Case No. 3:21-cv-01590-N

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

In re: Highland Capital Management, L.P.,
***Debtor*.**

James Dondero,
***Appellant*,**

v.

Highland Capital Management, L.P.,
***Appellee*.**

On Appeal from the United States Bankruptcy Court for
the Northern District of Texas, Adversary No. 20-03190
Hon. Stacey G.C. Jernigan, Presiding

REPLY BRIEF OF APPELLANT JAMES DONDERO

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTRODUCTION 1
REPLY POINTS 3
I. The bankruptcy court erred by holding Mr. Dondero in contempt for an alleged interference that occurred before the issuance of the TRO 3
A. The conduct the bankruptcy court found violated the TRO occurred before its entry, as detailed in the Debtor's Complaint 3
B. The Debtor presented no evidence that Mr. Dondero interfered with any trading after the entry of the TRO 6
II. Because the TRO did not state its terms specifically or describe in detail the acts restrained, the bankruptcy court erred by holding Mr. Dondero in contempt for communications with shared services employees 12
A. The TRO did not comply with Rule 65(d) 12
B. The TRO was not clear, definite, and specific 17
III. The bankruptcy court improperly assessed the $450,000 sanction 19
A. The Debtor did not support its fees with any evidence 19
B. The bankruptcy court erroneously awarded fees not caused by the allegedly contemptuous conduct 22
CONCLUSION 24
CERTIFICATE OF SERVICE 26
CERTIFICATE OF COMPLIANCE WITH RULE 8015(H) 26

TABLE OF AUTHORITIES

Cases

Coleman v. United States
912 F.3d 824 (5th Cir. 2019) 17

Ga. Power Co. v. NLRB
484 F.3d 1288 (11th Cir. 2007) 14

Goodyear Tire & Rubber Co.
137 S.Ct. 1178 (2017).....23

Oaks of Mid City Resident Council v. Sebelius
723 F.3d 581 (5th Cir. 2013) 3, 14

Payne v. Univ. of S. Miss.
681 F. App'x 384 (5th Cir. 2017).....21

Saizan v. Delta Concrete Prods. Co.,
448 F.3d 795 (5th Cir. 2006) 21

Schmidt v. Lessard
414 U.S. 473 (1974).....19

United States v. Neal
578 F.3d 270 (5th Cir. 2009) 15

United States v. Rodriguez-Leos,
953 F.3d 320 (5th Cir. 2020) 15

Vogel v. Veneman
276 F.3d 729 (5th Cir. 2002) 17

Wegner v. Standard Insurance Co.
129 F.3d 814 (5th Cir. 1997) 19, 20, 21

Rules

Fed. R. Civ. P. 65(d) 14, 15, 16, 17, 18

INTRODUCTION

Lacking any legitimate defense of the bankruptcy court's stated grounds for holding Mr. Dondero in contempt, the Debtor is forced to conjure up bases for the Contempt Order that the bankruptcy court neither considered nor found. Rhetoric aside, the Debtor simply did not meet its burden to prove by clear and convincing evidence that Mr. Dondero violated the TRO, including the two categories of conduct on which the Contempt Order is based—interference with trades and communications with the Debtor's employees.

Mr. Dondero openly admitted at the Contempt Hearing that, out of frustration, he interfered with the Debtor's trading of certain securities around Thanksgiving of 2020—actions that led to the entry of the TRO. But there is no evidence he did any such thing after the TRO was entered, as would be required for a finding of contempt. To the contrary, Mr. Dondero testified that, out of respect for the bankruptcy court's orders, he shaped his behavior in a good faith attempt to comply with the TRO.

Despite these attempts, the Debtor tried to hold Mr. Dondero in contempt for everything it could think of, including "willful ignorance of the TRO," "throwing away his cell phone," "trespassing on the Debtor's property," and "preventing the Debtor from completing its document production." Even if the Debtor could have proven these allegations, none of them violated the terms of the TRO, and the bankruptcy court ultimately agreed.

It is not surprising, therefore, that the Debtor was also unable to meet its burden of proving by clear and convincing evidence the interference and communications allegations that the bankruptcy court held violated the TRO. As to the allegations of interference, there was no evidence that Mr. Dondero took any prohibited action after the TRO was entered. Instead, he was held in contempt for the conduct he admitted to—which indisputably occurred *before* the entry of the TRO.

As to the allegations about improper communications, the record (and an examination of the TRO itself) reveals that the TRO was not valid, lawful, clear, and unambiguous. Mr. Dondero was found in contempt for communicating with shared employees of the Debtor and the Advisors—chiefly, lawyers and accountants from whom Mr. Dondero had received assistance and advice for years about legal and compliance issues. Due to the vagueness and ambiguities inherent in the TRO, Mr. Dondero could not permissibly be held in contempt just because he interpreted the TRO differently from the Debtor.

For either or both of these reasons, the Contempt Order must be reversed, and the sanctions award should be eliminated in any event.

REPLY POINTS

I. The bankruptcy court erred by holding Mr. Dondero in contempt for an alleged interference that occurred before the issuance of the TRO.

To obtain a civil contempt order, the Debtor had to prove, by clear and convincing evidence, that the "injunction was in effect at the time of the . . . supposedly contemptuous conduct." *Oaks of Mid City Resident Council v. Sebelius*, 723 F.3d 581, 585 (5th Cir. 2013). As to the allegations of interference, the Debtor failed to meet that burden of proof, requiring reversal.

A. The conduct the bankruptcy court found violated the TRO occurred before its entry, as detailed in the Debtor's Complaint.

The first of the two TRO violations the bankruptcy court found was interference with trading of Highland CLO Assets. [R.000088-94, 000103-04] But as the Contempt Order itself reveals, all of the conduct the bankruptcy court found violated the TRO's interference provision occurred before the TRO was entered. Indeed, the same conduct was alleged in the Debtor's Complaint that led to the TRO.

The Debtor filed its Complaint seeking injunctive relief on December 7, 2020, and the TRO was entered on December 10, 2020. [R.006233, 006306] Although the Debtor contends otherwise, the conclusion is inescapable that the ***exact*** conduct

the bankruptcy court found to violate the TRO was described by the Debtor in the Complaint that led to the TRO.[1] [R.006233]

For instance, the Debtor's Complaint asserted:

> 32. ***On November 24, 2020***, Mr. Dondero personally intervened to prevent sales of certain CLO assets that he knew Mr. Seery had authorized. Upon learning that the trades that Mr. Seery had authorized were being executed, Mr. Dondero sent an e-mail to Mr. Matthew Pearson (with copies to Mr. Hunter Covitz and Mr. Joseph Sowin) in which he said "No…… do not." About an hour later, Mr. Pearson (an HCMFA employee, not an employee of the Debtor) cancelled the trades, but Mr. Dondero warned Mr. Pearson that "HCMFA and DAF has [sic] instructed Highland in writing not to sell any CLO underlying assets . . . ***there is potential liability, don't do it again please***."

[R.006240 (emphasis added)]

In holding Mr. Dondero in contempt, the bankruptcy court unequivocally and exclusively based its ruling on this very same allegation regarding the events of November 24, 2020:

> Mr. Dondero testified at a deposition on January 5, 2021, that he gave instructions to a Debtor employee, Hunter Covitz, not to sell "SKY" equity after Mr. Covitz had been instructed by Mr. Seery to sell it. He also testified that he communicated with an employee named Matt Pearson, an equity trader, informing him that certain Non-Debtor Highland Related Entities ("HFAM" and "DAF")—who were investors

[1] The bankruptcy court's Contempt Order acknowledges in Section III that the Debtor's December 7, 2020 Complaint described the conduct that the bankruptcy court would later find violated the December 10, 2020 TRO: "In any event, various examples of communications that allegedly constituted interference were described in the Adversary Proceeding." [R.000067-68 (citing "Debtor's [withdrawn] Exh. 5, DE # 80 (11/24/20 – 11/27/20 emails of Mr. Dondero instructing Highland employee Hunter Covitz not to trade SKY equity as he had been instructed by James Seery)," and recognizing, "Mr. Dondero is alleged to have sent a threatening text to Mr. Seery, just a few hours after the demand letters were sent to him."]

> in the NexPoint/HCMFA Funds—had "instructed Highland in writing not to sell any CLO underlying assets. ***There is potential liability. Don't do it again***."

[R.000089 (emphasis added)]

Particularly telling, the bankruptcy court quoted the *same email string that the Debtor quoted in its Complaint*—emails dated November 24-27, 2020. This email string was not in the evidentiary record of the Contempt Hearing. Although the Debtor sought to admit the email string into evidence as Exhibit 5, Mr. Dondero objected to its admission, and the Debtor withdrew the exhibit. [R.006480, 006674, 008912, 009148]

The bankruptcy court also quoted and held Mr. Dondero in contempt for a December 3, 2020 text message from Mr. Dondero to Mr. Seery, which the Debtor had also quoted in its December 7, 2020 Complaint. The Debtor's Complaint asserted:

> 40. ***On December 3, 2020***, Debtor's counsel sent letters to representatives of Mr. Dondero and each of the Corporate Obligors demanding payment of all unpaid principal and accrued interest due under the Demand Notes by December 11, 2020. …
>
> 41. ***Shortly after the Debtor sent the Demand Letters***, Mr. Dondero sent a text message to Mr. Seery that stated only: "***Be careful what you do – last warning***."

[R.006242 (emphasis added)]

In discussing conduct that it found violated the TRO, the bankruptcy court's Contempt Order quoted this same pre-TRO text message: "Finally, Mr. Dondero

communicated with a text to Mr. Seery that stated: "***Be Careful what you do, last warning***." [R.000090 (emphasis added)]

Like the November 24-27, 2020 email string, the December 3, 2020 text message was not admitted into evidence at the Contempt Hearing because the Debtor withdrew its Exhibit 6 after Mr. Dondero objected. [R.006480, 006664, 008912, 009148]

The Debtor now contends that Mr. Dondero has "mischaracterize[d]" the bankruptcy court's Contempt Order and the record, asserting that Mr. Dondero's "argument is belied by the Contempt Order's plain text." [Br. at 10 (citing to the Contempt Order's assertion that the Contempt Motion "deals solely with whether Mr. Dondero violated the TRO after its entry.")] The Debtor is wrong: the statement the Debtor refers to in the Contempt Order is belied by the bankruptcy court's own descriptions of the conduct it found violated the TRO—conduct that demonstrably occurred *before* the TRO was entered on December 10, 2020.

B. The Debtor presented no evidence that Mr. Dondero interfered with any trading after the entry of the TRO.

The Debtor next argues that the bankruptcy court's interference findings "are supported by the overwhelming documentary and testimonial evidence presented during the contempt hearing." [Br. at 13] But again, all of the documentary evidence is dated before the entry of the TRO. That leaves only testimonial evidence, which does not fill the gap.

The testimonial evidence to which the Debtor refers is its effort to impeach Mr. Dondero with deposition testimony he gave on January 5, 2021—testimony he unequivocally corrected at the Contempt Hearing by clarifying that all of his communications about trading occurred before the TRO:

> BY MR. MORRIS [Debtor's Counsel]:
>
> Q Were you asked these questions and did you give these answers? Question, "And you personally instructed, on or about December 22, 2020, employees of the Advisors to stop doing the trades that Mr. Seery had authorized with respect to SKY and AVYA. Right?" Answer, "Yeah. Maybe we're splitting hairs here, but I instructed them not to trade them. I never gave instructions to settle trades that occurred, but that's a different ball of wax." "Okay." Question, "But you did instruct them not to execute trades that had not yet been made. Right?" Answer, "Yeah. Trades that I thought were inappropriate for no business purpose, I – I told them not to execute."
>
> Was that truthful testimony at the time you gave it?
>
> A No. It's -- this is part of the -- this is part of the clarification from 6 or 8 lines ago or 10 or 15 lines ago. It's all the same. I was in a truly emotional disapproving state during this part of the deposition. I believed it was against the Advisers' Act and Seery was intentionally causing harm to the CLOs. ***And I stopped the trades around Thanksgiving. I called the traders. I specifically stopped them. Once the TRO was in effect, I respected the TRO. I respected the Court. I did not call anybody. There's no evidence of me calling anybody. No one said I called anybody***.[2]

[R.008959-60 (emphasis added)]

[2] Mr. Seery's testimony at the Contempt Hearing confirms that Mr. Dondero did not stop or interfere with any trades in December. Mr. Seery testified that the Debtor did not fail to execute any trades in December 2020. [R.009128] He further testified that every trade the Debtor initiated in December 2020 closed. [R.009133]

Mr. Dondero was asked these same questions at a hearing on January 26, 2021, which the Debtor also now invokes:

> Q All right. On or about December 22nd, you personally instructed employees of the Advisors not to trade the SKY and AVYA securities that Mr. Seery had authorized. Is that right?
>
> A No.
>
> Q You personally instructed, on or about December 22, 2020, employees of those Advisors to stop doing the trades that Mr. Seery had authorized with respect to SKY and AVYA, right?
>
> A No. You know, we need to look at source documents. My recollection is I encouraged Compliance to look at those trades. But I'm willing to be – I'm willing to be – get source documents again, if you'd like.
>
> Q All right. ***My source document is your prior testimony***.
>
> ***
>
> BY MR. MORRIS:
>
> Q Page 73, beginning at Line 2, did you give the following answer to my question?
>
> "Q And you personally instructed, on or about December 22nd, 2020, employees of those Advisors to stop doing the trades that Mr. Seery had authorized with respect to SKY and AVYA, right?
>
> "A Yeah. Maybe we're splitting hairs here, but I instructed them not to trade them. I never gave instructions not to settle the trades that occurred, but that's a different ball of wax."
>
> Q Did you give that answer, sir?
>
> A ***I believe I confused dates or misspoke there, but I did give that answer***.

> Q Okay. Thank you. Stated a different way, you personally instructed the Advisors' employees not to execute the trades that Mr. Seery had authorized but which had not yet been made, right?
>
> A ***No. Not -- not on December 22nd. That was in November. November 22nd, I did not do that***.[3]

[R.007387-88 (emphasis added)]

As the January 26, 2021 testimony makes entirely clear, Mr. Dondero confused dates or misspoke when he testified in the January 5, 2021 deposition that he attempted to stop trades in December 2020. [R.007838] The testimony also reveals that the Debtor's only "source document" to support its claim that Mr. Dondero attempted to stop trades in December 2020 was Mr. Dondero's own mistaken deposition testimony, which he unequivocally corrected. [R.007387]

Thus, whatever trades Mr. Seery authorized "in the December 18 emails" to which the Debtor now refers, there is no evidence that they were trades with which Mr. Dondero supposedly "intervene[ed]." [Br. at 14-15] And the bankruptcy court did not—and could not—find that any such interference occurred after December 10, 2020.

[3] When pressed further at the Contempt Hearing about his January 5th deposition testimony, Mr. Dondero testified: "We went over this earlier today. I've clarified this several times. There is nobody, there's no emails, there's no one who says I contacted them on December 22nd. I misspoke. I contacted everybody the week of Thanksgiving. The only thing I did on the 22nd of December was one email to Jason Post, full stop, period. You have the system. If I am lying or you had any evidence of me talking to somebody else, you would have it, instead of just making me clarify this for the fifteenth time." [R.009081]

The only other "evidence" the Debtor offered of post-TRO interference was a letter Debtor's counsel sent to Mr. Dondero's counsel on December 23, 2020. In relevant part, that letter asserted:

> On December 22, 2020, employees of [NexPoint] and HCFMA notified the Debtor that they would not settle the CLOs' sale of the AVYA and SKY securities. To justify their conduct, those employees mimicked the frivolous argument made in the CLO Motion. This conduct violated the TRO, and HCMLP reserves the right to seek appropriate sanctions with respect to such violation.[4]

[R.006767-68] The fact that Mr. Dondero's counsel chose not to specifically respond to these self-serving and unsupported allegations is not "clear and convincing evidence" that can support a contempt finding of post-TRO interference.[5] Indeed, the Debtor made no attempt to ever identify the "employees of NPA and HCFMA" or offer any documents or testimony establishing the nature or date of the events vaguely alleged in the letter.

[4] In its Brief, the Debtor asserts that "[s]hortly after Dondero told Advisor employees not to execute the sales Seery authorized, the Advisors sent letters to Highland on December 22 and 23, refusing to execute further CLO sales and threatening to initiate termination of Highland's CLO management contracts." [Br. at 17 (citing R.006768, 006778-80, 006786-88] The Debtor cites to its own December 23, 2020 letter, as well as two letters sent from counsel for the Advisors to counsel for the Debtor. At the Contempt Hearing, the Debtor did not argue that the sending of these letters between counsel constituted or established a violation of the TRO by Mr. Dondero. Nor did the bankruptcy court base its finding of contempt on the sending of these letters.

[5] While questioning Mr. Dondero at the Contempt Hearing, the Debtor's counsel remarked, "Well, I do have evidence, sir. I have – I Have the Debtor's letter to your lawyers that your lawyers didn't respond to. Isn't that correct?" [R.009081] Mr. Dondero's counsel did respond to the letter, focusing instead on the Debtor's demand that Mr. Dondero "immediately turn over" his cell phone to the Debtor. [R.006768, 006805]

In its closing argument at the Contempt Hearing, the Debtor pointed to only two items supporting its claim of interference with trading: (1) Mr. Dondero's January 5, 2021 deposition testimony that he unequivocally corrected at the January 26 hearing and the Contempt Hearing; and (2) the Debtor's December 23, 2020 letter:

> Interference with trading. Mr. Dondero, his admission of interference with the trading is clear. It's unambiguous. The Debtor told his lawyers in that December 23rd letter that one of the very reasons they were evicting him was because of his interference with the trading and his interference with the Debtor's operations, and they never, ever rebut that. His lawyers never contest that. They never respond to it. They just let it go.

[R.009188]

The Debtor later confirmed in rebuttal that there was no other evidence of interference:

> Interference. Mr. Wilson seems to think that the only thing we have here is the Debtor's letter. No. The Debtor's letter said you interfered. There's no response. But more importantly, we rely on Mr. Dondero's sworn testimony. Question, "You personally instructed on or about December 22, 2020 employees of those Advisors to stop doing the trades that Mr. Seery had authorized?" Answer, "Yeah." That's at Page 73. He's trying to walk it back, but the testimony is what it is.

[R.009207-08]

But neither the January 5 deposition testimony (which Mr. Dondero twice corrected with the accurate November date), nor the Debtor's self-serving demand letter (which attached no documentary proof), amounts to clear and convincing

evidence that Mr. Dondero interfered with any trading after December 10 in violation of the TRO. And apparently recognizing as much, the bankruptcy court looked outside the record of the Contempt Hearing and based its finding of interference *solely* on November 2020 conduct that occurred before the entry of the TRO. Because the TRO was not in effect at the time of the only conduct that the court found to be an act of interference with trades, the Contempt Order must be reversed.

II. Because the TRO did not state its terms specifically or describe in detail the acts restrained, the bankruptcy court erred by holding Mr. Dondero in contempt for communications with shared services employees.

A. The TRO did not comply with Rule 65(d).

1. Rule 65(d) prohibits reference to other documents.

Recognizing that a TRO cannot reference other documents, the Debtor now claims that the term "shared services" in paragraph 2(c) of the TRO does not refer to the shared services agreements. [Br. at 19-22] Indeed, the Debtor goes so far as to claim that "[n]othing in paragraph 2(c) directed Dondero to refer to those shared-services agreements, in whole or in part, to determine the scope of the prohibited conduct set forth in the TRO." [*Id.* at 21] The Debtor is wrong.

To begin with, the Debtor told the bankruptcy court something very different. At the opening of the Contempt Hearing, the Debtor argued: "You might hear, oh, oh, these communications were about shared services. They will never be able to

prove that ***because they have not put on their exhibit list any shared services agreement.***" [R.008889-90 (emphasis added)] In fact, the agreements were on Mr. Dondero's witness and exhibit list and were admitted into evidence as Exhibits 1 and 2. [R 007700, 007719, 009032]

Even more telling, the Debtor conceded in closing that Mr. Dondero had actually offered two shared services agreements into evidence, but told the bankruptcy court: "We didn't dispute that shared services agreements existed. ***That's why there's an exception in the TRO for that***." [R.009180 (emphasis added)] At the conclusion of the hearing, the Debtor confirmed that the TRO referred to the shared services agreements: "We don't dispute it. ***It's, in fact, precisely why we agreed to put it in there, because the Debtor had a contractual obligation to provide all kinds of services, whatever they may be, under those agreements***. So I want to be really clear about that." [R.009220 (emphasis added)]

The Debtor has now changed its position. But while the Debtor now argues that paragraph 2(c) did not require Mr. Dondero to refer to the shared services agreements to determine the scope of the prohibited conduct, that is exactly what the Debtor argued Mr. Dondero should have been required to do to determine whether his communications violated the TRO. And that is exactly what the Debtor attempted to prove at the Contempt Hearing—that Mr. Dondero violated the TRO by not complying with the shared services agreements. [R.009221-22]

Even the bankruptcy court recognized that the TRO referred to the shared services agreements. At the Preliminary Injunction hearing on January 8, 2021, the bankruptcy court noted, "We already had a TRO that prevented Mr. Dondero from talking to any employees of the Debtor ***unless it was about shared services agreement***." [R.007278 (emphasis added)] Likewise, at the conclusion of the Contempt Hearing, the bankruptcy court stated, "I understand there's the exception with regard to ***the shared services agreement.***" [R.009216 (emphasis added)] Thus, there can be no question that the TRO failed to comply with Rule 65(d) because it required Mr. Dondero to refer to documents outside the TRO.

2. Mr. Dondero did not forfeit this argument on appeal.

The Debtor next tries to avoid its Rule 65(d) problem by claiming that Mr. Dondero forfeited this argument on appeal. [Br. at 22] But the Debtor cannot invoke forfeiture to skirt its own burden of proving by clear and convincing evidence that "(1) the allegedly violated ***order was valid and lawful***; (2) the ***order was clear and unambiguous***; and (3) the alleged violator had the ability to comply with the order." *Ga. Power Co. v. NLRB*, 484 F.3d 1288, 1291 (11th Cir. 2007) (emphasis added); *see also Oaks of Mid City Resident Council*, 723 F.3d at 585.

The Debtor thus bore the burden of proving—by clear and convincing evidence—that the TRO complied with Rule 65(d). Mr. Dondero argued strenuously that the Debtor could not meet that burden—in part because the TRO

was not clear and unambiguous and did not comply with Rule 65(d). [*See e.g.*, R.008023-28] In fact, Mr. Dondero raised the invalidity and unlawfulness of the TRO on numerous occasions in the bankruptcy court.

"There is no bright-line rule for determining whether a matter was raised below." *United States v. Rodriguez-Leos*, 953 F.3d 320, 324 (5th Cir. 2020). The "objection must be sufficiently specific to alert the district court to the nature of the alleged error and to provide an opportunity for correction." *United States v. Neal*, 578 F.3d 270, 272 (5th Cir. 2009). "The objection and argument on appeal need not be identical; the objections need only 'give the district court the opportunity to address' the gravamen of the argument presented on appeal." *Rodriguez-Leos*, 953 F.3d 325 (quoting *United States v. Nesmith*, 866 F.3d 677, 679 (5th Cir. 2017)).

At the TRO Hearing—just days after the Debtor sought the TRO—Mr. Dondero alerted the bankruptcy court to the invalidity issue by arguing that the Debtor's requested order would lead to "an overly broad TRO." [R.008308] Later, when the Debtor sought a Preliminary Injunction, Mr. Dondero filed an opposition arguing that the "scope of the proposed preliminary injunction is too broad and non-specific," particularly with respect to its prohibition of all communications with the Debtor's employees. [R.006634] He also specifically raised Rule 65(d), arguing that the TRO was non-specific, lacking in detail, and too vague to be enforceable. [R.006637] And he argued that the TRO "does not describe in reasonable detail the

acts restrained and, in explicit violation of Rule 65(d), ***makes reference to an outside source***." [*Id.* (emphasis added)]

Mr. Dondero's response to the Contempt Motion again argued that the TRO "does not provide clear notice to Dondero of the acts restrained and allows the Debtor to use the threat of contempt as a weapon to enjoin otherwise lawful conduct." [R.008020] He cited numerous cases discussing Rule 65(d) and specifically mentioned the Rule's requirements: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the acts or acts sought to be restrained." [R.008023 (quoting Fed. R. Civ. P. 65(d))]

Further, Mr. Dondero argued that "several provisions of the TRO (and later the Preliminary Injunction) are too broad, vague, nonspecific, and ambiguous as to be enforceable." He again asserted that the TRO violates Rule 65(d) because it "does not describe in reasonable detail the acts restrained," and "makes reference to an outside source." [R.008027] Therefore, Mr. Dondero urged the bankruptcy court not to hold him in contempt "based on an unclear, broad, and non-specific order that can be so broadly interpreted." [R.008028]

Finally, Mr. Dondero raised Rule 65(d)'s specificity requirements and prohibition on references to outside documents multiple times during the Contempt

Hearing. [R.008906-07, 008954, 009196, 009198-99, 009201-02, 009205, 009213-14, 009215-17, 009226-27] The Debtor's forfeiture argument is meritless.[6]

B. The TRO was not clear, definite, and specific.

Even if the TRO did not refer to shared services agreements, it is still unenforceable because its exception for "shared services" in paragraph 2(c) is impermissibly vague and ambiguous. [R.006307-08]

The Debtor now argues that the term "'shared services' is familiar and readily understood in [Mr. Dondero's] industry." [Br. at 23] The Debtor then asserts that Mr. Dondero should have known "what the TRO permitted him to discuss with Highland employees." [*Id.*] But the Debtor failed to prove that by clear and convincing evidence because the scope of the shared services agreements was far from clear.

While the Debtor globally states that the communications at issue are "plainly unrelated to shared services," not once does the Debtor attempt to identify how one would attempt to differentiate topics that are related to shared services from those that are not. [Br. at 23-27] Even the Debtor's CEO, Mr. Seery, admitted at the

[6] Even if Mr. Dondero failed to adequately raise this issue below, claims may be raised for the first time on appeal when they involve purely legal questions and where failure to consider them would result in a miscarriage of justice. *Vogel v. Veneman*, 276 F.3d 729, 734 (5th Cir. 2002). Interpretation of the Federal Rules of Civil Procedure (such as Rule 65(d)) is a pure question of law. *Coleman v. United States*, 912 F.3d 824, 828 (5th Cir. 2019). And holding a party in contempt for violating an order that does not comply with Rule 65(d) would be a miscarriage of justice.

hearing that the shared services agreements were ambiguous. [R.009136] If the Debtor cannot articulate what Mr. Dondero was and was not permitted to do under the TRO, and the Debtor's CEO believes the shared services agreements were ambiguous, how was Mr. Dondero to read the TRO and be able to comply? He could not, especially given the breath of the shared services agreements—which Mr. Seery has also acknowledged. [*Id.*]

The communications that the Debtor contends violated the TRO were unquestionably between Mr. Dondero and in-house lawyers, accountants, and administrative or secretarial staff, who were all shared employees to whom Mr. Dondero had relied on for years for "[a]ssistance and advice with respect to legal issues, litigation support, management of outside counsel, compliance support and implementation and general risk analysis." [R.009033-37, 007702-04, 007721, 009037] Given the ambiguous—and indisputably broad—definition of these shared services under the agreements, it was inevitable that the Debtor and Mr. Dondero would have disagreements about what he could and could not do under paragraph 2(c).

Rule 65(d) requires much more specificity and clarity than the TRO provided. In fact, this is precisely the situation that the Supreme Court warned against: "The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on

a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam). Contempt cannot rest on a prohibition as vague and ambiguous as paragraph 2(c), particularly given the further ambiguity in the broad shared services exception.

III. The bankruptcy court improperly assessed the $450,000 sanction.

At the outset, the Debtor has conceded that the bankruptcy court's $100,000 sanction for each level of appeal pursued by Mr. Dondero should be vacated. [Br. at 28, n.7] Otherwise, however, the Debtor erroneously argues that the $450,000 sanction award should be upheld because it represents attorney's fees the Debtor purportedly incurred. But attorney's fees awarded as damages cannot be affirmed under any theory because they lack the requisite evidentiary support—such as evidence of reasonableness and necessity—and because the bankruptcy court awarded fees that were not caused by any allegedly contemptuous conduct.

A. The Debtor did not support its fees with any evidence.

Wegner v. Standard Insurance Co. supports Mr. Dondero's argument, not the Debtor's. 129 F.3d 814 (5th Cir. 1997). In *Wegner*, Standard argued that Wegner "did not submit adequate documentation to support the amount of the fees awarded." *Id.* at 822. The Court held that "Wegner's proffer of documentation was marginal at best, and arguably inadequate: (1) a computer printout listing the number of hours expended by and hourly rates of attorneys who worked on the case; and (2) ***an***

affidavit from lead counsel reflecting her credentials and her view that the attorney's fees on the printout were reasonable and necessary in the prosecution of the case." *Id.* (emphasis added).

Wegner is different from this case in two respects: (1) Wegner did not submit an unsegregated mass of both relevant and irrelevant fee entries, and (2) Wegner accompanied its submission with an affidavit proving reasonableness and necessity. Despite the Debtor's recasting of Mr. Dondero's position, Mr. Dondero is not making the same argument as in *Wegner*, which was based on the inadequacy of the documentation itself. [Br. at 30] Instead, Mr. Dondero is challenging the lack of evidentiary support for the documentation submitted.[7]

Wegner is clear that the court "***must determine the reasonable number of hours expended on the litigation and the reasonable hourly rates*** for the participating attorneys, and then multiply the two figures together to arrive at the 'lodestar.'" *Id.* (emphasis added). Thus, parties seeking attorney's fees are "charged with the burden of ***showing the reasonableness of the hours billed*** and, therefore, are also charged with ***proving that they exercised billing judgment***." *Saizan v. Delta*

[7] The Debtor points out that Mr. Dondero "makes no specific objection to the attorneys' hours, tasks, or rates." [Br. at 30] But there was no way Mr. Dondero could have made such objections because the Debtor did not identify the specific fee entries for which it sought to recover, and the bankruptcy court did not specify the fee entries on which it purported to base its $450,000 award.

Concrete Prods. Co., 448 F.3d 795, 799 (5th Cir. 2006) (emphasis added). The Debtor failed entirely to offer any evidence that would meet this burden.

And while the Debtor claims that its submission "contained detailed records of the time [its] attorneys spent," the quality of the billing records is not the deficiency here. In fact, the Fifth Circuit does not require billing records at all, "as long as the evidence produced is adequate to determine reasonable hours." *Payne v. Univ. of S. Miss.*, 681 F. App'x 384, 390 (5th Cir. 2017). That is the deficiency here.

In *Payne*, the parties seeking fees did not produce contemporaneous billing records, but instead used detailed charts to organize their invoices:

> The defendants also provided multiple affidavits and a declaration from their attorneys explaining the time spent on the case, and supporting both the accuracy of the charts and the reasonableness of the hourly rates. Together, the detailed charts and the affidavits are sufficient to support the amount of attorneys' fees awarded.

Id.

What was important in *Payne*, as in *Wegner*, was that the party seeking fees produced evidence from which the court could determine the reasonableness and necessity of the hours billed. By contrast, the Debtor merely produced pages of fee records dating from November 3, 2020 through January 31, 2021, without giving the bankruptcy court any means or method to determine reasonableness and necessity except to guess or assume. And the Contempt Order confirms that the bankruptcy court did exactly that in arriving at the $450,000 sanction award. [R.000110-11

(revealing that the bankruptcy court "estimated," "assumed," and "rounded up" in arriving at the damage award)] No court has upheld a sanction award under similar circumstances, especially one this large.

B. The bankruptcy court erroneously awarded fees not caused by the allegedly contemptuous conduct.

The Debtor again mischaracterizes Mr. Dondero's argument and creates a red herring concerning the bankruptcy court's failure to calibrate the amount of the sanctions award to the allegedly contemptuous conduct. Although Mr. Dondero does assert that the bankruptcy court should have considered that the Debtor did not prevail on the majority of the claims alleged in its Contempt Motion, Mr. Dondero's main argument is that the Contempt Order "improperly reimburses the Debtor for fees that were not caused by the conduct the bankruptcy court held to be contemptuous." [Br. at 49] Indeed, the Debtor was awarded fees that were entirely unrelated to the Contempt Motion—for instance, fees incurred in obtaining the TRO.

While the full extent to which the bankruptcy court committed this error cannot be ascertained from the Contempt Order itself, it is clear that the bankruptcy court impermissibly awarded fees "***related to the TRO*** and the Contempt Motion." [R.000110 (emphasis added)] While at least some of the fees incurred in connection with the Contempt Motion may be recoverable, fees incurred in obtaining the TRO itself are not.

As the Supreme Court has explained in the context of sanction awards, "[t]he complaining party … may recover only the portion of his fees that he would not have paid but for the misconduct." *Goodyear Tire & Rubber Co.*, 137 S.Ct. 1178, 1186 (2017). Because the TRO was obtained before any conduct alleged to have violated it, the requisite causal link between the fees and any contemptuous conduct is missing.

Under *Goodyear*'s causation standard, the Debtor also cannot recover for time spent on grounds that were frivolously raised and for which it did not obtain any relief. For instance, as discussed in Mr. Dondero's opening brief, the Debtor sought to hold Mr. Dondero in contempt on several grounds that, even if true, could not violate the TRO. [Br. 9-10] These included "willful ignorance of the TRO," "throwing away his cell phone," "trespassing on the Debtor's property," and "preventing the Debtor from completing its document production." These allegations were not violations of the TRO, and the bankruptcy court did not hold Mr. Dondero in contempt based on any of them. Yet its sanction compensates the Debtor for pursuing these allegations. Because the $450,000 sanction award includes fees not caused by any conduct found to be contemptuous, it must be reversed for this additional reason.

CONCLUSION

The Debtor concedes that the appellate-related sanctions should be vacated. But that alone is not enough. For the reasons stated herein and in Mr. Dondero's opening brief, the Contempt Order and the $450,000 sanction award should be reversed and judgment should be rendered in favor of Mr. Dondero.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on March 16, 2022, a true and correct copy of the foregoing document was served *via the Court's CM/ECF system* on counsel for Appellee and all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink
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1. This document complies with the type-volume limitation of Fed. R. Bankr. P. 8015(h) as it contains 5,859 words, excluding the portions of the document exempted by Fed. R. Bankr. P. 8015(g).

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