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Counsel for Highland Capital Management, L.P.

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

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Plaintiff,

vs.

HIGHLAND CAPITAL MANAGEMENT FUND
ADVISORS, L.P.,

Defendant.

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Adv. Proc. No. 21-3004

Case No. 3:21-cv-00881-X



HIGHLAND CAPITAL MANAGEMENT, L.P.,

Plaintiff,

vs.

NEXPOINT ADVISORS, L.P., JAMES
DONDERO, NANCY DONDERO, AND
THE DUGABOY INVESTMENT TRUST,

Defendants.

Adv. Proc. No. 21-3005

Case No. 3:21-cv-00881-X

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Plaintiff,

vs.

HIGHLAND CAPITAL MANAGEMENT
SERVICES, INC., JAMES DONDERO,
NANCY DONDERO, AND THE DUGABOY
INVESTMENT TRUST,

Defendants.

Adv. Proc. No. 21-3006

Case No. 3:21-cv-00881-X

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. 21-3007

Case No. 3:21-cv-00881-X

**SUPPLEMENTAL DECLARATION OF JOHN A. MORRIS
IN SUPPORT OF 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, John A. Morris, pursuant to 28 U.S.C. § 1746, under penalty of perjury, declare as follows:

1. I am an attorney in the law firm of Pachulski, Stang, Ziehl & Jones LLP, counsel to Highland Capital Management, L.P., the reorganized debtor in the above-captioned chapter 11 case and plaintiff in the above-referenced adversary proceedings, and I submit this Supplemental Declaration in support of *Plaintiff's Omnibus Motion (A) to Strike Certain Documents and Arguments from the Record, (B) for Sanctions, and (C) for an Order of Contempt* (the "Motion"). I submit this Supplemental Declaration based on my personal knowledge and review of the documents listed below.

2. Attached as **Exhibit 10** is a true and correct copy of the transcript of the hearing held on December 13, 2021 (**Adv. Pro. Nos. 21-3005, 21-3006, and 21-3007**).

Dated: March 14, 2022.

/s/ John A. Morris
John A. Morris

EXHIBIT 10

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

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In Re:)
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HIGHLAND CAPITAL)
MANAGEMENT, L.P.,)
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Debtor.)
_____)

Case No. 19-34054-sgj-11
Chapter 11
Dallas, Texas
Monday, December 13, 2021
10:30 a.m. Docket

HIGHLAND CAPITAL)
MANAGEMENT, L.P.,)
)
Plaintiff,)
)
v.)
)
NEXPOINT ADVISORS, L.P.,)
et al.,)
)
Defendants.)
_____)

Adversary Proceeding 21-3005-sgj
MOTION TO EXTEND EXPERT
DISCLOSURE AND DISCOVERY
DEADLINES

HIGHLAND CAPITAL)
MANAGEMENT, L.P.,)
)
Plaintiff,)
)
v.)
)
HIGHLAND CAPITAL)
MANAGEMENT SERVICES, INC.,)
et al.,)
)
Defendants.)
_____)

Adversary Proceeding 21-3006-sgj
MOTION TO EXTEND EXPERT
DISCLOSURE AND DISCOVERY
DEADLINES

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HIGHLAND CAPITAL)	
MANAGEMENT, L.P.,)	Adversary Proceeding 21-3007-sgj
)	
Plaintiff,)	MOTION TO EXTEND EXPERT
)	DISCLOSURE AND DISCOVERY
)	DEADLINES
v.)	
)	
HCRE PARTNERS, LLC)	
(n/k/a NEXPOINT REAL)	
ESTATE PARTNERS, LLC),)	
)	
Defendant.)	

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

WEBEX APPEARANCES:

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Recorded by: Michael F. Edmond, Sr.
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Transcribed by: Kathy Rehling
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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 DALLAS, TEXAS - DECEMBER 13, 2021 - 10:55 A.M.

2 THE COURT: I will now take up the Highland three
3 motions to extend expert deadlines. So let me get appearances
4 from lawyers. First, who do we have appearing for the Debtor
5 this morning?

6 MS. WINOGRAD: Good morning, Your Honor. My name is
7 Hayley Winograd of Pachulski Stang Ziehl & Jones appearing on
8 behalf of Highland.

9 THE COURT: Okay. Good morning. For NexPoint
10 Advisors, who do we have appearing?

11 MR. RUKAVINA: Your Honor, good morning. Davor
12 Rukavina and Julian Vasek.

13 THE COURT: Good morning. All right. For HCMS and
14 NPPE, who do we have appearing?

15 (No response.)

16 THE COURT: Okay. Maybe I should say these names in
17 full.

18 MS. DEITSCH-PEREZ: I apologize, Your Honor. This is
19 Deborah Deitsch-Perez. I believe Michael Aigen will be
20 appearing for HCRE and HCMS. And I wonder if he's having
21 technical difficulties. I saw him on the line a few minutes
22 ago. I'm going to go off and call to make sure that there
23 isn't a problem.

24 THE COURT: Okay.

25 MR. RUKAVINA: But Your Honor, I'll be handling the

1 bulk of the arguments, and Mr. Aigen will cover a much smaller
2 amount.

3 THE COURT: Okay. Well, we'll --

4 MR. AIGEN: Your Honor, this is Michael Aigen. Are
5 you able to hear me now?

6 THE COURT: I can hear you now.

7 MR. AIGEN: I apologize. Michael Aigen for HCMS and
8 HCRE.

9 THE COURT: All right. I presume those are our only
10 formal appearances, but is there anyone else who wished to
11 appear?

12 (No response.)

13 THE COURT: All right. Well, Mr. Rukavina, I'll hear
14 your argument.

15 MR. RUKAVINA: Thank you, Your Honor.

16 I'm sure that the Court has read our papers, and by this
17 motion we seek to extend the expert deadline so that we can
18 retain Steven Pully as our expert on the standard of care.
19 Mr. Pully is on the video. I can see him right now. So, good
20 morning, Mr. Pully.

21 And Your Honor, I'd like for you to be aware that Friday
22 evening I did file on the docket Mr. Pully's report.
23 Obviously, the Court hasn't granted this motion, but I wanted
24 the Court to know that we moved as rapidly as possible, and
25 Mr. Pully has now finalized his report. So there's no future

1 need for additional time on my end if the Court grants this
2 motion.

3 Your Honor, before I get to the actual merits of this
4 motion, I feel it important to address a hearing that occurred
5 a few weeks ago that I was not present at because this motion
6 was discussed briefly at the end. This was a hearing held on
7 Ms. Deitsch-Perez's motion to dismiss and compel arbitration.

8 And Mr. Vasek, if you could please pull up the transcript
9 of that and scroll down to near the end where this motion is
10 discussed.

11 Your Honor will maybe recall that we have the transcript
12 where Ms. Deitsch-Perez mentioned as a scheduling matter that
13 this motion had been filed. And the Court says, What on earth
14 does that have to do with this litigation? I don't mean to be
15 flippant and laugh, but what on earth does that have to do
16 with notes?

17 And if we scroll down some more, Your Honor, Ms. Deitsch-
18 Perez was attempting to explain to the Court the purpose of
19 this motion, and the Court notes that, It sounds like you're
20 talking about an affirmative defense that hasn't been
21 articulated yet.

22 And if we scroll down some more, Ms. Deitsch-Perez
23 attempts to tell the Court that, in fact, this is an
24 affirmative defense that has always been asserted.

25 And the Court notes there in her dialogue with Ms.

1 Deitsch-Perez that, I'm just letting you know you have a very
2 uphill battle convincing me that experts regarding shared
3 services agreements would be germane.

4 And the Court goes on to say that it has heard a lot about
5 shared services agreements during the past few years,
6 including experts on the witness stand in the *Acis* case. And
7 the Court notes that, Under the pleadings as now in the
8 record, I just can't imagine why experts on shared services
9 agreements are going to be relevant evidence.

10 I think, Mr. Vasek, you can pull that down.

11 And I point this out only because, again, I know that the
12 Court has prepared for this hearing, but this is an
13 affirmative defense that has always been pled from the
14 beginning. It does not involve the interpretation of the
15 contract. We're not talking about the shared services
16 agreement. We're not talking about the contract. And recall,
17 Your Honor, that both Your Honor and the District Courts have
18 agreed that jury rights do attach here. So the question
19 really is not the Court's familiarity with shared services
20 agreements but whether expert testimony will be relevant to
21 help the jury.

22 So, what is that expert evidence, Your Honor, and how did
23 this arise? NexPoint is the obligor, the maker on a \$30
24 million note -- I'm using round numbers -- and that note had
25 been paid down to some \$24 million.

1 The note purports to require a payment every year on
2 December the 31st. And in the year 2020, although we argued
3 that the payment was prepaid, that payment was not made
4 timely. It was made a couple weeks later, when Mr. Dondero
5 realized what had happened.

6 Our version, NexPoint's version of why this payment did
7 not happen has until recently been that the Debtor dropped the
8 ball. Under the shared services agreement, and as Mr. Dondero
9 and Mr. Frank Waterhouse, the Debtor's former CFO, confirmed,
10 the Debtor was for years responsible to facilitate the annual
11 payment. The Debtor didn't pay from its own funds. It would
12 pay it from our funds. But that was both in the contract and
13 that was the practice. Again, Mr. Waterhouse -- and Your
14 Honor has seen in my papers and in his transcript -- confirmed
15 that it was reasonable for NexPoint to rely on the Debtor to
16 ensure that this payment would be made.

17 So Mr. Vasek, if we can pull up the shared services
18 agreement here.

19 I know that the Court likes to look at contracts, so I
20 will briefly take Your Honor through some of the pertinent
21 provisions, because this relates to directly to Mr. Pully.

22 And Mr. Vasek, if you'll please scroll down to the
23 definitions of Covered Person.

24 And Your Honor can read it for herself. This is just a
25 definitional that we need as we go forward. But Covered

1 Person means the staff and services provider. That is
2 Highland. That is the Debtor. And it includes managers,
3 members, employees, et cetera. Well, that would be Mr. Frank
4 Waterhouse. Mr. Waterhouse at that time was the Debtor' chief
5 financial officer, and he was also an officer of NexPoint. So
6 he, like many people here, wore two hats.

7 Mr. David Klos at that time was the controller for
8 Highland, and Ms. Kristin Hendrix was a senior accountant at
9 Highland. Both Mr. Klos and Ms. Hendrix were providing the
10 services we're going to discuss.

11 If you'll scroll down, Mr. Vasek.

12 The next provision, Your Honor, relates to what services
13 were being provided.

14 Scroll up just a -- just a tad.

15 So you'll see under Section 2.02 the parties are now
16 agreeing here's the services that Highland will be provided.
17 And it's important to note, Your Honor, that at this time this
18 agreement was in place. This agreement was terminated I want
19 to say at the end of February this year. But in December and
20 November of 2020, this agreement was in place.

21 And if the Court looks at the services being provided, the
22 first one there is assistance and advice. That word "advice"
23 is important. Assistance and advice with respect to various
24 things. And you see down there those things include finance
25 and accounting, payments, bookkeeping, cash management, cash

1 forecasting, accounts payable, et cetera.

2 Keep scrolling down, Mr. Vasek. Obviously, as the Court
3 very well knows, the Debtor was also providing legal services.

4 And if you keep scrolling down, Mr. Vasek, to the next
5 page, there you go, to K and L.

6 These are more catch-all. So if the language of what I
7 just showed you is not express or specific enough, here you
8 have these catch-alls, such as advice on all things ancillary
9 or incidental to the foregoing and advice relating to other
10 back- and middle-office services in connection with the day-
11 to-day business.

12 So, again, we're not here today, we're not asking the
13 Court to decide, nor do I think that it would be this Court to
14 decide, whether the Debtor had a duty to facilitate the
15 December payment. I'm just pointing out that we have, I think
16 anyone would agree, at least a *prima facie* colorable argument
17 that the Debtor would have such duty.

18 And just to address an issue that the Debtor raised, Mr.
19 Vasek, if you'll scroll down to 6.01, and then if you'll zoom
20 in.

21 Here, now, Your Honor, is the language that is of
22 relevance, the direct relevance. So we've seen that Covered
23 Person is defined, and we have seen that -- and we can now see
24 that this agreement requires Covered Person -- that includes
25 the Debtor; that includes Mr. Waterhouse; that includes Mr.

1 Klos -- to discharge its duties under this agreement. We've
2 seen that there's certainly a colorable argument that the
3 duties under this agreement include facilitating payments and
4 advice with payments and accounts payable and the like, and
5 that the Debtor has to discharge its duties with the care,
6 skill, prudence, and diligence under the circumstances then
7 prevailing that a prudent person acting in a like capacity and
8 familiar with such matters would use in the conduct of an
9 enterprise of a like character and with like aims.

10 That, Your Honor, is what we need the expert on. Not to
11 tell the jury what this contract says, not to tell the jury
12 that the Debtor had a duty, but to look at, under the facts,
13 did the Debtor's performance or lack thereof -- and I'll tell
14 you why that's important in a moment -- did that performance
15 or lack thereof comport with this standard of care?

16 This is a matter for an expert. The average juror, the
17 average layperson, myself, I would not know what the care,
18 skill, prudence, and diligence of a reasonable prudent person
19 in this situation would be. I can theorize on that. I can
20 opine on that. I'm not an expert on that. This is a matter
21 for an expert, the same as with medical malpractice, legal
22 malpractice, breach of fiduciary duty.

23 While we're on this agreement, just to address another
24 argument that the Debtor makes, the Debtor says that this
25 agreement exculpates negligence.

1 Mr. Vasek, if you'll please scroll down to the
2 exculpation.

3 And there is an exculpation provision. But if Your Honor
4 -- and it does exculpate negligence. It doesn't exculpate
5 gross negligence, et cetera. But it talks about that only
6 acts or omissions -- it's Romanette (i) -- acts or omissions
7 arising out of or in connection with the conduct of the
8 business of the management company that is exculpated. Again,
9 we're not here today to decide what this means, but the
10 business of NexPoint is not note-making; the business of
11 NexPoint is advising thousands of investors and funds with
12 respect to a billion dollars of investments.

13 It is -- the Debtor does have an argument, and either the
14 Court or the jury will have to decide whether this exculpation
15 provision applies. And then if -- and you can remove this,
16 Mr. Vasek -- the Debtor likewise says that the agreement's
17 indemnification provision prohibits this argument. We pointed
18 out in our briefing, Your Honor, that, in fact,
19 indemnification under Texas law does not apply to the parties
20 to the contract. It applies to claims made by third parties.
21 But, again, that's an argument that the Debtor has.

22 So we have this contract in place. Late November/early
23 December rolls around, and both Mr. Dondero and Mr. Waterhouse
24 testify that they had a meeting. What was said at that
25 meeting is in dispute.

1 Mr. Dondero believes that he told Mr. Waterhouse, stop
2 paying on the shared services agreement. It's NexPoint's
3 position -- Your Honor knows we filed an administrative claim
4 -- it's NexPoint's position that it had overpaid millions of
5 dollars under the shared services agreement, in part because
6 many of the employees of the Debtor that we were supposed to
7 be paying our respective share of weren't there anymore. So
8 Mr. Dondero says to Mr. Waterhouse, stop paying on this shared
9 services agreement.

10 Those are the facts as we knew them going into late
11 October. Based on that fact, and based on the fact that the
12 Debtor did not facilitate the payment, we've always asserted
13 as an affirmative defense that our lender, who is also our
14 lawyer, who's also our accountant, who's also our treasury
15 management people, and who have always facilitated these
16 payments in the past, dropped the ball. They committed simple
17 negligence, they dropped the ball, thereby causing the alleged
18 default.

19 We did not need an expert opinion on that at that time.
20 You've seen in my reply briefing, Your Honor, that, in fact,
21 the Fifth Circuit holds in multiple instances that when it's
22 simply a matter of missing a deadline -- a lawyer missing
23 limitations, if you will -- expert testimony is not required,
24 and in fact may be inappropriate because a lay person can
25 figure out that, a lay juror can figure out that, well, if you

1 just simply didn't do something, whether that's -- whether
2 that comports with the standard of care or not.

3 On October the 19th of this year, the Debtor and we
4 deposed Mr. Waterhouse. And Mr. Waterhouse had a different
5 testimony. He had a different recollection of that meeting.
6 Mr. Waterhouse said that Mr. Dondero told him in late November
7 or early December, don't make this NexPoint payment. In other
8 words, that Mr. Dondero expressly said the payment that's
9 coming up for NexPoint, do not make this payment.

10 That was news to us. I was so surprised by that testimony
11 that I actually asked Mr. Waterhouse that question four times.
12 And opposing counsel actually got angry at me, kept saying,
13 how many times are you going to keep asking this question? I
14 was surprised.

15 I was not able to talk to Mr. Waterhouse meaningfully
16 before that. Mr. Waterhouse has attorneys, Mr. Waterhouse is
17 in litigation with the Debtor, and those attorneys require
18 that I not communicate with him directly, I communicate only
19 through them. I never took up the chance to ask them about
20 this meeting because the only information that I had and that
21 my client had was that there was no such instruction. The
22 Debtor may or may not have been surprised as well.

23 Mr. Vasek, if you'll please pull up discovery.

24 Your Honor, we're sharing with you now certain of the
25 discovery in this case -- in particular, the Debtor's

1 responses.

2 And if you'll go to Interrogatory No. 1, Mr. Vasek.

3 So, Your Honor obviously can read this. But I ask the
4 Debtor, if it contends that it was not responsible for making
5 payments under the note on NexPoint's behalf, please explain
6 the legal and factual basis for such contention. I asked for
7 a factual basis as well. And Your Honor can see in the
8 response that the Debtor objects, the Debtor says that it was
9 not required to make the payment, but nowhere here does the
10 Debtor say that it had received an instruction not to make the
11 payment.

12 Pardon me, Your Honor.

13 This was, I believe, from May or June. In any event, it
14 was early in this litigation. Nowhere here am I put on any
15 kind of notice that it's the Debtor's position that it
16 received an instruction not to make the payment.

17 If we scroll down to Request for Production, I believe
18 it's No. 1, Mr. Vasek.

19 Here, we -- I ask for all communications pursuant to which
20 the Debtor was advised or instructed not to make the payment
21 or to cause the payment to be made. And the Debtor's answer
22 includes the following: Any communications responsive to
23 Request for Production No. 1 were verbal.

24 Okay. I had to await depositions. That's fine. I had
25 asked in an interrogatory, I didn't get a factual response,

1 and then I'm now being told that any communications were
2 verbal.

3 Now, the Debtor may not have known about Mr. Waterhouse's
4 instruction, it may not have, in which case I don't think it's
5 fair to accuse NexPoint or its counsel of dropping the ball.
6 Or the Debtor may have known of the instruction, in which case
7 the Debtor should have answered Interrogatory No. 1 factually
8 by saying, oh, wait, not only were we not required to make the
9 payment, et cetera, et cetera, but we received an instruction
10 from your boss, NexPoint, not to make the payment.

11 You can remove that.

12 So, here we go into October 19th. We depose Mr.
13 Waterhouse. We now see that, in fact, I guess it's -- I
14 forget who -- who the author is, but the plot has thickened.
15 The situation is now much more complicated. Whereas
16 previously we argued that the Debtor had dropped the ball, the
17 question now is, okay, if in fact the jury believes that Mr.
18 Dondero went to Mr. Waterhouse and said, don't make this
19 payment, did that discharge the Debtor's duties as specified
20 by the contract or not?

21 It's our belief that it did not. It's our belief that Mr.
22 Waterhouse should have, at a minimum, asked Mr. Dondero after
23 that, did I get you right, Jim? Did I understand correctly?
24 Did you mean not to make this payment? It's our belief that
25 the Debtor -- our legal advisers, our accountants, people that

1 are supposed to advise us -- should have called back and said,
2 Jim, you know that if you don't make this payment you're going
3 to have a note accelerated and it's going to be \$24 million.
4 They should have advised Mr. Dondero of the potential
5 consequences, especially given their clear conflict of
6 interest.

7 At the same time, they're our lender to the tune of \$24
8 million, and they're providing us all this assistance and
9 advice that we're paying millions and millions of dollars for.

10 And then also, if Mr. Dondero gave such an instruction,
11 did the Debtor have some duty to try to dissuade him by
12 saying, Jim, you're being a hothead, this is a very serious
13 matter, it's only \$1.4 million, make the payment? In fact, we
14 did make the payment in January, after this issue was learned
15 about. But the Debtor didn't do any of those things.

16 So, again, the question now is, did the Debtor's lack of
17 any subsequent follow-up -- putting its head in the sand, so
18 to speak -- did that comport with the duties as specified,
19 what would a reasonable person discharging his or her duties
20 under the facts and circumstances in that industry then in
21 place, what should or would have such a reasonable person
22 done? That's where Mr. Pully comes in.

23 I deposed Mr. Seery a few days after this deposition and I
24 asked him about this, and Mr. Seery said that no, in his view,
25 Mr. Waterhouse acted perfectly appropriately, that Mr.

1 Waterhouse had no duty to seek clarification or explain the
2 ramifications or anything else. And it was clear to me that
3 Mr. Seery is going to testify to that effect.

4 So at that point in time, now that we knew Mr.
5 Waterhouse's testimony, we decided that it is not only
6 advisable but perhaps necessary to retain an expert. And we
7 moved very quickly. I have had the fortune of working with
8 Mr. Pully before, so I knew him. I was able to rapidly retain
9 him because of our prior familiarity with each other. Mr.
10 Pully reviewed all the transcripts. He reviewed the
11 discovery. He prepared a full and final report. So, from
12 beginning to end, we were done in maybe five weeks, maybe six
13 weeks.

14 And we're not proposing, Your Honor, that the Debtor
15 doesn't have whatever time it needs to prepare a rebuttal.
16 We're not proposing that the Debtor can't depose Mr. Seery
17 [sic]. Of course it can.

18 So where this adversary proceeding now is is that
19 discovery is over. The Debtor will be filing by December the
20 17th a motion for summary judgment. Your Honor will recall
21 that Your Honor approved a scheduling order on that. And
22 there will be hearings before this Court on summary judgment,
23 and perhaps opposing counsel can remind me, but it's going to
24 be in late January, or I'm going by memory here, maybe early
25 February.

1 So that is, Your Honor, what happened. That is how it
2 happened. It's the truth. It's -- there's no laying behind
3 the log here. There's no litigation decisions that are now
4 backfiring and we're trying to get out of them. What happened
5 here is exactly what should happen in a lawsuit like this,
6 where discovery has illuminated various issues and now we have
7 to deal with the consequences of that discovery as we prepare
8 for trial.

9 October the 29th was the date in the scheduling order to
10 disclose experts and provide their reports. Mr. Pully
11 couldn't even hypothetically do that in time since I had
12 retained him a few days before that. But we moved very
13 quickly to file this motion, to file it before the deadline
14 actually expired, in hopes, again, of not -- not only of
15 showing Your Honor that we moved diligently and rapidly when
16 this issue unfolded, but also that we didn't need *nunc pro*
17 *tunc* relief.

18 So, Rule 16 does apply. The good cause requirement does
19 apply. But this is not some talismanic super-high burden to
20 meet. Yes, there's a burden. Yes, I must demonstrate to Your
21 Honor why leave based on good cause is required. But we're
22 not trying to unscramble the eggs, and we're not seeking
23 something extraordinary or exotic here.

24 The Fifth Circuit has specified the four factors that the
25 Court should look at. In the Fifth Circuit cases that we've

1 seen and that we've briefed, the deadline had already expired
2 and the people were seeking *nunc pro tunc* relief. I don't
3 think we have that high of a burden here, but even if we do,
4 we've analyzed those four factors.

5 And the first factor is the explanation for the lateness.
6 Again, did NexPoint act diligently? Did NexPoint hide behind
7 the log? Is there some litigation strategy here that has
8 backfired? None of that, Your Honor, is present. There's
9 been no delay. We deposed, pursuant to agreed deposition
10 schedules, we deposed all of the main witnesses in October.
11 When we deposed Mr. Waterhouse, this issue arose. We moved as
12 rapidly as we could thereafter. And you've seen, Your Honor,
13 in the interrogatory answer, that if the Debtor knew about
14 this instruction, then, really, the Debtor should have
15 answered its interrogatory to say, we got an instruction not
16 to pay and that's why we didn't pay.

17 Maybe the Debtor -- maybe the Debtor didn't know that.
18 But when we deposed Mr. Klos and Ms. Hendrix, who are still
19 employees of the Debtor, they testified that they heard Mr.
20 Waterhouse tell them that in late November last year. So they
21 -- they testified that in late November last year Frank
22 Waterhouse told them, Jim Dondero told me, don't make this
23 payment.

24 So, even if the Debtor didn't know what Mr. Waterhouse
25 would testify to, Mr. Klos and Ms. Henderson [sic] did.

1 Again, I am not pointing the fingers here at the Debtor.
2 I'm not saying that their answer to Interrogatory No. 1 was
3 manipulative, that it was calculated to deceive. I'm not
4 suggesting that. I'm just suggesting that, had the Debtor
5 given a more fulsome answer, we would have immediately
6 investigated and immediately retained an expert back in May or
7 June of this year.

8 The next element, or the next factor, rather, is the
9 importance of this extension. And Your Honor, we have quoted
10 at length Fifth Circuit opinions that say that when the
11 standard of care is involved, expert opinion is appropriate
12 and may be required.

13 It goes back to, again, if the Debtor just dropped the
14 ball and didn't facilitate the payment, that's easy. That
15 doesn't need an expert. But if the Debtor was instructed by
16 Mr. Dondero not to make the payment and there was a month left
17 before the payment was to be made, did the standard of care as
18 specified in the contract require the Debtor to do something
19 that it failed to do?

20 So we are talking about the standard of care. That is
21 appropriate expert testimony. It may be required. And it is
22 not something that I can argue to a lay juror just based on a
23 deadline being missed.

24 So, yes, this -- the relief we're seeking is important,
25 especially given the jury nature of this trial.

1 The third factor is the potential prejudice. So, the
2 Debtor says, well, this will increase costs. Yes, it will.
3 But costs alone is not the legally -- the legal standard here.
4 Every litigation has costs. Every litigation has burdens.
5 And if the Debtor prevails in this lawsuit, they will claim
6 attorneys' fees and costs. They're entitled to that under the
7 note and under Texas law.

8 So there will be an incremental cost for the Debtor to
9 retain an expert, but that would have been present as of
10 October the 29th anyway.

11 Remember, I filed this motion on the deadline. We're
12 seeking six weeks of delay here. This is not late-stage
13 litigation where all the facts are known, all the witnesses
14 have been deposed, everyone's ready for trial, and suddenly a
15 party seeks to increase its opponent's litigation costs here
16 with a last-second expert. This is not that case.

17 So, there is no prejudice, at least not in the legally
18 relevant way by way of costs, nor is there any prejudice by
19 delay. And this also ties into the fourth factor, which
20 discusses a continuance. There is no prejudice here because
21 we're not trial-set. We don't know when we're going to be
22 trial-set.

23 Even if the Court denies summary judgment in whole or in
24 part at the end of January or early February -- which I don't
25 think that's very realistic because I think the Court is going

1 to want to think about it some, the Court is going to want to
2 prepare a report and recommendation -- this is not going to be
3 a straightforward summary judgment proceeding.

4 What is also out there is that the Debtor has filed a
5 motion to consolidate all these note cases in front of one
6 District Court judge. That's going to have to be reviewed by
7 the District Court judges and ruled on.

8 So we are months, months away from being trial-ready, and
9 then we don't know how long it's going to be before we're up
10 for a week or two long jury trial. No one knows that. That
11 is plenty of time for the Debtor to get a rebuttal expert.
12 It's plenty of time for the Debtor to depose Mr. Pully. It's
13 plenty of time for everything to come to play so that this
14 case will be certified trial-ready, irrespective of whether
15 there's an expert or not. This is not going to delay the
16 process. We're not seeking to delay the process.

17 Nor are we seeking to derail the summary judgment
18 proceedings. If the Debtor wants to retain an expert for
19 summary judgment proceedings, that just proves that there is a
20 question of fact here that precludes summary judgment.

21 But as far as continuance or trial-setting, that's just
22 not present here.

23 And I've quoted Your Honor at length a District Court's
24 opinion from the Eastern District of Texas that talks about
25 prejudice, that talks about costs. And that judge basically

1 said, look, when it's -- when it's an affirmative defense that
2 you've known that since the beginning, which the Debtor has
3 known here since the beginning, then, really, it's not a last-
4 second tactic. It's not real prejudice. Yeah. Yeah, there's
5 a delay. Yeah, there's an increased cost. But the plaintiff
6 is now trying to fundamentally change this lawsuit, to
7 fundamentally interject something new here. The plaintiff
8 just needs some more time. And the question is, should the
9 plaintiff have more time?

10 Your Honor, those are the factors. We have -- we have the
11 exhibits. We have the record prepared. It's a part of the
12 motion and the Debtor's response. And Your Honor, we ask that
13 the Court grant this motion -- again, reminding the Court that
14 this does relate to an affirmative defense that's been around
15 since the beginning. It does relate to one that was -- only
16 -- only really became the subject of expert testimony in late
17 October. And it's only because discovery in this case worked
18 as it should. No one laid behind the log. No one made a
19 calculated decision that has backfired. No one delayed
20 anything or was less than diligent.

21 Under these circumstances, Your Honor, because the point
22 of a trial in front of a jury is to get to the truth and it's
23 to enable the jury to have what it needs to make a true, full,
24 and informed decision, we believe that good cause exists, and
25 we'd ask -- NexPoint would ask that the Court grant this

1 motion.

2 THE COURT: All right. Thank you.

3 I'll ask Mr. Aigen, does he have anything he wants to
4 supplement with?

5 MR. AIGEN: Yes, Your Honor. I can make a very quick
6 argument here.

7 As you know, HCMS and HCRE have filed a joinder, asking
8 for the same relief. The only thing I want to quickly point
9 out is that the only difference between our clients and Mr.
10 Rukavina's client is the lack of a written services agreement.
11 But I would point out, as the evidence we submitted in our
12 briefing shows, the undisputed testimony is that there was an
13 oral agreement to provide these services, that the Debtor did
14 provide these same exact services that they provided from --
15 for NexPoint to HCMS and HCRE, that they had done this for
16 years, and this included making loan payments.

17 So I just wanted to point that out, and I think what this
18 means is that, for the same reasons that Mr. Rukavina asked
19 for this relief, we believe we are entitled to the same
20 relief. And I won't bother to go through all the same
21 arguments that Mr. Rukavina just made to the Court. So that's
22 all I have, Your Honor.

23 THE COURT: All right. Thank you. Ms. Winograd?

24 MS. WINOGRAD: May it please the Court?

25 THE COURT: You may proceed.

1 MS. WINOGRAD: Your Honor, the motion should be
2 denied because there is no good cause for modifying the
3 scheduling order. The motion is untimely. The expert
4 testimony Defendants seek to gather is both improper and
5 irrelevant. And if the motion is granted, Highland will be
6 prejudiced.

7 This is -- this adversary -- adversary proceeding is a
8 garden-variety collection action on a simple note, it has been
9 going on for roughly a year, and it continues to get delayed
10 due to unnecessary and costly motion practice. Defendants'
11 latest motion is not only another delay tactic, but it is also
12 completely unsupported.

13 And before I tell you why it is unsupported, I want to
14 take a step back and just summarize the context of Defendants'
15 motion. Defendants have always and continue to assert the
16 same affirmative defense, which is that their default under
17 the note was the result of Highland's negligence under the
18 shared services agreement. It is Defendants' position that
19 before Mr. Waterhouse's deposition an expert was not needed to
20 testify regarding Highland's duties under the shared services
21 agreement.

22 Mr. Waterhouse then testified that Mr. Dondero gave him
23 instruction not to make a payment under the note. It is now
24 Defendants' contention that, solely in light of this
25 testimony, all of a sudden an expert is needed to testify

1 regarding whether Highland owed an affirmative duty under that
2 same shared services agreement to ask Mr. Dondero if he
3 understood the implications of his instruction, and if so, if
4 Highland breached such a purported duty.

5 First of all, Your Honor, based on the clear terms of the
6 shared services agreement, there is no affirmative duty for
7 Highland to ask Mr. Dondero if he understood the implications
8 of his own instruction.

9 Moreover, Your Honor, the question of what Highland's
10 duties are is a legal issue reserved for the Court, and the
11 issue of whether Highland breached -- and Highland submits
12 there was no such breach -- but that issue is reserved for the
13 jury.

14 Your Honor, if expert testimony wasn't needed before, it
15 is not needed now.

16 This Court entered a scheduling order in September of
17 2021. Under Rule 16(b) of the Federal Rules of Civil
18 Procedure, an existing scheduling order can only be modified
19 upon a showing of good cause. The purpose of Rule 16 is for
20 the Court to prevent unforeseeable and never-ending litigation
21 expenditures.

22 So the critical question before Your Honor today is
23 whether there is good cause to modify the scheduling order.
24 And Highland submits there is not.

25 Courts consider four general factors to determine whether

1 there's good cause. It's the party's explanation for failing
2 to previously identify the witness. It's the importance of
3 the witness's testimony. And it's the prejudice to the other
4 side in allowing the testimony. All of these factors weigh in
5 favor of denying the motion.

6 Regarding the first factor, Defendants' explanation for
7 failing to previously identify the witness is entirely without
8 merit. Again, NexPoint first raised its affirmative defense
9 that its default under the note was the result of Highland's
10 own negligence back in March of 2021. In other words,
11 NexPoint had nine months to retain an expert to testify
12 regarding Highland's duties for nine months.

13 NexPoint seeks to create -- to distinguish between these
14 notions of Highland somehow, quote, dropping the ball versus
15 Highland not asking Mr. Dondero if he understood the
16 implications of his own instruction. Defendants cite no
17 authority in support of the notion that one of these factual
18 circumstances would somehow require an expert but that the
19 other would not.

20 What this comes down to, Your Honor, is that Defendants
21 are using this testimony as an excuse to muddy the water, to
22 muddy the waters as to the critical issues in this case and as
23 a latch-ditch attempt to bolster their defense.

24 I don't want to bog you down with case law that's already
25 cited in our brief, but I want to flag a particularly on-point

1 case, and that is *Reliance*, 110 F.3d at 257. The Fifth
2 Circuit affirmed the lower court's denial of a party's motion
3 to modify the scheduling order when that -- when a deposition
4 didn't go well, specifically holding District Courts have the
5 power to control their dockets by refusing to give ineffective
6 litigants a second chance to develop their case.

7 The suggested expert testimony also is improper as a
8 matter of law. It is well-settled law in the Fifth Circuit
9 that an expert cannot testify regarding the scope of a party's
10 contractual duties under an agreement and whether that party
11 fulfilled such duties. And that is exactly what NexPoint and
12 Defendants are trying to do here. It is trying to have its
13 expert interpret the terms of a shared services agreement and
14 testify regarding Highland's duties thereunder and ultimately
15 whether it thinks Highland breached those duties.

16 This is an improper subject for expert testimony and
17 precisely the type of expert testimony that the Northern
18 District of Texas rejected in *Panhandle* and which the Fifth
19 Circuit affirmed the rejection of in *Askanase*, two cases cited
20 in our papers.

21 Even if the suggested expert testimony were proper, which
22 it is not, it is also irrelevant. In order to be relevant,
23 expert testimony must assist the trier of fact understand a
24 complex or distinct issue in a case. Here, the critical issue
25 for Defendants is whether they can prove that their default

1 under the note was the result of Highland's negligence. This
2 issue is well within the common understanding of a lay person.

3 Again, this is a garden-variety collection action. All of
4 the cases NexPoint cites in its papers in support of the
5 notion that expert testimony is required, all of those cases
6 involve professional malpractice cases, whether legal or
7 medical. And in those cases, an expert was required to
8 testify regarding the general standard of care in a particular
9 industry.

10 Here, NexPoint doesn't seek to have an expert testify
11 regarding the general standard of care in a particular
12 industry. That is not an issue in this case. And this
13 certainly is not a professional malpractice case.

14 NexPoint seeks to have its expert opine as to the scope of
15 Highland's legal duties in a shared services agreement and
16 ultimately whether Highland breached the purported duties,
17 which, again, we submit it did not.

18 The other case NexPoint cites to, *In re Schooler*, that
19 case also doesn't support Defendants' position, and in fact
20 supports Highland's position. In that case, the Fifth Circuit
21 noted, and I quote, Expert testimony is not needed in many, if
22 not most, cases.

23 I also want to briefly address NexPoint's argument raised
24 for the first time in its reply that Highland was also acting
25 as an attorney to Defendants during this time. As a

1 procedural matter, this argument is entirely improper because
2 it is not proper to raise an argument for the first time in a
3 reply.

4 And on the merits, again, this is not a professional
5 malpractice case. So for these reasons alone, such a
6 contention should be summarily disregarded by the Court.

7 Finally, Your Honor, Highland would suffer prejudice if
8 the motion is granted because it would be forced to expend
9 significant and costly resources responding to the testimony
10 in the form of retaining a rebuttal expert, taking and
11 defending additional depositions, and engaging in more motion
12 practice. This would be a waste of resources for both parties
13 and for the Court because this testimony isn't ultimately
14 going to be needed at trial.

15 It is improper because it opines as to the ultimate legal
16 issues in this case that are reserved for the Court and then
17 for the jury. And it is also irrelevant because all of the
18 issues in this case are well within the common understanding
19 of a lay person.

20 I also want to note that HCRE and HCMS's motions asking
21 for the same relief are equally if not more frivolous than
22 NexPoint's because HCMS and HCRE aren't even parties to the
23 shared services agreement. To the extent HCMS and HCRE are
24 asking an expert to testify regarding Highland's alleged
25 duties under an oral agreement, the terms of which are

1 unknown, such a contention is frivolous on its face.

2 But even if such an alleged oral agreement exists, which
3 it does not, this does not change the Rule 16(b) analysis.
4 The Defendants fail to show good cause for modifying the
5 scheduling order.

6 In brief, Your Honor, this motion is simply a delay
7 tactic, the expert testimony is improper, and the motion
8 should be denied. Thank you.

9 THE COURT: Thank you.

10 All right. Movants get the last word. Mr. Rukavina,
11 anything further?

12 MR. RUKAVINA: Yes, Your Honor. Most of what
13 opposing counsel says is the topic of a *Daubert* issue. We're
14 not seeking to prejudice *Daubert* today, and they have every
15 ability in the future to argue that Mr. Pully's testimony
16 should not be admissible.

17 Second, this is not a garden-variety case. It is not. It
18 is a case where, again, our lender was also our officer, was
19 providing all kinds of payment services, accounting services,
20 and legal services. It may not be unique, it may not have
21 never happened before, but it is not a garden-variety.

22 I do take issue with the notion that there has been any
23 delay in this case. That is not correct. I just looked at
24 the docket again to refresh my memory. We had a contested
25 hearing on my motion to withdraw the reference that the Debtor

1 objected to, arguing that 542 was a core matter. Your Honor
2 rejected that argument, and Your Honor agreed with me, as did
3 the District Court, that the reference will be withdrawn when
4 this trial -- when this case is certified trial-ready.

5 So the notion that there has been delay, intentional delay
6 by us, that this is a matter of delay, is absolutely wrong.
7 In fact, this lawsuit has gone on quickly. It's been handled
8 professionally. Both sides have been cooperative, giving each
9 other various accommodations. And I am proud, I think, of how
10 every lawyer has handled themselves in this lawsuit. To
11 suggest delay or intentional delay is wrong.

12 On the law, Your Honor, *In re Schooler*, I heard counsel
13 argue that it's just illogical and wrong to argue that an
14 expert wasn't required in one situation but now is. But
15 that's *In re Schooler*, the Fifth Circuit, Your Honor, 725 F.3d
16 498, that I quote at length from. That's one where the
17 trustee dropped the ball, a Chapter 7 trustee failed to give
18 property of the estate. And that's the one where the Fifth
19 Circuit does say, Accordingly, we have explained that, as a
20 general rule, expert testimony is not needed in many, if not
21 most, cases. And then the Fifth Circuit says that, It
22 requires no technical or expert knowledge to recognize that
23 she -- the trustee -- affirmatively should have undertaken
24 some form of action to acquire for the bankruptcy estate the
25 assets to which it was entitled.

1 But, again, this is not that case. This was that case
2 before Mr. Waterhouse testified, and now it's not. This is
3 not a case anymore where the debtor simply dropped the ball,
4 as did that trustee, or as does the doctor who amputates the
5 wrong leg, or as does the lawyer who misses a limitations
6 deadline. This is now a case where, if the jury believes Mr.
7 Waterhouse, the plot has thickened.

8 And finally, Your Honor, again, I'm not here to point
9 fingers, but look at the Debtor's response to Interrogatory
10 No. 1. All that the Debtor needed to say six or seven months
11 ago to avoid this delay is that, oh, wait, we received an
12 instruction not to pay. It would have taken ten words, one
13 sentence, by the Debtor to fully answer an interrogatory and
14 this motion would not have been necessary.

15 Thank you.

16 THE COURT: All right. Mr. Aigen, anything further
17 from you?

18 MR. AIGEN: No, nothing further, Your Honor. We just
19 join in Mr. Rukavina's reply points.

20 THE COURT: All right. As I understand it, the
21 deadline was October 29th for disclosure of experts, and the
22 record shows that at 5:22 p.m. on October 29th the Defendants
23 -- let me double-check that. That was actually the
24 declaration of Mr. Rukavina. No, 5:22 p.m. on the deadline,
25 the motion of the Defendant to extend the expert disclosure

1 and discovery deadlines was filed.

2 The legal authority that governs here is Rule 16(b). As
3 everyone has acknowledged, it provides that deadlines in
4 scheduling orders may be modified for good cause. I think the
5 standard does apply here. While I guess a lot of the cases
6 analyze it in terms of a request after a deadline has expired,
7 I think a motion on the day of the deadline at 5:22 p.m. is
8 going to be governed by Rule 16(b).

9 So, as the parties have argued to the Court, the Fifth
10 Circuit has specified four factors in guiding a decision in
11 this situation: the explanation for failure to timely move
12 for leave to amend; the importance of the amendment; potential
13 prejudice in allowing the amendment; and availability of a
14 continuance to cure such prejudice.

15 Here, as I think everyone readily acknowledges, these
16 Defendants have always asserted as a defense that the Debtor
17 dropped the ball, I think was one phrase used. That, in any
18 event, it was the fault of the Debtor that the Defendants did
19 default on the payment of these notes. I do not think the
20 sudden statement of Frank Waterhouse suddenly is a game-
21 changer that creates some new need for an expert. So,
22 therefore, looking at the factors, I don't think the
23 explanation here to extend the deadlines has merit.

24 Moreover, as far as the importance of the amendment,
25 Factor No. 2, I think it is appropriate to look at the big

1 picture here a little bit, even though we're not in a *Daubert*
2 situation, and look at what the expert is argued to be needed
3 for. And I do not think an expert can testify about
4 contractual duties and attempt to interpret its provisions.
5 That is the job of the Court, and I think it is improper
6 subject matter for an expert.

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

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

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

24 So the motions are denied.

25 Ms. Winograd, could you please prepare a form of order?

1 It can be a simple form of order. Run it by opposing counsel
2 before you upload it, please. All right?

3 MS. WINOGRAD: Yes, Your Honor.

4 THE COURT: Thank you. We're adjourned.

5 MS. WINOGRAD: Thank you.

6 THE CLERK: All rise.

7 (Proceedings concluded at 11:47 a.m.)

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CERTIFICATE

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I certify that the foregoing is a correct transcript from
the electronic sound recording of the proceedings in the
above-entitled matter.

23

/s/ Kathy Rehling

12/13/2021

24

25

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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