No. 3:21-cv-01590-N

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

In the Matter of: Highland Capital Management, L.P.,

Debtor.

JAMES DONDERO,
APPELLANT

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
APPELLEE.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS
BANKRUPTCY CASE NO. 19-34054 (SGJ)
ADV. PROC. NO. 20-03190 (SGJ)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in Local Bankruptcy Rule 8012.1, have an interest in the outcome of this appeal.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Bankruptcy Procedure 8012(a), undersigned counsel certifies that Highland has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock. Pursuant to Federal Rule of Bankruptcy Procedure 8012(b), undersigned counsel certifies that there are no debtors not named in the caption.

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STATEMENT REGARDING ORAL ARGUMENT

Appellee respectfully submits that oral argument is unnecessary. The Bankruptcy Court's Contempt Order was a straightforward application of its temporary restraining order, and this appeal involves no legal or factual issues that cannot be resolved by the briefing alone.

STATEMENT OF THE ISSUES

1. Whether the Bankruptcy Court's finding that Dondero interfered with Highland after entry of the TRO should be affirmed as not clearly erroneous.

2. Whether paragraph 2(c) of the TRO was sufficiently specific and detailed, under Rule 65(d), to form the basis of the Bankruptcy Court's finding that Dondero's communications with Highland employees violated the TRO.

3. Whether the Bankruptcy Court's sanctions award based on Highland's incurred fees was a proper exercise of its discretion.

INTRODUCTION

Since he was ousted as CEO of Appellee Highland Capital Management, L.P. ("Highland"), Appellant James Dondero has seized on every opportunity to interfere with Highland and the resolution of its bankruptcy case. Dondero, and entities he controls, have litigated virtually every issue in the case, including filing motions that the Bankruptcy Court found to be frivolous. Dondero's explicitly stated goal, the Bankruptcy Court has observed, is to "burn the place down" after he did not get his way in these proceedings.

It is therefore no surprise that Dondero has *twice* been held in contempt of Bankruptcy Court orders. This appeal involves one of those contempt findings and is yet another Dondero effort to undermine Highland while further squandering party and judicial resources.

Dondero's blatant interference with Highland began almost immediately after his ouster from the company. He sent threatening messages to Highland's new CEO and instructed Highland employees to disobey Highland's instructions to sell assets. Against that backdrop, the Bankruptcy Court granted Highland a Temporary Restraining Order ("TRO") on December 10, 2020, enjoining Dondero from, among other things, most communications with Highland employees and interference with Highland's business.

But Dondero nevertheless continued to interfere with Highland's direction of CLO asset sales and kept communicating with Highland employees about impermissible topics that directly conflicted with Highland's interests. Highland moved for a contempt finding to stop those violations. After a lengthy evidentiary hearing, the Bankruptcy Court in an exhaustive, 54-page decision found that Dondero had violated the TRO in multiple respects after its entry.

In this appeal, Dondero challenges the Bankruptcy Court's factual findings, the lawfulness of the TRO itself, and the sanctions awarded by the court. None of those arguments has merit. The Bankruptcy Court's contempt findings are amply

supported by the record, its TRO complied with the relevant rule, and its sanctions award was, with one exception, firmly within the court's broad discretion.

STATEMENT OF THE CASE

A. Initiation Of Bankruptcy Proceedings

Highland was a multibillion-dollar global investment adviser. R.006077. It filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on October 16, 2019. R.006078. At the time, Highland was privately owned and controlled by James Dondero, one of Highland's two co-founders. R.006077-78.

As the Bankruptcy Court explained when confirming Highland's reorganization plan, Highland was forced into bankruptcy by the "myriad of massive, unrelated, business litigation claims that it faced . . . after a decade or more of contentious litigation in multiple forums all over the world." R.006080. Indeed, both the U.S. Trustee and Highland's Official Committee of Unsecured Creditors (the "Committee") expressed serious concerns about Highland's ability to act as a fiduciary to its estate given Dondero's history of self-dealing, fraud, and other misconduct. R.006083. They threatened to seek the appointment of a chapter 11 trustee to manage the estate. *Id.* To avoid such a drastic step, the Committee, Highland, and Dondero agreed to a governance settlement on January 9, 2020. *Id.*

Under the settlement, Dondero relinquished control of Highland and resigned his positions as a Highland officer and director, but remained as an unpaid employee

and portfolio manager. R.006083, 006354. Dondero reported to three independent directors who were appointed to govern Highland. R.000007. In July 2020, one of the independent directors, James P. Seery, Jr., was appointed Highland's Chief Executive Officer and Chief Restructuring Officer. R.006084.

It wasn't long, however, before tensions between Dondero and Highland boiled over. Dondero objected to a settlement between Highland and one of its creditors (a long-time Dondero adversary) and directed one of his family trusts to allege Highland's mismanagement of a subsidiary's asset sales. R.000016, 006355-56. Highland determined that it was untenable for Dondero to remain an employee, and the independent directors demanded Dondero's resignation. R.006436. Dondero resigned on October 9, 2020. *Id.*

Dondero nevertheless continued (and continues today) to own and control numerous non-debtor entities that were part of the Highland enterprise before the bankruptcy. Two of the non-debtor entities are NexPoint Advisors, L.P. ("NexPoint") and Highland Capital Management Fund Advisors, L.P. ("HCMFA," and together the "Advisors"). Historically, Highland's employees provided middle- and back-office services to the Advisors pursuant to shared-services agreements.

Each Advisor is a registered investment advisor that manages publicly traded mutual funds. These funds hold, among other assets, interests in collateralized loan obligations ("CLOs") that are managed by Highland. R.000011. Highland manages

those CLOs pursuant to various portfolio management agreements, which authorize Highland to cause the CLOs to sell assets; Highland does not need NexPoint's or HCMFA's consent to direct the sale of the CLOs' assets.

B. Temporary Restraining Order Proceedings

Dondero began interfering in Highland's business promptly after being forced to resign in October 2020. Around November 24, 2020, Seery authorized the CLOs to sell certain securities with the tickers "SKY" and "AVYA." R.006460. An email thread detailing those planned sales was forwarded to Dondero on November 24. R.006445. Dondero replied by instructing Matt Pearson, an HCMFA employee, and Hunter Covitz, a Highland employee, not to make those sales. *Id.*; *see also* R.006459 (another November 24 Dondero email instructing that the sales not to be completed). Pearson responded to Dondero that he had already completed a small amount of the sales but had canceled the rest. R.006445. Dondero replied, "don't do it again please." R.006444. Dondero later sent a threatening message to Seery, on December 3, 2020, telling Seery, "Be careful what you do—last warning." R.000013, 006664 (vol. 28).

In light of Dondero's actions, Highland moved for a temporary restraining order ("TRO") and preliminary injunction against Dondero on December 7, 2020.

R.006248-52. After a hearing, the Bankruptcy Court granted Highland a TRO on December 10, 2020. R.006306-09.[1] Paragraph 2 of the TRO enjoined Dondero from:

> (a) communicating (whether orally, in writing, or otherwise), directly or indirectly, with any Board member unless Mr. Dondero's counsel and counsel for the Debtor are included in any such communication;
>
> (b) making any express or implied threats of any nature against the Debtor or any of its directors, officers, employees, professionals, or agents;
>
> (c) communicating with any of the Debtor's employees, except as it specifically relates to shared services currently provided to affiliates owned or controlled by Mr. Dondero;
>
> (d) interfering with or otherwise impeding, directly or indirectly, the Debtor's business, including but not limited to the Debtor's decisions concerning its operations, management, treatment of claims, disposition of assets owned or controlled by the Debtor, and pursuit of the Plan or any alternative to the Plan; and
>
> (e) otherwise violating section 362(a) of the Bankruptcy Code.

R.006307-08. Paragraph 3 of the TRO further enjoined Dondero from "causing, encouraging, or conspiring with (a) any entity owned or controlled by him, and/or (b) any person or entity acting on his behalf, from, directly or indirectly, engaging in any Prohibited Conduct." R.006308.

C. Post-TRO Conduct

On December 18, 2020, Seery directed the CLOs to sell certain assets, including additional SKY and AVYA securities. R.006771-72. Joe Sowin, an

[1] Following an evidentiary hearing, the Bankruptcy Court later granted Highland a preliminary injunction against Dondero on January 8, 2021. R.007250.

HCMFA employee, forwarded Seery's authorization of those sales to Dondero. R.006771. Four days later, on December 22, the Advisors notified Highland that they refused to settle the CLOs' sale of the SKY and AVYA securities. R.006778-80. Dondero later admitted that he instructed Advisor employees not to settle those sales. R.006839, 007159.

In response to Dondero's renewed interference in its operations, Highland terminated Dondero's access to his Highland email account and to Highland's office. R.006768. Highland also demanded that Dondero return a company cellphone and instructed him not to delete any data or information from that device. R.006768-69. Dondero nevertheless entered Highland's office on January 5, 2021, continued communicating with Scott Ellington, Highland's then General Counsel, and directed a Highland executive accountant not to provide the Committee any "details" about his family trust "without [a] subpoena." R.000033, 000041. And, as Dondero later testified, his Highland cellphone was wiped of data and thrown away. R.000025.

D. Contempt Proceedings

On January 7, 2021, Highland moved for an order requiring Dondero to show cause why he should not be held in civil contempt for violating the TRO. R.006604-08 (vol. 27). Highland claimed Dondero violated the TRO in seven ways:

> (a) willfully ignoring the TRO by not reading it or the underlying pleadings and allegations, failing to listen during the TRO hearing, and making no meaningful effort to understand the TRO's scope;

> (b) throwing his Highland-furnished cellphone into the garbage in an attempt to evade discovery;
>
> (c) trespassing on Highland's property after Highland evicted him;
>
> (d) interfering with Highland's trading of CLO its assets;
>
> (e) encouraging the Advisors to make further demands and threats against Highland regarding the trading of its CLO assets;
>
> (f) communicating with Highland's then in-house counsel, Scott Ellington and Isaac Leventon, before they were terminated from Highland, to coordinate his own legal strategy against Highland; and
>
> (g) interfering with Highland's obligation to produce certain documents requested by the Committee that were in Highland's possession, custody, and control.

(the "Contempt Motion"). R.000020-21.

On March 22 and 24, 2021, the Bankruptcy Court held a hearing on the Contempt Motion. On June 7, 2021, it issued a 54-page order granting Highland's motion in part, finding Dondero to be in civil contempt for his violations of the TRO between December 10, 2020, and January 7, 2021, and awarding damages to Highland (the "Contempt Order"). R.000004-58.

The Bankruptcy Court first defined the scope of the Contempt Order, emphasizing that its contempt findings "deal[t] solely with whether Mr. Dondero violated the TRO after its entry on December 10, 2020 at 1:31 pm CST, up through the time of the filing of the Contempt Motion on January 7, 2021." R.000021 (emphasis omitted). The Bankruptcy Court found that Dondero had violated the TRO in several respects during that relevant period.

First, the Bankruptcy Court found that Dondero's renewed interference with Highland's CLO asset sales violated paragraph 3(a) of the TRO. R.000048. The court concluded that Dondero had again interfered with Highland's sales of CLO assets around December 22, pointing to Dondero's emails with Sowin on December 18 and Dondero's testimony admitting to interfering with the sales around December 22. R.000035, 000049. The court rejected Dondero's argument that his interference was permissible because it was intended to benefit investors. R.000049.[2]

Second, the Bankruptcy Court found that Dondero had repeatedly violated paragraph 2(c) of the TRO by communicating with Highland employees other than about Highland's shared services to its affiliates. R.000046. The Bankruptcy Court pointed to Dondero's post-TRO communications with Ellington, including Dondero's (1) request for Ellington to identify a witness who would testify *against Highland*, and in support of Dondero's interests, at an upcoming hearing; (2) pursuit of a "pot plan" bankruptcy reorganization of Highland; (3) plan to object to Highland's settlement of a claim by HarbourVest; (4) collaboration with UBS and its counsel on supposed evidence of Seery's claimed ineptitude; (5) communications

[2] The Bankruptcy Court denied other aspects of Highland's contempt motion, even while expressing serious concerns about the propriety of Dondero's other conduct. In particular, the court did not find Dondero to have violated the TRO with respect to the disappearance of his cellphone, his trespass onto Highland's property, or his alleged willful ignorance of the TRO's restraints on his conduct. R.000052-53.

with his counsel about Highland's request for discovery from Dondero and disputes involving non-debtor, Dondero-related entities; (6) pursuit of a joint defense agreement drafted by his family trusts' lawyer intended to include certain Highland employees; and (7) request that Ellington show "leadership," which the court understood to be a request that Ellington coordinate the efforts of the many lawyers representing Dondero's interests against the interests of Highland. R.000041, 000046-47. The court rejected Dondero's assertion that his communications with Ellington were permissible because Dondero believed Ellington to be performing a "settlement counsel" role intermediating between Highland and Dondero. The court credited Seery's testimony that Ellington never had any such a role. R.000046.

The Bankruptcy Court also found that Dondero violated the TRO, after its entry, by communicating with at least two other Highland employees, by (among other things) sending: (i) a text message to a Highland executive accountant, directing her to refuse to produce documents on Highland's system to the Committee concerning Dondero's family trust "without [a] subpoena," and (ii) other text messages to another Highland employee about his cellphone. R.000041, 000047.

The Bankruptcy Court awarded sanctions for those TRO violations. After carefully scrutinizing invoices documenting more than $1.2 million in fees, the court conservatively estimated that damages corresponding to $450,000 of Highland's attorneys' fees were warranted. R.000056. In an attempt to account for future

expenses that Highland would bear as a result of Dondero's misconduct, the court also imposed a $100,000 sanction for each unsuccessful level of rehearing, appeal, or petition for certiorari that Dondero chose to pursue. R.000057.

STANDARD OF REVIEW

A contempt order is reviewed for abuse of discretion. *FDIC v. LeGrand*, 43 F.3d 163, 166 (5th Cir. 1995). A court's underlying findings of fact are not disturbed unless they are clearly erroneous. *Id.*; *see also Martin v. Trinity Indus., Inc.*, 959 F.2d 45, 46-47 (5th Cir. 1992). A court properly finds a party in civil contempt where the movant shows, by clear and convincing evidence, "(1) that a court order was in effect; (2) that the order required certain conduct by the respondent; and (3) that the respondent failed to comply with the court's order." *Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 401 (5th Cir. 1987).

SUMMARY OF ARGUMENT

I. The Bankruptcy Court properly found that Dondero interfered with Highland's business after entry of the TRO. The court found credible Dondero's prior testimony *admitting* to interfering in Highland's sale of CLO assets twelve days *after* entry of the TRO. The court's discussion of Dondero's pre-TRO interference served to contextualize his renewed interference after the TRO, and no perceived ambiguity in the order about Dondero's pre- versus post-TRO conduct renders the court's finding clearly erroneous.

II. The Bankruptcy Court properly found Dondero in contempt for violating paragraph 2(c) of the TRO when he communicated with Highland employees about topics other than shared services. Paragraph 2(c) did not violate Federal Rule of Civil Procedure 65(d) by referring to outside documents—it refers to no such document. Nor did it violate that Rule by failing to provide sufficient detail about what conduct was prohibited. The TRO plainly permitted Dondero's communication with Highland employees *only* about the back-office services that Highland provided to Dondero's controlled affiliates. Nevertheless, Dondero repeatedly communicated with those employees about topics adverse to Highland's interests and unambiguously outside the scope of the TRO, including coordinating with such employees about his personal litigation strategy against Highland.

III. The Bankruptcy Court properly exercised its discretion by awarding $450,000 in sanctions based on detailed records submitted by Highland and the court's reasonable and conservative estimates. The court's decision not to reduce fees further for counsel's work related to conduct ultimately found non-contemptuous was firmly in line with Supreme Court and Fifth Circuit precedent. The Bankruptcy Court's award of an additional sanction for each level of unsuccessful appeal that Dondero pursues, however, should be vacated.

ARGUMENT

I. THE BANKRUPTCY COURT'S FINDING THAT DONDERO INTERFERED WITH HIGHLAND'S BUSINESS AFTER THE TRO IS NOT CLEAR ERROR

Dondero contends that the Bankruptcy Court impermissibly relied on his pre-TRO conduct to find that he interfered with Highland's business in contempt of the TRO. Br. 20-25. His contentions mischaracterize the Bankruptcy Court's Contempt Order and the record.

First, Dondero's argument is belied by the Contempt Order's plain text. "To be clear," the Bankruptcy Court emphasized, Highland's Contempt Motion "***deals solely with whether Mr. Dondero violated the TRO after its entry on December 10, 2020 at 1:31 pm CST; up through the time of the filing of the Contempt Motion on January 7, 2021***." R.000021 (double emphasis in original). As to the court's business-interference findings, the court expressly acknowledged that "[a]t issue here, in particular, are the Debtor's attempted sales in late December 2020—*after* entry of the TRO." R.000034 (emphasis added); *see also* R.000021. It explicitly found that "Dondero interfered with the Debtor's trading of Highland CLO assets *after* entry of the TRO." R.000039 (emphasis added).

Moreover, the Bankruptcy Court's findings are supported by the overwhelming documentary and testimonial evidence presented during the contempt hearing. The Bankruptcy Court specifically addressed Dondero's testimony that "he

may have interfered with trades the week of Thanksgiving, but he did not after entry of the TRO." R.000035. The court found that "[t]he evidence does not seem to support this testimony." *Id.*

That finding was not clear error. In fact, the Bankruptcy Court had before it, and relied on, ample evidence that Dondero had interfered in Highland's sale of CLO assets on or around December 22, 2020, *twelve days after* entry of the TRO. Indeed, the court twice relied on Dondero's own testimony in which he ***admitted*** to interfering with Highland's sale of CLO assets in late December.

First, the court found that "[t]he evidence does not seem to support" Dondero's denial of interference in December, citing Dondero's impeachment by his prior testimony at an earlier hearing. R.000035 (citing R.008959-60).[3] In his prior testimony, Dondero stated that, on December 18, he had received an email thread from Joe Sowin, an HCMFA employee, containing an email from Seery authorizing new sales of CLO assets. R.007160-61. Dondero then admitted to intervening in the sales Seery had authorized in those December 18 emails:

> Q: And you personally instructed, ***on or about December 22nd, 2020***, employees of those Advisors to stop doing the trades that Mr. Seery had authorized with respect [to] SKY and AVAYA, right?
>
> A: Yeah. Maybe we're splitting hairs here, but I instructed them not to trade them. I never gave instructions not to settle trades that occurred. But that's a different ball of wax.

[3] Dondero fails to mention his contradictory testimony in his brief, falsely claiming that he has "unequivocally" denied interfering after entry of the TRO. Br. 22.

> Q: Okay. But you did instruct them not to execute trades that had not been made yet, right?
>
> A: Yeah. Trades that I thought were inappropriate, for no business purpose, I -- I told them not to execute.

R.007158-59 (emphasis added); *see also* R.007162 (admitting to "personally instruct[ing] the employees of the Advisors not to execute the very trades that Mr. Seery identifie[d] in [the December 18 emails]").

Next, the Bankruptcy Court also relied on Dondero's January 5, 2021, deposition testimony as evidence that Dondero had communicated with Sowin in December about stopping Highland's CLO asset sales. R.000049 (citing R.006838). During that deposition, Dondero similarly admitted to "instruct[ing] employees of [NexPoint] and HCMFA on or around December 22nd to stop doing the trades" of Highland CLO assets. R.006838; *see also* R.006839 (admitting that "it was on the basis of [the December 18 emails] that [he] instructed the [NexPoint] and HCMFA employees not to execute these sales").

Although Dondero later contradicted his testimony and denied any such post-TRO interference with these sales, *see* R.007388, 008959-60, the Bankruptcy Court credited Dondero's earlier (and repeated) testimony over his later, inconsistent testimony. R.000035. That credibility determination was firmly within its purview. *See In re Martin*, 963 F.2d 809, 814 (5th Cir. 1992) ("The determination as to credibility of a witness is within the province of the bankruptcy judge.").

A reviewing court appropriately "defers to the bankruptcy court's determinations of witness credibility." *Saenz v. Gomez*, 899 F.3d 384, 392 (5th Cir. 2018); *see also In re Tex. Mortg. Servs. Corp.*, 761 F.2d 1068, 1078 (5th Cir. 1985) (similar).

Nor is Dondero's contradictory testimony especially convincing. During a hearing on January 26, 2021, Dondero claimed that his prior testimony had mixed up the November and December timeframes. But both times when Dondero admitted to interfering during December, he was looking at the December 18 email thread and had been asked specifically whether he had intervened to stop the sales identified in that thread.

Even if Dondero's attempt to change his testimony created "two permissible views of the evidence," the Bankruptcy Court's choice between them "cannot be clearly erroneous." *Martin*, 963 F.2d at 814 (quoting *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 574 (1985)); *see also In re Bradley*, 501 F.3d 421, 434 (5th Cir. 2007) ("[W]hen the bankruptcy court's weighing of the evidence is plausible in light of the record taken as a whole, a finding of clear error is precluded, even if [the reviewing court] would have weighed the evidence differently.").

Dondero points to instances in which the Bankruptcy Court's Contempt Order refers to his pre-TRO conduct in November 2020. But the Bankruptcy Court's reference to those pre-TRO events serves only to contextualize Dondero's post-TRO violations. The Bankruptcy Court specifically explained that, although "Dondero

disagreed that . . . securities should be sold" in both November and December 2020, "[a]t issue here, in particular, are the Debtor's attempted sales in late December 2020—after entry of the TRO." *See* R.000034.

In any event, any perceived ambiguity or confusion in the order about which events took place during which month is not salient. The Bankruptcy Court's finding of post-TRO interference would be clear error "only if on the entire evidence, the court is left with the definite and firm conviction that a mistake has been committed." *In re Dennis*, 330 F.3d 696, 701 (5th Cir. 2003) (internal quotation marks and citation omitted). As explained above, the record before the Bankruptcy Court was replete with evidence supporting its finding.

Lastly, Dondero claims that his actions did not amount to interference because Highland ultimately managed to close all of the December asset sales. Br. 26. This argument is also unavailing. Though Dondero's actions were unsuccessful in completely stopping the CLO sales, they did interfere with Highland's business. Shortly after Dondero told Advisor employees not to execute the sales Seery authorized, the Advisors sent letters to Highland on December 22 and 23, refusing to execute further CLO sales and threatening to initiate termination of Highland's CLO management contracts. R.006768, 006778-80, 006786-88. The Bankruptcy Court did not err in finding that this amounted to interference in violation of the TRO.

II. RULE 65 DOES NOT PRECLUDE THE BANKRUPTCY COURT'S FINDING THAT DONDERO'S COMMUNICATIONS WITH HIGHLAND EMPLOYEES VIOLATED THE TRO

The Bankruptcy Court correctly found Dondero to be in contempt of the TRO based on the many communications that he and his agents had with Highland employees in violation of paragraph 2(c) of the TRO. Paragraph 2(c) prohibited Dondero from "communicating with any of the Debtor's employees, *except as it specifically relates to shared services currently provided to affiliates owned or controlled by Mr. Dondero*." R.006307-08 (emphasis added). That had a plain meaning: Dondero was enjoined from communicating with Highland employees *unless* his communication was about the services that Highland was providing to the Advisors or other Dondero-controlled affiliates.

Dondero nevertheless communicated with Highland employees about everything under the sun, including identifying witnesses to testify against Highland, the coordination of Dondero's legal team, joint defense agreements that contemplated the inclusion of certain Highland employees, Dondero's preferred "pot plan" for resolving Highland's bankruptcy, his objections to Highland's settlement with a creditor, and his demand that Highland refuse to give its creditors information on his family trusts. R.000039-41. None of those topics had anything to do with Highland's shared services to the Advisors, and all were directly adverse to Highland's interests.

Dondero now seeks to excuse those clear violations of the TRO by asserting that paragraph 2(c) did not comply with Federal Rule of Civil Procedure 65(d)(1), which requires restraining orders to "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required" and to "state its terms specifically." In particular, Dondero contends that paragraph 2(c) impermissibly referred to two shared-services agreements between Highland and the Advisors, and otherwise failed to clearly state its scope. (Br. 29-35). Those arguments are meritless.

A. Paragraph 2(c) Does Not Refer To Other Documents

Dondero argues (Br. 26-35) that the TRO violates Rule 65(d) because it referred to other documents. Specifically, Dondero contends that the prohibition set forth in paragraph 2(c) of the TRO, which prevented Dondero from communicating with Highland's employees "except as it specifically relates to shared services," "incorporate[s] the terms" of Highland's two shared-services agreements with the Advisors, and, therefore, violates Rule 65(d) by "referring to the complaint or other document." *Id.* at 26, 30 (emphasis omitted). That argument is without merit.

Rule 65(d) requires that an order granting an injunction "(A) state the reason why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1). Rule 65(d)(1)(C)'s "no-reference" condition

thus requires that injunctions and restraining orders *themselves* describe the prohibited conduct within the four corners of the order, and not to do so only by reference to other documents. It is therefore "insufficient simply to enjoin defendant from violations 'as charged in the complaint,'" or otherwise to describe "the enjoined acts" merely by the "incorporation by reference" of another document that contains the description. 11A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2955 (3d ed. 2021). The Rule thus requires the description of the restrained acts to be set forth within the order itself, not somewhere else. *See id.*

Accordingly, when courts have held that an injunction impermissibly referred to outside documents, the injunction expressly incorporated the other document in order to state its scope. As an example that Dondero calls "illustrat[ive]" (Br. 28), the injunction in *Tracfone Wireless, Inc. v. Brooks* prohibited the purchase or sale of mobile phones "that may be offered for sale in the future, as listed" on either of two Tracfone websites *identified in the order*. No. 3:07-cv-2033-L-BK, 2014 WL 7187087, at *1 (N.D. Tex. Dec. 16, 2014), *report and recommendation adopted*, 2015 WL 233274 (Jan. 15, 2015) (internal quotation marks omitted). The court reversed the injunction because the only way for the restrained party to know which mobile-phone models it could not buy or sell was to check lists that were available only on the identified websites and not "included within the order." *Id.* at *6.

Likewise, in *Seattle-First National Bank v. Manges*, 900 F.2d 795 (5th Cir. 1990), the Fifth Circuit reversed an injunction that impermissibly referred to and "adopted the magistrate's findings and recommendation without further elaboration." *Id.* at 800. Once again, that order did not comply with Rule 65(d) because it expressly directed the restrained party to another document—the magistrate judge's prior order—to determine what not to do. *See also Meltzer v. Bd. of Pub. Instruction of Orange Cty., Fla.*, 480 F.2d 552, 554 (5th Cir. 1973) (per curiam) (holding that Rule 65(d) precluded an injunction ordering compliance with the terms of a prior order).

Here, by contrast, the TRO described in reasonable detail, within its four corners, the act or acts restrained. It did not do so by reference to the shared-services agreements. Paragraph 2(c) did not invoke the shared-services agreements; it did not include the word "agreement" at all. Nothing in paragraph 2(c) directed Dondero to refer to those shared-services agreements, in whole or in part, to determine the scope of the prohibited conduct set forth in the TRO. Debtor could find no case—and Dondero cites none—in which Rule 65(d)'s no-reference condition was applied to excuse noncompliance with an order that did not expressly refer to another document.

Nor does the fact that the shared-services agreements describe the terms on which Highland provided "shared services" mean that the TRO *incorporated* those

agreements simply by using that term. If that were the law—and it is not—then paragraph 2(c)'s mention of "Debtor's employees" would impermissibly incorporate Highland's employee roster. And an order restraining someone's trespass onto property at a certain address would impermissibly incorporate the property plat recorded at the county courthouse. Nonsense. Rather, a restraining order's use of general, fairly understood terms does not automatically and necessarily incorporate and rely on outside documents that also use or further define those terms.

Finally, and independently, Dondero forfeited this meritless, no-reference objection to paragraph 2(c) in the Bankruptcy Court. He did not object to Highland's motion for a TRO and proposed order on the ground that its paragraph 2(c) impermissibly incorporated the shared-services agreements. *See* R.006633-38 (vol. 27). Nor did he object to Highland's motion for a contempt finding on that ground. *See* R.008017-43.[4] Dondero's dual failures to raise this objection in the Bankruptcy Court mean that it is forfeited for purposes of this appeal. *See, e.g.*, *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021).

[4] Before the Bankruptcy Court, Dondero argued that the TRO violated Rule 65(d)'s specificity requirement only with respect to the no-interference requirement, not with respect to the shared-services exception to its no-communications requirement. *See* R.008023-28. He does not press that objection on appeal.

B. Paragraph 2(c) Is Not Vague

Dondero also argues that paragraph 2(c) lacked detail sufficient to give him fair notice of what communications about "shared services" he was permitted to have with Highland employees. (Br. 36-41). This argument also lacks merit.

Dondero acknowledges—as he must—that the term "shared services" is familiar and readily understood in his industry. Br. 30. Indeed, he explains in his brief that shared services are a "common arrangement in the financial services industry" in which a manager (here, Highland) provides "a variety of back-office services" to its affiliated funds and advisors, "including in the areas of information technology, legal and compliance, accounting, telecom, and administrative and secretarial support." Br. 29-30. Dondero testified—and repeats in his brief—that this commonplace sharing of back-office services among affiliates provides "a centralized model for high-cost people in the legal, accounting, and tax arena so that each subsidiary doesn't have to have their own expensive, duplicative set of employees." Br. 30 (quoting R.009035; citing R.007193-200).

Nor can Dondero seriously contend that he did not know what services Highland shared with the Advisors, and thus what the TRO permitted him to discuss with Highland employees. After all, Dondero is each Advisor's president *and* Highland's recently departed CEO. He indisputably knew exactly what services Highland provided his controlled entities. Paragraph 2(c) was thus abundantly clear

to Dondero: He could continue to communicate with Highland employees about those back-office support services, but not about anything else.

That more than satisfied Rule 65(d)'s requirements of "reasonable detail" and "specificity." *See* WRIGHT & MILLER, *supra*, § 2955 (describing these two requirements as "repetitious"). An injunction need only be "framed so that those enjoined will know what conduct the court has prohibited." *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 373 (5th Cir. 1981). Nor would "[t]he mere fact that interpretation is necessary . . . render the injunction so vague and ambiguous that a party cannot know what is expected." *United States v. Brown*, 561 F.3d 420, 438 (5th Cir. 2009) (internal quotation marks omitted). Rather, the question is simply one of fair notice: would an ordinary person in Dondero's shoes, upon reading the court's order, "be able to ascertain from the document itself exactly what conduct is proscribed"? *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016) (per curiam) (quoting *United States Steel Corp. v. United Mine Workers of Am.*, 519 F.2d 1236, 1246 n.20 (5th Cir. 1975)).

In the circumstances, Dondero assuredly had such notice. And yet he chose to communicate with Highland employees about topics plainly unrelated to shared services. Specifically, the Bankruptcy Court found that Dondero and his agents communicated with Highland employees about matters including identifying a witness to support his interests against Highland at a court hearing; a joint defense

agreement intended to include Highland employees; the coordination of the attorneys representing Dondero's interests against Highland; his preferred "pot plan" for resolving Highland's bankruptcy; various information requests; and his plan to object to Highland's settlement of a certain claim.[5] R.000039-41. Dondero also directed a Highland employee not to produce certain information to creditors without a subpoena compelling that production. R.000041.

These communications were all in writing and none of them was plausibly—let alone "specifically" (R.006308 (TRO ¶ 2(c)))—related to shared services. What is more, Dondero knew that these impermissible communications were directly adverse to Highland's interests. His attempts to scheme with Highland employees to further his interests at Highland's expense is about as far from "shared services" as it gets. It is implausible that Dondero could have reasonably believed that the TRO allowed him to communicate with Highland employees for the purpose of undermining Highland.[6]

[5] In the Bankruptcy Court, Dondero did not argue that these pot-plan discussions were about shared services—they clearly were not—but rather that Highland's then general counsel, Scott Ellington, was performing a "settlement counsel" role to which paragraph 2(c) did not apply. R.000039-40. The Bankruptcy Court found that assertion "simply not accurate," R.000039, and Dondero does not challenge that finding of fact on appeal.

[6] Indeed, Dondero never expected his written communications with Highland's employees to be publicly revealed. In a moment of unprovoked candor, Dondero expressed surprise that his communications with Highland's lawyers were revealed in court. R.008977 ("Why isn't this privileged," Dondero reflexively asked, upon seeing the introduction of these communications at the hearing). But Dondero's belief that he could scheme with two Highland lawyers, unbeknownst to others, only goes to show that he knew these communications had nothing to do with "shared services."

Dondero argues that the Bankruptcy Court's contempt finding should be reversed because of his subjective belief that he *could* discuss these topics—and evidently anything else he wanted—with any Highland employee *whose job included* providing shared services. *See* Br. 33-34. But that is not what paragraph 2(c) actually said, and so Dondero's supposed contrary belief provides no basis to reverse the decision below.

Finally, in the unlikely event that Dondero was *actually* uncertain about what communications with Highland employees were prohibited under the TRO, then he could have—and should have—asked the Bankruptcy Court to clarify or modify its order. As the Fifth Circuit has explained, the proper way to resolve "doubts about the meaning of any part of [an] injunction" is to seek the issuing court's guidance. *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 517 (5th Cir. 1969) (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949)); *see also In re SkyPort Glob. Commc'ns, Inc.*, No. 08-bk-36737, 2013 WL 4046397, at *45 (Bankr. S.D. Tex. Aug. 7, 2013) ("If the [restrained parties] had any doubts as to the applicability of the Preliminary Injunction Order, they had the ability to seek clarification . . . .").

And, in fact, Dondero *did* move to modify the TRO to allow him to communicate with Highland's Board about his preferred "pot plan" of reorganization. In doing so, Dondero acknowledged that this topic was *not* among his permitted communications under the TRO. But, shortly after the Bankruptcy Court

set a hearing on that motion, Dondero inexplicably withdrew it. Perhaps Dondero, having already *had* proscribed communications with Highland employees about his "pot plan," decided that he was better off asking for forgiveness than for permission. In any event, Dondero should not now be rewarded with reversal of the Bankruptcy Court's contempt finding based on a supposed ambiguity that Dondero elected not to take up with the Bankruptcy Court when he had the chance.

III. THE BANKRUPTCY COURT'S AWARD OF INCURRED FEES AND EXPENSES WAS NOT AN ABUSE OF DISCRETION

"An attorney's fee award rests within the sound discretion of the [fee-awarding] court, and accordingly, we will not reverse an award of attorneys' fees unless the trial court abused its discretion or based its award on clearly erroneous findings of fact." *Combs v. City of Huntington, Tex.*, 829 F.3d 388, 391 (5th Cir. 2016) (cleaned up). "A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *Allen v. C & H Distribs., L.L.C.*, 813 F.3d 566, 572 (5th Cir. 2015) (citation and internal quotation marks omitted). Showing that a factual finding was clearly erroneous in a review of an award of attorneys' fees is difficult, especially given that "'[t]he essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection,' and therefore 'substantial deference' is owed the [fee-awarding] court's 'overall sense of a suit.'" *Roussell v.*

Brinker Int'l, Inc., 441 F. App'x 222, 233 (5th Cir. 2011) (per curiam) (quoting *Fox v. Vice*, 563 U.S. 826, 838 (2011)).

Dondero advances two main arguments for overturning the Bankruptcy Court's award. First, he argues that Highland failed to provide information to show that its fees were reasonable, and thus that the fee award lacked sufficient evidentiary support. Br. 45-49. Second, he contends that the Bankruptcy Court awarded fees that were not caused by the alleged contemptuous conduct. Br. 49-52. He is wrong as to both: the Bankruptcy Court did not abuse its discretion in awarding fees based on the detailed timesheets that Highland moved into evidence, and the court was within its discretion to award the specific fees that Dondero targets too.[7]

A. The Bankruptcy Court Did Not Abuse Its Discretion In Awarding Fees Based On The Evidence Before It

In Dondero's view, Highland "made no effort to carry its burden of showing the reasonableness and necessity of [its] claimed fees." Br. 46. In an exercise of

[7] The Bankruptcy Court assessed an additional sanction of $100,000 for each level of unsuccessful appeal that Dondero takes from the contempt order. It awarded that sanction in lieu of Debtor's request for treble damages upon any future violations, and to protect the estate from having to bear substantial, additional litigation expense as a result of Dondero's contemptuous misconduct. R.000057. The Bankruptcy Court has acknowledged Dondero's "history of continued litigiousness" and "question[ed] the good faith of Mr. Dondero and his affiliates" in pursuing their many challenges to the court's rulings. R.006128, 006091. Indeed, the Bankruptcy Court has found that Dondero threatened Highland's CEO that he would "burn down the place" through vexatious litigation and similar obstructionism because he did not get his way in this bankruptcy. R.006127. Dondero argues (Br. 42-45) that a prospective sanction for pursuing unsuccessful, frivolous appeals is beyond a trial court's authority. Debtor agrees that portion of the Bankruptcy Court's order (R.000057 ¶ iii)) should be vacated without prejudice. Debtor will seek additional sanctions to compensate it for the expense of parrying Dondero's frivolous appeals in due course and from the appropriate court.

extreme understatement, Dondero complains that Highland "merely introduced 87 pages of unsegregated fee statements without a sponsoring witness or affidavit." Br. 46. But those 87 pages in fact contained detailed records of the time Highland's attorneys spent mitigating and ultimately stopping Dondero's contemptuous conduct. *See* R.008109-96. Those records were meticulously kept and identified the timekeeper, hourly rate, time spent, and work performed on every single task. Dondero cites no case supporting his view that the Bankruptcy Court was not entitled to use those records to ascertain a reasonable attorneys' fee.

Ironically, one case he cites (Br. 46), *Wegner v. Standard Ins. Co.*, 129 F.3d 814 (5th Cir. 1997), in fact proves him wrong. In *Wegner*, the fee applicant's documentation lacked "evidence of (1) the qualifications, skill, or reputation of four of the five participating attorneys, (2) the specific work performed by any of the attorneys, and (3) the necessary nature of such work." 129 F.3d at 822. There were no "time sheets or descriptions of the work done." *Id.* at 823. The district court nonetheless awarded fees, *and the Fifth Circuit declined to reverse on appeal*.

Litigants, the Fifth Circuit reasoned, "'take their chances' that the [trial] court will reject or reduce fee awards if they submit vague or incomplete applications." *Id.* at 822 (quoting *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 327 (5th Cir. 1995)). The fee-awarding court, after all, has "broad discretion to exclude or reduce hours based on insufficient documentation." *League of United Latin Am. Citizens*

No. 4552 (LULAC) v. Roscoe Indep. Sch. Dist., 119 F.3d 1228, 1233 (5th Cir. 1997). But once *the fee-awarding court* decides that the documentation is adequate, appellate review is far more circumscribed. And so the *Wegner* court affirmed the award because the documentation supporting it "was [not] so vague or incomplete that the [fee-awarding] court was precluded from conducting a meaningful review of whether the hours claimed on this litigation were reasonably expended." *Wegner*, 129 F.3d at 823.

The documentation here is far more robust than in *Wegner*. The Bankruptcy Court was given detailed invoices and conducted a meaningful review of them. Indeed, the court delved into the records, eliminated time unrelated to Dondero's contemptuous conduct, and came to a "conservative[]" estimate of how much Dondero owed.[8] R.000055-56. Moreover, Dondero (like the *Wenger* appellant) makes no specific objection to the attorneys' hours, tasks, or rates, and instead confines his argument to general carping about the adequacy of documentation. Br. 45-47. In those circumstances, this Court, like the *Wegner* court, should decline

[8] The lack of a specific finding concerning Highland's attorneys' rates is unsurprising: the Bankruptcy Court had already approved the same attorneys' rates when they filed for interim fees in the bankruptcy itself. *See* Bankr. Case No. 19-34054, Dkt. No. 607 (the application, with the same attorneys and the same rates); Bankr. Case No. 19-34054, Dkt. No. 663 (the order approving that application and those rates). Indeed, Dondero controlled Highland when Highland retained these same attorneys and when the company attested to counsel's expertise and the reasonableness of their rates. *See* Bankr. Case No. 19-34054, Dkt. No. 70.

to enter into "a sphere of judicial decisionmaking in which appellate micromanagement has [nothing] to recommend it." *Fox*, 563 U.S. at 838.

The same is true with regard to Dondero's subordinate arguments—that the Bankruptcy Court lacked a reasonable basis to award fees to Highland's counsel for its work in February and March, to award any fees to Highland's local counsel and to counsel for the unsecured creditors' committee, or to compensate Highland for additional expenses that it incurred because of Dondero's contemptuous conduct. Br. 48-49. Although Highland did not offer into evidence invoices for its counsel's work in February and March, the Bankruptcy Court reasonably (and conservatively) determined that Highland's primary attorney and his paralegal each spent 20 hours, at their established rates, on those hearings (much of that time in the courtroom). R.000056. That common-sense approach is not reversible error.

The Bankruptcy Court also "conservative[ly]" added $50,000 to the sanction for additional expenses and fees occasioned by Dondero's conduct. *Id.* The Bankruptcy Court was intimately familiar with what reasonable expenses and additional fees those other lawyers would have incurred "given [the court's] familiarity with the legal work done." *Wegner*, 129 F.3d at 823. This Court should defer to the Bankruptcy Court's well-reasoned judgment and conclude that that part of the award was also within the Bankruptcy Court's considerable discretion.

B. The Bankruptcy Court Did Not Abuse Its Discretion In Awarding The Amount Of Fees That It Awarded

Dondero also claims that the Bankruptcy Court erred in awarding fees for time spent on dealing with conduct that was not held to be contemptuous. But he ignores the relevant legal standard, which is fatal to his argument. The governing rule for when a litigant achieves partial success in a litigation—succeeding on some claims, while losing on others—is set out in a long line of cases going back to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In *Hensley*, the Supreme Court held that, where "the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories," the time that counsel spends on any claims related to that common core of facts time cannot be apportioned as between the "successful" and "unsuccessful" claims. *Id.* at 435. Likewise, Dondero's contemptuous conduct was so interrelated and interconnected with the conduct that the Bankruptcy Court ultimately found not to be contemptuous that strict segregation of time spent between "successful" contempt claims and "unsuccessful" contempt claims is impossible.

In this situation, "the [fee-awarding] court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* If a plaintiff has "obtained excellent results, his attorney should recover a fully compensatory fee"; "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Id.* For example, in *United States ex rel. Longhi v. Lithium Power*

Technologies., Inc., the Fifth Circuit applied *Hensley* and awarded counsel all the fees that they expended on relator's behalf even though the relator did not prevail on every single claim. 575 F.3d 458, 475-76 (2009). The claims there were not "factually distinct" because they "arose from the same set of contracts, same actors, and the same illegal intent to defraud the government," and so the district court "did not abuse its discretion in finding that the level of success on the four [successful] claims alone was sufficient enough to merit entitlement to a full attorneys' fees award." *Id.* at 476.

So too here. As the Bankruptcy Court found, Dondero's contemptuous conduct occurred at a "critical time when the Debtor had filed a Chapter 11 plan, was still negotiating it with creditors, and was set for a confirmation hearing." R.000054. This interference "posed a risk to the Debtor's plan of reorganization that, ultimately ended up being supported by hundreds of millions of dollars-worth of creditors." R.000055. And so Highland and its counsel acted quickly and "br[ought] the Contempt Motion before much damage could be done." *Id.* By any measure, that was a massive success; the contempt motion and the findings it brought about were, in the Bankruptcy Court's estimation, critical to the successful confirmation of Highland's reorganization plan.[9] The Bankruptcy Court was more than justified in

[9] Such an acknowledgment of a high level of success need not be explicit. *See Gulf Coast Emp. Leasing v. Jacoby*, No. 98-60389, 2000 WL 309977, at *2 (5th Cir. Mar. 8, 2000) (per curiam) (noting that an "implicit characterization of [a litigation] as 'successful' was . . . appropriate").

awarding Highland its fees for all the work its attorneys had to do to achieve that result.[10]

CONCLUSION

The Bankruptcy Court's Contempt Order should be affirmed except as to its imposition of a sanction on Dondero for pursuing unsuccessful appeals.

[10] Dondero also claims that a stray reference to fees incurred "relating to the TRO" means that the bankruptcy court awarded Highland "unrecoverable fees" stemming from steps it took to address Dondero's conduct leading up the entry of the TRO. *See* Br. 51 (quoting R.000055-57). That kind of hair-splitting is unwarranted; Dondero provides no actual evidence that the sanction was, in fact, based on pre-TRO work and fees. Indeed, in the paragraph immediately preceding the passage that Dondero quotes in his brief, the Bankruptcy Court stated that it would order only "what [was] necessary . . . to compensate the Debtor/estate for losses *resulting from Mr. Dondero's non-compliance with a court order*." R.000054 (emphasis added). In any event, given the Bankruptcy Court's conservative assumptions when determining the fee award, and the reasonableness of that award given Dondero's misconduct, the court did not abuse its discretion.

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