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

In re:	§	**Case No. 19-34054**
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	**Chapter 11**
Debtor.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	**Adv. Proc. No. 21-03005-sgj**
vs.	§	
NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,	§	
Defendants.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	**Adv. Proc. No. 21-03006-sgj**
vs.	§	
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.**	§ § § § § § § § § § § §	**Adv. Proc. No. 21-03007-sgj**

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S OMNIBUS MOTION (A) TO STRIKE CERTAIN DOCUMENTS AND ARGUMENTS FROM THE RECORD, (B) FOR SANCTIONS, AND (C) FOR AN ORDER OF CONTEMPT

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Defendants Highland Capital Management Services, Inc. ("HCMS"), HCRE Partners, LLC ("HCRE"), and NexPoint Advisors, L.P. ("NexPoint"), referred to collectively herein as "Defendants," the Defendants in the above-captioned adversary proceedings, hereby file this Response in Opposition to Plaintiff's Omnibus Motion (A) to Strike Certain Documents and Arguments from the Record, (B) For Sanctions, and (C) For an Order of Contempt.

I. Preliminary Statement

1. In their Memoranda of Law responding to Plaintiff's Motions for Summary Judgment,[1] Defendants made an offer of proof of the expert report of Steven Pully. The expert report shows additional fact issues that preclude the granting of summary judgment. It was not part of the record because, as described in the proffer, the Court had denied Defendants' Motion to Extend Expert Discovery. Thus, the only procedural mechanism to ensure that the report is part of the record on appeal in the event that the Bankruptcy Court grants summary judgment is to make a proffer of the evidence. Plaintiff sought to insulate such a determination from a full and fair review by bullying Defendants into withdrawing the proffer, and when that failed, asks this Court to hold Defendants in contempt for seeking to protect the record and their rights to a full and fair review. Specifically, Plaintiff contends that Defendants should have their pleadings stricken, be sanctioned, and held in contempt under Federal Rule of Civil Procedure 37 for allegedly violating prior orders of the Court.

[1] Case 21-03005-sgj [Doc 156]; Case 21-03006-sgj [Doc 157]; Case 21-03007-sgj [Doc 152].

2. Conspicuously absent from Plaintiff's baseless motion is any discussion of offers of proof, let alone an analysis of when offers of proof are proper or improper. Instead, Plaintiff bases its Omnibus Motion on two discovery orders from this Court, neither of which mention or contemplate, let alone prohibit, the offer of proof that was made. Neither order addresses summary judgment evidence, offers of proof, or preserving the record on appeal. Neither order prohibits Defendants from making an offer of proof of evidence that should be considered in deciding whether summary judgment is appropriate. Especially because the Bankruptcy Court is the not the final arbiter of whether summary judgment is warranted, the record must be preserved so the District Court has in the record before it all evidence related to potential issues of disputed material fact.

3. Accordingly, Defendants did not create "havoc" (whatever that means) in these adversary proceedings, as Plaintiff contends, and they certainly have not "ignored the Orders" issued by this Court; rather the orders were specifically addressed in Defendants' Opposition.[2] Plaintiff's Omnibus Motion is an improper device calculated to harass Defendants with costly and meritless motion practice. The appropriate device would have been a motion to strike or disregard the evidence, a motion that itself was unnecessary because ***Defendants offered to stipulate that this Court could disregard the evidence, as it was presented solely for the purpose of protecting the record on appeal***, an offer Plaintiff simply ignored. Plaintiff's motion for sanctions and to hold Defendants in contempt should be denied and Plaintiff should be admonished for its abuse of process.

[2] Omnibus Motion, ¶¶ 3, 7.

II. Factual Background

A. The Court Denies Defendants' Motion to Extend Expert Discovery.

4. The two discovery Orders that Plaintiff alleges Defendants violated are the Orders Approving Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues[3] (the "Scheduling Order") and the Order Denying Motions to Extend Expert Disclosure and Discovery Deadlines[4] (the "Expert Order," and, together, the "Orders"). Neither order addresses what evidence can or should be submitted in opposition to Plaintiff's motion for Summary Judgment and neither addresses what can or cannot be the subject of an offer of proof.

On September 7, 2021, this Court entered the Scheduling Order in the above-captioned adversary proceedings.[5] The Scheduling Order states in relevant part that:

> The Parties shall abide by the following pretrial schedule (the "Joint Pretrial Schedule") pursuant to the Stipulation:
>
> . . . .
>
> - 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.[6]

The Scheduling Order contained no language explicitly or implicitly barring or excluding any expert reports obtained after October 29, 2021 as offers of proof.

5. On October 29, 2021, Defendants filed their Motion[s] to Extend Expert Disclosure and Discovery Deadlines (the "Motions to Extend").[7] Defendants sought an extension of expert

[3] Attached to Plaintiff's Omnibus Motion as Exhibit 3.

[4] Attached to Plaintiff's Omnibus Motion as Exhibit 4.

[5] Case 21-03005-sgj [Doc 70]; Case 21-03006-sgj [Doc 75]; Case 21-03007-sgj [Doc 70].

[6] Case 21-03005-sgj [Doc 70], ¶ 3; Case 21-03006-sgj [Doc 75], ¶ 3; Case 21-03007-sgj [Doc 70], ¶ 3.

[7] *See* Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines, Case 21-03005-sgj [Doc 86]; Defendant Highland Capital Management Services, Inc.'s Motion to Extend Expert. Disclosure

discovery because "unexpected testimony [in the prior week of October 18, 2021] gave rise to the need to investigate whether expert testimony on the duties of a servicer like Highland Capital Management would be useful."[8] Defendants sought the extension to obtain an expert report from Mr. Steven Pully (the "Pully Report"), who could opine on the nature and duties under the shared services agreements between Plaintiff and Defendants.[9]

6. From the bench, at a hearing on the motions, this Court denied Defendants' Motions to Extend, and issued the Expert Order.[10] After a recitation of the respective procedural background, the Expert Order simply states, in relevant part:

> . . . 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.[11]**

That is it. The Expert Order in no way, either explicitly or implicitly, barred or excluded the inclusion of the Pully Report, or any other evidence, as an offer of proof in connection with Plaintiff's Motion for Summary Judgment.

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and Discovery Deadlines, Case 21-03006-sgj [Doc 91]; Defendant HCRE Partners, LLC's Motion to Extend Expert Disclosure and Discovery Deadlines, Case 21-03007-sgj [Doc 86].

[8] *Id.* at ¶ 2; Defendant Highland Capital Management Services, Inc.'s Motion to Extend Expert Disclosure and Discovery Deadlines, Case 21-03006-sgj [Doc 91], ¶ 2; Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines, Case 21-03006-sgj [Doc 86], ¶ 21(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).

[9] *Id.* at ¶ 16-17; Defendant Highland Capital Management Services, Inc.'s Motion to Extend Expert Disclosure and Discovery Deadlines, Case 21-03006-sgj [Doc 91], ¶ 2; Defendant HCRE Partners, LLC's Motion to Extend Expert Disclosure and Discovery Deadlines, Case 21-03007-sgj [Doc 86], ¶ 2.

[10] Omnibus Motion, Exhibit 4.

[11] Case 21-03005-sgj [Doc 138], p.2; Case 21-03006-sgj [Doc 139], p.2; Case 21-03007-sgj [Doc 130], p.2.

B. Defendants Make an Offer of Proof of the Expert Report of Steven J. Pully to Preserve the Record for Appeal.

7. On January 20, 2022, Defendants filed their Oppositions to Plaintiff's Motion for Partial Summary Judgment[12] and Memoranda of Law[13] in support of same. In Defendants' Memoranda of Law, Defendants included footnote 76, which stated:

> Defendants' position is bolstered by the Expert Report of Steven J. Pully, ¶ 59 (Def. Ex. 3-F, Def. Appx. 232), which was incorrectly not permitted to be included in the record by the Court, ***Defendants submit this proffer to preserve their objection***."[14]

By expressly including this language, Defendants: (1) recognized the existence of this Court's Scheduling and Expert Orders, and (2) made it abundantly clear to the Court and to Plaintiff that the reference to the Pully Report was made solely as an offer of proof to preserve their ability to have the District Court review on appeal the evidence that they would have submitted in opposition to the Motion for Summary Judgment had the Bankruptcy Court not entered the Expert Order.

C. Plaintiff Threatens Contempt.

8. On January 22, 2022 – the morning after Defendants' Responses were filed – Plaintiff reached out via email with the subject line entitled "Highland: NOTICE OF INTENT TO FILE A MOTION FOR CONTEMPT," threatening action that "[would] result in Plaintiff filing a motion to hold you, your firms, and your clients in contempt of Court for violating multiple Court Orders," and demanding that "Defendants take all steps to (a) withdraw the Tully [sic] Report from its Appendix, and (b) remove all references to, and all arguments derived from the Tully [sic] Report . . . by 5:00 p.m. on Tuesday, January 25, 2022."[15] Nowhere in Plaintiff's notice did

[12] Case 21-03005-sgj [Doc 155]; Case 21-03006-sgj [Doc 156]; Case 21-03007-sgj [Doc 151].

[13] Case 21-03005-sgj [Doc 156]; Case 21-03006-sgj [Doc 157]; Case 21-03007-sgj [Doc 152].

[14] Case 21-03005-sgj [Doc 156], fn. 76 (emphasis added); Case 21-03006-sgj [Doc 157], fn. 76 (emphasis added); Case 21-03007-sgj [Doc 152], fn. 76 (emphasis added).

[15] Omnibus Motion, Exhibit 9, p.5-6.

Plaintiff acknowledge that the Pully Report was being offered solely as an offer of proof. Additionally, Plaintiff's notice failed to cite any orders relevant to offers of proof or any case law supporting its demand. However, Plaintiff still threatened, "Defendants' failure to timely comply with these demands will result in a motion to hold you, your firms, and your clients in contempt of Court for knowing and intentional violations of the Orders."[16]

D. Defendants Attempt to Resolve the Offer of Proof Dispute.

9. On January 24, 2022, Defendants, in an attempt to resolve this dispute, responded via email, stating:

> As you [Plaintiff] know, we explicitly stated in our Response that the Expert Order was denied and that the evidence was being offered as part of an offer of proof. Do you have any authority stating that providing such an offer of proof is improper, let along [sic] something that could be subject to a contempt finding? If so, ***please provide us with such authority*** so we can adequately respond to your email.[17]

Later the same day, Plaintiff responded via email, once again failing to reference any orders or case law relevant to offers of proof, and declaring that Plaintiff was unwilling to even discuss this matter further:

> Here, the Court entered Orders prohibiting Defendants from (a) pursuing expert testimony concerning the shared services agreement and (b) arguing the Barred Defense.[18] Nevertheless, with full knowledge of the Orders, the Defendants did the very things the Court said they could not. I'm not sure I can think of a better definition of contempt.
>
> ***To be clear, we do not need any further response. Defendants will either comply with Plaintiff's demands or they won't***.[19]

[16] *Id.*, p.6.

[17] *Id.*, p.5.

[18] HCMFA is responding separately to Debtor's motion as it relates to what Debtor incorrectly calls the "Barred Defense."

[19] *Id.*, p.4 (emphasis added).

10. Despite Plaintiff's refusal to engage in further discussions, Defendants again attempted to reach an amicable resolution by offering Plaintiff (1) legal authority showing that Defendants' offers of proof are proper, and (2) a stipulation to alleviate Plaintiff's concerns that the Pully Report would be considered as something other than an offer of proof.

1. Defendants Provided Legal Authority and a Stipulation that Addressed Plaintiff's Concerns.

11. On January 25, 2022, Defendant reached out to Plaintiff again via email in another effort to resolve the matter without court intervention. After ***again*** reiterating that the Pully Report was included solely as an "offer of proof intended to preserve our ability to object to and appeal the Bankruptcy Court's consideration of Plaintiff's Summary Judgement Motion without consideration of the Pully Material . . . as well as to preserve our ability to appeal the denial of the Expert Deadline Motion,"[20] Defendants provided relevant authority to Plaintiff (discussed further below), as well as a stipulation that should have resolved this issue:

> Based on this [legal authority], we don't understand how making an offer of proof (not in front of a jury, where harm occurs because of the inability of jurors to unhear something they should not have heard) can violate an order excluding evidence (even assuming the Court's order could be so construed, which it cannot be) because that is the exact reason that offers of proof are allowed, and indeed, often required. ***In an effort to resolve this without court intervention, however, we have drafted***

[20] *Id.*, p.3 (emphasis added). Plaintiff is quick to argue waiver and mootness, so Defendants are particularly cautious at this point. Appellee's Motion to Dismiss Appeal as Constitutionally Moot, Case 3:20-cv-03390-X [Doc 18] (Debtor arguing that Jim Dondero's appeal should be dismissed because the appeal is moot); Appellee's Motion to Dismiss Appeal as Moot, Case 3:21-cv-02268-S [Doc 12] (Debtor arguing that The Dugaboy Investment Trust should be dismissed because the appeal is moot); Plaintiff's Opposition to Defendant's Motion to Withdraw the Reference, Case 21-03003-sgj [Doc 30] (Plaintiff argued that Defendant Jim Dondero waived any right to a jury trial by filing five proofs of claim and asserting setoffs and similar claims, thereby consenting to the equitable jurisdiction of the Bankruptcy Court for final adjudication of the adversary proceedings); Debtor's Brief in Support of its Objection to Motion to Compel Arbitration and Stay Litigation, Case 21-03003-sgj [Doc 93] (Debtor argued that Defendants waived their right to arbitration by participating in initial discovery); Debtor's Opposition to Motion for Leave to File Amended Answer, Case 21-03006-sgj [Doc 17] (Debtor argued that Defendant waived its right to assert an ambiguity defense by taking nearly four months to determine that certain notes were ambiguous); Highland's Memorandum of Law in Support of Objection to Motion of Defendant NexPoint Advisors, L.P. to Extend Expert Disclosure and Discovery Deadlines, Case 21-03005-sgj [Doc 105] (Debtor argued that Defendant waived its right to file an amended answer by not previously asserting a defense).

> ***the attached stipulation, which should alleviate your expressed concerns about the Pully Report being used at summary judgment but still allows us to properly preserve our appellate rights.*** Please let me know if it is acceptable.[21]

Defendants attached a proposed stipulation (the "Stipulation") to the January 25, 2022 email, which included the following relevant proposed language:

> 1. The Bankruptcy Court may disregard the Pully Material in the Opposition and consider the Opposition as if it did not contain any reference to the Pully Material (until and unless the Expert Deadline Order is modified to allow the Pully Report to be used by Defendants);[22]

In the same email, Defendants again requested "any case law or legal authority" from Plaintiff substantiating its position that the Pully Report could not be included as an offer of proof, stating further that "[w]e have found no such authority [substantiating Plaintiff's position] and you have provided none."[23]

12. On January 26, 2022, Plaintiff responded to Defendants' email, expressly stating that it "would consider a stipulation," and that "[a]s I said. . . I will consider a stipulation."[24] However, Plaintiff did not address or even mention the proposed stipulation, originally attached to Defendants' January 25, 2022 email, and indeed did not include it in the copy of the email it provided to the Court in Exhibit 9 to the Omnibus Motion. This failure to disclose accurately what transpired underscores Plaintiff's bad faith here. Omitting the proffered stipulation does not make it disappear, no matter how harmful it is to Plaintiff's position.

13. Despite stating that Plaintiff would consider a stipulation, Plaintiff proceeded as if it had never received the stipulation. On January 26, 2022, Plaintiff wrote Defendant complaining

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[21] *Id.*

[22] Stipulation, Defendants' Exhibit 1, Def. Appx. 9-14.

[23] *Id.*

[24] *Id.*, p.2.

of the "myriad" of problems and "endless questions" it had concerning the offer of proof.[25] Then – rather than working with Defendants to resolve whatever issue it had – Plaintiff stated that it was "not dealing with the havoc and endless questions your insistence on ignoring the orders [sic] is creating[,]" and "[w]e'll file our [Omnibus] motion and you can respond however you wish."[26]

2. Plaintiff Tacitly Acknowledge that the Offer of Proof was Proper.

14. Disclosing the cynical bad faith underpinning Plaintiff's request that this Court sanction Defendants for acting to preserve their appellate rights, Plaintiff tacitly acknowledged – in the same email chain it attached to its Omnibus Motion – that there is nothing improper about Defendants' offer of proof. On January 26, 2022, in the same email in which Plaintiff conceded that it would consider a stipulation (only after Defendants pre-briefed the issue for Plaintiff as discussed in more detail *infra*, III.A.2.), Plaintiff acknowledged that preserving the record for appeal is an appropriate goal and that a pretrial proffer is necessary unless evidence is excluded unconditionally:

> Given that the evidence and arguments subject to the proffer were already the subject of motions and orders. . . I don't understand the concern or necessity [to include the proffer]. Indeed, as you note, "[w]here the "pretrial proffer is adequate and ***evidence is excluded unconditionally by a pretrial order,***" then "the proponent ***has preserved the issue for appeal*** and (other circumstances being unchanged) need not bring the witness to court and proffer the evidence again at trial." Fusco v. Gen. Motors Corp., 11 F.3d 259, 262-63 (1st Cir. 1993) (emphasis added).

As Plaintiff well knew and knows, this is not a case in which there was a motion *in limine* or the like in which the Court expressly precluded the evidence from being submitted at trial or summary judgment, making an offer of proof the only prudent course.

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[25] Omnibus Motion, Exhibit 9, p.1.

[26] *Id.*

3. Plaintiff Filed its Omnibus Motion.

15. Notwithstanding Defendants' efforts to resolve the matter with a stipulation that provided Plaintiff with the assurances it claimed to seek, Plaintiff filed its Omnibus Motion requesting the Court to strike the Pully Report from the record, hold the Defendants in contempt, and sanction Defendants under Federal Rule of Civil Procedure. 37(b)(2).[27] None of the relief sought is warranted and indeed, it is so meritless that if sanctions were warranted, it would be against Plaintiff for its frivolous pleading.

III. Arguments and Authorities

A. The Court's Orders Did Not Preclude Defendants' Ability to Include the Pully Report as an Offer of Proof and the Pully Report Should not be Stricken as an Offer of Proof.

1. The Court Did Not Expressly Exclude the Pully Report.

16. Neither the Scheduling Order nor the Expert Order exclude the use of the Pully Report as a proffer, either explicitly or implicitly, nor is the proffer precluded by any other authority. Plaintiff's argument that "[b]y including the Pully Report in the record, the Term Note Defendants violated two discovery orders, the Scheduling Order and the Expert Order[]" is simply not true. The Scheduling Order (as cited *supra*, II.A) simply set the initial deadlines for expert discovery. The Expert Order (as also cited *supra*, II.A) simply denied Defendants' request to extend the Scheduling Order and allow for rebuttal expert discovery regarding new information obtained in discovery. ***Neither*** Order expressly or implicitly precludes or bars any offers of proof made for the purpose of preserving an appeal, which is the entire basis for Plaintiff's Omnibus Motion. Although this point was brought to Plaintiff's attention, it went ignored, just like Defendants' proposed stipulation.

[27] Omnibus Motion, §§ C-F.

17. Rule 37(b)(2)(A)(iii) – the authority by which Plaintiff seeks to have the Pully Report stricken – provides,

> (b) *Failure to Comply with a Court Order*.
>
> (2) *Sanctions Sought in the District Where the Action Is Pending*.
>
> (A) *For Not Obeying a Discovery Order*. If a party. . .fails to obey an order to provide or permit discovery. . .the court where the action is pending may issue further just orders. They may include the following:
>
> (iii) striking pleadings in whole or in part.

Fed. R. Civ. P. 37(b)(2)(A)(iii).

18. Here, Defendants did not "fail to obey an order to provide or permit discovery," the prerequisite for any action under the Rule. Rather, the Orders Plaintiff contends were "violated" do not address a party's ability to make a proffer at all. The Expert Order simply denied Defendants' request for further expert discovery. It did not command Defendants to do – or not do – anything. Plaintiff has consistently failed to provide any authority to the contrary, either in its correspondence with Defendants or in its briefing. Thus, Plaintiff's argument that Defendants' proffer somehow violated the Scheduling Order and the Expert Order is without merit or supporting legal authority, is harassing, and patently designed to protract litigation and increase fees. Thus, Rule 37 on its face is not authority for sanctions here.

2. Including the Pully Report as an Offer of Proof is Proper at Summary Judgment.

19. What Plaintiff does not provide in its briefing – perhaps because all of the legal authority favors Defendants – is any authority addressing the propriety of offers of proof, which are proper at the summary judgment stage. Offers of proof are routinely used (i) to permit the trial judge "to reevaluate his decision in light of the actual evidence to be offered" and (ii) "to permit the reviewing court to determine if the exclusion affected the substantial rights of the party offering

it." *Fortunato v. Ford Motor Co.*, 464 F.2d 962, 967 (2d Cir. 1972). The court must be "well aware of the substance of the evidence," and the record must "reflect[] the substance of the evidence." *United States v. Sheffield*, 992 F.2d 1164, 1169–70 (11th Cir. 1993). The proponent of excluded evidence must show "the substance of the proposed evidence" and "make known to the court for what reasons the evidence is offered." *McQuaig v. McCoy*, 806 F.2d 1298, 1301–02 (5th Cir. 1987). And, importantly, offers of proof can and are used at summary judgment. *Utica Mutual Insurance Company v. Munich Reinsurance America, Inc.*, 7 F.4th 50, 64 (2d. Cir. 2021); *Germano v. International Profit Ass'n, Inc.*, 544 F.3d 798, 801 (7th Cir. 2008); *York v. Toone*, 2018 WL 8619800, at *1 (W.D. Tex. Dec. 10, 2018).

20. Here, the Expert Order only denied Defendants' Motion to Extend, which sought an extension of expert discovery. It in no way, either explicitly or implicitly, barred or excluded the inclusion of the Pully Report, or any other evidence, as an offer of proof. And there was no ruling or order that the Pully Report was "excluded unconditionally" from trial, meaning that an offer of proof was arguably necessary to preserve Defendants' right to have the District Court review the evidence that they would have submitted in opposition to the Motion for Summary Judgment had the Bankruptcy Court not entered the Expert Order. Only where the "pretrial proffer is adequate and evidence is excluded unconditionally by a pretrial order," then "the proponent has preserved the issue for appeal and (other circumstances being unchanged) need not bring the witness to court and proffer the evidence again at trial." *Fusco v. Gen. Motors Corp.*, 11 F.3d 259, 262–63 (1st Cir. 1993); *see also Walden v. Georgia-Pac. Corp.*, 126 F.3d 506, 517, 519 (3d Cir. 1997).

21. The above authority was provided to Plaintiff when Plaintiff was purportedly "considering" signing a stipulation.[28] And although Plaintiff did not challenge this authority, Plaintiff nonetheless chose to pursue aggressive litigation tactics instead of amicably and professionally working towards a resolution, digging its heels into the position of "[w]e'll file our motion and you can respond however you wish."[29]

22. Any authority contrary to that which Defendants provided to Plaintiff is not only absent from Plaintiff's correspondence, but also noticeably absent from Plaintiff's Omnibus Motion. Rather than address the glaring void in its Motion, Plaintiff simply pivots to generic case law stating that sanctions are, in fact, available under Rule 37.[30] Defendants do not contest this basic premise codified by the Federal Rules of Civil Procedure. Rather, Defendants take issue with the fact that Plaintiff cannot – and will not be able to – point to any document or case showing that Defendants' offer of proof violated any order, which is the very foundation upon which Rule 37 is predicated. Therefore, Plaintiff's Omnibus Motion must be denied.

B. Defendants' Conduct Does Not Warrant Sanctions Under Rule 37.

23. Because Defendants have not violated Rule 37 at all (as discussed *supra*, III.A.), neither Defendants, Defendants' law firms, nor Defendants' individual attorneys are subject to sanctions under Rule 37. But even if Rule 37 were somehow implicated here, which it is not, Plaintiff cites no authority that the Defendants have done something worthy of sanction. While Plaintiff cites cases for the general and undisputed proposition that a court may impose sanctions

[28] Omnibus Motion, Exhibit 9, p.3.

[29] *Id.*, p.1.

[30] Omnibus Motion, ¶¶ 39, 40 (speaking in generalities that, "[u]nder Rule 37, a party, their attorney, or both, may be personally liable for reasonable expenses including attorney's fees caused by the failure to comply with a discovery order[]" and "[i]t is 'well within the court's discretion to use sanctions as a tool to deter future abuse of discovery' under Rule 37.").

under Rule 37,[31] it provides absolutely no authority that is analogous to this case. In fact, Plaintiff's authority shows that this case is nothing like a case in which sanctions can be imposed. For example, in *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co., 685 F.3d 486* (5th Cir. 2012), the court held that Rule 37(b) sanctions were appropriate where the appellant law firm violated a Rule 26(c) protective order by divulging the other party's confidential information that the protective order was specifically tailored to prohibit. Further, the appellant in *Smith* "[did] not dispute that they violated [the] Protective Order." *Id.* at 487. Here, unlike in *Smith*, there is no narrowly-tailored protective order seeking to accomplish a specific objective, and Defendants vehemently dispute Plaintiff's contention that they violated a discovery order.

24. Likewise, in *Matter of Ridgeway*, 973 F.3d 421 (5th Cir. 2020), also cited by Plaintiff, the court found that where a party violated a court order that "'was extremely explicit' as to [the violating party's] obligations," such a violation amounted to willful misconduct which warranted the striking of its pleadings under Rule 37. *Id.* at 423, 428. Here, the Court's Orders– are not "extremely explicit" regarding prohibiting offers of proof, nor is there a scintilla of evidence of willful misconduct by Defendants. Rather, Defendants made every effort to resolve the dispute but Plaintiff unilaterally decided it would not participate in any good-faith efforts to resolve the issue.

25. More useful is *Williams v. Manitowoc Cranes, LLC*, No. 1:14CV383-HSO-JCG, 2016 WL 7666158 (S.D. Miss. Jan. 12, 2016), which dealt with an analogous Rule 37 issue. In *Williams*, the lower court issued an order compelling discovery that lacked a definitive date by

[31] Omnibus Motion, ¶ 39 ("'This sort of sanction is justifiable when there is willful misconduct and when lesser sanctions will not achieve the desired deterrent effect.'" (citing *Matter of Ridgeway*, 973 F.3d 421, 428 (5th Cir. 2020)) (emphasis added). Despite making this claim, Plaintiff again provides no analogous facts upon which to base its blanket assertion that Defendants must be sanctioned.

which the discovery was due. The complaining party argued that, because the respondent did not produce the discovery until two months after it was ordered, respondent should be sanctioned under Rule 37. The District Court held that, "[b]ecause the Magistrate Judge's Order [] did not set forth a date certain for Defendant to respond to Plaintiff's [discovery], the Court cannot say that Defendant technically violated the [discovery] Order[,]" and found that Rule 37 sanctions were not appropriate. *Id.* at 4. Similar to the orders in *Williams*, here, the Expert Orders lack specific (or indeed any) language requiring particular conduct or prohibiting the conduct at issue, making an offer of proof. As in *Williams* – Defendants here did not violate any specific term in the Expert Orders – no matter how many pejorative adverbs and adjectives Plaintiff throws at Defendants. Therefore, Plaintiff's Omnibus Motion must be denied.[32] Plaintiff's own willful violation of the Northern District of Texas Local Rules provides a useful contrast, highlighting the absurdity of Plaintiff's Omnibus Motion. Plaintiff submitted new evidence in its Reply Memorandum of Law in Further Support of its Motion for Partial Summary Judgment Against the Alleged Agreement Defendants,[33] a clear violation of the pertinent rules. Specifically, Local Rule 56.7 provides that,

> Except for the motions, responses, replies, briefs, and appendices required by these rules, a party may not, without the permission of the presiding judge, file supplemental pleadings, briefs, authorities, ***or evidence***.[34]

---

[32] *In re Directech Sw., Inc., Fair Labor Standards Act (FLSA) Litig.*, No. MDL 08-1984, 2009 WL 10663038 at 2 (E.D. La. Nov. 17, 2009) (denying a Rule 37 motion for sanctions, finding the complaining party's interpretation of the alleged violated orders to be "strained and unreasonable," and holding that respondent complied with the court's discovery order requiring respondents to search their internet servers for discoverable information because, notwithstanding with movant's allegation that respondent's search was too limited, the court did not specify how broad the searches should be).

[33] Case 21-03005-sgj [Doc 164]; Case 21-03006-sgj [Doc 165]; Case 21-03007-sgj [Doc 160].

[34] Northern District of Texas Local Civil Rule 56.7. Because the purpose of a reply brief is to rebut the nonmovant's response, ***not to introduce new evidence***, such leave will be granted only in limited circumstances." *Racetrac Petroleum, Inc., v. J.J.'s Fast Stop, Inc.*, No. CIV.A. 3:01-CV-1397, 2003 WL 251318, at 19 (N.D. Tex. Feb. 3, 2003) (emphasis added).

Here, however, Plaintiff took the liberty to supplement its own appendix by including a "Reply Declaration of David Klos in Further Support of Highland Capital Management L.P.'s Motion for Partial Summary Judgment" as Exhibit 1 to Plaintiff's Appendix in Support of Plaintiff's Reply Memorandum of Law to add, for the first time, evidence attempting to counter HCMS' prepayment defense, something it failed to do it Klos's moving declaration, despite purporting to challenge that defense in the Motion for Summary Judgment.[35] So if anyone is attempting to wreak havoc in these proceedings, it is Plaintiff.[36]

C. Defendants are Not in Contempt of the Court's Orders.

26. As discussed above, Defendants are not in violation of either the Scheduling Order or the Expert Order. Plaintiff's entire analysis supporting its contention that Defendants are in contempt of the Court's Orders begins and ends with one sentence: "[t]he Term Note Defendants should be held in contempt under Rule 37(b)(2)(A)(vii) for violating the two discovery orders; namely, the Scheduling Order and the Expert Order."[37] Plaintiff's lack of legal authority, analogy, or support for its one-sentence conclusory claim is emblematic of its entire briefing.[38] However, "[c]ontempt is committed when a person 'violates an order of a court requiring in *specific and definite language* that a person do or refrain from doing an act.'" *Baddock v. Villard (In re Baum),* 606 F.2d 592, 593 (5th Cir 1979) (citing cases) (emphasis added). "The judicial contempt power is a potent weapon which could not be used if the court's order upon which the contempt was

[35] Case 21-03005-sgj [Doc 165], p.3; Case 21-03006-sgj [Doc 166], p.3; Case 21-03007-sgj [Doc 161], p.3.

[36] Defendants filed a Motion to Strike Appendix in Support of Plaintiff's Reply Memorandum of Law in Further Support of its Motion for Partial Summary Judgment Against the Alleged Agreement Defendants on February 24, 2022.

[37] Omnibus Motion, ¶ 42.

founded is vague or ambiguous[,]" and "[t]hus, the court's order 'must set forth in specific detail an unequivocal command.'" *In re Baum* at 593 (denying a motion for sanctions where the court's order did not specifically prohibit the complained of conduct). Further, as stated by the Fifth Circuit:

> It is firmly established that in a civil contempt proceeding, the party seeking an order of contempt need only establish, *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. A party commits contempt when he violates a *definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts* with knowledge of the court's order. The judicial contempt power is a potent weapon which should not be used if the court's order upon which the contempt was founded is vague or ambiguous. Therefore, the contempt power should only be invoked where a specific aspect of the injunction has been clearly violated.

Piggly Wiggly Clarksville, Inc. v. Mrs. Baird's Bakeries, 177 F.3d 380, 383 (5th Cir. 1999) (upholding lower court's decision to not hold party in contempt where the final order restricted narrow, specific conduct that the party did not violate) (internal citations omitted) (emphasis added).

27. Here, nothing in the Scheduling Order or Expert Order specifically or definitively precludes offers of proof, elements that the Fifth Circuit requires clear and convincing evidence for any violation thereof under *Piggly Wiggly*. In fact, the Expert Orders do not even mention offers of proof. As such, Plaintiff cannot point to any "specific detail" or "unequivocal command" contained in the Scheduling or Expert Order that Defendants expressly violated by making an offer of proof. Because Rule 37(b)(2)(A) is only triggered when a party "fails to obey an order to provide or permit discovery," Plaintiffs cannot meet the high burden of proof to show any violation of specific and definitive conduct precluded by the Scheduling Order or the Expert Order as

required by the Fifth Circuit to hold a party in contempt, Plaintiff's Omnibus Motion must be denied.

D. Defendants are Not Liable for Plaintiff's Costs and Fees.

28. Finally, Defendants cannot be held liable for Plaintiff's costs or attorneys' fees for the reasons discussed above. Plaintiff's one-sentence conclusory request for fees[39] is founded on an improper interpretation of the relevant Orders and a complete lack of relevant legal authority under Rule 37. Therefore, Plaintiff's Omnibus Motion must be denied.

E. The Bankruptcy Court Lacks Jurisdiction Over Contempt.

29. This is a non-core proceeding over which this Court may or may not be acting as a magistrate judge (although this Court has previously stated that it is serving as a magistrate). This Court therefore lacks core jurisdiction to find contempt or to issue sanctions for contempt. The Court has core jurisdiction to enforce an order of contempt where this Court has core jurisdiction over the underlying order. *See, e.g., In re Skinner*, 917 F.2d 444, 448 (10th Cir. 1990). Since the Expert Order is not a core proceeding, any contempt of that order is likewise a non-core proceeding. And, if this Court is acting as a magistrate, then federal statute requires that the Court provide a report and recommendation of the alleged contempt to the District Court (since this Court is not proceeding to enter a final judgment with the consent of the parties). *See* 28 U.S.C. § 636(e)(6)(B).

30. Therefore, Defendants object to this Court's entry of any final order of contempt against itself or its counsel and requests instead that this Court provide the District Court with a report and recommendation on that issue.

[39] Omnibus Motion, ¶ 43.

IV. Conclusion

WHEREFORE, Defendants respectfully request this Court Deny Plaintiff's Omnibus Motion (A) to Strike Certain Documents and Arguments from the Record, (B) for Sanctions, and (C) for an Order of Contempt.

Dated: February 28, 2022

Respectfully submitted,

/s/Deborah Deitsch-Perez

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 28th day of February, 2022, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for Plaintiff Highland Capital Management, L.P. and on all other parties requesting or consenting to such service in this case.

/s/Deborah Deitsch-Perez
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