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**Attorneys for James Dondero, Nancy Dondero,  
 Highland Capital Management Services, Inc. and  
 HCRE Partners, LLC**

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

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





Dated: February 28, 2022

Respectfully submitted,

/s/Deborah Deitsch-Perez

Deborah Deitsch-Perez  
State Bar No. 24036072  
Michael P. Aigen  
State Bar No. 24012196  
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**ATTORNEYS FOR HIGHLAND CAPITAL  
MANAGEMENT SERVICES, INC. AND  
HCRE PARTNERS, LLC**

/s/Davor Rukavina

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

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that, on February 28, 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* \_\_\_\_\_  
Deborah Deitsch-Perez

# **Exhibit A**

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**Attorneys for James Dondero, Nancy Dondero,  
 Highland Capital Management Services, Inc. and  
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**IN THE UNITED STATES BANKRUPTCY COURT  
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<b>In re:</b>	§	<b>Case No. 19-34054</b>
	§	
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	§	
<b>Debtor.</b>	§	
<hr/>		
<b>HIGHLAND CAPITAL MANAGEMENT, L.P.,</b>	§	
	§	
<b>Plaintiff,</b>	§	
	§	
<b>vs.</b>	§	<b>Adv. Proc. No. 21-03005-sgj</b>
	§	
<b>NEXPOINT ADVISORS, L.P., JAMES          DONDERO, NANCY DONDERO, AND          THE DUGABOY INVESTMENT TRUST,</b>	§	
	§	
	§	
<b>Defendants.</b>	§	
<hr/>		
<b>HIGHLAND CAPITAL MANAGEMENT, L.P.,</b>	§	
	§	
<b>Plaintiff,</b>	§	
	§	
<b>vs.</b>	§	<b>Adv. Proc. No. 21-03006-sgj</b>
	§	
	§	
<b>HIGHLAND CAPITAL MANAGEMENT          SERVICES, INC., JAMES DONDERO,          NANCY DONDERO, AND THE          DUGABOY INVESTMENT TRUST,</b>	§	
	§	
	§	
<b>Defendants.</b>	§	
<hr/>		

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Plaintiff,

vs.

HCRE PARTNERS, LLC (n/k/a NexPoint Real Estate Partners, LLC), JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST,

Defendants.

§  
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§

Adv. Proc. No. 21-03007-sgj

**DECLARATION OF MICHAEL P. AIGEN IN SUPPORT OF 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**

Michael P. Aigen, pursuant to 28 U.S.C. § 1746(a), under penalty of perjury, declares as follows:

1. I am a member of the law firm of Stinson LLP, counsel to Defendants Highland Capital Management Services, Inc. and HCRE Partners, LLC, and I submit this Declaration in support of the *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*, which is being filed concurrently with this Declaration. I submit this Declaration based on my personal knowledge and the documents listed below.

2. Attached as **Exhibit 1** is a true and correct copy of an email from M. Aigen to counsel, including the attached proposed stipulation, dated January 25, 2022.

Dated: February 28, 2022.

/s/Michael P. Aigen  
Michael P. Aigen

# **Exhibit 1**



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**From:** Aigen, Michael P.  
**Sent:** Tuesday, January 25, 2022 4:30 PM  
**To:** John A. Morris; Rukavina, Davor (drukavina@munsch.com); Vasek, Julian (jvasek@munsch.com); Deitsch-Perez, Deborah R.  
**Cc:** Jeff Pomerantz; Gregory V. Demo; Hayley R. Winograd  
**Subject:** RE: Highland: NOTICE OF INTENT TO FILE A MOTION FOR CONTEMPT  
**Attachments:** Stipulation.DOCX

John,

As we indicated yesterday and as we indicated in our summary judgment response, our inclusion of the Pully Report in our response was 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 defined in the Stipulation), as well as to preserve our ability to appeal the denial of the Expert Deadline Motion (lest Debtor argue it is moot or otherwise infirm because of a grant of a motion for summary judgment).

As you know, offers of proof are typically 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). A proffer of evidence may be required if the trial judge is not "well aware of the content and purpose of the evidence." Frederick v. Swift Transp. Co., 616 F.3d 1074, 1083 (10th Cir. 2010). 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). 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). Offers of proof are also 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).

Based on this, 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 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. If you are willing to do so, my understanding is that Davor will contact you about negotiating a similar stipulation or resolution with respect to the HCMFA Motion to Amend.

Additionally, we once again request that you provide us with any case law or authority that would support your position that making an offer of proof with respect to evidence not yet admitted but likely to be excluded because of a prior procedural motion is improper and would subject us to sanctions or contempt. Without making a proffer in connection with a summary judgment motion or trial, as the case may be, a court has not been given the context in which to evaluate proposed evidence. Absent some authority for your position, any motion that you file would be improper and frivolous. We have found no such authority and you have provided none. The Court's prior contempt orders were issued in entirely different circumstances. There is no definitive order that making a proffer violates. If you proceed to file your motion, we intend to file a Rule 11 motion.

Thank you,  
Michael

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**From:** John A. Morris <jmorris@pszjlaw.com>  
**Sent:** Monday, January 24, 2022 5:01 PM  
**To:** Aigen, Michael P. <michael.aigen@stinson.com>; Rukavina, Davor (drukavina@munsch.com) <drukavina@munsch.com>; Vasek, Julian (jvasek@munsch.com) <jvasek@munsch.com>; Deitsch-Perez, Deborah R. <deborah.deitschperez@stinson.com>  
**Cc:** Jeff Pomerantz <jpomerantz@pszjlaw.com>; Gregory V. Demo <GDemo@pszjlaw.com>; Hayley R. Winograd <hwinograd@pszjlaw.com>  
**Subject:** RE: Highland: NOTICE OF INTENT TO FILE A MOTION FOR CONTEMPT

Michael:

The legal standard for civil contempt can be found in two other contempt orders issued by the bankruptcy court in the Highland case, Docket No. 2660 at 22-23 and Adv. Pro. 20-03190, Docket No. 191 at 39-41.

Here, the Court entered Orders prohibiting Defendants from (a) pursuing expert testimony concerning the shared services agreement and (b) arguing the Barred Defense. 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.

Regards,

John

**John A. Morris**  
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[vCard](#) | [Bio](#) | [LinkedIn](#)



Los Angeles | San Francisco | Wilmington, DE | New York | Houston

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**From:** Aigen, Michael P. [<mailto:michael.aigen@stinson.com>]  
**Sent:** Monday, January 24, 2022 5:21 PM  
**To:** John A. Morris <jmorris@pszjlaw.com>; Rukavina, Davor (drukavina@munsch.com) <drukavina@munsch.com>; Vasek, Julian (jvasek@munsch.com) <jvasek@munsch.com>; Deitsch-Perez, Deborah R.

<[deborah.deitschperez@stinson.com](mailto:deborah.deitschperez@stinson.com)>

Cc: Jeff Pomerantz <[jpomerantz@pszjlaw.com](mailto:jpomerantz@pszjlaw.com)>; Gregory V. Demo <[GDemo@pszjlaw.com](mailto:GDemo@pszjlaw.com)>; Hayley R. Winograd <[hwinograd@pszjlaw.com](mailto:hwinograd@pszjlaw.com)>

Subject: RE: Highland: NOTICE OF INTENT TO FILE A MOTION FOR CONTEMPT

John:

Thank you for your email. We will get back to you by tomorrow, as requested, with our response. As you 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 alone 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.

Thanks,  
Michael

**Michael P. Aigen**

Partner

STINSON LLP

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Direct: 214.560.2201 \ [Bio](#)

**STINSON.COM**

This communication (including any attachments) is from a law firm and may contain confidential and/or privileged information. If it has been sent to you in error, please contact the sender for instructions concerning return or destruction, and do not use or disclose the contents to others.

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**From:** John A. Morris <[jmorris@pszjlaw.com](mailto:jmorris@pszjlaw.com)>

**Sent:** Saturday, January 22, 2022 7:17 AM

**To:** Rukavina, Davor ([drukavina@munsch.com](mailto:drukavina@munsch.com)) <[drukavina@munsch.com](mailto:drukavina@munsch.com)>; Vasek, Julian ([jvasek@munsch.com](mailto:jvasek@munsch.com)) <[jvasek@munsch.com](mailto:jvasek@munsch.com)>; Aigen, Michael P. <[michael.aigen@stinson.com](mailto:michael.aigen@stinson.com)>; Deitsch-Perez, Deborah R. <[deborah.deitschperez@stinson.com](mailto:deborah.deitschperez@stinson.com)>

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**Cc:** Jeff Pomerantz <[jpomerantz@pszjlaw.com](mailto:jpomerantz@pszjlaw.com)>; Gregory V. Demo <[GDemo@pszjlaw.com](mailto:GDemo@pszjlaw.com)>; Hayley R. Winograd <[hwinograd@pszjlaw.com](mailto:hwinograd@pszjlaw.com)>

**Subject:** Highland: NOTICE OF INTENT TO FILE A MOTION FOR CONTEMPT

**External Email – Use Caution**

Counsel:

We are reviewing the Defendants' opposition papers to Plaintiff's motion for partial summary judgment and write to address two issues that, if not promptly addressed, will result in Plaintiff filing a motion to hold you, your firms, and your clients in contempt of Court for violating multiple Court orders.

First, Defendants have included in their appendix the expert report of Mr. Tully, dated December 10, 2021 and filed as Appendix Exhibit F (the "Tully Report"). The inclusion of the Tully Report violates the Bankruptcy Court's *Order Denying Motions to Extend Expert Disclosure and Discovery Deadlines*, entered on December 22, 2021, in Adv. Pro. 21-03005 at Docket No. 138 (the "Expert Order"), in response to motions filed by NexPoint, HCMS, and HCRE. The inclusion of the Tully Report in Defendants' appendix also violates the *Order Approving Stipulation and Agreed Order Governing Discovery and Other Pre-Trial Issues* (see, e.g., Adv. Pro. 21-03004 at Docket No. 67) which required, among other things, that expert disclosures be completed by October 29, 2021 (the "Discovery Order").

Second, in its brief, HCMFA contends, among other things, that “HCMFA never actually signed the notes.” HCMFA moved for leave to amend its answer to assert this exact defense (the “Barred Defense”), but the motion was denied in the Court’s *Order Denying Defendant’s Second Motion for Leave to Amend Answer*, entered on January 14, 2022, in Adv. Pro. 21-03004, at Docket No. 123 (the “Answer Order” and together with the Expert Order and the Discovery Order, the “Orders”). We believe HCMFA’s assertion of the defense plainly violates the Answer Order.

Plaintiff demands that Defendants take all steps to (a) withdraw the Tully Report from its Appendix, and (b) remove all references to, and all arguments derived from, the Tully Report and the Barred Defense by 5:00 p.m. on Tuesday, January 25, 2022.

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.

Plaintiff reserves, and does not waive, all of its rights at law and in equity with respect to these matters.

Regards,

John

**John A. Morris**

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NexPoint, and HCMS, the “Defendants,” and Plaintiff and Defendants together, the “Parties”) on the other hand.

**RECITALS**

WHEREAS, on January 22, 2021, Plaintiff commenced the Adversary Proceedings;

WHEREAS, Plaintiff subsequently amended its pleading to add additional claims and parties (collectively, the "Amended Complaints");

WHEREAS, October 29, 2021, Defendants NexPoint, HCMS and HCRE filed Motions to Extend Expert Disclosure and Discovery Deadlines (the "Expert Deadline Motion");

WHEREAS, on December 22, 2021, the Bankruptcy Court entered an Order denying the Expert Deadline Motion (the "Expert Deadline Order");

WHEREAS, on December 17 and 18, 2021, Plaintiff filed its Motion for Partial Summary Judgment (as amended on December 20, 2021) (the "Summary Judgment Motion");

WHEREAS, on January 20, 2022, Defendants filed their Opposition to Highland Capital Management, L.P.'s Motion for Partial Summary Judgment (the "Opposition");

WHEREAS, in their Opposition, Defendants specifically stated that the Expert Report of Steven J. Pully ("Pully Report") "was incorrectly not permitted to be included in the record by the Court" and that "Defendants submit this proffer to preserve their objection." (Opposition at fn. 76);

WHEREAS, on January 22, 2022, Plaintiff send a Notice of Intent to File a Motion for Contempt, asserting that the inclusion of the Pully Report into their appendix and referencing the Pully Report in Defendants' Opposition violated the Expert Deadline Order; and

WHEREAS, Plaintiff demanded that Defendants withdraw the Pully Report from their appendix and remove all references to the Pully Report (the “Pully Material”) from the Opposition.

**STIPULATION**

NOW, THEREFORE, in consideration of the foregoing, the Parties agree and stipulate as follows:

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

2. Defendants properly preserved any objections that they may have to the Expert Deadline Order for purposes of any appeals, objections, or otherwise;

3. Defendants properly preserved any objection to the exclusion from consideration of the Pully Report and the issue of whether the Pully Report should have been considered in connection with Plaintiff's Partial Motion for Summary Judgment is preserved for any challenge to the Court's report and recommendation on the motion for summary judgment and/or any appeal, just as if the proffer of such evidence fully remained before the Bankruptcy Court unaffected by this stipulation; and

4. Plaintiff expressly agrees that it will not argue in any court or in any proceeding that Defendants waived any objections to the Expert Deadline Order or to the Bankruptcy Court not considering the Pully Material in connection with Plaintiff's Motion for Partial Summary Judgment.

Dated: January 25, 2022



CONSENTED AND AGREED TO BY:

/s/Deborah Deitsch-Perez

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Michael P. Aigen  
State Bar No. 24012196  
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/s/ John A. Morris

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*Attorneys for Debtor Highland Capital  
Management, LP*

/s/Clay M. Taylor

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*Attorneys for James Dondero*

/s/Davor Rukavina

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Email: drukavina@munsch.com

*Attorneys for NexPoint Advisors, L.P.*

**CERTIFICATE OF SERVICE**

I certify that on January 25, 2022, a true and correct copy of the foregoing document was served via the Court's Electronic Case Filing system to the parties that are registered or otherwise entitled to receive electronic notices in this adversary proceeding.

*/s/ Michael P. Aigen* \_\_\_\_\_

Michael P. Aigen