requests or other discovery proceedings.

6. The Debtor objects to the Requests to the extent they seek to expand on or conflict with Federal Rules of Civil Procedure, the Federal Rules of Bankruptcy Procedure and/or the Local Rules of the Bankruptcy Court for the Northern District of Texas.

7. The Debtor's agreement to produce documents with respect to a specific Request shall not be construed as a representation that such documents actually exist or are within Plaintiff's possession, custody or control.

8. These General Objections and Responses shall be deemed to be incorporated by reference into the Specific Responses and Objections set forth below.

RESPONSES TO REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1:

Admit that the Debtor was responsible for making payments under the Note on NexPoint's behalf pursuant to the Shared Services Agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 1:

The Debtor denies Request for Admission No. 1 on the ground that the Shared Services Agreement does not provide that the Debtor was responsible for making payments under the Note.

REQUEST FOR ADMISSION NO. 2:

Admit that the Debtor was responsible for causing payments to be made under the Note on NexPoint's behalf pursuant to the Shared Services Agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 2:

The Debtor denies Request for Admission No. 2 on the ground that the Shared Services Agreement does not provide that Debtor was responsible for causing payments to be made under the Note.

REQUEST FOR ADMISSION NO. 3:

Admit that the Debtor did not make the December Payment on NexPoint's behalf.

RESPONSE TO REQUEST FOR ADMISSION NO. 3:

Admit, providing that NexPoint did not request that any such payment be made, and providing also that when the Debtor received instruction from NexPoint to make a payment during January 2021, it did make the payment.

REQUEST FOR ADMISSION NO. 4:

Admit that the Debtor did not cause the December Payment to be made on NexPoint's behalf.

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

Admit, providing also that when the Debtor received instruction from NexPoint to cause a payment to be made during January 2021, it did so.

REQUEST FOR ADMISSION NO. 5:

Admit that, pursuant to the Shared Services Agreement, the Debtor made a payment on the Debtor's behalf under the Note on or about December 31, 2018.

RESPONSE TO REQUEST FOR ADMISSION NO. 5:

The Debtor admits that it made a payment on NexPoint's behalf, and at NexPoint's request and instruction, under the Note on or about December 31, 2018. The Debtor otherwise denies Request for Admission No. 5 on the grounds that the Shared Services Agreement speaks for itself and the Debtor did not make any payment on its own behalf.

REQUEST FOR ADMISSION NO. 6:

Admit that, pursuant to the Shared Services Agreement, the Debtor caused a payment to be made on the Debtor's behalf under the Note on or about December 31, 2018.

RESPONSE TO REQUEST FOR ADMISSION NO. 6:

The Debtor admits that it caused a payment to be made on NexPoint's behalf, and at NexPoint's request and instruction, under the Note on or about December 31, 2018. The Debtor otherwise denies Request for Admission No. 6 on the grounds that the Shared Services Agreement speaks for itself and the Debtor did not make any payment on its own behalf.

REQUEST FOR ADMISSION NO. 7:

Admit that, pursuant to the Shared Services Agreement, the Debtor made a payment on the Debtor's behalf under the Note on or about December 31, 2019.

RESPONSE TO REQUEST FOR ADMISSION NO. 7:

The Debtor admits that it made a payment on NexPoint's behalf, and at NexPoint's request and instruction, under the Note on or about December 31, 2019. The Debtor otherwise denies Request for Admission No. 7 on the grounds that the Shared Services Agreement speaks for itself and the Debtor did not make any payment on its own behalf.

REQUEST FOR ADMISSION NO. 8:

Admit that, pursuant to the Shared Services Agreement, the Debtor made a payment on the Debtor's behalf under the Note on or about December 31, 2019.

RESPONSE TO REQUEST FOR ADMISSION NO. 8:

The Debtor admits that it caused a payment to be made on NexPoint's behalf, and at NexPoint's request and instruction, under the Note on or about December 31, 2019. The Debtor otherwise denies Request for Admission No. 8 on the grounds that the Shared Services Agreement speaks for itself and the Debtor did not make any payment on its own behalf.

REQUEST FOR ADMISSION NO. 9:

Admit that, prior to the alleged default on December 31, 2020, NexPoint never defaulted under the Note.

RESPONSE TO REQUEST FOR ADMISSION NO. 9:

Admit.

OBJECTIONS AND RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

If the Debtor contends that it was not responsible for making payments under the Note on NexPoint's behalf pursuant to the Shared Services Agreement, explain the legal and factual basis for such contention.

RESPONSE TO INTERROGATORY NO. 1:

The Debtor objects to Interrogatory No. 1 on the ground that it seeks a legal conclusion or legal analysis. Subject to its objection, the Shared Services Agreement did not require that the Debtor to make payments under the Note on NexPoint's behalf. The Debtor further states that after the Debtor sent NexPoint the Default Letters, NexPoint did not contend that the Debtor was required to make payments under the Note on NexPoint's behalf. The Debtor's personnel processed the January Payment upon instruction from NexPoint.

INTERROGATORY NO. 2:

If the Debtor contends that it was not responsible for causing payments to be made under the Note on NexPoint's behalf pursuant to the Shared Services Agreement, explain the legal and factual basis for such contention.

RESPONSE TO INTERROGATORY NO. 2:

The Debtor objects to Interrogatory No. 2 on the ground that it seeks a legal conclusion or legal analysis. Subject to its objection, the Shared Services Agreement did not provide that the Debtor was responsible for causing payments to be made under the Note. The Debtor further states that after the Debtor sent NexPoint the Default Letters, NexPoint did not contend that the Debtor was required to make payments under the Note on NexPoint's behalf. The Debtor's personnel caused the January Payment to be processed upon instruction from NexPoint.

INTERROGATORY NO. 3:

Provide the following information with respect to each payment made under the Note since its inception: (a) the date such payment was made; (b) the amount of such payment; (c) the individuals involved in making such payment or causing such payment to be made; (d) the account from which such payment was made; and (e) the method by which such payment was made.

RESPONSE TO INTERROGATORY NO. 3:

See Exhibit A.

INTERROGATORY NO. 4:

Describe in detail all steps the Debtor took, including by identifying every individual involved, to evaluate the Note, the December Payment, the January Payment, and/or the alleged default.

RESPONSE TO INTERROGATORY NO. 4:

The Debtor objects to Interrogatory No. 4 on the grounds that it calls for a legal conclusion or legal analysis, is vague and ambiguous, and is overly broad and unduly burdensome. *See* Fed. R. Civ. P. 26(b)(1). Subject to its objection, the Debtor identifies the following individuals and entity in response to Interrogatory No. 4:

Jim Seery

Greg Demo

John Morris

Frank Waterhouse

Kristin Hendrix

DSI Consulting

INTERROGATORY NO. 5:

Describe in detail all steps the Debtor took, including by identifying every individual involved, to evaluate the Debtor's obligations to make a payment or cause a payment to be made under the Note on NexPoint's behalf.

RESPONSE TO INTERROGATORY NO. 5:

The Debtor objects to Interrogatory No. 5 on the grounds that it assumes the Debtor was obligated to make payments or cause a payment to be made under the Note on NexPoint's behalf. The Debtor further objects on the grounds that it calls for a legal conclusion or analysis, and is

overly broad and unduly burdensome. *See* Fed. R. Civ. P. 26(b)(1). Subject to its objection, the Debtor identifies the following individuals and entity in response to Interrogatory No. 5:

Jim Seery

Greg Demo

John Morris

Frank Waterhouse

Kristin Hendrix

Blair Hillis

DSI Consulting

INTERROGATORY NO. 6:

Identify all records the Debtor kept regarding services the Debtor provided to NexPoint under the Shared Services Agreement with respect to the Note, and indicate whether such records identify what employee(s) provided services, when such services were provided, and how much time was spent providing such services.

RESPONSE TO INTERROGATORY NO. 6:

The Debtor does not possess information responsive to Interrogatory No. 6.

INTERROGATORY NO. 7:

For each request for admission above that the Debtor did not unequivocally admit, explain the factual and legal basis for not doing so.

RESPONSE TO INTERROGATORY NO. 7:

The Debtor objects to Interrogatory No. 7 on the grounds that it calls for a legal analysis or legal conclusion, and is overly broad and unduly burdensome. *See* Fed. R. Civ. P. 26(b)(1).

SPECIFIC OBJECTIONS AND RESPONSES TO DOCUMENT REQUESTS

REQUEST FOR PRODUCTION NO. 1:

All Communications pursuant to which any director, officer, or employee of the Debtor was advised or instructed not to make the December Payment or to cause the December Payment to be made.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

Subject to the General Objections, the Debtor is unaware of any documents responsive to Request for Production No. 1. Any Communications responsive to Request for Production No. 1 were verbal.

REQUEST FOR PRODUCTION NO. 2:

All Communications between directors, officers, and/or employees of the Debtor related to the Note.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

Subject to the General Objections, the Debtor will search for and produce documents responsive to Request for Production No. 2.

REQUEST FOR PRODUCTION NO. 3:

All Communications between directors, officers, and/or employees of the Debtor related to any and all defaults under the Note.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3:

Subject to the General Objections, the Debtor will search for and produce documents responsive to Request for Production No. 3.

REQUEST FOR PRODUCTION NO. 4:

All Communications between directors, officers, and/or employees of the Debtor related to the December Payment.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4:

Subject to the General Objections, the Debtor will search for and produce documents responsive to Request for Production No. 4.

REQUEST FOR PRODUCTION NO. 5:

All Communications between directors, officers, and/or employees of the Debtor related to prior payments the Debtor made or caused to be made on NexPoint's behalf under the Note.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5:

Subject to the General Objections, the Debtor will search for and produce documents responsive to Request for Production No. 5.

REQUEST FOR PRODUCTION NO. 6:

All Communications between directors, officers, and/or employees of the Debtor related to the January Payment.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6:

Subject to the General Objections, the Debtor will search for and produce documents responsive to Request for Production No. 6.

REQUEST FOR PRODUCTION NO. 7:

All Communications with third parties related to the Note.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7:

Subject to the General Objections, the Debtor will search for and produce documents responsive to Request for Production No. 7.

REQUEST FOR PRODUCTION NO. 8:

All Communications with third parties related to the December Payment.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8:

Subject to the General Objections, the Debtor will search for and produce documents responsive to Request for Production No. 8.

REQUEST FOR PRODUCTION NO. 9:

All Communications with third parties related to the January Payment.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9:

Subject to the General Objections, the Debtor will search for and produce documents responsive to Request for Production No. 9.

REQUEST FOR PRODUCTION NO. 10:

All Communications with third parties related to prior payments the Debtor made or caused to be made on NexPoint's behalf under the Note.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10:

Subject to the General Objections, the Debtor will search for and produce documents responsive to Request for Production No. 10.

REQUEST FOR PRODUCTION NO. 11:

All Communications with third parties related to any and all defaults under the Note.

RESPONSE TO REQUEST FOR PRODUCTION NO. 11:

Subject to the General Objections, the Debtor will search for and produce documents responsive to Request for Production No. 11.

REQUEST FOR PRODUCTION NO. 12:

All Communications with the Committee (including, but not limited to, Communications solely between counsel for the Debtor and the Committee) related to the Note, any and all defaults under the Note, the December Payment, the January Payment, and/or the Default Letters.

RESPONSE TO REQUEST FOR PRODUCTION NO. 12:

Subject to the General Objections, the Debtor will search for and produce documents responsive to Request for Production No. 12.

REQUEST FOR PRODUCTION NO. 13:

All ledgers, statements, and accounting records related to payments made under the Note to date.

RESPONSE TO REQUEST FOR PRODUCTION NO. 13:

Subject to the General Objections, the Debtor will search for and produce documents responsive to Request for Production No. 13.

REQUEST FOR PRODUCTION NO. 14:

All Documents pursuant to which the Debtor was authorized and/or required to make payments or cause payments to be made on NexPoint's behalf under the Note.

RESPONSE TO REQUEST FOR PRODUCTION NO. 14:

The Debtor objects to Request for Production No. 14 to the extent that it assumes that the Debtor was required to make payments or cause payments to be made on NexPoint's behalf under the Note. Subject to its General and Specific Objections, the Debtor is not aware of documents otherwise responsive to Request for Production No. 14.

REQUEST FOR PRODUCTION NO. 15:

All Documents and Communications pursuant to which the Debtor contends it was relieved of its obligation to make payments or cause payments to be made under the Note on NexPoint's behalf pursuant to the Shared Services Agreement.

RESPONSE TO REQUEST FOR PRODUCTION NO. 15:

The Debtor objects to Request for Production No. 15 to the extent that it assumes that the Debtor was obligated to make payments or cause payments to be made on NexPoint's behalf under the Note. Subject to its General and Specific Objections, the Debtor is not aware of documents otherwise responsive to Request for Production No. 15.

REQUEST FOR PRODUCTION NO. 16:

All Communications related to potentially marketing and/or selling the Note.

RESPONSE TO REQUEST FOR PRODUCTION NO. 16:

The Debtor objects to Request for Production No. 16 on the ground that it is not "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1).

REQUEST FOR PRODUCTION NO. 17:

The Shared Services Agreement, including all amendments and supplements thereto, whether informal or formal, regardless of how documented.

RESPONSE TO REQUEST FOR PRODUCTION NO. 17:

Subject to the General Objections, the Debtor will search for and produce documents responsive to Request for Production No. 17.

REQUEST FOR PRODUCTION NO. 18:

All Documents and Communications construing the Debtor's obligations to NexPoint under the Shared Services Agreement.

RESPONSE TO REQUEST FOR PRODUCTION NO. 18:

The Debtor objects to Request for Production No. 18 on the ground that it is vague and ambiguous, overly broad, and not proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1).

REQUEST FOR PRODUCTION NO. 19:

All Documents and Communications related to the scope of the Debtor's obligations to NexPoint under the Shared Services Agreement.

RESPONSE TO REQUEST FOR PRODUCTION NO. 19:

The Debtor objects to Request for Production No. 19 on the ground that it is overly broad, unduly burdensome, and not proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1).

REQUEST FOR PRODUCTION NO. 20:

All Documents and Communications identified in connection with Interrogatory 6 above.

RESPONSE TO REQUEST FOR PRODUCTION NO. 20:

The Debtor objects to Request for Production No. 20 on the ground that it is not aware of any such documents. Subject to the General and Specific Objections, the Debtor will search for and produce documents responsive to Request for Production No. 20.

REQUEST FOR PRODUCTION NO. 21:

All billing statements from Pachulski Stang Ziehl & Jones LLP and Hayward PLLC related to fees the Debtor seeks to collect in the Adversary Proceeding.

RESPONSE TO REQUEST FOR PRODUCTION NO. 21:

Subject to the General Objections, the Debtor will search for and produce documents responsive to Request for Production No. 21.

Dated: May 11, 2021

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)

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EXHIBIT A

Response to Interrogatory No. 3

**NexPoint Advisors
Note Receivable Payment Summary**

<u>Payment Date</u>	<u>Total Paid</u>	<u>Pmt Account</u>	<u>Pmt Method</u>	<u>Individuals Involved in Making Pmt</u>
10/20/2017	800,000.00	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber
12/5/2017	1,301,504.99	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber
4/10/2018	439,721.54	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber
5/1/2018	146,573.85	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber
5/9/2018	879,927.65	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber
9/5/2018	280,765.40	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber
9/21/2018	1,023,750.00	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber
12/18/2018	294,695.10	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber
3/29/2019	750,000.00	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber
4/16/2019	1,300,000.00	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber
6/4/2019	300,000.00	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber
6/19/2019	2,100,000.00	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber
7/9/2019	630,000.00	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber
8/13/2019	1,300,000.00	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber
12/30/2019	530,112.36	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber
1/14/2021	1,406,111.92	NexBank Operating Acct *171	Electronic Bank Transfer	Frank Waterhouse, Dave Klos, Kristin Hendrix, Blair Roeber

EXHIBIT "A"

Davor Rukavina
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ATTORNEYS FOR NEXPOINT ADVISORS, 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.,	§	
Debtor.	§	Case No. 19-34054-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
vs.	§	21-03005-sgj
	§	
NEXPOINT ADVISORS, L.P., JAMES	§	
DONDERO, NANCY DONDERO, AND THE	§	
DUGABOY INVESTMENT TRUST,	§	
Defendants.	§	

NOTICE OF EXPERT REPORT OF STEVEN J. PULLY

NexPoint Advisors, L.P., one of the defendants in the above styled and numbered Adversary Proceeding, hereby serves upon all parties the *Expert Report of Steven J. Pully, CPA, CFA, Esq.*, a true, correct, and full copy of which is attached hereto.

Dated at Dallas, Texas this the 10th day of December, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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**ATTORNEYS FOR NEXPOINT ADVISORS,
L.P.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on December 10th, 2021, a true and correct copy of the foregoing document, including the exhibit thereto, was served via the Court's CM/ECF system on parties entitled to notice thereof, including on counsel for the Debtor/Plaintiff.

/s/ Davor Rukavina

Davor Rukavina

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
	§	
HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
NEXPOINT ADVISORS, L.P., JAMES	§	Adversary Proceeding No.
DONDERO, NANCY DONDERO, AND	§	21-03005
THE DUGABOY INVESTMENT	§	
TRUST,	§	
	§	
Defendants.	§	
	§	
HIGHLAND CAPITAL	§	Adversary Proceeding No.
MANAGEMENT SERVICES, INC.,	§	21-03006
JAMES DONDERO, NANCY	§	
DONDERO, AND THE DUGABOY	§	
INVESTMENT TRUST,	§	
	§	
Defendants.	§	
	§	
HCRE PARTERS, LLC (N/K/A/ NEXPOINT REAL ESTATE	§	Adversary Proceeding No.
PARTNERS, LLC), JAMES DONDERO,	§	21-03007
NANCY DONDERO, AND THE	§	
DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

**EXPERT REPORT OF
STEVEN J. PULLY, CPA, CFA, ESQ.**

December 10, 2021

Confidential

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I. BACKGROUND AND QUALIFICATIONS

1. My professional background includes over thirty-six years of experience as an investment banker, corporate board member, corporate executive, hedge fund executive, attorney, consultant, and expert witness.
2. I graduated with honors from Georgetown University in 1982 with a BSBA in Accounting, and I graduated from The University of Texas at Austin in 1985 with a Doctor of Jurisprudence degree. I hold the Chartered Financial Analyst (CFA) designation and am a licensed CPA and attorney in the State of Texas. I also hold the Series 7, 63, and 79 FINRA securities licenses¹. My CFA designation and my law, CPA, and FINRA licenses are all current.
3. I currently work as a corporate executive, as a corporate board member, as an investment banker, and as an expert witness.
 - a. I work on a part-time basis as the Chief Executive Officer of Harvest Oil & Gas, a former public company that is in the process of dissolving. I was Chairman of the Board of Harvest before assuming the Chief Executive Officer role. Until recently, Harvest was largely managed by another company pursuant to a services agreement. When the services agreement was entered into, the services provider and the predecessor of Harvest were affiliates, which they ceased to be during the term of the agreement. Services provided under the agreement included treasury, accounting, and operating functions. One of my roles as Chief Executive Officer is to replace the former service provider by bringing most business functions in-house.
 - b. I currently serve on the boards of seven private companies. I am typically appointed to boards by large shareholders. In total, I have been on the boards of thirty-two public and private companies. Those companies have operated in a broad cross section of industries, including agriculture, aviation, energy, entertainment, manufacturing, real estate, refining, retail, restaurants, technology, and telecom. I have served on the boards of companies that have outsourced most of their corporate functions or provided outsourcing services for other companies.
 - c. I conduct my investment banking work through Speyside Partners, LLC (“Speyside Partners”), an entity that I co-founded.² At Speyside I work on mergers, acquisitions and divestitures, financings, and restructurings.
4. Through the end of 2014, I spent thirteen years working for two different hedge funds. I was the General Counsel and a partner of Carlson Capital, the most recent hedge fund for which I worked. Carlson Capital managed approximately \$9 billion across a number of different funds during much of my tenure and followed a multi-strategy investing approach. Prior to working at Carlson Capital, I worked for Newcastle Capital Management, a hedge fund that pursued a deep value and activist investment strategy. I was the President of Newcastle Capital

¹ I formerly held the Series 24 FINRA license.

² The website for Speyside Partners is www.speysidepartners.com.

Management and worked there for almost six years. Newcastle Capital Management managed as much as \$650 million across a variety of funds while I was employed there. During my tenure, I served as the Chief Executive Officer of two companies controlled by the firm. Both Carlson Capital and Newcastle Capital Management had “shared-services” arrangements, where a separate entity provided a variety of back office, mid-office, and front office services to an affiliated party.

5. Prior to becoming a hedge fund executive, I was an investment banker for approximately twelve years at various large firms, including as a Managing Director for Bank of America Securities and as a Senior Managing Director for Bear Stearns. I also worked as an investment banker at Kidder Peabody, PaineWebber, and Wasserstein Perella. Over the course of my work at large investment banking firms, I focused on mergers, acquisitions, divestitures, capital raising, and restructurings.
6. Prior to becoming an investment banker, I was a securities and corporate lawyer for almost four years at Baker Botts.
7. Based on the work that I have done over the past thirty-six years, I have developed a deep understanding of services agreements and outsourcing generally as well as corporate governance-related matters. I applied the knowledge and experience that I have gained over the past thirty-six years to my analysis in this report.
8. I have previously served as a testifying and/or consulting witness in the following actions:
 - a. Ascent Resources – *Utica, LLC (f/k/a American Energy – Utica, LLC); Ascent Resources, LLC (f/k/a American Energy Appalachia Holdings, LLC); Ascent Resources Utica Holdings, LLC (f/k/a American Energy Ohio Holdings, LLC); The Energy & Minerals Group Fund III, LP; EMG Fund III Offshore Holdings, LP; FR AEU Holdings, LLC and FR AE Marcellus Holdings, LLC v. Duane Morris LLP*, in the 165th Judicial District Court of Harris County, Cause No. 2015-46550) — Consulting and Testifying witness for Plaintiffs.
 - b. *In re Paladin Energy Corp.*, Case No. 16-13590, in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division — Consulting and Testifying witness for Debtor.
 - c. *In re: Potential Complaint Against Larry Noble, Noble Operating, LLC, Noble Natural Resources, L.L.C. and Javier Urias to Avoid Transfers* — Testifying witness for Potential Defendants.
 - d. *James D. Sallah, not individually but solely in his capacity as Corporate Monitor for OM Global Investment Fund LLC and OM Global LP, Plaintiff, v. BGT Consulting, LLC, d/b/a BGT Fund Administration, and Lara Goldberg, Defendants* — Testifying witness on behalf of Defendants BGT Consulting, LLC, d/b/a BGT Fund Administration and Lara Goldberg.
 - e. *Kenneth A. Kristofek, Gruene Interests, LLC and Gruene Interests Services, LLC, Gran Toro Rojo, LLC, and Gruene USFC, LLC, v. David Gunderson, Horace Winchester, Stan*

- Bradshaw, and Jerry Williamson, Gruenepointe Holdings, LLC, Adora 8, LLC, Adora 9, LLC, Adora 10, LLC, Adora 14 Realty, LLC, Onpointe Healthcare Development, LLC, U.S. Freedom Capital Holdings, LLC, Lake Ohana, LLC, U.S. Freedom Capital, LLC, and Encantado Investments, LLC*, in the District Court of Dallas County, Texas, No. DC-16-07674 — Testifying witness on behalf of Plaintiffs.
- f. *In re SunEdison Securities Litigation*, in the U.S. District Court for the Southern District of New York, 16-md-2742-PKC — Testifying witness on behalf of Plaintiffs.
- g. *Avid Controls, Inc. v. GE Energy Power Conversion Technology, Ltd.; General Electric Company; and Current Power Solutions, Inc.*, In the United States District Court for the Southern District of Texas - Houston Division, Civil Action No. 4:19-CV-01076 — Testifying witness on behalf of Plaintiff.
- h. *Lumos Partners, LLC, Claimant v. VAC-TRON EQUIPMENT, L.L.C., Respondent*, In Arbitration before the American Arbitration Association — Testifying witness on behalf of Claimant.
- i. *Lord Abbett Affiliated Fund, Inc., et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. Navient Corporation, et al., Defendants*, Case No. 1:16-cv-112-GMS, in the United States District Court for the District of Delaware, Case No. 1:16-cv-112-MN — Testifying witness on behalf of Plaintiff.
- j. *Southland National Insurance Corporation in Rehabilitation, Bankers Life Insurance Company in Rehabilitation, Colorado Bankers Life Insurance Company in Rehabilitation, and Southland National Reinsurance Corporation in Rehabilitation, Plaintiffs, v. Greg E. Lindberg, Academy Association, Inc., Edwards Mill Asset Management, LLC, New England Capital, LLC and Private Bankers Life and Annuity Co., Ltd., Defendants*, in the General Court of Justice Superior Court Division, 19 CV 13093 — Testifying witness on behalf of Defendants.
- k. *Baylor University and Southwestern Baptist Theological Seminary, Plaintiffs, v. Harold E. Riley Foundation and Mike C. Hughes, Defendants*, in the District Court of Tarrant County, Texas, 67th Judicial District — Testifying witness on behalf of Defendants.
- l. *Advsr, LLC, Plaintiff, v. Magisto, Ltd. And Yahal Zilka, Defendants*, in the United States District Court, Northern District of California, San Francisco Division, Case No. 3:19-cv-2670 — Testifying witness on behalf of Defendants.
- m. *Lumos Partners, LLC, Claimant v. Altavian, Inc.*, In Arbitration before the American Arbitration Association — Testifying witness on behalf of Claimant.
- n. *Fouad Saade; and Kobi Electric, LLC, Claimants, v. Woodbridge International LLC, f/k/a Woodbridge Group, LLC; and Texender “Tex” Sekhon, Respondents*, In Arbitration before the American Arbitration Association - Testifying witness on behalf of Claimant.
9. I have attached a copy of my curriculum vitae as Exhibit A to this expert report (“Report”).

II. ENGAGEMENT

10. Highland Capital Management, L.P., is the debtor in the bankruptcy proceeding, *In re: Highland Capital Management, L.P., Debtor*, and is referred to herein as the “Debtor” or the “Plaintiff.” I have been engaged in the matters related to the bankruptcy proceeding that are listed below (collectively referred to as the “Actions”).
- a. *HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants*, Adversary Proceeding No. 21-03005, as a consulting and testifying expert witness on behalf of NexPoint Advisors, L.P. (“NexPoint”), and James Dondero (“Dondero” and NexPoint are collectively referred to as the “NexPoint Defendants”).
 - b. *HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants*, Adversary Proceeding No. 21-03006, as a consulting and testifying expert witness on behalf of Highland Capital Management Services, Inc. (“HCMS”), and Dondero (Dondero and HCMS are collectively referred to as the “HCMS Defendants”).
 - c. *HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HCRE PARTERS, LLC (N/K/A/ NEXPOINT REAL ESTATE PARTNERS, LLC), JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants*, Adversary Proceeding No. 21-03007, as a consulting and testifying expert witness on behalf of HCRE Partners, LLC (“HCRE”), and Dondero (Dondero and HCRE are collectively referred to as the “HCRE Defendants”).
 - d. The NexPoint Defendants, the HCMS Defendants, and the HCRE Defendants are collectively referred to as the “Defendants.”
11. The Plaintiff has made claims against the Defendants for breach of contract, turnover of property, fraudulent transfer, and breach of fiduciary duty.
12. My engagement is through the law firms of Munsch Hardt Kopf & Harr, P.C. (“Munsch Hardt”) and Stinson LLP (“Stinson”), which are acting as counsel to the Defendants. I am being compensated for my time at the rate of \$750.00 per hour. My compensation is not in any way contingent on (i) the opinions I express in this Report or any additional report, (ii) the content of any testimony I may give, or (iii) the outcome of the Action.
13. I have met with Dondero as well as D. J. Sauter, who is the General Counsel of NexPoint. I have also met with attorneys from counsel to the Defendants: Munsch Hardt, and Stinson.
14. I was asked to provide my opinion regarding whether it was appropriate for the Plaintiff to not pay the interest and principal on the Notes (as hereinafter defined) on behalf of NexPoint, HCMS and HCRE (collectively, the “Makers”) by December 31, 2020.

III. BRIEF SUMMARY OF OPINIONS

15. I believe that the Plaintiff did not act reasonably by failing to pay amounts due on the Notes on behalf of the Makers by December 31, 2020, and otherwise in how it comported itself with respect to the Notes. Section 6.01 of the NexPoint Services Agreement (as hereinafter defined) sets forth a standard of care that the Plaintiff was supposed to comply with in paying the NexPoint Term Note; I also believe that each of the services agreements between the Plaintiff and the Makers required the Plaintiff to act in a reasonable way.
16. In forming my opinions and preparing this Report, I relied on all the materials listed in Exhibit B or otherwise cited herein as well as my background and personal experiences.
17. In offering my opinions, I am not opining on the legal enforceability of any agreements between the parties to the Actions.
18. I reserve the right to amend my Report should new information become available, including any assertions of the parties, witnesses, or any experts made in response to this Report.

IV. ASSUMPTIONS

19. The Debtor filed for bankruptcy on October 16, 2019. During the Debtor's bankruptcy, James Seery ("Seery") served as the Chief Executive Officer and/or Chief Restructuring Officer of the Debtor.
20. The Debtor was formerly managed by Dondero, who was the firm's co-founder and was its President until January 9, 2020, at which time he resigned all positions with the Debtor and also relinquished control of the Debtor.³ As of October 9, 2020, Dondero ceased to have any involvement as an officer or director of the Debtor.⁴ Dondero also testified that there was tension between Seery and him as well as Seery and others at Highland.⁵
21. During 2020, the relationship between Dondero and the Plaintiff became increasingly adversarial. For example, in addition to Dondero ceasing to have any involvement as an officer or director of the Plaintiff, there were various adversarial proceedings between the parties.⁶
22. NexPoint, HCMS and HCRE executed certain notes in favor of the Debtor as described below:
 - a. NexPoint executed a promissory note in the original principal amount of \$30,746,812.33, and payable in thirty annual installments beginning by December 31, 2017 (the "NexPoint Term Note").⁷ The NexPoint Note was fully payable in

³ Dondero Deposition, Volume 2, Page 291, lines 9 – 12.

⁴ *Id.* at Page 374, lines 8 – 10.

⁵ *Id.* at page 87, lines 8 – 14.

⁶ *See, e.g., Id.* at page 374, lines 6 – 9.

⁷ Amended Complaint dated August 27, 2021 (the "NexPoint Amended Complaint"), filed by Highland Capital Management, L.P. as plaintiff against defendants, NexPoint Advisors, L.P., James Dondero, Nancy Dondero, and The Dugaboy Investment Trust at 2.

the event of default.⁸ As of December 31, 2020, \$23,610,194.59 of principal remained outstanding on the NexPoint Term Note.⁹

- b. HCMS executed a term note in the original principal amount of \$20,247,628.02 and payable in thirty annual installments beginning on December 31, 2017 (the “HCMS Term Note”).¹⁰ The HCMS Term Note was fully payable in the event of default.¹¹
 - c. HCRE executed a term note in the original principal amount of \$6,059,831.51 and payable in thirty annual installments beginning on December 31, 2017 (the “HCRE Term Note”).¹² The HCRE Term Note was fully payable in the event of default.¹³
23. The Debtor and the Makers were all involved in the investment management business, collectively managing billions of dollars on behalf of investors at various points over the course of their relationship with each other. At the time that the NexPoint Term Note, the HCMS Term Note, and the HCRE Term Note (collectively, the “Notes”) were entered into, the Plaintiff, NexPoint, HCMS, and HCRE were all related parties as a result of overlapping equity ownership of the entities. As of December 31, 2020, NexPoint, HCMS, and HCRE ceased to have any overlapping equity ownership with the Plaintiff but continued to have overlapping ownership with each other.
24. The Plaintiff and NexPoint are parties to an Amended and Restated Shared Services Agreement dated January 1, 2018 (the “NexPoint Services Agreement”) pursuant to which Plaintiff provided a broad array of services to NexPoint.¹⁴ NexPoint operated its business with a small number of employees, relying on Plaintiff’s much larger workforce to provide many key services for NexPoint to run its business. The NexPoint Services Agreement details numerous areas where the Plaintiff was to provide services to NexPoint, with the Plaintiff essentially providing the entire workforce for most areas of NexPoint’s business. The areas that the Plaintiff provided services to NexPoint were detailed under the following headings in the NexPoint Services Agreement: Back- and Middle-Office, Legal Compliance/Risk Analysis, Tax, Management of Clients and Accounts, Valuation, Execution and Documentation, Marketing, Reporting, Administrative Services, Ancillary Services, and Other.¹⁵ The NexPoint Services Agreement essentially covered all functional areas of NexPoint’s business other than the executive and investment functions.

⁸ NexPoint Amended Complaint, Exhibit 3. Additionally, I am informed that there was the potential for forgiveness of the Notes in certain circumstances that had also not occurred by December 31, 2020.

⁹ D-NNI -074142.

¹⁰ Amended Complaint dated August 27, 2021 (“HCMS Amended Complaint”), filed by Highland Capital Management, L.P. as plaintiff against defendants, Highland Capital Management Services, Inc., James Dondero, Nancy Dondero, and The Dugaboy Investment Trust at 2.

¹¹ HCMS Amended Complaint, Exhibit 6.

¹² Amended Complaint dated August 27, 2021 (“HCRE Amended Complaint”), filed by Highland Capital Management, L.P. as plaintiff against defendants, HCRE Partners, LLC, James Dondero, Nancy Dondero, and The Dugaboy Investment Trust at 2.

¹³ HCRE Amended Complaint, Exhibit 6.

¹⁴ Amended and Restated Services Agreement dated January 1, 2018, Exhibit 9 to Seery Deposition.

¹⁵ *Id.* at pages 3 – 5.

25. The NexPoint Services Agreement contains several provisions relating to the Plaintiff's obligation to make interest and principal payments on the NexPoint Term Note, including the following:
- a. Section 2.02(a) details various "Back and Middle Office" tasks that the Plaintiff was responsible for performing on behalf of NexPoint.¹⁶ Those services included "payments,"¹⁷ which encompassed payments of interest and principal on the NexPoint Term Note.
 - b. Section 2.02 (b) provided for the Plaintiff to provide "[a]ssistance and advice with respect to legal issues..."¹⁸
 - c. Section 6.01 describes the standard of care that the Plaintiff was supposed to provide to NexPoint.¹⁹ The provision provides that the Plaintiff "shall discharge its duties under this Agreement with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."
 - d. Section 8.01 required that any amendments or modifications to the agreement were required to be in writing and signed by each party.²⁰
 - e. Section 8.07 provided that any "condition or obligation imposed upon any Party may be waived only upon the written consent of the Parties."²¹
26. The Plaintiff first sought to provide notice of termination of the NexPoint Services Agreement in November of 2020, however, the termination date was extended²² and the NexPoint Services Agreement was still in effect as of December 31, 2020.
27. While there was no written agreement between either HCMS or HCRE, on the one hand, and the Plaintiff, on the other hand, relating to services that the Plaintiff was to supply to either party, the services that the Plaintiff provided to HCMS and HCRE were essentially the same services that the Plaintiff provided to NexPoint²³ and involved a comprehensive array of services that were necessary in the day-to-day operations of the business of HCMS and HCRE. Like with NexPoint, by December 31, 2020, there was a long history of the Plaintiff having provided services to HCMS and HCRE.²⁴

¹⁶ *Id.* at pages 3 - 4.

¹⁷ *Id.*, Section 2.02(a) provided, "Back- and Middle Office. Assistance and advice with respect to back- and middle-office functions including, but not limited to . . . finance and accounting, payments, operation, bookkeeping, cash management . . . accounts payable . . ."

¹⁸ *Id.* at page 4.

¹⁹ *Id.* at 11.

²⁰ *Id.* at 14.

²¹ *Id.* at 16.

²² Dondero Deposition, Volume 2, page 375, lines 3-10.

²³ *See, e.g.*, Dondero Deposition, Volume 2, page 335, line 19 to page 336, line 13; Waterhouse Deposition, page 353, lines 6 – 10, page 357, lines 19 – 24.

²⁴ Dondero Deposition, Volume 2, page 94, lines 20 – 22; page 95, lines 4 – 9.

28. When asked about whether the Plaintiff had a services agreement with HCMS, Dondero replied as follows during his deposition²⁵:

My answer would be the advisors like NexPoint and HFAM that had to have by law and regulatory statute have to have formal sub advisors and shared services agreements had formal shared services agreement. Entities that didn't need to have formal written shared services agreements were often serviced similarly or -- or exactly the same as those entities, but without a written agreement, but with a verbal shared services agreement providing, again, all the same similar services, and the entities that didn't have a written shared services agreement weren't getting shared services or support from any other entities other than Highland doing the same thing for them that it did for the mutual funds.

29. Dondero had a similar response with regard to there being an oral agreement for the Plaintiff to provide services to HCRE.²⁶

30. There was extensive testimony about the services that the Plaintiff provided to HCMS and HCRE:

- a. Under the oral agreements to provide services to HCMS and HCRE, the Plaintiff was responsible for making payments of interest and principal on the HCMS Notes and the HCRE Notes, which had previously been made by December 31, 2017, 2018, and 2019.²⁷
- b. HCMS and HCRE relied on the Plaintiff to provide services because HCMS and HCRE, like NexPoint, did not have the employees or infrastructure to run its business without the services provided by the Plaintiff.²⁸
- c. According to Frank Waterhouse (“Waterhouse”), the Chief Financial Officer of the Plaintiff throughout 2020²⁹, the Plaintiff provided the same services to HCRE and HCMSS that it did for NexPoint.³⁰ He also specifically testified that Plaintiff’s services included timely paying of bills and loan payments for HCMS³¹ and the same bill paying for HCRE that it did for HCMS and NexPoint.³²

31. Interest and principal were due on the Notes by December 31, 2020. Neither interest nor any principal payments were paid on any of the Notes by December 31, 2020. The Plaintiff was supposed to facilitate these payments even though the payments were supposed to be to itself.

²⁵ Dondero Deposition, Volume 2, page 335, line 19 to page 336, line 13.

²⁶ *Id.* at page 381, lines 10 – 23.

²⁷ Waterhouse Deposition, page 354, lines 2 – 23, page 357, lines 2 – 18.

²⁸ Dondero Deposition, Volume 2, page 371, lines 5-9.

²⁹ Waterhouse Deposition, page 28, lines 15-16.

³⁰ *Id.*, page 353, 6-10; 357: 19 – 24.

³¹ *Id.* at page 354, lines 2 to page 357, line 18.

³² *Id.* at page 358, lines 12 – 24.

32. On January 7, 2021, the Debtor delivered a letter to each of the Makers (the “Acceleration Letters”) indicating that a default had occurred on each of the Notes and demanding the immediate full payment of “all principal, interest, and any other amounts due on the Note...”³³ The effect of the Acceleration Letters was that millions of dollars of principal payments were suddenly due; had the Acceleration Letters not been sent, principal on the Notes would have amortized ratably through 2047.
33. In addition to being the Plaintiff’s Chief Financial Officer, Waterhouse was also an officer of two of the three Makers as of December 31, 2020.
- a. He was the Treasurer of NexPoint, an officer-level role, during all periods relevant to my Report. Waterhouse reported at his deposition, “I still manage the finance and accounting function for NexPoint.”³⁴
 - b. He was the treasurer and acting treasurer of HCMS.³⁵
34. Plaintiff alleges that Dondero orally instructed Waterhouse to not pay the interest and principal on the NexPoint Term Note that was due on December 31, 2021.³⁶ No evidence has been presented that suggests that Dondero’s alleged instructions for the Plaintiff to not pay interest and principal on the NexPoint Term Note was in writing. The apparent rationale for the alleged instruction was that NexPoint believed that there had been substantial overcharges totaling in the millions of dollars by the Plaintiff under the NexPoint Services Agreement. The overcharges related to charges for employees who were no longer working for the Plaintiff but that were still being charged to NexPoint, which was a violation of the NexPoint Services Agreement. Furthermore, Dondero denies that he instructed Waterhouse not to pay the NexPoint Term Note.³⁷
- a. Dondero denies that he instructed that no interest and principal be paid on the NexPoint Term Note, testifying, “There is no logical reason, nor would I have ever authorized or suggested no payment to put us...in default due to a *deminimis* amount of money....even if I was highly annoyed with Seery, even if we knew that Seery and Highland had overcharged NexPoint by whatever it was, 14, 16, million bucks, I would not have let a small amount cause a...breach.”³⁸
 - b. Dondero also testified that the Plaintiff made the payments due on the Notes by December 31 of 2017, 2018 and 2019 without any specific authorization from any of the Makers.³⁹
35. No evidence was presented suggesting that Dondero, HCMS or HCRE instructed the Plaintiff not to make payments on the HCMS Term Note or the HCRE Term Note. HCMS and HCRE had a reasonable expectation that interest and principal on the HCMS Notes and HCRE Notes

³³ Exhibit 6 to Seery Deposition taken on October 21, 2021.

³⁴ Waterhouse Deposition, page 28, lines 15-16.

³⁵ *Id.*, at page 30, lines 9 – 16.

³⁶ *Id.*, at page 390, lines 4 – 13.

³⁷ Dondero Deposition, Volume 2, page 391:18-25.

³⁸ *Id.*

³⁹ *Id.* at page 463, lines 10-25.

would be paid by December 31, 2020, given past practices and the Plaintiff's obligation to do so.

36. Mr. Waterhouse testified about his responsibility in connection with making the payments on the Notes that were due by December 21, 2020⁴⁰:

Q: Did you approve of each payment that was made against principal and interest on the notes that were given by the affiliates of Mr. Dondero?

A: Did I approve the payments? I approve - I approve - if there was cash - if there was cash being repaid on a note payment, yes, I approved in the general sense of being made aware of the payment and the amount.”

Q: And are you the person who authorized Highland's employees to effectuate those payments?

A: Yes.

37. No evidence has been presented of any discussions that the Plaintiff had with Dondero or any of the Makers prior to December 31, 2020, with regard to payments on the Notes other than the alleged discussion between Dondero and Waterhouse described above relating to the NexPoint Term Note. Specifically, the evidentiary record reflects that there was no follow-up by Waterhouse or anyone else at the Plaintiff confirming that it was Dondero's intent for there not to be any payments made on the NexPoint Term Note.⁴¹

- a. A number of Plaintiff's employees knew about Dondero's alleged instructions prior to December 31, 2020, with respect to the NexPoint Term Note, yet no effort was undertaken to investigate Dondero's instructions by speaking with him or otherwise confirming what NexPoint's intent was regarding the NexPoint Term Note.
- b. Deposition testimony by Kristin Hendrix (“Hendrix”), who was the assistant controller of the Plaintiff at the time, revealed that she knew by November 30, 2020, or December 1, 2020, that the Plaintiff was not going to pay the interest and principal on the NexPoint Term Note that was due by December 31, 2020.⁴²
- c. Waterhouse testified that he did not follow-up with Dondero about whether NexPoint should make the payments required by December 31, 2020.⁴³

38. Waterhouse also testified that there had not been any instructions from anyone to the Plaintiff to not make the required payments on the HCMS Term Note or the HCRE Term Note by December 31, 2020.⁴⁴ When asked about Dondero's tone when he talked to him about the fact that the payments had not been made on the HCMS Term Note and the HCRE Term Note,

⁴⁰ Waterhouse Deposition, page 56, line 21 to page 57, line 10.

⁴¹ *Id.*, at page 391, lines 18 – 21.

⁴² Hendrix Deposition, page 12, lines 4 – 7.

⁴³ Waterhouse deposition, pages 391: line 18 to page 392, line 2.

⁴⁴ Waterhouse Deposition, pages 393, line 21 – 25 to page 394, line 4.

Waterhouse said that the tone was very negative and that Dondero's reaction was consistent with the fact that Dondero was surprised that the payments had not been made.⁴⁵

V. SERVICES AGREEMENTS GENERALLY

39. Companies seeking to conduct operations more efficiently frequently outsource various operational, accounting, treasury, and other functions to a service provider. By outsourcing such functions, the customer of the services provider can avoid costly employee and infrastructure investments that would otherwise be required to conduct the outsourced functions.
40. The agreement between the party receiving the services and the party providing the services is often referred to as a "services agreement," an "outsourcing agreement," or a "shared services agreement." These terms have the same meaning for purposes of this Report although the term "shared services" is often used in the context of a company sharing services with an affiliated party.
41. The parties to a services agreement are sometimes related and other times are completely separate with no prior business relationship.
42. The actual agreement that comprises the services to be provided under a services agreement varies in form. Some services agreements are comprehensive, others provide limited written direction, and still others are oral.
43. Smaller companies are often more likely to outsource a broad set of business functions, typically because they are growing rapidly and do not have the financial resources or time to build out various important business functions.
44. Virtually every company outsources some type of business function to a third-party. For example, many companies outsource limited functions such as payroll processing or IT services to various vendors. There is a distinct difference, however, between outsourcing limited functions to a vendor that provides services for many clients versus the more fulsome relationship that is embodied by the typical services agreement involving the services provider managing major aspects of a company's operational and back-office functions.
 - a. Providers of more fulsome services have additional duties relative to a provider that is responsible for limited services. Those additional duties generally emanate from the level of responsibility that the services provider takes on and the services provider's more intimate knowledge of its customer's business.
 - b. Said another way, a provider of a straightforward and often outsourced service such as payroll processing has no reason to understand the underlying business issues of its customers or the perspectives of the employees for which it processes payroll. On the other hand, a provider of more fulsome services has an intimate knowledge

⁴⁵ *Id.* at page 394, lines 12 – 21.

of the goals, objectives, and capabilities of its customers and in discharging its obligations, cannot ignore that knowledge.

45. In the case of services agreements that cover a fulsome set of activities for the customer, even if there is a comprehensive agreement between the parties, it is difficult to enumerate with specificity each individual task that the services provider is expected to perform. Tasks are therefore often described in broad terms as opposed to specific detail (i.e., the service provider is required to handle accounting functions for its customer as opposed to saying that a trial balance is required 15 days after month-end, or the annual audit must be completed by a specified date).
- a. Despite the difficulty in describing each task with specificity that the services provider is required to perform, the specific tasks become apparent as the services provider performs functions on behalf of its customer. In the ordinary course, practices develop that inevitably are deemed acceptable to the services provider and its customer. Such practices are generally fully clarified within one year of the inception of the services agreement because that timeframe allows the parties to interact with each other over the course of a full accounting cycle.
 - b. Following the initial cycle of activities, those previously performed practices are often referred to as “past practices” and such past practices become an important piece in gauging whether the services provider has met its obligations in future periods. Having been affiliated with companies that are customers of services providers, I think of past practices as having virtually the same effect as a written document provided that the services agreement is not written in a way that prohibits such an interpretation.
46. Services agreements between related parties often present complicated issues, especially if the relationship changes between the parties during the term of the services agreement. For example, at the beginning of the term of the services agreement, two related parties might constructively work together, almost obviating the need for a detailed agreement between the parties. If there is a change in the relationship between the parties that leads to less cooperation, the original agreement may not be comprehensive enough to optimally deal with the change in circumstances.
- a. In such situations, past practices can become an even more important factor in determining the services provider’s obligations and the reasonable expectations that the customer should have if the contract language is not explicit on the point.
 - b. While the services provider and a customer that is related at the outset of an agreement may cease to be related at some point during the term of the agreement, the services provider’s knowledge of the customer’s business objectives does not necessarily become stale immediately upon the change in affiliate status. Consequently, any higher duty that comes about from the knowledge that the services provider has about its customer is not necessarily impacted if the affiliate status of the services provider and its customer changes.

VI. OPINIONS

A. The Plaintiff was obligated to pay interest and principal on the NexPoint Term Note by December 31, 2021, on behalf of NexPoint. Despite the alleged instruction from Dondero that the Plaintiff should not make any payments on NexPoint's behalf, the Plaintiff's obligations to make the payments did not end. At a minimum, the Plaintiff had a duty to investigate whether the payments should have been made, which it did not do. In not making the payments on the NexPoint Term Note and not undertaking steps to further investigate whether the payments should have been made, the Plaintiff did not act reasonably.

47. The payment terms of the NexPoint Term Note required that interest and principal was due to the Plaintiff from NexPoint on or before December 31, 2020. It is undisputed that interest and principal were not paid on the NexPoint Term Note by the required date.
48. The Plaintiff was obligated to make the payment of interest and principal on behalf of NexPoint on or before December 31, 2020, under the NexPoint Services Agreement.
49. The Plaintiff has taken the position that the interest and principal that was due on the NexPoint Term Note by December 31, 2020, was not paid because of Dondero's alleged directive to Waterhouse to not make the payments.⁴⁶
50. The evidentiary record highlights several noteworthy facts:
 - a. The Plaintiff had conflicting roles because it was the payee of the NexPoint Term Note and also had the obligation to cause the payments to be made on the NexPoint Term Note. The conflicting roles were also heightened because of the increasingly adversarial role that had developed between the Plaintiff and Dondero.
 - b. The Plaintiff stood to benefit mightily if NexPoint defaulted on the payment of interest or principal, given the Plaintiff's ability to immediately accelerate the payment of the NexPoint Term Note. Without a default, some of the principal of the Notes could have been outstanding until 2047.
 - c. Waterhouse was an officer of the Plaintiff and was also an officer of NexPoint, creating a conflict beyond the conflicts that the Plaintiff had that are described above. Given his dual roles, he had knowledge of the business objectives and financial condition of NexPoint, which should have made it clear to him that NexPoint would not welcome a default on the NexPoint Term Note.
 - d. NexPoint allegedly made overpayments to the Plaintiff that Dondero wanted to be offset against the required interest and principal payments on the NexPoint Term Loan.⁴⁷ The overpayments related to workers that the Plaintiff was charging to NexPoint that no longer worked for the Plaintiff, which violated the terms of the

⁴⁶ Waterhouse Deposition, page 390, lines 4 – 13.

⁴⁷ Seery Deposition, page 226, lines 2 – 4; Dondero Deposition, Volume 2, page 392, lines 3 – 7.

NexPoint Services Agreement. There were ongoing discussions between Dondero and Seery leading up to the end of 2020 relating to the topic.

- e. There is no evidentiary record describing any effort by the Plaintiff to warn NexPoint of the implications of Dondero's alleged request for the payments on the NexPoint Term Note to not be made. For example, despite the fact that the NexPoint Services Agreement required the Plaintiff to provide NexPoint with legal services, the Plaintiff failed to provide NexPoint with legal advice that failing to pay interest and principal could result in an acceleration of the NexPoint Term Loan.
51. In my opinion, Dondero's alleged statement to Waterhouse that the Plaintiff should not make payments on the NexPoint Term Note on December 31, 2020, did not provide a basis for the Plaintiff to not make the payments on the Notes given its obligations to NexPoint under the NexPoint Services Agreement. Several reasons support my opinion:
- a. There is no evidence that the Plaintiff took any reasonable steps to address the myriad of conflicts that it faced.
 - i. The Plaintiff's obligations regarding the required payments of the Notes involved the conflict-ridden task of authorizing and making a payment to itself. Additionally, the Plaintiff stood to benefit significantly by putting the NexPoint Term Note into default given that a default would allow the Plaintiff to realize the proceeds from repayment of the note far earlier than it otherwise would have; had the NexPoint Term Loan not been accelerated, it would have remained outstanding until 2047. While the evidence is silent on whether the Plaintiff was considering the repayment benefit of the NexPoint Term Loan to itself, from an appearance standpoint, the conflict was glaring.
 - ii. The Plaintiff apparently took no steps to address these conflicts either by conferring with NexPoint or Dondero. Conferring with NexPoint or Dondero would have helped in establishing that NexPoint and Dondero really did not want the Plaintiff to transfer funds to pay interest and principal on the NexPoint Term Loan.
 - iii. The Plaintiff also has presented no evidentiary record reflecting how any internal steps were taken to address the conflict. Such steps might have included conducting meetings internally with minutes to reflect discussion regarding the conflict or any efforts to seek guidance from counsel to assist with the conflict.
 - iv. According to deposition testimony by Hendrix, who was the assistant controller of the Plaintiff at the time⁴⁸, she recalled receiving a phone call from Waterhouse on either November 30, 2020, or December 1, 2020, where Waterhouse indicated that no payments would be made by the Plaintiff

⁴⁸ Hendrix Deposition, page 12, lines 4 – 7.

on behalf of NexPoint.⁴⁹ Accordingly, it seems that Plaintiff decided as early November 30, 2020 or December 1, 2020, to not make the payments on the NexPoint Term Note. Given the apparent time frame of the decision to not make the payment, the Plaintiff had ample time to confirm in writing with Dondero that the payments should not be made or to otherwise take reasonable steps to ensure that a mistake was not being made and that the Plaintiff was acting reasonably.

- b. The Plaintiff had an obligation to act reasonably in discharging its obligations to make the payments on the NexPoint Term Note on behalf of NexPoint. In addition to not properly addressing conflicts as set forth above, the evidentiary record further reflects that the Plaintiff did not act reasonably.
 - i. No effort was undertaken to inform Dondero that the Plaintiff disagreed with his assumption that there were offsets to the required interest and principal payment requirements on the NexPoint Term Note. Absent any communication from the Plaintiff, Dondero simply had no way of knowing that the Plaintiff disagreed with his perspective that a right of offset did exist, so it was reasonable for him to think that discussion of an offset was on the table.
 - ii. Waterhouse had worked for or with Dondero for many years, making him very familiar with Dondero's management style. Dondero is a decisionmaker who is willing and does change his mind when presented with new facts, something that Waterhouse should have been aware of yet did nothing to address.
 - iii. Given the massive implications of a default of the NexPoint Term Loan to NexPoint, which the Plaintiff should have understood given the robust services that it was providing to NexPoint and the dual financial responsibilities that Waterhouse had to both organizations, the Plaintiff should have acted more responsibly by engaging with NexPoint and Dondero to confirm NexPoint's intent.
 - iv. The NexPoint Services Agreement provides that the Plaintiff was supposed to provide NexPoint with legal advice. In effect, the Plaintiff was NexPoint's law firm. Had the Plaintiff met its commitment, it would have had its internal counsel consult with NexPoint to point out the legal ramifications of the interest and principal payments not being made. There is no evidence suggesting that the Plaintiff took any steps to meet its obligation to provide legal advice as required under the NexPoint Services Agreement.
- c. Waterhouse had a conflict separate from the conflicts that the Plaintiff otherwise had given that he was an officer of both the Plaintiff and the NexPoint. Among

⁴⁹ *Id.* at 71, lines 4 – 7.

other things, Waterhouse’s officer role for NexPoint must have provided him with insights into NexPoint’s business objectives, which could not have included any appetite for having the Notes accelerated. Yet there is no evidence that Waterhouse’s knowledge was utilized in Plaintiff’s decision making regarding the required payments of the Notes. It is inapposite to argue that because Waterhouse had knowledge about NexPoint from a source other than the Plaintiff, that he was entitled to ignore that knowledge. In discharging its duties under the NexPoint Services Agreement, the Plaintiff should have been using all information that it had available in its work on behalf of NexPoint.

- d. The NexPoint Services Agreement provided that any amendment to the agreement needed to be in writing⁵⁰ and any consent to a change in the agreement needed to be in writing.⁵¹ No such effort to comply with the writing requirement was undertaken and highlights the fact that any oral statement by Dondero regarding the NexPoint Term Loan not being paid was insufficient under the express terms of the NexPoint Services Agreement.
 - e. Section 6.01 of the NexPoint Services Agreement also describes the standard of care that the Plaintiff was supposed to provide to NexPoint in the discharge of its obligations under the agreement.⁵² The provision provides that the Plaintiff “shall discharge its duties under this Agreement with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” For reasons already described herein, the Plaintiff did not discharge its duties with such care.
52. For the foregoing reasons, any alleged default under the NexPoint Term Note was the result of the Plaintiff’s own negligence and misconduct, which underscores that Plaintiff did not act reasonably in the discharge of its obligations to NexPoint.

B. Based on the oral agreement that the Plaintiff had with HCMS and HCRE and consistent with the services that the Plaintiff had previously provided, HCMS and HCRE had a reasonable expectation that the Plaintiff would continue paying interest and principal on behalf of those entities absent explicit direction to the contrary. As there was no directive from anyone affiliated with HCMS or HCRE to relieve the Plaintiff of that responsibility, the Plaintiff did not act reasonably by not meeting its obligations to make payments of interest and principal on behalf of HCMS and HCRE.

53. While the services agreements between Plaintiff, on the one hand, and HCMS and HCRE, on the other hand, were oral, the existence of an oral services agreement between affiliated parties involved in the investment management business is common and is something that I have regularly observed.

⁵⁰ Amended Services Agreement, Section 8.01.

⁵¹ *Id.* at Section 8.07.

⁵² *Id.* at Section 6.01.

54. Like with NexPoint, the Plaintiff provided HCMS and HCRE with a comprehensive array of services that were necessary to the day-to-day operation of their businesses. There was a lengthy history of the Plaintiff providing HCMS and HCRE with such services. The broad array of services provided by the Plaintiff to NexPoint were the same as the scope of work performed by the Plaintiff for HCMS and HCRE.

55. The evidentiary record highlights several noteworthy facts:

- a. The evidentiary record reflects that the Plaintiff historically made payments on behalf of the HCMS Term Note and HCRE Term Note in addition to providing an array of other critical services to HCMS and HCRE not dissimilar from many of the services that the Plaintiff provided to NexPoint under the NexPoint Services Agreement.⁵³
- b. No evidence has been presented suggesting that there was any communication from HCMS, HCRE, or Dondero suggesting that the payments on the HCMS Term Note and the HCRE Term Note should not continue.
- c. No evidence has been presented suggesting that on payment dates in years prior to 2020 HCMS or HCRE had to notify the Plaintiff that it wanted the Plaintiff to make the required payments on the HCMS Term Note or the HCRE Term Note. Accordingly, it would not have been reasonable for the Plaintiff to expect that HCMS or HCRE were required to take any affirmative steps to have payments made on their notes.
- d. The Plaintiff had conflicting roles because it was the payee of the HCMS Term Note and the HCRE Term Note and also had the obligation to cause the payments to be made of those notes. The conflicting roles were also heightened because of the increasingly adversarial role that had developed between the Plaintiff and Dondero.
- e. The Plaintiff stood to benefit mightily if HCMS and HCRE defaulted on the payment of interest or principal, given the Plaintiff's ability to immediately accelerate the payment of those notes. Without a default, some of the principal of the HCMS Term Note and the HCRE Term Note could have been outstanding until 2047.
- f. Waterhouse was an officer of the Plaintiff and was also an officer of HCMS, creating a conflict beyond the conflicts that the Plaintiff had that are described above. Given Waterhouse's dual roles, he had knowledge of HCMS's business objectives and financial condition, which should have alerted him that HCMS would not welcome a default on the HCMS Term Note.

⁵³ See, e.g., Dondero Deposition, Volume 2, pages 335:19 to 336:13; page 381, lines 10-23.

- g. The Plaintiff made no effort to warn HCMS or HCRE of the implications of the Plaintiff not making payments on the HCMS Term Note or HCRE Term Note by December 31, 2020.

56. Dondero testified about the payments that were required on the HCMS Term Note by December 31, 2020, indicating that there was an expectation by HCMS that the payments were going to be made, regardless of whether there were specific instructions by HCMS to do so.⁵⁴

Q: Okay. Do you know whether anybody acting on behalf of HCMS ever instructed or authorized Highland to make a payment on account of HCMS's term note to Highland?

A. Well, again, and maybe I didn't say it clearly enough. I think there was a reliance in the due course aspect, especially on small amounts, and it would have been done by Highland personnel on behalf of Services.

* * * * *

Q. And I'm going to ask you, Mr. Dondero, to be patient with me and to listen carefully to my question. Are you aware of anybody acting on behalf of HCMS, whoever instructed Highland to make a payment in satisfaction of any payment that was due at the year-end of 2020 under the term note?

A. Not specifically, but I'm saying I don't think it needed to be made specifically.

57. The Plaintiff was required to act reasonably in the performance of its obligations to HCMS and HCRE given the record of past practices and the precedent created by similar work done by the Plaintiff for NexPoint. With respect to the payments required under the HCMS Term Note and the HCRE Term Note by the Plaintiff, HCMS and HCRE had a reasonable expectation that they would continue receiving such payment services absent a clear termination by Plaintiff of its obligations to HCMS and HCRE. Given that there is no evidence suggesting that any of the parties had terminated the Plaintiff's obligations to provide services to HCMS and HCRE as of December 31, 2020, especially given that the Plaintiff continued to perform other services on behalf of those entities as of such date, the Plaintiff did not act reasonably by not making the payments on the HCMS Term Note and the HCRE Term Note by December 31, 2021. Likewise, it was also not reasonable for the Plaintiff to not discuss with HCMS and HCRE that payments were not going to be made on the HCMS Term Note and the HCRE Term Note given that payments had been made in prior years without any request by HCMS or HCRE.

58. Hendrix testified that the instruction to her not to make the NexPoint Term Loan payment by December 31, 2020, did not apply to the payments required on the HCMS Term Note and the HCRE Term Note by December 31, 2020.⁵⁵ She also testified that she made no attempt or effort to determine whether Dondero wanted the payments required on the HCMS Term Note

⁵⁴ Dondero Deposition, Volume 2, pages 371:23 – 372:18.

⁵⁵ Hendrix Deposition, page 100, lines 20 – 23; page 101, lines 8 – 12.

and the HCRE Term Note to be paid by December 31, 2020.⁵⁶ Finally, Hendrix made no attempt to check with anyone whether the payments should be made.⁵⁷ Hendrix's testimony underscores that Plaintiff did not act reasonably in discharging its obligations to HCMS and HCRE.

59. For the foregoing reasons, any alleged default under the HCMS Term Note and the HCRE Term Note was the result of the Plaintiff's own negligence and misconduct, which underscores that Plaintiff did not act reasonably in the discharge of its obligations to HCMS and HCRE.

VII. CONCLUSION

60. In summary, based on the evidence that I have reviewed and relied upon, as well as my training and experience, it is my opinion that the Plaintiff did not act reasonably in choosing not to pay the interest and principal due under the Notes. As a result of Plaintiff's failures to act reasonably, it should not have accelerated payment of the principal amount of the Notes.

Respectfully submitted,



Steven J. Pully, CPA, CFA, ESQ.

⁵⁶ *Id.* at page 102, lines 10 – 13.

⁵⁷ *Id.* at page 105, lines 8 – 11.

Exhibit A

STEVEN J. PULLY

4564 Meadowood Road, Dallas, Texas

(214) 587-6133

sjpully@yahoo.com

Employment History

October 2014 – Present	<p>SPEYSIDE PARTNERS/INVESTMENT BANKER/CONSULTANT/BOARD DIRECTOR/CORPORATE EXECUTIVE</p> <ul style="list-style-type: none"> • <i>Investment banker/consultant to companies, investors and creditors on matters including capital raising, distressed debt restructurings, asset dispositions, activist investing defense, strategic opportunities, and expert witness matters</i> • <i>Chief Executive Officer and Chairman, Harvest Oil & Gas (post-reorg)</i>
January 2008 – Sept. 2014	<p>CARLSON CAPITAL, L.P., General Counsel and Partner, Dallas, Texas</p> <ul style="list-style-type: none"> • <i>Responsible for legal affairs of hedge fund with over \$9.0 B of AUM; worked closely with affiliated oil and gas private equity fund with \$700 of AUM beginning in 2010</i> • <i>Member of Management, Operating and Valuation Committees (Chair)</i>
Dec. 2001 – October 2007	<p>NEWCASTLE CAPITAL MANAGEMENT, L.P., President, Dallas, Texas</p> <ul style="list-style-type: none"> • <i>Activist fund with \$650 MM of assets under management</i> • <i>Operating positions for portfolio companies: CEO of Pinnacle Frames, Jan. 2003 – June 2004 (largest domestic picture frame manufacturer with 600 employees; involved in multiple visits to Wal-Mart, visited China and identified new CEO for company); CEO of New Century Equity Holdings, June 2003 – Oct. 2007 (cash shell seeking to acquire business)</i>
May 2000 – Dec. 2001	BANC OF AMERICA SECURITIES , Managing Director, Investment Banking - M&A/ Energy & Power Groups; Houston and Dallas, Texas
January 1997 – May 2000	BEAR STEARNS & CO. INC. , Senior Managing Director - Investment Banking Department; Dallas, Texas
April 1996 – Dec. 1996	<p>CONVERGENT ASSOCIATES, INC., President, Dallas, Texas.</p> <ul style="list-style-type: none"> • <i>Private equity firm that controlled three technology-oriented companies involved in travel, media and software; affiliated with EDS</i>
January 1996 - April 1996	<p>WASSERSTEIN PERELLA & CO., INC., Vice President - Investment Banking Department; Dallas, Texas</p> <ul style="list-style-type: none"> • <i>Left after brief association because supervisor announced departure plans</i>
July 1989 - Dec. 1995	PAINWEBBER INCORPORATED/ KIDDER, PEABODY & CO. , First Vice President - Investment Banking Department; New York City and Houston, Texas
October 1985 - July 1989	BAKER & BOTTS, Attorneys , Associate – Corporate Department; Houston, Texas

Board Experience

Board Leadership - Experience as Lead Director, Chairman of the Board, Executive Committee member and Chairman of Audit, Compensation, Governance and Strategic Committees

Accounting/Finance - CPA and CFA certifications, significant experience with financial statements and analysis, member of several audit committees including chair role

Strategic Transactions/Capital Raising - Substantial history with successful strategic transactions and efficient capital raising, including debt restructurings

Governance/Activist Investing Expertise - Extensive experience with shareholder governance and activist investing/defense; positive reputation with shareholders as a value creator

Legal/Regulatory - Licensed attorney, extensive experience managing legal/compliance department

Public Company Directorships

Previous: Bellatrix Exploration, Energy XXI (Chair – Comp and Strategic), EPL Oil & Gas Inc. (Lead Director, Chair - Comp), Ember Resources, Cano Petroleum, Goodrich Petroleum, Harvest Oil and Gas (Chairman of the Board, Chair – Audit), Peerless Systems (Chair – Audit), New Century Equity Holdings, MaxWorldwide, Geoworks Corporation, Pizza Inn (Chair – Governance), Titan Energy, VAALCO Energy (Chair – Governance, Comp), Whitehall Jewelers (Chairman)

Private Company Directorships

Current: Harvest Oil & Gas (Chairman of the Board and Chief Executive Officer, formerly public company), Limetree Bay Energy, Heritage Power, Response Team 1, Wild Rivers, OWS, ExpressJet

Previous: Fox & Hound, GenCanna Global, Pinnacle Frames & Accents, Aspire Holdings (Chair – Comp), PermianLide, Tribune Resources (Chair – Audit), PGI, Southland Royalty, Greylock Energy, Karya Properties, PRIMEXX Energy, Titan Energy

Professional Certifications, Education and Other Interests

CHARTERED FINANCIAL ANALYST, 2004 (Active member), **CERTIFIED PUBLIC ACCOUNTANT**, Texas, 1985 (Active member), **STATE BAR OF TEXAS**, 1985 (Active member), **FINRA** Series 7, 63 and 79 (Current)

The University of Texas School of Law, 1985

International Law Journal, Moot Court, Board of Advocates

Georgetown University, BSBA with honors, 1982, Major in accounting with 3.90 GPA in major
President of Student Government Senate, National Model U.N. Team

Centre for Management Studies, Oxford University, England, Summer 1981

Sailing, golf, writing, biking and travel; married with two adult daughters

Board of Advisors, Georgetown McDonough School of Business, 2015 - 2018

Documents Reviewed

Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate (Dkt. No. 1, Adv. Proc. No. 21-03004)

Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty (Dkt. No. 63, Adv. Proc. No. 21-03005)

Defendant NexPoint Advisors, L.P.'s Answer to Amended Complaint (Dkt. No. 64, Adv. Proc. No. 21-03005)

Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty (Dkt. No. 68, Adv. Proc. No. 21-03006)

Highland Capital Management Services, Inc.'s Answer to Plaintiff's Complaint (Dkt. No. 6, Adv. Proc. No. 21-03006)

Defendant Highland Capital Management Services, Inc.'s Answer to Amended Complaint (Dkt. No. 73, Adv. Proc. No. 21-03006)

Amended Complaint for (I) Breach of Contract, (II) Turnover of Property, (III) Fraudulent Transfer, and (IV) Breach of Fiduciary Duty (Dkt. No. 63, Adv. Proc. No. 21-03007)

Defendant HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC)'s Answer to Amended Complaint (Dkt. No. 68, Adv. Proc. No. 21-03007)

Defendant James Dondero's Answer to Amended Complaint (Dkt. No. 83, Adv. Proc. No. 21-03003)

Remote Videotaped Deposition of Frank Waterhouse, taken October 19, 2021 and Exhibits

Video Deposition of James P. Seery, Jr., taken October 21, 2021 and Exhibits

Deposition of Kristin Hendrix, taken October 27, 2021 and Exhibits

Deposition of David Klos, taken October 27, 2021

Remote Deposition of James Dondero, Volume II, taken October 29, 2021 (Rough draft) and Exhibits

Remote Deposition of James Dondero, Volume III, taken November 4, 2021 (Rough draft) and Exhibits

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

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In Re:)
HIGHLAND CAPITAL)
MANAGEMENT, L.P.,)
Debtor.)

Case No. 19-34054-sgj-11
Chapter 11
Dallas, Texas
Monday, December 13, 2021
10:30 a.m. Docket

HIGHLAND CAPITAL)
MANAGEMENT, L.P.,)
Plaintiff,)
v.)
NEXPOINT ADVISORS, L.P.,)
et al.,)
Defendants.)

Adversary Proceeding 21-3005-sgj
MOTION TO EXTEND EXPERT
DISCLOSURE AND DISCOVERY
DEADLINES

HIGHLAND CAPITAL)
MANAGEMENT, L.P.,)
Plaintiff,)
v.)
HIGHLAND CAPITAL)
MANAGEMENT SERVICES, INC.,)
et al.,)
Defendants.)

Adversary Proceeding 21-3006-sgj
MOTION TO EXTEND EXPERT
DISCLOSURE AND DISCOVERY
DEADLINES

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HIGHLAND CAPITAL)	
MANAGEMENT, L.P.,)	Adversary Proceeding 21-3007-sgj
)	
Plaintiff,)	MOTION TO EXTEND EXPERT
)	DISCLOSURE AND DISCOVERY
)	DEADLINES
v.)	
)	
HCRE PARTNERS, LLC)	
(n/k/a NEXPOINT REAL)	
ESTATE PARTNERS, LLC),)	
)	
Defendant.)	

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

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

1 DALLAS, TEXAS - DECEMBER 13, 2021 - 10:55 A.M.

2 THE COURT: I will now take up the Highland three
3 motions to extend expert deadlines. So let me get appearances
4 from lawyers. First, who do we have appearing for the Debtor
5 this morning?

6 MS. WINOGRAD: Good morning, Your Honor. My name is
7 Hayley Winograd of Pachulski Stang Ziehl & Jones appearing on
8 behalf of Highland.

9 THE COURT: Okay. Good morning. For NexPoint
10 Advisors, who do we have appearing?

11 MR. RUKAVINA: Your Honor, good morning. Davor
12 Rukavina and Julian Vasek.

13 THE COURT: Good morning. All right. For HCMS and
14 NPPE, who do we have appearing?

15 (No response.)

16 THE COURT: Okay. Maybe I should say these names in
17 full.

18 MS. DEITSCH-PEREZ: I apologize, Your Honor. This is
19 Deborah Deitsch-Perez. I believe Michael Aigen will be
20 appearing for HCRE and HCMS. And I wonder if he's having
21 technical difficulties. I saw him on the line a few minutes
22 ago. I'm going to go off and call to make sure that there
23 isn't a problem.

24 THE COURT: Okay.

25 MR. RUKAVINA: But Your Honor, I'll be handling the

1 bulk of the arguments, and Mr. Aigen will cover a much smaller
2 amount.

3 THE COURT: Okay. Well, we'll --

4 MR. AIGEN: Your Honor, this is Michael Aigen. Are
5 you able to hear me now?

6 THE COURT: I can hear you now.

7 MR. AIGEN: I apologize. Michael Aigen for HCMS and
8 HCRE.

9 THE COURT: All right. I presume those are our only
10 formal appearances, but is there anyone else who wished to
11 appear?

12 (No response.)

13 THE COURT: All right. Well, Mr. Rukavina, I'll hear
14 your argument.

15 MR. RUKAVINA: Thank you, Your Honor.

16 I'm sure that the Court has read our papers, and by this
17 motion we seek to extend the expert deadline so that we can
18 retain Steven Pully as our expert on the standard of care.
19 Mr. Pully is on the video. I can see him right now. So, good
20 morning, Mr. Pully.

21 And Your Honor, I'd like for you to be aware that Friday
22 evening I did file on the docket Mr. Pully's report.
23 Obviously, the Court hasn't granted this motion, but I wanted
24 the Court to know that we moved as rapidly as possible, and
25 Mr. Pully has now finalized his report. So there's no future

1 need for additional time on my end if the Court grants this
2 motion.

3 Your Honor, before I get to the actual merits of this
4 motion, I feel it important to address a hearing that occurred
5 a few weeks ago that I was not present at because this motion
6 was discussed briefly at the end. This was a hearing held on
7 Ms. Deitsch-Perez's motion to dismiss and compel arbitration.

8 And Mr. Vasek, if you could please pull up the transcript
9 of that and scroll down to near the end where this motion is
10 discussed.

11 Your Honor will maybe recall that we have the transcript
12 where Ms. Deitsch-Perez mentioned as a scheduling matter that
13 this motion had been filed. And the Court says, What on earth
14 does that have to do with this litigation? I don't mean to be
15 flippant and laugh, but what on earth does that have to do
16 with notes?

17 And if we scroll down some more, Your Honor, Ms. Deitsch-
18 Perez was attempting to explain to the Court the purpose of
19 this motion, and the Court notes that, It sounds like you're
20 talking about an affirmative defense that hasn't been
21 articulated yet.

22 And if we scroll down some more, Ms. Deitsch-Perez
23 attempts to tell the Court that, in fact, this is an
24 affirmative defense that has always been asserted.

25 And the Court notes there in her dialogue with Ms.

1 Deitsch-Perez that, I'm just letting you know you have a very
2 uphill battle convincing me that experts regarding shared
3 services agreements would be germane.

4 And the Court goes on to say that it has heard a lot about
5 shared services agreements during the past few years,
6 including experts on the witness stand in the *Acis* case. And
7 the Court notes that, Under the pleadings as now in the
8 record, I just can't imagine why experts on shared services
9 agreements are going to be relevant evidence.

10 I think, Mr. Vasek, you can pull that down.

11 And I point this out only because, again, I know that the
12 Court has prepared for this hearing, but this is an
13 affirmative defense that has always been pled from the
14 beginning. It does not involve the interpretation of the
15 contract. We're not talking about the shared services
16 agreement. We're not talking about the contract. And recall,
17 Your Honor, that both Your Honor and the District Courts have
18 agreed that jury rights do attach here. So the question
19 really is not the Court's familiarity with shared services
20 agreements but whether expert testimony will be relevant to
21 help the jury.

22 So, what is that expert evidence, Your Honor, and how did
23 this arise? NexPoint is the obligor, the maker on a \$30
24 million note -- I'm using round numbers -- and that note had
25 been paid down to some \$24 million.

1 The note purports to require a payment every year on
2 December the 31st. And in the year 2020, although we argued
3 that the payment was prepaid, that payment was not made
4 timely. It was made a couple weeks later, when Mr. Dondero
5 realized what had happened.

6 Our version, NexPoint's version of why this payment did
7 not happen has until recently been that the Debtor dropped the
8 ball. Under the shared services agreement, and as Mr. Dondero
9 and Mr. Frank Waterhouse, the Debtor's former CFO, confirmed,
10 the Debtor was for years responsible to facilitate the annual
11 payment. The Debtor didn't pay from its own funds. It would
12 pay it from our funds. But that was both in the contract and
13 that was the practice. Again, Mr. Waterhouse -- and Your
14 Honor has seen in my papers and in his transcript -- confirmed
15 that it was reasonable for NexPoint to rely on the Debtor to
16 ensure that this payment would be made.

17 So Mr. Vasek, if we can pull up the shared services
18 agreement here.

19 I know that the Court likes to look at contracts, so I
20 will briefly take Your Honor through some of the pertinent
21 provisions, because this relates to directly to Mr. Pully.

22 And Mr. Vasek, if you'll please scroll down to the
23 definitions of Covered Person.

24 And Your Honor can read it for herself. This is just a
25 definitional that we need as we go forward. But Covered

1 Person means the staff and services provider. That is
2 Highland. That is the Debtor. And it includes managers,
3 members, employees, et cetera. Well, that would be Mr. Frank
4 Waterhouse. Mr. Waterhouse at that time was the Debtor' chief
5 financial officer, and he was also an officer of NexPoint. So
6 he, like many people here, wore two hats.

7 Mr. David Klos at that time was the controller for
8 Highland, and Ms. Kristin Hendrix was a senior accountant at
9 Highland. Both Mr. Klos and Ms. Hendrix were providing the
10 services we're going to discuss.

11 If you'll scroll down, Mr. Vasek.

12 The next provision, Your Honor, relates to what services
13 were being provided.

14 Scroll up just a -- just a tad.

15 So you'll see under Section 2.02 the parties are now
16 agreeing here's the services that Highland will be provided.
17 And it's important to note, Your Honor, that at this time this
18 agreement was in place. This agreement was terminated I want
19 to say at the end of February this year. But in December and
20 November of 2020, this agreement was in place.

21 And if the Court looks at the services being provided, the
22 first one there is assistance and advice. That word "advice"
23 is important. Assistance and advice with respect to various
24 things. And you see down there those things include finance
25 and accounting, payments, bookkeeping, cash management, cash

1 forecasting, accounts payable, et cetera.

2 Keep scrolling down, Mr. Vasek. Obviously, as the Court
3 very well knows, the Debtor was also providing legal services.

4 And if you keep scrolling down, Mr. Vasek, to the next
5 page, there you go, to K and L.

6 These are more catch-all. So if the language of what I
7 just showed you is not express or specific enough, here you
8 have these catch-alls, such as advice on all things ancillary
9 or incidental to the foregoing and advice relating to other
10 back- and middle-office services in connection with the day-
11 to-day business.

12 So, again, we're not here today, we're not asking the
13 Court to decide, nor do I think that it would be this Court to
14 decide, whether the Debtor had a duty to facilitate the
15 December payment. I'm just pointing out that we have, I think
16 anyone would agree, at least a *prima facie* colorable argument
17 that the Debtor would have such duty.

18 And just to address an issue that the Debtor raised, Mr.
19 Vasek, if you'll scroll down to 6.01, and then if you'll zoom
20 in.

21 Here, now, Your Honor, is the language that is of
22 relevance, the direct relevance. So we've seen that Covered
23 Person is defined, and we have seen that -- and we can now see
24 that this agreement requires Covered Person -- that includes
25 the Debtor; that includes Mr. Waterhouse; that includes Mr.

1 Klos -- to discharge its duties under this agreement. We've
2 seen that there's certainly a colorable argument that the
3 duties under this agreement include facilitating payments and
4 advice with payments and accounts payable and the like, and
5 that the Debtor has to discharge its duties with the care,
6 skill, prudence, and diligence under the circumstances then
7 prevailing that a prudent person acting in a like capacity and
8 familiar with such matters would use in the conduct of an
9 enterprise of a like character and with like aims.

10 That, Your Honor, is what we need the expert on. Not to
11 tell the jury what this contract says, not to tell the jury
12 that the Debtor had a duty, but to look at, under the facts,
13 did the Debtor's performance or lack thereof -- and I'll tell
14 you why that's important in a moment -- did that performance
15 or lack thereof comport with this standard of care?

16 This is a matter for an expert. The average juror, the
17 average layperson, myself, I would not know what the care,
18 skill, prudence, and diligence of a reasonable prudent person
19 in this situation would be. I can theorize on that. I can
20 opine on that. I'm not an expert on that. This is a matter
21 for an expert, the same as with medical malpractice, legal
22 malpractice, breach of fiduciary duty.

23 While we're on this agreement, just to address another
24 argument that the Debtor makes, the Debtor says that this
25 agreement exculpates negligence.

1 Mr. Vasek, if you'll please scroll down to the
2 exculpation.

3 And there is an exculpation provision. But if Your Honor
4 -- and it does exculpate negligence. It doesn't exculpate
5 gross negligence, et cetera. But it talks about that only
6 acts or omissions -- it's Romanette (i) -- acts or omissions
7 arising out of or in connection with the conduct of the
8 business of the management company that is exculpated. Again,
9 we're not here today to decide what this means, but the
10 business of NexPoint is not note-making; the business of
11 NexPoint is advising thousands of investors and funds with
12 respect to a billion dollars of investments.

13 It is -- the Debtor does have an argument, and either the
14 Court or the jury will have to decide whether this exculpation
15 provision applies. And then if -- and you can remove this,
16 Mr. Vasek -- the Debtor likewise says that the agreement's
17 indemnification provision prohibits this argument. We pointed
18 out in our briefing, Your Honor, that, in fact,
19 indemnification under Texas law does not apply to the parties
20 to the contract. It applies to claims made by third parties.
21 But, again, that's an argument that the Debtor has.

22 So we have this contract in place. Late November/early
23 December rolls around, and both Mr. Dondero and Mr. Waterhouse
24 testify that they had a meeting. What was said at that
25 meeting is in dispute.

1 Mr. Dondero believes that he told Mr. Waterhouse, stop
2 paying on the shared services agreement. It's NexPoint's
3 position -- Your Honor knows we filed an administrative claim
4 -- it's NexPoint's position that it had overpaid millions of
5 dollars under the shared services agreement, in part because
6 many of the employees of the Debtor that we were supposed to
7 be paying our respective share of weren't there anymore. So
8 Mr. Dondero says to Mr. Waterhouse, stop paying on this shared
9 services agreement.

10 Those are the facts as we knew them going into late
11 October. Based on that fact, and based on the fact that the
12 Debtor did not facilitate the payment, we've always asserted
13 as an affirmative defense that our lender, who is also our
14 lawyer, who's also our accountant, who's also our treasury
15 management people, and who have always facilitated these
16 payments in the past, dropped the ball. They committed simple
17 negligence, they dropped the ball, thereby causing the alleged
18 default.

19 We did not need an expert opinion on that at that time.
20 You've seen in my reply briefing, Your Honor, that, in fact,
21 the Fifth Circuit holds in multiple instances that when it's
22 simply a matter of missing a deadline -- a lawyer missing
23 limitations, if you will -- expert testimony is not required,
24 and in fact may be inappropriate because a lay person can
25 figure out that, a lay juror can figure out that, well, if you

1 just simply didn't do something, whether that's -- whether
2 that comports with the standard of care or not.

3 On October the 19th of this year, the Debtor and we
4 deposed Mr. Waterhouse. And Mr. Waterhouse had a different
5 testimony. He had a different recollection of that meeting.
6 Mr. Waterhouse said that Mr. Dondero told him in late November
7 or early December, don't make this NexPoint payment. In other
8 words, that Mr. Dondero expressly said the payment that's
9 coming up for NexPoint, do not make this payment.

10 That was news to us. I was so surprised by that testimony
11 that I actually asked Mr. Waterhouse that question four times.
12 And opposing counsel actually got angry at me, kept saying,
13 how many times are you going to keep asking this question? I
14 was surprised.

15 I was not able to talk to Mr. Waterhouse meaningfully
16 before that. Mr. Waterhouse has attorneys, Mr. Waterhouse is
17 in litigation with the Debtor, and those attorneys require
18 that I not communicate with him directly, I communicate only
19 through them. I never took up the chance to ask them about
20 this meeting because the only information that I had and that
21 my client had was that there was no such instruction. The
22 Debtor may or may not have been surprised as well.

23 Mr. Vasek, if you'll please pull up discovery.

24 Your Honor, we're sharing with you now certain of the
25 discovery in this case -- in particular, the Debtor's

1 responses.

2 And if you'll go to Interrogatory No. 1, Mr. Vasek.

3 So, Your Honor obviously can read this. But I ask the
4 Debtor, if it contends that it was not responsible for making
5 payments under the note on NexPoint's behalf, please explain
6 the legal and factual basis for such contention. I asked for
7 a factual basis as well. And Your Honor can see in the
8 response that the Debtor objects, the Debtor says that it was
9 not required to make the payment, but nowhere here does the
10 Debtor say that it had received an instruction not to make the
11 payment.

12 Pardon me, Your Honor.

13 This was, I believe, from May or June. In any event, it
14 was early in this litigation. Nowhere here am I put on any
15 kind of notice that it's the Debtor's position that it
16 received an instruction not to make the payment.

17 If we scroll down to Request for Production, I believe
18 it's No. 1, Mr. Vasek.

19 Here, we -- I ask for all communications pursuant to which
20 the Debtor was advised or instructed not to make the payment
21 or to cause the payment to be made. And the Debtor's answer
22 includes the following: Any communications responsive to
23 Request for Production No. 1 were verbal.

24 Okay. I had to await depositions. That's fine. I had
25 asked in an interrogatory, I didn't get a factual response,

1 and then I'm now being told that any communications were
2 verbal.

3 Now, the Debtor may not have known about Mr. Waterhouse's
4 instruction, it may not have, in which case I don't think it's
5 fair to accuse NexPoint or its counsel of dropping the ball.
6 Or the Debtor may have known of the instruction, in which case
7 the Debtor should have answered Interrogatory No. 1 factually
8 by saying, oh, wait, not only were we not required to make the
9 payment, et cetera, et cetera, but we received an instruction
10 from your boss, NexPoint, not to make the payment.

11 You can remove that.

12 So, here we go into October 19th. We depose Mr.
13 Waterhouse. We now see that, in fact, I guess it's -- I
14 forget who -- who the author is, but the plot has thickened.
15 The situation is now much more complicated. Whereas
16 previously we argued that the Debtor had dropped the ball, the
17 question now is, okay, if in fact the jury believes that Mr.
18 Dondero went to Mr. Waterhouse and said, don't make this
19 payment, did that discharge the Debtor's duties as specified
20 by the contract or not?

21 It's our belief that it did not. It's our belief that Mr.
22 Waterhouse should have, at a minimum, asked Mr. Dondero after
23 that, did I get you right, Jim? Did I understand correctly?
24 Did you mean not to make this payment? It's our belief that
25 the Debtor -- our legal advisers, our accountants, people that

1 are supposed to advise us -- should have called back and said,
2 Jim, you know that if you don't make this payment you're going
3 to have a note accelerated and it's going to be \$24 million.
4 They should have advised Mr. Dondero of the potential
5 consequences, especially given their clear conflict of
6 interest.

7 At the same time, they're our lender to the tune of \$24
8 million, and they're providing us all this assistance and
9 advice that we're paying millions and millions of dollars for.

10 And then also, if Mr. Dondero gave such an instruction,
11 did the Debtor have some duty to try to dissuade him by
12 saying, Jim, you're being a hothead, this is a very serious
13 matter, it's only \$1.4 million, make the payment? In fact, we
14 did make the payment in January, after this issue was learned
15 about. But the Debtor didn't do any of those things.

16 So, again, the question now is, did the Debtor's lack of
17 any subsequent follow-up -- putting its head in the sand, so
18 to speak -- did that comport with the duties as specified,
19 what would a reasonable person discharging his or her duties
20 under the facts and circumstances in that industry then in
21 place, what should or would have such a reasonable person
22 done? That's where Mr. Pully comes in.

23 I deposed Mr. Seery a few days after this deposition and I
24 asked him about this, and Mr. Seery said that no, in his view,
25 Mr. Waterhouse acted perfectly appropriately, that Mr.

1 Waterhouse had no duty to seek clarification or explain the
2 ramifications or anything else. And it was clear to me that
3 Mr. Seery is going to testify to that effect.

4 So at that point in time, now that we knew Mr.
5 Waterhouse's testimony, we decided that it is not only
6 advisable but perhaps necessary to retain an expert. And we
7 moved very quickly. I have had the fortune of working with
8 Mr. Pully before, so I knew him. I was able to rapidly retain
9 him because of our prior familiarity with each other. Mr.
10 Pully reviewed all the transcripts. He reviewed the
11 discovery. He prepared a full and final report. So, from
12 beginning to end, we were done in maybe five weeks, maybe six
13 weeks.

14 And we're not proposing, Your Honor, that the Debtor
15 doesn't have whatever time it needs to prepare a rebuttal.
16 We're not proposing that the Debtor can't depose Mr. Seery
17 [sic]. Of course it can.

18 So where this adversary proceeding now is is that
19 discovery is over. The Debtor will be filing by December the
20 17th a motion for summary judgment. Your Honor will recall
21 that Your Honor approved a scheduling order on that. And
22 there will be hearings before this Court on summary judgment,
23 and perhaps opposing counsel can remind me, but it's going to
24 be in late January, or I'm going by memory here, maybe early
25 February.

1 So that is, Your Honor, what happened. That is how it
2 happened. It's the truth. It's -- there's no laying behind
3 the log here. There's no litigation decisions that are now
4 backfiring and we're trying to get out of them. What happened
5 here is exactly what should happen in a lawsuit like this,
6 where discovery has illuminated various issues and now we have
7 to deal with the consequences of that discovery as we prepare
8 for trial.

9 October the 29th was the date in the scheduling order to
10 disclose experts and provide their reports. Mr. Pully
11 couldn't even hypothetically do that in time since I had
12 retained him a few days before that. But we moved very
13 quickly to file this motion, to file it before the deadline
14 actually expired, in hopes, again, of not -- not only of
15 showing Your Honor that we moved diligently and rapidly when
16 this issue unfolded, but also that we didn't need *nunc pro*
17 *tunc* relief.

18 So, Rule 16 does apply. The good cause requirement does
19 apply. But this is not some talismanic super-high burden to
20 meet. Yes, there's a burden. Yes, I must demonstrate to Your
21 Honor why leave based on good cause is required. But we're
22 not trying to unscramble the eggs, and we're not seeking
23 something extraordinary or exotic here.

24 The Fifth Circuit has specified the four factors that the
25 Court should look at. In the Fifth Circuit cases that we've

1 seen and that we've briefed, the deadline had already expired
2 and the people were seeking *nunc pro tunc* relief. I don't
3 think we have that high of a burden here, but even if we do,
4 we've analyzed those four factors.

5 And the first factor is the explanation for the lateness.
6 Again, did NexPoint act diligently? Did NexPoint hide behind
7 the log? Is there some litigation strategy here that has
8 backfired? None of that, Your Honor, is present. There's
9 been no delay. We deposed, pursuant to agreed deposition
10 schedules, we deposed all of the main witnesses in October.
11 When we deposed Mr. Waterhouse, this issue arose. We moved as
12 rapidly as we could thereafter. And you've seen, Your Honor,
13 in the interrogatory answer, that if the Debtor knew about
14 this instruction, then, really, the Debtor should have
15 answered its interrogatory to say, we got an instruction not
16 to pay and that's why we didn't pay.

17 Maybe the Debtor -- maybe the Debtor didn't know that.
18 But when we deposed Mr. Klos and Ms. Hendrix, who are still
19 employees of the Debtor, they testified that they heard Mr.
20 Waterhouse tell them that in late November last year. So they
21 -- they testified that in late November last year Frank
22 Waterhouse told them, Jim Dondero told me, don't make this
23 payment.

24 So, even if the Debtor didn't know what Mr. Waterhouse
25 would testify to, Mr. Klos and Ms. Henderson [sic] did.

1 Again, I am not pointing the fingers here at the Debtor.
2 I'm not saying that their answer to Interrogatory No. 1 was
3 manipulative, that it was calculated to deceive. I'm not
4 suggesting that. I'm just suggesting that, had the Debtor
5 given a more fulsome answer, we would have immediately
6 investigated and immediately retained an expert back in May or
7 June of this year.

8 The next element, or the next factor, rather, is the
9 importance of this extension. And Your Honor, we have quoted
10 at length Fifth Circuit opinions that say that when the
11 standard of care is involved, expert opinion is appropriate
12 and may be required.

13 It goes back to, again, if the Debtor just dropped the
14 ball and didn't facilitate the payment, that's easy. That
15 doesn't need an expert. But if the Debtor was instructed by
16 Mr. Dondero not to make the payment and there was a month left
17 before the payment was to be made, did the standard of care as
18 specified in the contract require the Debtor to do something
19 that it failed to do?

20 So we are talking about the standard of care. That is
21 appropriate expert testimony. It may be required. And it is
22 not something that I can argue to a lay juror just based on a
23 deadline being missed.

24 So, yes, this -- the relief we're seeking is important,
25 especially given the jury nature of this trial.

1 The third factor is the potential prejudice. So, the
2 Debtor says, well, this will increase costs. Yes, it will.
3 But costs alone is not the legally -- the legal standard here.
4 Every litigation has costs. Every litigation has burdens.
5 And if the Debtor prevails in this lawsuit, they will claim
6 attorneys' fees and costs. They're entitled to that under the
7 note and under Texas law.

8 So there will be an incremental cost for the Debtor to
9 retain an expert, but that would have been present as of
10 October the 29th anyway.

11 Remember, I filed this motion on the deadline. We're
12 seeking six weeks of delay here. This is not late-stage
13 litigation where all the facts are known, all the witnesses
14 have been deposed, everyone's ready for trial, and suddenly a
15 party seeks to increase its opponent's litigation costs here
16 with a last-second expert. This is not that case.

17 So, there is no prejudice, at least not in the legally
18 relevant way by way of costs, nor is there any prejudice by
19 delay. And this also ties into the fourth factor, which
20 discusses a continuance. There is no prejudice here because
21 we're not trial-set. We don't know when we're going to be
22 trial-set.

23 Even if the Court denies summary judgment in whole or in
24 part at the end of January or early February -- which I don't
25 think that's very realistic because I think the Court is going

1 to want to think about it some, the Court is going to want to
2 prepare a report and recommendation -- this is not going to be
3 a straightforward summary judgment proceeding.

4 What is also out there is that the Debtor has filed a
5 motion to consolidate all these note cases in front of one
6 District Court judge. That's going to have to be reviewed by
7 the District Court judges and ruled on.

8 So we are months, months away from being trial-ready, and
9 then we don't know how long it's going to be before we're up
10 for a week or two long jury trial. No one knows that. That
11 is plenty of time for the Debtor to get a rebuttal expert.
12 It's plenty of time for the Debtor to depose Mr. Pully. It's
13 plenty of time for everything to come to play so that this
14 case will be certified trial-ready, irrespective of whether
15 there's an expert or not. This is not going to delay the
16 process. We're not seeking to delay the process.

17 Nor are we seeking to derail the summary judgment
18 proceedings. If the Debtor wants to retain an expert for
19 summary judgment proceedings, that just proves that there is a
20 question of fact here that precludes summary judgment.

21 But as far as continuance or trial-setting, that's just
22 not present here.

23 And I've quoted Your Honor at length a District Court's
24 opinion from the Eastern District of Texas that talks about
25 prejudice, that talks about costs. And that judge basically

1 said, look, when it's -- when it's an affirmative defense that
2 you've known that since the beginning, which the Debtor has
3 known here since the beginning, then, really, it's not a last-
4 second tactic. It's not real prejudice. Yeah. Yeah, there's
5 a delay. Yeah, there's an increased cost. But the plaintiff
6 is now trying to fundamentally change this lawsuit, to
7 fundamentally interject something new here. The plaintiff
8 just needs some more time. And the question is, should the
9 plaintiff have more time?

10 Your Honor, those are the factors. We have -- we have the
11 exhibits. We have the record prepared. It's a part of the
12 motion and the Debtor's response. And Your Honor, we ask that
13 the Court grant this motion -- again, reminding the Court that
14 this does relate to an affirmative defense that's been around
15 since the beginning. It does relate to one that was -- only
16 -- only really became the subject of expert testimony in late
17 October. And it's only because discovery in this case worked
18 as it should. No one laid behind the log. No one made a
19 calculated decision that has backfired. No one delayed
20 anything or was less than diligent.

21 Under these circumstances, Your Honor, because the point
22 of a trial in front of a jury is to get to the truth and it's
23 to enable the jury to have what it needs to make a true, full,
24 and informed decision, we believe that good cause exists, and
25 we'd ask -- NexPoint would ask that the Court grant this

1 motion.

2 THE COURT: All right. Thank you.

3 I'll ask Mr. Aigen, does he have anything he wants to
4 supplement with?

5 MR. AIGEN: Yes, Your Honor. I can make a very quick
6 argument here.

7 As you know, HCMS and HCRE have filed a joinder, asking
8 for the same relief. The only thing I want to quickly point
9 out is that the only difference between our clients and Mr.
10 Rukavina's client is the lack of a written services agreement.
11 But I would point out, as the evidence we submitted in our
12 briefing shows, the undisputed testimony is that there was an
13 oral agreement to provide these services, that the Debtor did
14 provide these same exact services that they provided from --
15 for NexPoint to HCMS and HCRE, that they had done this for
16 years, and this included making loan payments.

17 So I just wanted to point that out, and I think what this
18 means is that, for the same reasons that Mr. Rukavina asked
19 for this relief, we believe we are entitled to the same
20 relief. And I won't bother to go through all the same
21 arguments that Mr. Rukavina just made to the Court. So that's
22 all I have, Your Honor.

23 THE COURT: All right. Thank you. Ms. Winograd?

24 MS. WINOGRAD: May it please the Court?

25 THE COURT: You may proceed.

1 MS. WINOGRAD: Your Honor, the motion should be
2 denied because there is no good cause for modifying the
3 scheduling order. The motion is untimely. The expert
4 testimony Defendants seek to gather is both improper and
5 irrelevant. And if the motion is granted, Highland will be
6 prejudiced.

7 This is -- this adversary -- adversary proceeding is a
8 garden-variety collection action on a simple note, it has been
9 going on for roughly a year, and it continues to get delayed
10 due to unnecessary and costly motion practice. Defendants'
11 latest motion is not only another delay tactic, but it is also
12 completely unsupported.

13 And before I tell you why it is unsupported, I want to
14 take a step back and just summarize the context of Defendants'
15 motion. Defendants have always and continue to assert the
16 same affirmative defense, which is that their default under
17 the note was the result of Highland's negligence under the
18 shared services agreement. It is Defendants' position that
19 before Mr. Waterhouse's deposition an expert was not needed to
20 testify regarding Highland's duties under the shared services
21 agreement.

22 Mr. Waterhouse then testified that Mr. Dondero gave him
23 instruction not to make a payment under the note. It is now
24 Defendants' contention that, solely in light of this
25 testimony, all of a sudden an expert is needed to testify

1 regarding whether Highland owed an affirmative duty under that
2 same shared services agreement to ask Mr. Dondero if he
3 understood the implications of his instruction, and if so, if
4 Highland breached such a purported duty.

5 First of all, Your Honor, based on the clear terms of the
6 shared services agreement, there is no affirmative duty for
7 Highland to ask Mr. Dondero if he understood the implications
8 of his own instruction.

9 Moreover, Your Honor, the question of what Highland's
10 duties are is a legal issue reserved for the Court, and the
11 issue of whether Highland breached -- and Highland submits
12 there was no such breach -- but that issue is reserved for the
13 jury.

14 Your Honor, if expert testimony wasn't needed before, it
15 is not needed now.

16 This Court entered a scheduling order in September of
17 2021. Under Rule 16(b) of the Federal Rules of Civil
18 Procedure, an existing scheduling order can only be modified
19 upon a showing of good cause. The purpose of Rule 16 is for
20 the Court to prevent unforeseeable and never-ending litigation
21 expenditures.

22 So the critical question before Your Honor today is
23 whether there is good cause to modify the scheduling order.
24 And Highland submits there is not.

25 Courts consider four general factors to determine whether

1 there's good cause. It's the party's explanation for failing
2 to previously identify the witness. It's the importance of
3 the witness's testimony. And it's the prejudice to the other
4 side in allowing the testimony. All of these factors weigh in
5 favor of denying the motion.

6 Regarding the first factor, Defendants' explanation for
7 failing to previously identify the witness is entirely without
8 merit. Again, NexPoint first raised its affirmative defense
9 that its default under the note was the result of Highland's
10 own negligence back in March of 2021. In other words,
11 NexPoint had nine months to retain an expert to testify
12 regarding Highland's duties for nine months.

13 NexPoint seeks to create -- to distinguish between these
14 notions of Highland somehow, quote, dropping the ball versus
15 Highland not asking Mr. Dondero if he understood the
16 implications of his own instruction. Defendants cite no
17 authority in support of the notion that one of these factual
18 circumstances would somehow require an expert but that the
19 other would not.

20 What this comes down to, Your Honor, is that Defendants
21 are using this testimony as an excuse to muddy the water, to
22 muddy the waters as to the critical issues in this case and as
23 a latch-ditch attempt to bolster their defense.

24 I don't want to bog you down with case law that's already
25 cited in our brief, but I want to flag a particularly on-point

1 case, and that is *Reliance*, 110 F.3d at 257. The Fifth
2 Circuit affirmed the lower court's denial of a party's motion
3 to modify the scheduling order when that -- when a deposition
4 didn't go well, specifically holding District Courts have the
5 power to control their dockets by refusing to give ineffective
6 litigants a second chance to develop their case.

7 The suggested expert testimony also is improper as a
8 matter of law. It is well-settled law in the Fifth Circuit
9 that an expert cannot testify regarding the scope of a party's
10 contractual duties under an agreement and whether that party
11 fulfilled such duties. And that is exactly what NexPoint and
12 Defendants are trying to do here. It is trying to have its
13 expert interpret the terms of a shared services agreement and
14 testify regarding Highland's duties thereunder and ultimately
15 whether it thinks Highland breached those duties.

16 This is an improper subject for expert testimony and
17 precisely the type of expert testimony that the Northern
18 District of Texas rejected in *Panhandle* and which the Fifth
19 Circuit affirmed the rejection of in *Askanase*, two cases cited
20 in our papers.

21 Even if the suggested expert testimony were proper, which
22 it is not, it is also irrelevant. In order to be relevant,
23 expert testimony must assist the trier of fact understand a
24 complex or distinct issue in a case. Here, the critical issue
25 for Defendants is whether they can prove that their default

1 under the note was the result of Highland's negligence. This
2 issue is well within the common understanding of a lay person.

3 Again, this is a garden-variety collection action. All of
4 the cases NexPoint cites in its papers in support of the
5 notion that expert testimony is required, all of those cases
6 involve professional malpractice cases, whether legal or
7 medical. And in those cases, an expert was required to
8 testify regarding the general standard of care in a particular
9 industry.

10 Here, NexPoint doesn't seek to have an expert testify
11 regarding the general standard of care in a particular
12 industry. That is not an issue in this case. And this
13 certainly is not a professional malpractice case.

14 NexPoint seeks to have its expert opine as to the scope of
15 Highland's legal duties in a shared services agreement and
16 ultimately whether Highland breached the purported duties,
17 which, again, we submit it did not.

18 The other case NexPoint cites to, *In re Schooler*, that
19 case also doesn't support Defendants' position, and in fact
20 supports Highland's position. In that case, the Fifth Circuit
21 noted, and I quote, Expert testimony is not needed in many, if
22 not most, cases.

23 I also want to briefly address NexPoint's argument raised
24 for the first time in its reply that Highland was also acting
25 as an attorney to Defendants during this time. As a

1 procedural matter, this argument is entirely improper because
2 it is not proper to raise an argument for the first time in a
3 reply.

4 And on the merits, again, this is not a professional
5 malpractice case. So for these reasons alone, such a
6 contention should be summarily disregarded by the Court.

7 Finally, Your Honor, Highland would suffer prejudice if
8 the motion is granted because it would be forced to expend
9 significant and costly resources responding to the testimony
10 in the form of retaining a rebuttal expert, taking and
11 defending additional depositions, and engaging in more motion
12 practice. This would be a waste of resources for both parties
13 and for the Court because this testimony isn't ultimately
14 going to be needed at trial.

15 It is improper because it opines as to the ultimate legal
16 issues in this case that are reserved for the Court and then
17 for the jury. And it is also irrelevant because all of the
18 issues in this case are well within the common understanding
19 of a lay person.

20 I also want to note that HCRE and HCMS's motions asking
21 for the same relief are equally if not more frivolous than
22 NexPoint's because HCMS and HCRE aren't even parties to the
23 shared services agreement. To the extent HCMS and HCRE are
24 asking an expert to testify regarding Highland's alleged
25 duties under an oral agreement, the terms of which are

1 unknown, such a contention is frivolous on its face.

2 But even if such an alleged oral agreement exists, which
3 it does not, this does not change the Rule 16(b) analysis.
4 The Defendants fail to show good cause for modifying the
5 scheduling order.

6 In brief, Your Honor, this motion is simply a delay
7 tactic, the expert testimony is improper, and the motion
8 should be denied. Thank you.

9 THE COURT: Thank you.

10 All right. Movants get the last word. Mr. Rukavina,
11 anything further?

12 MR. RUKAVINA: Yes, Your Honor. Most of what
13 opposing counsel says is the topic of a *Daubert* issue. We're
14 not seeking to prejudice *Daubert* today, and they have every
15 ability in the future to argue that Mr. Pully's testimony
16 should not be admissible.

17 Second, this is not a garden-variety case. It is not. It
18 is a case where, again, our lender was also our officer, was
19 providing all kinds of payment services, accounting services,
20 and legal services. It may not be unique, it may not have
21 never happened before, but it is not a garden-variety.

22 I do take issue with the notion that there has been any
23 delay in this case. That is not correct. I just looked at
24 the docket again to refresh my memory. We had a contested
25 hearing on my motion to withdraw the reference that the Debtor

1 objected to, arguing that 542 was a core matter. Your Honor
2 rejected that argument, and Your Honor agreed with me, as did
3 the District Court, that the reference will be withdrawn when
4 this trial -- when this case is certified trial-ready.

5 So the notion that there has been delay, intentional delay
6 by us, that this is a matter of delay, is absolutely wrong.
7 In fact, this lawsuit has gone on quickly. It's been handled
8 professionally. Both sides have been cooperative, giving each
9 other various accommodations. And I am proud, I think, of how
10 every lawyer has handled themselves in this lawsuit. To
11 suggest delay or intentional delay is wrong.

12 On the law, Your Honor, *In re Schooler*, I heard counsel
13 argue that it's just illogical and wrong to argue that an
14 expert wasn't required in one situation but now is. But
15 that's *In re Schooler*, the Fifth Circuit, Your Honor, 725 F.3d
16 498, that I quote at length from. That's one where the
17 trustee dropped the ball, a Chapter 7 trustee failed to give
18 property of the estate. And that's the one where the Fifth
19 Circuit does say, Accordingly, we have explained that, as a
20 general rule, expert testimony is not needed in many, if not
21 most, cases. And then the Fifth Circuit says that, It
22 requires no technical or expert knowledge to recognize that
23 she -- the trustee -- affirmatively should have undertaken
24 some form of action to acquire for the bankruptcy estate the
25 assets to which it was entitled.

1 But, again, this is not that case. This was that case
2 before Mr. Waterhouse testified, and now it's not. This is
3 not a case anymore where the debtor simply dropped the ball,
4 as did that trustee, or as does the doctor who amputates the
5 wrong leg, or as does the lawyer who misses a limitations
6 deadline. This is now a case where, if the jury believes Mr.
7 Waterhouse, the plot has thickened.

8 And finally, Your Honor, again, I'm not here to point
9 fingers, but look at the Debtor's response to Interrogatory
10 No. 1. All that the Debtor needed to say six or seven months
11 ago to avoid this delay is that, oh, wait, we received an
12 instruction not to pay. It would have taken ten words, one
13 sentence, by the Debtor to fully answer an interrogatory and
14 this motion would not have been necessary.

15 Thank you.

16 THE COURT: All right. Mr. Aigen, anything further
17 from you?

18 MR. AIGEN: No, nothing further, Your Honor. We just
19 join in Mr. Rukavina's reply points.

20 THE COURT: All right. As I understand it, the
21 deadline was October 29th for disclosure of experts, and the
22 record shows that at 5:22 p.m. on October 29th the Defendants
23 -- let me double-check that. That was actually the
24 declaration of Mr. Rukavina. No, 5:22 p.m. on the deadline,
25 the motion of the Defendant to extend the expert disclosure

1 and discovery deadlines was filed.

2 The legal authority that governs here is Rule 16(b). As
3 everyone has acknowledged, it provides that deadlines in
4 scheduling orders may be modified for good cause. I think the
5 standard does apply here. While I guess a lot of the cases
6 analyze it in terms of a request after a deadline has expired,
7 I think a motion on the day of the deadline at 5:22 p.m. is
8 going to be governed by Rule 16(b).

9 So, as the parties have argued to the Court, the Fifth
10 Circuit has specified four factors in guiding a decision in
11 this situation: the explanation for failure to timely move
12 for leave to amend; the importance of the amendment; potential
13 prejudice in allowing the amendment; and availability of a
14 continuance to cure such prejudice.

15 Here, as I think everyone readily acknowledges, these
16 Defendants have always asserted as a defense that the Debtor
17 dropped the ball, I think was one phrase used. That, in any
18 event, it was the fault of the Debtor that the Defendants did
19 default on the payment of these notes. I do not think the
20 sudden statement of Frank Waterhouse suddenly is a game-
21 changer that creates some new need for an expert. So,
22 therefore, looking at the factors, I don't think the
23 explanation here to extend the deadlines has merit.

24 Moreover, as far as the importance of the amendment,
25 Factor No. 2, I think it is appropriate to look at the big

1 picture here a little bit, even though we're not in a *Daubert*
2 situation, and look at what the expert is argued to be needed
3 for. And I do not think an expert can testify about
4 contractual duties and attempt to interpret its provisions.
5 That is the job of the Court, and I think it is improper
6 subject matter for an expert.

7 I don't buy into any notion that this is terribly unique
8 territory or exotic. I mean, it was a contract. Shared
9 services agreements are not all that unique, shall we say?
10 It's not a device that is used solely in the investment
11 advisor fund world. It's in the corporate world generally.
12 Courts see these in all kinds of cases. So, again, I don't
13 think contract interpretation needs an expert here or should
14 have an expert here.

15 And just because experts are sometimes -- often, I should
16 say -- appropriate in legal malpractice or medical malpractice
17 or other kinds of tort cases where duties might be needing of
18 elaboration, here, the contract spells out the duties, and I
19 just don't think any of those cases argued are applicable.

20 Prejudice, I do think there is potential prejudice in
21 allowing an extension of this deadline. It will be costly,
22 add a layer of expense and delay to this litigation, when I
23 don't think it would be admissible at trial ultimately.

24 So the motions are denied.

25 Ms. Winograd, could you please prepare a form of order?

1 It can be a simple form of order. Run it by opposing counsel
2 before you upload it, please. All right?

3 MS. WINOGRAD: Yes, Your Honor.

4 THE COURT: Thank you. We're adjourned.

5 MS. WINOGRAD: Thank you.

6 THE CLERK: All rise.

7 (Proceedings concluded at 11:47 a.m.)

8 --oOo--

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CERTIFICATE

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

23

/s/ Kathy Rehling

12/13/2021

24

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

25

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CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

Signed December 21, 2021

Henry G. C. Gammage
United States Bankruptcy Judge

**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
Reorganized Debtor.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Adversary Proceeding No.
Plaintiff,	§	21-03005-sgj
vs.	§	
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO AND THE DUGABOY INVESTMENT TRUST,	§	
Defendants.	§	Adversary Proceeding No.
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	21-03006-sgj
Plaintiff,	§	
vs.	§	

¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

HIGHLAND CAPITAL MANAGEMENT	§	
SERVICES, INC., JAMES DONDERO, NANCY	§	
DONDERO, AND THE DUGABOY	§	
INVESTMENT TRUST,	§	
	§	
Defendants.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
vs.	§	21-03007-sgj
	§	
HCRE PARTNERS, LLC (N/K/A NEXPOINT	§	
REAL ESTATE PARTNERS, LLC), JAMES	§	
DONDERO, NANCY DONDERO, AND THE	§	
DUGABOY INVESTMENT TRUST,	§	
	§	
Defendants.	§	

**ORDER DENYING MOTIONS TO EXTEND EXPERT DISCLOSURE
AND DISCOVERY DEADLINES**

This matter having come before the Court on the (a) *Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosures and Discovery Deadlines* [Adv. Proc. 21-3005, Docket No. 86] (the “NexPoint Motion”) filed by NexPoint Advisors, L.P. (“NexPoint”); (b) *Defendant Highland Capital Management Services, Inc.’s Motion to Extend Expert Disclosure and Discovery Deadlines* [Adv. Proc. 21-3006, Docket No. 91] (the “HCMS Motion”) filed by Highland Capital Management Services, Inc. (“HCMS”); and (c) *Defendant HCRE Partners, LLC’s Motion to Extend Expert Disclosure and Discovery Deadlines* [Adv. Proc. 21-3007, Docket No. 86] (the “HCRE Motion,” and collectively with the NexPoint Motion and the HCMS Motion, the “Motions”) filed by HCRE Partners, LLC (“HCRE,” and collectively with NexPoint and HCMS, “Defendants”); and this Court having considered (i) the Motions; (ii) *Highland’s Objection to Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines* [Adv. Proc. 21-3005, Docket No. 104; Adv. Proc. 21-3006, Docket No. 109; Adv. Proc. 21-3007, Docket No. 104] (the “Objection”) filed by Highland Capital Management, L.P. (“Highland”); (iii) the (a) *Reply of*

Defendant NexPoint Advisors, L.P. in Support of Motion to Extend Expert Disclosure and Discovery Deadlines [Adv. Proc. 21-3005, Docket No. 115] (the “NexPoint Reply”) filed by NexPoint; and (b) *Highland Capital Management Services, Inc. and HCRE partners, LLC’s Reply in Support of Defendants’ Motion to Extend Expert Disclosure and Discovery Deadlines* [Adv. Proc. 21-3006, Docket No. 120, and Adv. Proc. 21-3007, Docket No. 115] (the “HCRE and HCMS Replies,” and together with the NexPoint Reply, the “Replies”) filed by HCRE and HCMS; and (iv) the arguments made during the hearing held on December 13, 2021 (the “Hearing”); and this Court having found that Defendants have not established “good cause” under Rule 16(b) of the Federal Rules of Civil Procedure for the relief requested in the Motions; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that venue of this proceeding and the Motions in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; 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 during the Hearing on these Motions, **IT IS ORDERED, ADJUDGED, AND DECREED THAT:**

1. The Motions are **DENIED**.
2. This Court retains jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

END OF ORDER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 5, 2022, a true and correct copy of the foregoing document, including any exhibit(s) thereto, was served on the following recipients via the Court's CM/ECF system:

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