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

IN RE

HIGHLAND CAPITAL MANAGEMENT, L.P. §
§ CASE NO. 19-340540SGJ11
§ DALLAS, TEXAS
Debtor § TUESDAY, APRIL 12, 2022
§ 2:19 P.M. - 6:18 P.M.

HIGHLAND CAPITAL MANAGEMENT, L.P., §
Plaintiff, §
vs. § ADVERSARY PROCEEDING
§ NO. 21-03010-SGJ

HIGHLAND CAPITAL MANAGEMENT FUND §
ADVISORS, L.P., et al. §
Defendants. §

TRIAL

BEFORE THE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY JUDGE

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.



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1 DALLAS, TEXAS; TUESDAY, APRIL 12, 2022; 2:19:25 P.M.

2 (Counsel confer)

3 CROSS-EXAMINATION

4 BY MR. RUKAVINA:

5 Q Mr. Klos, you and I have met in deposition a couple of
6 times but not in person, so good afternoon.

7 A Good afternoon.

8 Q I guess I'm a little bit conceptually perplexed. Is it
9 your understanding of these contracts that if every single
10 Highland employee quit, that the advisors would still have
11 to keep paying under the payroll reimbursement and shared
12 service agreements?

13 A If every single employee of Highland quit, would they
14 still have to continue paying?

15 Q Yeah.

16 A I don't know. I don't know that practically that is
17 ever a possibility.

18 Q But if it happened, is it your understanding as the
19 controller and CFO and having administered these contracts
20 for years that my clients would still have to be paying
21 every month?

22 A I don't know as a legal matter. As a practical matter,
23 no.

24 Q Okay. Now, just go a few background things. You're a
25 CPA, correct?

1 A Yes.

2 Q Your -- you consider yourself a professional, correct?

3 A Yes.

4 Q You've never been disciplined as an accountant or CPA,
5 correct?

6 A Correct.

7 Q You pride yourself in doing a professional job for your
8 employer, correct?

9 A Yes, I pride -- I take pride in my job.

10 Q Okay. Would you not deceive anyone with your work
11 product or your professionalism, would you not
12 intentionally?

13 A Never intentionally, no.

14 Q Okay. You wouldn't assist someone else intentionally
15 with deceiving the IRS or deceiving contract counterparties,
16 would you?

17 A No. No.

18 Q You wouldn't deceive intentionally any auditor, would
19 you?

20 A No.

21 Q Okay. You wouldn't deceive intentionally Mr.
22 Waterhouse your boss back then, would you?

23 A No.

24 Q Or FTI or the unsecured creditor's committee, would
25 you?

1 A No, we do things in good faith.

2 Q Or DSI too, right?

3 A Correct.

4 Q So you consider yourself as an ethical professional
5 accountant now CFO.

6 A Yes, I consider myself ethical, yes.

7 Q Before I get into the meat of the matter, there's a
8 couple of things I thought I heard you say that we can
9 clarify. I thought I heard you say that the advisors had
10 not been paying for investment advice services before the
11 subadvisory agreements; isn't that correct?

12 A Yes, that's correct I believe, yeah.

13 Q Yeah. I think you said that the advisors were paying
14 under shared services agreements, but there was no similar
15 front office investment reimbursement agreement, correct?

16 A Correct. There was no front office equivalent.

17 Q Okay. How do you know that?

18 A I was a part of the corporate team throughout the
19 period from the very beginning of NexPoint and
20 (indiscernible) existence and wasn't aware of such an
21 agreement or certainly any amount paid under such
22 agreements.

23 Q Would you please turn to your Exhibit 29? It's the --
24 yeah, it's the -- one of the thick binders.

25 Let me know when you're there, sir. This has been

1 admitted into evidence. This is the shared services
2 agreement with NexPoint going back to 2013. Do you see
3 that, sir?

4 A Yes.

5 Q And on the third page, Section 2.01 if you'll flip with
6 me there, that's the services that are contracted for and
7 being paid for, correct?

8 A I'll take your word for it, but it appears so, yes.

9 Q Well, yes, I mean, we can all read better. It talks
10 about the services more fully, described more fully on Annex
11 A, do you see that, sir? And if we please look to Annex A
12 which is at the end, it's going to be page -- it's going to
13 end with Bates label 625.

14 A Sorry --

15 Q Bottom of 625, yeah.

16 A -- 665. I'm with you.

17 Q See the very bottom there it says investments,
18 investment research and recommendations on an ad hoc basis
19 as requested. Do you see that?

20 A Yes, I do see that.

21 Q Isn't that front office services?

22 A It depends on your definition of front office services.
23 It doesn't look to me like advisory services, but it's -- it
24 is a reference to front office.

25 Q Okay. And do we have to look through the same one for

1 HCMFA or do you agree that there's a similar protegent price
2 in the --

3 A If -- I would take your representation if you said it
4 was.

5 Q Did you look -- when was the last time, if ever, you
6 looked at this original shared services agreement with
7 NexPoint?

8 A I don't recall specifically.

9 Q Would it have been in the last few weeks?

10 A I'm certain I've looked at it in the context of this --
11 of today's events.

12 Q Is it possible that you made a mistake when you
13 testified a little bit ago to the five years the advisors
14 were not paying for investment services to Highland?

15 A No, I don't think I misspoke on that.

16 Q Because you said that there was no separate contract
17 for investment services, right?

18 A Correct, there was no -- there was none.

19 Q But we see at least these contracts that just -- that
20 investment services were actually being paid for, just not
21 by a separate contract.

22 A We see a reference to investment research and
23 recommendations on an ad hoc basis, as requested.

24 Q And I had another question for you that I was confused
25 about.

1 MR. RUKAVINA: Mr. Bergham, if you'll pull up your
2 deposition or not your deposition, Mr. Klos' deposition.

3 Q Do you remember me deposing you on March 14th?

4 A Yes, sir. I don't remember the day, but I assume
5 that's right.

6 Q And you testified earlier today that when Mr. Dondero
7 told you \$5 million from HCMFA and \$6 million for NexPoint
8 because of cash needs at Highland and because they wanted
9 deductions at the advisors, right?

10 A I don't know that those were my specific words.

11 Q What did you testify earlier today about how the 5 and
12 \$6 million were arrived at?

13 A I don't specifically remember my testimony but that
14 certainly those numbers originated from Mr. Dondero.

15 Q Okay. Well, let's look at how you answered my question
16 less than a month ago, beginning on the bottom of page 10.
17 Can you see, Mr. Klos?

18 MR. MORRIS: Objection, Your Honor, there's
19 nothing to impeach. Why is he going to the deposition
20 testimony?

21 THE COURT: It doesn't seem like he's done
22 anything to impeach yet?

23 MR. RUKAVINA: Of course he does. Your Honor,
24 this morning he testified that Dondero told him to make the
25 numbers 6 million and 5 million because Highland needed cash

1 and the advisors needed tax deductions. When I asked him
2 that question a month ago, you'll see he says he's
3 speculating. I asked him. I asked him, why do you think
4 it's 5 and 6 and he says I'm speculating. So, yes, I'm
5 impeaching him.

6 BY MR. RUKAVINA:

7 Q Are you -- or, Mr. Klos, let's ask it this way.

8 Do you have personal knowledge as to how Mr. Dondero
9 arrived at the 5 and \$6 million numbers he gave you for his
10 analysis?

11 A These are two different questions, but.

12 THE COURT: Are we moving on from the other
13 question?

14 MR. MORRIS: No, Mr. Klos is with Mr. Rukavina,
15 they're doing fine.

16 THE COURT: Okay. Go ahead.

17 MR. RUKAVINA: Okay. So do you want to go a page
18 higher. Go up a page higher, Mr. Bergham, page 9.

19 Q So you see there in line 16 to 18, we're talking about
20 the two payroll reimbursement agreements. Do you see that,
21 Mr. Klos?

22 MR. MORRIS: I'm still objecting. There's no --
23 nothing to impeach.

24 MR. RUKAVINA: Your Honor, I haven't shown him yet
25 what there is to impeach because again a month ago he

1 testified that he would be speculating if -- to determine
2 how the 5 and \$6 million numbers were arrived at. This
3 morning he testified that Dondero told him at a meeting with
4 Mr. Waterhouse and others that Highland needed money and
5 that the advisors needed tax deductions. That is -- I'm
6 allowed to impeach him if he didn't -- if a month ago he's
7 saying he's speculating and today he's saying that's what
8 Dondero told him.

9 MR. MORRIS: Your Honor, if I may there's two
10 different questions. One is, where did the number come
11 from, the other, how was it arrived at. Mr. Klos testified
12 unequivocally that the numbers came from Mr. Dondero, and if
13 he wants to ask him the question do you know how they were
14 calculated, he should ask him the question. There's nothing
15 to impeach.

16 MR. RUKAVINA: That's fine.

17 BY MR. RUKAVINA:

18 Q Do you know how the numbers were calculated?

19 A I don't know where Mr. Dondero -- I would be
20 speculating as to --

21 Q Okay.

22 A -- whether -- as to where Mr. Dondero came up with
23 those numbers. I'm not speculating that the numbers came
24 from Mr. Dondero.

25 Q I understand. So if this morning, if I heard you or

1 someone heard you say that Mr. Dondero told you it was 5 and
2 6 million because of the tax deductions and cashal (ph)
3 needs, you would have been speculating if that's what you
4 testified?

5 A Again, I think -- I don't think that's correct as you
6 characterized.

7 Q Let's just be very clear because this is very
8 important. Right now, you're telling me that you do not
9 know how Mr. Dondero arrived at the \$5 million number for
10 HCMFA, true or false?

11 A How Mr. Dondero arrived at the number, no, I don't. I
12 would be speculating.

13 Q Okay. And the same question for NexPoint of \$6
14 million. Do you know how Mr. Dondero arrived at that
15 number?

16 A Same answer, not specifically, no.

17 Q Okay. And we'll talk more about your December 2020
18 analysis. I think you testified, correct me if I'm wrong,
19 that Mr. Waterhouse told you to use the current head count,
20 correct?

21 A Sorry, just to be clear on the time frame.

22 Q Yeah, let's --

23 A On December of 2020?

24 Q Yes, sir, we'll -- we can just to refresh your --
25 pardon, to refresh your recollection it's in my exhibit

1 binder, my binders are smaller.

2 MR. RUKAVINA: Which one -- the December analysis.

3 MR. BERGHAM: Double C.

4 BY MR. RUKAVINA:

5 Q It's Q, Mr. Klos.

6 A Q?

7 Q Yes.

8 A Yes, I'm there.

9 Q Okay. So Q, this is the cover e-mail from you to Mr.
10 Waterhouse and you attach at least the first page of an
11 Excel spreadsheet that you PDF'd, correct?

12 A I attached the PDF.

13 Q Yeah. So I'm -- that's what I'm asking you about.
14 When you testified earlier about this, you said that Mr.
15 Waterhouse told you to use current head count, correct?

16 A Correct. Yeah, then current head count.

17 Q Then current.

18 And you said that Mr. Waterhouse told you to assume no
19 bonuses, correct?

20 A Correct.

21 Q And you said that Mr. Waterhouse told you to use the
22 same allocations as in the contracts, correct?

23 A No. No, I did not.

24 Q Okay. So did he tell you anything about the
25 allocations?

1 A We have to be careful with allocations, two different
2 things. The allocations that I testified to not being
3 adjusted were the allocations that were given to the UCC,
4 not the allocations from the PRAs.

5 Q So when you created Exhibit Q and we'll look at the
6 Excel spreadsheet, if necessary, what allocations did you
7 use?

8 A The same percentages that had been part of the previous
9 year analysis for the UCC, to the best of my recollection.

10 Q Okay. Is that when you said that you did a goalpost
11 here and a goalpost there and you took an average?

12 A Correct.

13 Q Okay. So just to be clear again, Exhibit Q it is -- it
14 was your good faith analysis, at least as of December 2019,
15 regarding the percentages.

16 A You said 2019.

17 Q Okay. Exhibit Q you created in December 2020, correct?

18 A Exhibit Q --

19 Q Yeah.

20 A -- yes.

21 Q But you used the percentage allocations from your
22 December 2019 analysis that you gave to FTI, correct?

23 A Correct with a small caveat in that there had been new
24 employees that had come on since then. So obviously they
25 didn't have a percentage in the original because they didn't

1 exist for purposes of that analysis. And then in the '20,
2 you know, percentages were added for those people.

3 Q I just want to make sure again that Judge Jernigan
4 understands when we talk about Exhibit Q some more, that the
5 percentage allocations you used were not the ones from May
6 2018, but the ones from December 2019 done in conjunction
7 with Evers at Highland and given to the committee and FTI.

8 A Yes, I believe that's correct.

9 Q Okay. Thank you.

10 Exhibit A, please, that's one of the payroll
11 reimbursement agreements you have it in front of you and go
12 to the last page which are the employee allocations.

13 A Okay. I'm there.

14 Q Are you saying, sir, that you pulled these percentage
15 allocations out of thin air?

16 A I wouldn't say I pulled them out of thin air.

17 Q So did you apply any logic and did you at least attempt
18 to try to get a reasonable estimate?

19 A Yes, I applied some logic.

20 Q Okay. I think we established that it's quite
21 subjective to determine how much an employee may work for an
22 advisor, but that even though it's very subjective you tried
23 in good faith to find a reasonable estimate whenever you
24 prepared these percentage allocations, correct?

25 A I think the main purpose of this analysis was to get

1 back to the numbers that we already had and the percentages
2 on the page are -- were at the time not completely
3 unreasonable. And to take an easier example, if I can find
4 one.

5 Asanji Gulati (ph), for example, who's at a hundred
6 percent for HCMFA, there's a logic to that, in that he was
7 charged with a single fund that was managed by HCMFA hence
8 he's a hundred percent.

9 Everybody who's not a hundred percent or zero, it's a
10 lot more subjective.

11 Q Sir, but even though it's objective, again you
12 established that you in good faith and employing your skill
13 and expertise tried to find a reasonable estimate, correct?

14 A I tried to find a reasonable estimate that would also
15 validate the outcome that was already known.

16 Q Sure. Because you had to divide a number given to you
17 by Mr. Dondero by a certain amount of employees, right?

18 A Yes.

19 Q And then you had to use these, you had to calculate the
20 percentages with those two metrics already known, correct?

21 A I don't know that I had to do anything, but that was
22 the approach that was taken.

23 Q That's what you did. You were given here's the number,
24 whatever it is per month or per year, here's the employees,
25 now please, Mr. Klos, calculate the percentages. That's

1 what you were told to do, correct?

2 A I wouldn't put it that way. I was told here's the
3 number.

4 Q Did you pull this list of employees or did somebody
5 give you the list of employees?

6 A I believe I would've pulled that. I might have
7 verified it with somebody.

8 Q I didn't hear you. Did you pull it or just verify it?

9 A I believe I pulled it.

10 Q Okay.

11 A If -- I may have, you know, I may have checked with
12 somebody but I don't recall that specifically. I believe I
13 probably would have pulled this list.

14 Q Okay. So not only did you try to apply some analysis
15 to the percentage allocations, you actually picked the 25
16 employees here?

17 A Again, picked is the wrong word, these were the
18 Highland --

19 Q You knew that these were employees --

20 A -- Investment professionals.

21 Q -- that were working --

22 MR. MORRIS: Excuse me.

23 Q -- as Highland advisors.

24 MR. MORRIS: If he could allow the witness to
25 finish his answer.

1 THE COURT: Yeah, he was in the middle of an
2 answer, go ahead.

3 THE WITNESS: Sorry, could you -- I lost my train
4 of thought.

5 BY MR. RUKAVINA:

6 Q I was asking, did you pick these 25 employees?

7 A Oh, yes. And what I was saying was, these were the
8 employees of HCMLP so this wasn't like a subset, these were
9 the front office professionals at HCMLP at the time.

10 Q Got it. This was the universe of front office
11 professionals?

12 A Yes, to the best of my recollection.

13 Q Okay.

14 A Yes.

15 Q So we've established that Mr. Dondero picked the
16 resulting number that he wanted. We've established that you
17 picked the front office professionals --

18 A I didn't pick the front office professionals. The
19 front office professionals were who they were.

20 Q Sir, there's no subjectivity in identifying these
21 employees, correct?

22 A I don't believe there was, no.

23 Q Okay. The subjectivity goes to the allocation
24 percentages and you already testified about that, correct?

25 A Correct.

1 Q Okay.

2 A And I would point out there is additional subjectivity
3 in the analysis beyond just the percentages. So I should
4 make that point.

5 Q Well, let's make that. Let's talk about that. Let's
6 go to Exhibit J please.

7 A Okay. I'm there.

8 Q This is -- you might need to read several pages here to
9 refresh your memory. I'm going to ask you about your e-mail
10 from January 3rd, 2018 at 10:28 a.m. where you highlight
11 certain language. Do you need to read that, sir?

12 A No, you can ask the question and I'll do my best.

13 Q Okay. Well, do you remember -- I'll represent to you
14 that you highlighted that language, do you remember that, do
15 you have any reason to disagree with that?

16 A No reason to disagree with that.

17 Q Okay. And is it fair to say that here you were taking
18 a form, a contract and talking to others about language
19 you'd like to remove from that form contract as you prepared
20 a new search service agreement?

21 A This I'm not sure.

22 Q Well, if you read above, sir, it says, "is there a way
23 to pare back the language in Section 2.03? I highlighted
24 the sections below, that I prefer to exclude or modify as
25 this looks like we're just creating work that will certainly

1 slip through the cracks." You wrote that, right?

2 A Yes.

3 Q So you were suggesting to Evers that the highlighted
4 language down there be removed, correct?

5 A It does appear that's what I'm --

6 Q Okay.

7 A -- identifying.

8 Q And if we read the first highlighted part it says, "the
9 name, location, and such other matters as the parties desire
10 to reflect with respect to each shared employee shall be
11 identified on the books and records of each of the
12 management company and the staff and services provider,
13 which may be amended in writing from time to time by the
14 parties to add or remove any shared employee to reflect the
15 employment or lack thereof of such employee."

16 Do you remember -- did I read that correctly?

17 A Yes.

18 Q And why were you asking that that language be removed?

19 A Because all -- this is accomplishing -- the language
20 itself is accomplishing nothing for the agreement. From my
21 perspective, again, this is all just creating internal work
22 for no value to the overall complex. So it seems
23 unnecessary. It seemed unnecessary to me in my review.

24 Q Here you're referring to the shared services
25 agreements, correct?

1 A It appears so.

2 Q Because it talks about shared employee and management
3 company, right?

4 A Well not because it talks about shared -- I'm basing
5 that mainly on the fact that it's -- we're referring the
6 NREA and NPA SS agreements and the subject less about
7 management company and staff and services provider.

8 Q And ultimately as we determined and as the contracts
9 read the shared service agreements with the advisors were
10 flat monthly fee agreements, correct?

11 A The shared service -- in respect to NREA and NPA.

12 Q Yeah.

13 A Yes.

14 Q Now, if we go to Exhibit K you discussed this some with
15 Mr. Morris. This is your communication with Ms. -- and I
16 apologize because of my accent, but Ms. Fedford (ph) --

17 A Uh-huh.

18 Q -- that's just an impossible word for me to pronounce.
19 And this led up to the payroll reimbursement agreements,
20 correct?

21 A Yes, this is just a few days before it was executed.

22 Q Okay. So similar to the e-mail we just looked at for
23 the shared services agreement, on April 17th, 2018 at 10:48,
24 you write, "Lauren, does it have to be framed as
25 reimbursement of actual costs?" Are you there, sir?

1 A Sorry.

2 Q No problem, it's my fault. It's Bates labeled bottom
3 400.

4 A I'm with you, the 10:48 e-mail?

5 Q Yes, sir. "Does it have to be framed as reimbursement
6 of actual costs? We'd much rather it be characterized as
7 just an agreed upon amount between the two entities. It's
8 not a small task and involves subjective assumptions to
9 allocate individual employees. So as it's written, it would
10 be creating a ton of internal work that isn't adding any
11 value to the overall complex." You wrote that to her,
12 right?

13 A I did.

14 Q Okay. And now she -- and she's an officer of the
15 advisors, right?

16 A I believe so at the time.

17 Q Yeah. And she writes back to you, "I'm open to
18 changing from definition of actual costs but my understand"
19 -- and I apologize, apparently, she's writing very poorly --
20 "but my understand from Fox was that there needs to be some
21 method of determining the amounts, per counsel, treating
22 this as a reimbursement is important, however." She wrote
23 that, right?

24 A She did.

25 Q Okay. So you made requests from her to change the --

1 or negotiate the contract and she basically rejected your
2 proposal, correct?

3 MR. MORRIS: Objection to the -- Your Honor, he
4 should use the whole e-mail which we put in front of the
5 witness because she -- he actually has her answer. If you'd
6 give me just one second, I can tell you what the exhibit
7 number is.

8 MR. BERGHAM: It is the whole thing.

9 MR. RUKAVINA: This is the whole thing.

10 MR. MORRIS: It's not. Give me one moment.

11 MR. RUKAVINA: If he wants to read a
12 (indiscernible) optional completeness, this is the e-mail
13 and I'm asking a very limited question which is, he made a
14 request and she, the contractual counterparty, rejected it.

15 MR. MORRIS: Hold on one second.

16 MR. RUKAVINA: This e-mail's been admitted into
17 evidence anyway.

18 MR. MORRIS: You go right ahead; I'll do it on
19 redirect.

20 MR. RUKAVINA: Okay.

21 THE COURT: Continue.

22 BY MR. RUKAVINA:

23 Q Mr. -- you made a suggestion to Ms. Fedford and she
24 rejected it, correct?

25 MR. MORRIS: Objection to the form of the

1 question.

2 THE COURT: To the form of the question?

3 Overruled. I mean he can answer what he thinks the answer
4 is.

5 THE WITNESS: I don't think this is a rejection.
6 She's -- to me it's a continuation of the discussion.

7 BY MR. RUKAVINA:

8 Q Okay. You say, we'd much rather it be characterized as
9 just an agreed upon amount between the two entities. You
10 wrote that, right?

11 A Yes.

12 Q And she wrote back saying basically this needs to be
13 treated as a reimbursement, didn't she?

14 A She said treating this as a reimbursement is important,
15 however.

16 Q And ultimately it was treated as a reimbursement,
17 correct?

18 A No.

19 Q So you're saying that the payroll reimbursement
20 agreements are not reimbursement?

21 A I'm saying the -- no, what I'm saying is that the
22 payroll reimbursements, are the amount for those agreements
23 is C-A-C actual cost, which is a defined term at a fixed
24 amount per month.

25 Q Unless it's changed, correct?

1 A Correct, yeah, with the agreement of the two parties.

2 Q Okay. And, in fact, you respond back then to Ms.

3 Fedford, "could we say that actual costs is being determined

4 at the outset of the agreement, have a schedule as of

5 January 1, 2018 instead of actual costs shall be as set out

6 in that schedule and shall be made in monthly installments

7 for the term of the agreement, that way the exercise is only

8 performed once." You wrote that, right?

9 A I did.

10 Q Okay. And was that ultimately your understanding as to

11 what happened, did it work itself into the agreement?

12 A It did through that definition of actual costs.

13 Q And then you write, "beyond that year, termination

14 provisions kick in, so there's a belief that the actual

15 costs have changed materially, either party could terminate

16 and/or renegotiate for an amended agreement. You wrote

17 that, right?

18 A I wrote that.

19 Q Okay. And did that concept also work itself into the

20 agreement?

21 A I believe so. It may have already been in there, I

22 don't recall. So I don't know if this was my addition or if

23 it was something that was already in there.

24 Q Okay.

25 A But the concept ended up there.

1 Q That if either party had a problem with amounts being
2 charged or paid they could terminate or renegotiate,
3 correct?

4 A I don't recall specifically what the agreement says.

5 Q Then Ms. Fedford writes back, "I think it's workable.
6 Do you have a methodology for the outset determination?"

7 What did you understand she meant by outset
8 determination?

9 A Outset determination I have to assume is a reference to
10 my e-mail where I'm saying a schedule as of January 1st, so
11 a schedule.

12 Q That's how -- that's what you assumed back then what
13 she meant, right?

14 A Yes, I believe so.

15 Q And you write back, "will have to work on one. It'll
16 be so sort of fully loaded compensation amount times an
17 allocated percentage which will have to be reasonable." You
18 wrote that, right?

19 A Uh-huh.

20 Q And I'm sorry, you've got to say yes or no in court.

21 A Oh, I'm sorry, I apologize. Yes, I wrote that.

22 Q And what you wrote back, those percentages that you put
23 in there, did you intend them to be reasonable?

24 A Yes, I did.

25 Q Did you intend Ms. Fedford to rely on them?

1 A No, I didn't intend for Ms. Fedford to rely on them.

2 Q Why not?

3 A I don't know that I was -- I don't know that I really
4 -- Lauren's assistance on this was in her capacity as legal
5 counsel. So whether she was convinced or unconvinced or
6 partially convinced wouldn't have been the topic that was on
7 my mind at that point.

8 Q You know it was a poor question of mine.

9 Did you understand or intend that she would take these
10 numbers and put it into final work product?

11 A Yes, yes, certainly, yes.

12 Q And that she would, based on this e-mail, consider
13 those numbers to be reasonable. Did you think that this
14 would consider them to be reasonable?

15 A Same answer as before, I don't know that I cared or
16 thought about what she thought about the numbers. So I
17 don't know that I can really answer that.

18 Q Did you flag anything for Ms. Fedford at that time
19 about anything fishy or that you didn't like about these
20 payroll reimbursement agreements?

21 A Not that I can remember, other than as I testified
22 earlier, a little bit of frustration that there's this level
23 of work that needs to go on for what I had assumed in my
24 mind was going to be a simple reproduction of the NexPoint
25 subadvisory agreement that we had put in a few months

1 before.

2 Q So let's see if I can walk you through this, just so
3 that I understand completely. On the shared service
4 agreements you had, pardon me, suggested that a periodic
5 change be removed and there just be a flat monthly fee,
6 correct?

7 A I don't know that that was my suggestion.

8 Q Okay. You want to go back to Exhibit J, Mr. Klos, the
9 highlighted language. It's Bates labeled 428.

10 A Sure, I'm there.

11 Q The top highlighted language, do you recall whether
12 that language that you wanted removed was, in fact, removed
13 from the shared service agreement?

14 A I'm not sure if it was or wasn't.

15 Q Okay. But you remember that the shared services
16 agreement was a flat monthly fee.

17 A Which services -- which shared services agreement.

18 Q NexPoint.

19 A NexPoint. NexPoint advisors, yes, it was a fixed
20 amount.

21 Q And HCMFA?

22 A It varied.

23 Q Okay. But that concept was a similar concept of just a
24 flat fee was rejected or not -- it was not accepted by Ms.
25 Fedford and then your alternative of let's have a set amount

1 up front subject to revision, that was accepted, correct?

2 A It's hard for me to characterize it that way, accepted,
3 not accepted. This was a discussion happening in real time
4 and a resolution was reached fairly quickly.

5 Q You understand, sir, that it is Highland's position at
6 this trial today that the payroll reimbursement agreements
7 just provided for basically I think Mr. Norris said in the
8 beginning just shared services for a flat monthly amount.

9 A I don't know that I'm in a position to fully articulate
10 the argument that our side is making.

11 Q The only thing that I find of real importance from you
12 is that when you discussed this with Ms. Fedford, you and
13 her agreed that there would be some ability to periodically
14 adjust the amounts under the payroll reimbursement
15 agreements or they could be terminated, correct?

16 A Again, I struggle with the word agreement. We worked
17 through comments to a document that was going to get
18 executed and that document was ultimately executed.

19 Q You gave her --

20 A And the document says what it says.

21 Q You gave her a concept and she put that concept into
22 the agreement?

23 A I'm not sure.

24 Q Okay. Do you know whether those payroll reimbursement
25 agreements still provide a monthly or quarterly or annual or

1 any kind of potential variance to the amounts?

2 A I don't recall specifically, but I'd be happy to look
3 at the agreement.

4 Q Well, did you see the final agreement before it was
5 executed by Mr. Waterhouse?

6 A Yes, I believe I did.

7 Q Okay. Do you remember whether you reviewed it before
8 he signed it?

9 A Yes, I believe I did.

10 Q Do you remember if anything in there caught your
11 attention as something outside of what you had understood
12 the final version to be?

13 A Don't remember specifically.

14 Q Okay. So now let's go please to your December 2019
15 analysis which you did with Mr. Waterhouse for FTI and the
16 committee.

17 A Uh-huh.

18 MR. RUKAVINA: Now, Your Honor, briefly we have
19 that printed out on paper. It's an Excel spreadsheet and
20 there was a misprint. So while during the lunch break, we
21 had a runner bring in a new one, so maybe during the next
22 break we'll give you and the clerks the new print, the
23 printout. In the meantime, we'll pull it up in Excel
24 format.

25 THE COURT: Okay.

1 MR. RUKAVINA: This is the December 2019. Which
2 one is it? It's L. Is that it, Thomas?

3 BY MR. RUKAVINA:

4 Q Now, Mr. Morris asked you a little bit about this, just
5 so that we're clear, this was the one that actually went to
6 the committee and DSI, right?

7 A Can you go to the summary tab please?

8 MR. RUKAVINA: Go to the summary.

9 THE WITNESS: It appears to be.

10 BY MR. RUKAVINA:

11 Q Okay. And you're not the only one who worked on this,
12 but you were one of the people that worked on this, correct?

13 A I was one of the people that worked on this.

14 Q Okay. What was your role, I mean, summarize for me
15 what, if anything, in here are you the one that principally
16 analyzed or prepared?

17 A What in here did I -- sorry, one more time.

18 Q What was -- yeah. So we've established that you --
19 you're the one that actually revisited the original
20 allocation percentages by taking goalposts and averaging
21 them, right?

22 A I wouldn't say it's a revisitation of the allocation
23 percentages.

24 Q You're the one that testified that you took the
25 goalposts on this one and went down the averages to find the

1 allocation percentages for this report, correct?

2 A Yes.

3 Q You did that.

4 A Yes.

5 Q Okay. So I'm asking --

6 A With -- you know, with collaboration with others, yes.

7 Q Okay. So anything else in here what did you if
8 anything else do in here, as opposed to someone else?

9 A Well, I'm the -- I created the spreadsheet and
10 populated the information throughout. I don't know --

11 Q The employees?

12 A Yes, the employees --

13 Q Their compensation?

14 A Yes.

15 Q Okay.

16 A Yes.

17 Q And when you did all that, you understood that this
18 would be shared with an official committee of unsecured
19 creditors, right?

20 A No. I don't know that I specifically knew exactly who
21 the audience was going to be.

22 Q Who did you think the audience was going to be?

23 A Some combination of the UCC, FTI and DSI.

24 Q You knew that it was going to be important for the
25 bankruptcy case, right?

1 A Important? I knew that it was an issue that had been
2 identified very early on, so you know, from that standpoint
3 it was the item that was on my plate and people were asking
4 about.

5 Q And you knew that others would rely on this
6 information, correct?

7 A No, I don't think that's correct.

8 Q You did not think people would be relying on the
9 information you put in this analysis?

10 A I assumed and what actually happened was that we had
11 the opportunity to present this to FTI over the course of
12 half a day, which is what we did. That they would have the
13 opportunity to ask questions, dig in wherever they felt they
14 wanted to and we'd be able to respond to those questions.

15 And as I mentioned earlier, relying on is really
16 difficult with an analysis like this and it was very
17 clearly, very clearly maintained with in that meeting and in
18 meetings leading up to the meeting that these were highly,
19 highly, highly subjective assumptions. They were being put
20 together in good faith, but there is no right answer.

21 Q And is that part of why you took the goalposts and
22 averaged them because you knew that it was highly, highly,
23 highly subjective so you tried to find a more reasonable
24 middle point?

25 A My recollection of the goalposts was to recognize the

1 inherent subjectivity and say that, you know, in all
2 likelihood somewhere between those goalposts is probably the
3 right answer but the right answer isn't knowable. That's
4 not to say the midpoint is the right answer, just somewhere
5 is most likely the right answer.

6 Q Because any time you're dealing with averages one might
7 be higher than the average, one might be lower, but the more
8 data you have the more likely or reasonable a result is?

9 A No, I don't agree with how you phrased that.

10 Q Okay. Did you intend to deceive anyone when you
11 prepared this exhibit?

12 A No.

13 Q Okay.

14 MR. RUKAVINA: So if we go to by department,
15 Thomas.

16 Q So this is a tab that says by department. And you see
17 down there it says current charge, 3.0 for NPA, ACMFA 5.0,
18 do you see that, sir?

19 A Yes.

20 Q Those are the charges under the payroll reimbursement
21 agreements, correct?

22 A Yes.

23 Q Okay. The line below that says investment support.
24 What does that mean?

25 A It's a reference to the front office allocations.

1 Q The -- what you were trying to do here was to calculate
2 the costs of those front office allocations to Highland,
3 correct?

4 A Estimate them.

5 Q Estimate them. And according to this estimate that you
6 prepared and that went out to the committee at -- that
7 estimate at that point the profitability to Highland with
8 the payroll reimbursement agreements together was \$3
9 million, correct?

10 A That's what this tab is indicating, yes.

11 Q That's what you prepared, correct?

12 A Yes, I prepared this.

13 Q Okay. And let's go to allocations. I'm not sure this
14 is very relevant but there's does (indiscernible) opinion
15 tabs here.

16 MR. RUKAVINA: Thomas --

17 MR. BERGHMAN: (Indiscernible).

18 MR. RUKAVINA: Yeah, employee listing. Yeah, so
19 let's hide the employees. Are we hiding the employees,
20 Thomas, so that the people on the WebEx can't see it?

21 MR. BERGHMAN: Yeah, it doesn't show any --

22 MR. RUKAVINA: So where's the hidden tabs?

23 MR. BERGHMAN: We don't want these.

24 MR. RUKAVINA: Your Honor, I'm sorry, Mr. Berghman
25 and I are just trying to not let people on the WebEx see

1 employee data, which is why we're struggling how to do this.

2 Okay. Are there any hidden tabs on here?

3 MR. BERGHMAN: There are (indiscernible) because
4 that's where the data is.

5 MR. RUKAVINA: I'm sorry, Your Honor.

6 (Pause)

7 BY MR. RUKAVINA:

8 Q So let's look at the first person -- Mr. Klos, I need
9 glasses, I can't read that close, what is that person's
10 name?

11 A It's Sahan -- I apologize --

12 Q Let's pick an easy one, let's pick an easy one. Lauren
13 Baker.

14 A Okay. Lauren Baker, I guess I see her.

15 Q Okay. So these are the allocation percentages that you
16 created there in AC, AB, AE, AF, et cetera?

17 A AC -- yeah, AC through AF is one goalpost and then AN
18 through AQ is the other goalpost.

19 Q Okay. And we can look at the original agreement,
20 that's Exhibit A for Ms. -- well, we got it on the first
21 person because Ms. Baker isn't on it. So --

22 A She's not on the PRA.

23 Q I was trying to save us --

24 A As you noticed.

25 Q The first person, though, say the first name.

1 A Sahan (ph).

2 Q So where is the midpoint of the two goalposts for Sahan
3 that you selected?

4 A So -- well, I'll focus on HCMLP, somewhere between 10
5 percent and when I'm referring to -- I don't know what
6 people can see here, so AN9.

7 Q Yes.

8 A Somewhere between 10 percent and 55 percent of his time
9 is on HCMLP.

10 Q Okay. What about HCMFA for him?

11 A HCMFA somewhere between 30 percent and 55 percent.

12 Q How did you get those goalposts, 30 and 55?

13 A 30 and 55.

14 Q Did you talk to him?

15 A No, I didn't.

16 Q Did you talk to HR?

17 A I did not talk to HR.

18 Q Okay. So what methodology, if any, did you use to get
19 those 30 and 55 goalposts? I'm sorry, 15 and 55 goalposts?

20 A 10 and 55.

21 Q Yeah, 10 and 55.

22 A Subjectivity.

23 Q Just subjectivity, did you just pull numbers out of the
24 air?

25 A My -- so what's the midpoint on those, about 32 and a

1 half percent.

2 MR. RUKAVINA: Are there any problems in this one,
3 Thomas, or did you want to hide them? Just a second. We
4 might make it easier.

5 (Pause)

6 BY MR. RUKAVINA:

7 Q This is your Excel spreadsheet. Walk us through
8 please, are there, first of all to your knowledge, are there
9 any unshown or hidden columns right now?

10 A Yes, there are unshown columns.

11 Q Which -- where please?

12 A Looks like --

13 MR. RUKAVINA: I'm just telling Mr. Berghman how
14 to open them because I don't know Excel.

15 THE WITNESS: Sure. It's -- you've got to be -- I
16 don't know if he's watching this right now, but there's
17 quite a bit of sensitive compensation information on here.

18 Q Okay. So the hidden ones have the sensitive
19 compensation information?

20 A Yeah, and probably some information that's not
21 sensitive, but until we open it --

22 Q Okay.

23 A -- up, I'm not going to be able to tell you.

24 Q Well, here, just walk me through then as best you can
25 without showing everyone sensitive information, go back to

1 Sahar or Sahan.

2 A Uh-huh.

3 Q Where is the goalpost that is the lowest for him, where
4 is the goalpost that is the highest for him and then what is
5 the one that you picked?

6 A Sure. So the --

7 Q I mean, for let's take HCMFA.

8 A Yeah, for HCMFA so on the lowest shared allocation 30
9 percent and on the highest 55 percent. And so what is that
10 42 and a half percent as a midpoint. You can't see the 42
11 and a half percent on the screen right now, but that's the
12 midpoint of 30 and 55.

13 Q Oh, so the 42 and a half might be in the hidden fields
14 to do the math?

15 A I don't think the 42 and a half is even on the
16 spreadsheet, but I'm just doing the math.

17 Q Okay. But for him on Exhibit -- on that Exhibit A to
18 my Exhibit A he's shown at 29 percent. You can just look at
19 it. So in this case, in this case, at the end of 2019 you
20 applied the methodology to try to make it more reasonable
21 and current, correct?

22 A In 2019, yes, I did.

23 Q Okay. So now we'll go to your December 2020 analysis,
24 please.

25 A Okay.

1 Q So we've already seen the summary of it, Q and let's
2 look at Q please. So this is the one that you prepared at
3 the request of Mr. Waterhouse where Mr. Waterhouse told you
4 use these assumptions, correct?

5 A Yeah, he gave me assumptions to use.

6 Q The assumptions again being current head count, assume
7 no bonuses and use the December 2019 allocation percentages
8 we just looked at, correct?

9 A Correct with a small caveat that, yeah, I don't state
10 that explicitly in the e-mail but that's my recollection.
11 And further as I testified before, there were some new
12 employees so there wasn't a previous analysis to --

13 Q Did you include the --

14 A -- leave this in.

15 Q -- new employees in this one?

16 A I did.

17 Q Okay. So you took into account the fact of new
18 employees.

19 A Yes.

20 Q Okay. And just to summarize, isn't it true that here,
21 you are estimating unadjusted gain on the payroll
22 reimbursement agreements at \$6.6 million on an annualized
23 basis as of the snapshot in time in December 2020?

24 A Yes, with no bonus compensation.

25 Q Yes, I understand. We've talked about the assumptions.

1 A Yep, yep.

2 Q But I'm not asking you to validate those assumptions --

3 A Sure.

4 Q -- I'm just asking that to the best of your ability

5 knowing that they're subjectivity and employing those

6 assumptions, this is the calculation that you prepared?

7 A Yes, employing those assumptions, this is the output.

8 Q Okay. And then what's the next line, offset for non-

9 debtor employees providing services to the debtor.

10 A That's a reference to people who weren't employed by

11 HCMLP but who, you know, from time to time would help on

12 HCMLP related issues.

13 Q And that happened, correct, the advisors had certain of

14 their own employees and they would basically let HCMLP

15 sometimes use those employees.

16 A Like I said there was a time when we were all one big

17 happy family and everybody used --

18 Q And that continued to some degree post petition until

19 certain things happened later in 2020 when Mr. Dondero

20 forbade some employees from executing Mister Series (ph)

21 trades; isn't that correct?

22 A Sorry, can you --

23 Q Strike that.

24 A Okay.

25 Q How did you calculate the \$1.1 million here?

1 A I believe it was by looking at a few of those employees
2 and applying effectively the same logic but in reverse. So
3 instead of Highland -- HCMLP absorbing all the costs and
4 allocating it elsewhere, there were a couple of employees
5 who were employed elsewhere and allocating some part of
6 their time back to HCMLP, you know, notwithstanding that
7 that's not how the agreement works, but it's identifying as
8 an offset which would, you know, you can further, you know,
9 be an addition.

10 Q And Highland never paid the advisors for the periodic
11 use of the advisor's employees, right?

12 A Correct.

13 Q Now, walk us through please the next box there that
14 talks about shared services. Those were the shared services
15 agreements with the advisors I take it?

16 A These are the shared services with the advisors as well
17 as NexPoint Real Estate advisors.

18 Q Okay. And what's the line on incurring charge?

19 A That's the amount that was being charged at the time.

20 Q Okay. And what's the line-item shared services?

21 A It looks to me --

22 Q Isn't that --

23 A I'm not sure, I'm not sure.

24 Q Isn't that you trying to calculate the actual cost of
25 the shared services to Highland?

1 A No. No, I wouldn't characterize it that way.

2 Q Well, when you take the current charge and you delete
3 shared services, you delete litigation to get to estimated
4 point in time profitability, right?

5 A Correct --

6 Q So --

7 A -- current charge less shared services less litigation,
8 yeah.

9 Q So what -- so if you're conducting shared services you
10 have no memory of what that was?

11 A My -- I'm speculating a bit here, but my guess is that
12 this is just a simple summation of everything in that top
13 box that has shared services next to it.

14 Q Uh-huh.

15 A Notwithstanding that that may or may not be an exact
16 one-for-one with the actual agreement.

17 Q Okay. And what about the line litigation, what is
18 that?

19 A I believe it's the same thing and because there isn't
20 anything up above with litigation it's pulling nothing.

21 Q Okay. And then estimated point in time profitability
22 .4 and .6, let's just 1 million together, was that your
23 estimate based on Mr. Waterhouse's assumptions given to you
24 of the profitability to Highland of the shared service
25 agreements as of December 2020?

1 A No.

2 Q What -- then what did that -- what did those .4 and .6
3 mean?

4 A Sitting here today they're -- to me they're numbers on
5 a page. They're the output of an analysis that manages to
6 exclude pretty relevant data.

7 Q Okay. What about the next line, unadjusted gain on
8 material shared services agreement, 1.0 -- I'm sorry, 1.0
9 million.

10 A Uh-huh.

11 Q What does that mean?

12 A That number is just the summation of the .4 and the .6
13 directly above.

14 Q Okay. Sir, didn't you have to somewhere in here deduct
15 the actual cost to Highland of providing the shared services
16 to arrive at a \$1 million annualized profit?

17 A Sorry, can you ask that again, it's just --

18 Q You are here concluding, right or wrong, it's okay, you
19 were here on --

20 A If I can stop, I don't know if I'm concluding anything
21 with this. I'm taking a direction from my boss and I'm
22 returning that analysis to him. I've spent a lot more time
23 in the last 20 minutes thinking about this than when the
24 request was given to me. I didn't have a belief that --

25 Q I'm asking you a --

1 A -- matched what's --

2 Q -- very simple question, Mr. Klos. I'm asking you a
3 very simple --

4 MR. MORRIS: Your Honor, he's interrupting him
5 again.

6 MR. RUKAVINA: No, I'm not. He started -- he
7 answered my question and then elaborated.

8 THE COURT: Okay. Overruled.

9 BY MR. RUKAVINA:

10 Q I'm asking a very simple question. Is there anywhere
11 on this page an estimate by you of the actual costs to
12 Highland of providing the shared services under the shared
13 services agreements?

14 A No, it's not. It's not called out on this page.

15 Q Okay. And you're not prepared to say that this report
16 at least shows that you estimated at that point in time of
17 \$1 million annualized gain on the shared services agreements
18 to Highland?

19 A I would never put my reputation on the line for this
20 analysis. This is not at all reflective of what my views
21 were then, what my views were -- are now. This is like I
22 said a response to a request.

23 Q Okay. So on the cover e-mail to Mr. Waterhouse, where
24 did you tell him, hey, Frank, this may not make sense, this
25 may be bogus, this may be junk math? Where here do you

1 caution him at all about that this might not reflect your
2 views or reality?

3 A I don't know that that's contained in my e-mail to
4 Frank.

5 Q In fact, you tell him output here is roughly an
6 annualized \$9.6 million gain primarily attributable to the
7 front office payroll reimbursement agreements, that's what
8 you write, correct?

9 A Yes.

10 Q And again, those front office payroll reimbursement
11 agreements are the what we call here the payroll
12 reimbursement agreements, correct?

13 A Yes, it looks to be one in the same.

14 Q And then you write, "which makes sense, given the
15 material reduction in head count, especially at the senior
16 level." You wrote that, right?

17 A I wrote that.

18 Q Yeah, and that's very logical because a lot of those
19 employees that the advisors were paying for simply weren't
20 employed anymore, correct?

21 A I disagree with the characterization of the question; I
22 don't believe they were paying for a portion of individual
23 employees' time.

24 Q Then you tell the judge what you meant by which makes
25 sense given the material reduction in head count especially

1 at the senior level.

2 A So we had three departures that in my mind were fairly
3 material. Those were from a dollar perspective, Trey Parker
4 (ph), John Poglich (ph), and Ajit Jain. I feel like I'm
5 forgetting someone on the front office side, but my point is
6 the same point I was making earlier, which is that when
7 revenue stays the same and expenses go down, profitability
8 improves.

9 Q And expenses went down because Highland didn't have
10 some of those employees that were listed on the attachments
11 to your exhibits to the payroll reimbursement agreements?

12 A I wouldn't characterize it that way.

13 Q How would you characterize it?

14 A I would say it had certain of the employees did leave,
15 some of them weren't on the original list, Agit is a good
16 example of that, as someone who was not on the PRA list,
17 notwithstanding that he did all of his work for us,
18 substantially all of his work for the advisors.

19 So when he departed, Highland became more profitable in
20 a short term from the standpoint that it no longer has an
21 expense that it has to bear. But again, he's not a great --
22 he's not even on the PRA.

23 Q "Biggest difference between this sort of analysis and
24 actual P&L being recorded on HCMLP's books is that on the
25 books HCMLP has been accruing for 2020 bonus expenses

1 throughout the year." What did you mean by that, sir?

2 A What I meant by that is HCMLP had been accruing bonuses
3 throughout the year of 2020.

4 Q On it's -- accruing on its financials, right?

5 A Yes.

6 Q But not necessarily paying the bonuses to all
7 employees, right?

8 A It was accruing -- it had paid bonuses to virtually all
9 employees except for the insiders that weren't allowed to be
10 paid.

11 Q Yes. And those are the ones that got the seven figure
12 bonuses, right?

13 A I don't remember. I don't remember their specific
14 bonuses, I think some were lower, some were higher.

15 Q Some were in the seven figures, right?

16 A Yes, none who were part of the payroll reimbursement
17 agreement though.

18 Q Understand. But you took all that into account --
19 well, strike that.

20 Are you, sir, today saying that your analysis on
21 Exhibit Q was not your good faith estimate of the
22 profitability of these contracts for Highland?

23 A No, because that's not the exercise I was asked to
24 undertake.

25 Q You undertook the exercise that you were given which

1 was to in good faith estimate the profitability of these
2 contracts --

3 A That's not the exercise I was given. It's not.

4 Q Then telling me exactly what exercise you were doing.

5 A The exercise I was given was take the work product from
6 last year, update it with these assumptions and send it to
7 me.

8 Q And what was the exercise of the work product from last
9 year?

10 A The exercise of the work product was admittedly a much
11 more thoughtful analysis with all compensation included and
12 with, you know, at least a good faith effort to estimate the
13 then current percentages with the caveat that they were
14 within a huge -- was in a huge band of goalposts, like we
15 saw for Sahan or it's somewhere between, you know, 10 and 55
16 percent, you can drive a truck through.

17 Q Okay. Did you ever discuss -- I'm just going to call
18 them overpayments, okay, they're alleged overpayments, you
19 don't have to say that they're overpayments we can call them
20 something else if you want. Did you ever discuss the
21 advisors' alleged overpayments under the payroll
22 reimbursement agreements with anyone internally at Highland
23 like Mr. Waterhouse?

24 A I'd prefer to call them something other than that
25 word --

1 Q Tell me what to call them.

2 A -- overpayments.

3 Q Tell me what to call them.

4 A It's the amounts that Highland was paying under those
5 agreements would be my preference.

6 Q The amounts that Highland was paying?

7 A Sorry, sorry, the amount that the advisors were paying.

8 Q I'll just call them alleged overpayments, okay?

9 A Okay.

10 Q Did you discuss the alleged overpayments with anyone
11 internally at Highland?

12 A I'm sorry I can't get over the alleged overpayments. I
13 discussed --

14 Q Did you discuss with anyone at Highland the fact that
15 the advisors were paying under the payroll reimbursement
16 agreement for employees who were no longer there?

17 A Not sure, maybe.

18 Q Did you discuss it with Mr. Waterhouse during the
19 process in 2019 when y'all were preparing the analysis for
20 the committee?

21 A I don't believe so.

22 Q Do you know whether Mr. Waterhouse or did you hear Mr.
23 Waterhouse tell Frank -- I'm sorry, tell Fred Caruso that
24 the advisors were overpaid?

25 A Did I hear him ask that?

1 Q Yeah.

2 A I don't believe so.

3 Q Okay. Did Mr. Waterhouse ever tell you that he told
4 Mr. Caruso that the advisors were overpaid?

5 A Not that I remember.

6 Q Okay. Did you ever hear anything about the automatic
7 stay being mentioned as preventing any adjustment of the
8 payroll reimbursement agreements?

9 A I heard of the automatic stay; I can't say I was
10 entirely vassaled with what the provisions of it.

11 Q Okay. But did you hear at some point in time that the
12 automatic stay, whatever it is, prevented any adjustment of
13 those reimbursement amounts under the PRA?

14 A I don't remember specifically, no.

15 Q Okay. Do you remember anything not specifically?

16 A No.

17 Q Did you ever discuss that with Mr. Norris?

18 A Did I ever discuss what with Mr. Norris?

19 Q The possibility that the advisors were overpaying
20 because employees weren't there anymore?

21 A Yes. I remember Dustin bringing that issue to me.

22 Q And did you tell him that the automatic stay prevented
23 any adjustment of those?

24 A Not that I remember. I don't ever remember using
25 automatic stay.

1 Q Okay. Would you have used something similar,
2 bankruptcy stay, bankruptcy laws?

3 A Since we've been in BK, that kind of --

4 Q Okay.

5 A Since we've been in BK, this is what we've been paying.

6 Q Do you remember any discussions that because we're in
7 BK we can't adjust the amounts under the PRAs?

8 A I don't remember those discussions with Dustin, no.

9 Q Do you remember them with anyone like Mr. Waterhouse,
10 Mr. Levenger --

11 A No, not --

12 Q -- Mr. Dondero?

13 A -- specifically.

14 Q Okay. Not specifically, so okay.

15 So you're not saying they didn't happen you just don't
16 remember specifically?

17 A I suppose so, yeah, I just don't remember.

18 Q Okay. Now, you mentioned that the notices of
19 termination of the shared services agreements went out
20 November 30th or December 1st, somewhere along there.

21 A Yeah, I think it was the evening of November 30th, yes.

22 Q Were the PRAs ever terminated?

23 A I don't believe so.

24 Q Why?

25 A I don't know.

1 Q Didn't you tell Mr. Norris that it was because they
2 were too profitable for Highland to terminate?

3 A No.

4 Q Did you discuss with Mr. Norris at all as to why
5 Highland was not terminating the PRAs even at the same time
6 that it was terminating the shared service agreements?

7 A I don't remember any of those discussions.

8 Q Did it not strike you as strange that Highland is
9 terminating two agreements, but not ones that you calculated
10 the profit on?

11 A Did I find it strange?

12 Q Yes.

13 A I thought about it, I don't know if I would use the
14 word strange, but I thought about it.

15 Q And you didn't discuss it with anyone?

16 A I might have discussed it with Frank, I don't remember
17 specifically but.

18 Q Were you part of the negotiations for the transitions
19 services agreement?

20 A A small part.

21 Q Do you remember that one of the conditions that the
22 advisors made to enter into that transition service
23 agreement was that Highland does, in fact, terminate the
24 PRAs?

25 A I'm not aware.

1 Q Okay. So sitting here today you don't remember any
2 discussion about the fact that Highland didn't terminate the
3 PRAs because they were profitable?

4 A No, not specifically.

5 Q Okay. Go to Exhibit P, I think we looked at Exhibit P
6 before. P as in Paul. In particular, the bottom e-mail
7 from you to Mr. Norris, Mr. Sauter, Mr. Waterhouse.

8 A Uh-huh.

9 Q Where you write that, these have not changed since BK,
10 which given the changes in head count, you point out along
11 with not paying inside the bonus compensation has increased
12 the profitability of the contracts from HCMLP's perspective.
13 Do you see that?

14 A I see that.

15 Q And by that point in time, according to the December
16 2019 analysis you had calculated that there was a \$3 million
17 profit on the PRAs.

18 A In December 19th --

19 Q Yeah, December 2019 the one that we looked at that
20 went to the committee and FTI. You remember that you
21 had calculated or estimated, I'm sorry, estimated a \$3
22 million --

23 A I think that was the output of the midpoint of that
24 analysis.

25 Q Yeah. And in which you're -- so when you write, it has

1 increased the profitability of the contracts in your own
2 mind, you're acknowledging that since that time it's even
3 more profitable to Highland, aren't you?

4 A There's a lot of conflating here. We're talking about
5 insider bonus compensation which isn't even relevant for the
6 PRAs, so I don't -- I think it's kind of apples and oranges.

7 Q Okay. But no where in any of these e-mails we've
8 looked at do you tell anyone that it's apples and oranges or
9 this might not be reliable data, do you?

10 A No, I can't imagine why I would do that.

11 Q Because at that point in time you believe in good faith
12 that your estimates were reasonable, correct?

13 A Which estimates are we referring to?

14 Q The profitability, sir, the December 2019, the December
15 2020.

16 A So some of those are reasonable, some of them aren't,
17 some are less reasonable, some are more, they're all
18 varied.

19 Q That's not my question.

20 A Okay. Okay.

21 Q I'm saying at that point in time, at that point in
22 time, you believe that they were reasonable enough not to
23 alert anyone in any of these e-mails we've looked at that
24 maybe they shouldn't rely on them?

25 A No, nothing rose to the point of having to interject in

1 this e-mail.

2 Q Okay. You mentioned that dual employees were hired in
3 2018 and 2019, who were you referring to?

4 A In 2018 and 2019 in terms of hires, there's Ajit Jain
5 and Bailika Jain, no relation. There's -- what's -- I'm
6 sorry, what's the time period, 2018?

7 Q I believe -- yes, 2018 and 2019. I recall you
8 testifying to Mr. Morris that although a number of dual
9 employees had left, some had been hired, some replacement
10 ones had been hired.

11 A Yes, yes. So more thoroughly, there were around 11 or
12 so effectively backfills through either transfers, new
13 hires, or -- when I say transfers, transfers of employer,
14 new hires, or transition of role. A good example of those
15 being the ones that Mr. Norris took me through for the legal
16 and distress team where their roles were modified, expanded
17 to perform those services.

18 Q Okay.

19 MR. RUKAVINA: Pass the witness, Your Honor, thank
20 you.

21 THE COURT: Okay. Redirect?

22 MR. MORRIS: I think this will be brief.

23 THE COURT: Okay.

24 REDIRECT EXAMINATION

25 BY MR. MORRIS:

1 Q Mr. Klos, are you familiar -- we looked at the invoice
2 for --

3 A Uh-huh.

4 Q -- the HCMFA shared services agreement. Do you
5 remember that?

6 A I remember.

7 Q And am I correct that that invoice is calculated on
8 cost plus 5 percent?

9 A Yes.

10 Q And is that what the contract -- is that your
11 understanding of what the contract between HCMFA and
12 Highland provided?

13 A Yes, that's what the contract says.

14 Q So there was an agreement to limit Highland's profit in
15 that contract; is that correct?

16 A Yes.

17 Q Was there any limit on the profit that Highland could
18 earn under the payroll reimbursement agreements?

19 A No.

20 Q So the parties to the payroll reimbursement agreement
21 knew how to enter into an agreement that would limit profit
22 as they did under the share's services agreement, but your
23 recollection is that they didn't do that under the payroll
24 reimbursement agreement; is that right?

25 A Correct.

1 Q Okay. Your analysis showed profit under the payroll
2 reimbursement agreement but it showed losses under the
3 shared services agreement, is that generally, correct?

4 A That's generally correct as of that December analysis.

5 Q Is there any protection anywhere for Highland against
6 losses?

7 A No, if I'm understanding.

8 Q Right. So they're upset that Highland was making a
9 profit. Did they care, did they express, were they -- are
10 you aware of any discussions where the advisors promised to
11 make Highland whole for all the losses they suffered under
12 the shared services agreement?

13 A No. No, no.

14 Q Okay. Let's go to Exhibit Q in their binder. This is
15 the December 2020 analysis.

16 A Yes.

17 Q I believe I heard you when you were asked about the
18 estimate point and time profitability, I think that's the
19 spot where you said that there was material data that was
20 excluded. Did I hear that correctly?

21 A Yes, yes.

22 Q Would you describe for the Court what material data was
23 excluded?

24 A The material data that's in the analysis you mean?

25 Q Yeah.

1 A Yes. So primarily the bonuses themselves, cash bonus,
2 deferred bonus, those were the main amounts that are not in
3 there whatsoever.

4 Q And those bonuses were all paid in 2020 except for the
5 senior executives; is that right?

6 A Correct.

7 Q Okay. And all of this is taking place in December
8 2020; is that right?

9 A Yes.

10 Q And that's not only after Highland had given notice of
11 termination of the shared services agreements, do you recall
12 that that's also the moment in time where Highland had an
13 approved plan and disclosure statement or an approved
14 disclosure statement?

15 A Yes. I think the disclosure statement was around the
16 November time frame, yes.

17 Q And do you remember that in or around December you and
18 others and my firm were preparing for confirmation?

19 A Yes.

20 Q And so was there any expectation that somehow Highland
21 was going to terminate the shares services agreement, but
22 somehow retained these enormously profitable payroll
23 reimbursement agreements for the future?

24 A Certainly not that I was aware of and it's patently
25 ridiculous that they would continue.

1 Q Was there some secret plan to somehow get out from
2 under the burdensome shared services agreements but go
3 forward with these profitable agreements with the payroll
4 reimbursement agreement?

5 A No, and it's a pretty ridiculous proposition.

6 Q That's what I thought. Mr. Rukavina spent a lot of
7 time trying to get you to embrace the reasonableness of the
8 percentages in Exhibits 80. Do you remember that?

9 A Uh-huh. Yes, sorry.

10 Q And you would agree that that was your best good faith
11 estimate to try to come to an allocation; is that fair?

12 A Are we referring to the '19 and '20 or the '19 analysis
13 or are we referring to the Exhibit A?

14 Q Exhibit A.

15 A Exhibit A. And, sorry, ask -- please repeat the
16 question.

17 Q You did that in good faith, right?

18 A The 2018?

19 Q Yeah.

20 A Yeah, yeah, I did.

21 Q But it was within the bounds of the 252 number, wasn't
22 it?

23 A Yes, absolutely.

24 Q And --

25 A And if I could add one more thing, it was also in the

1 bounds of the fact that we had -- I'm going to estimate, in
2 the neighborhood of 3 million -- \$3 billion of ACIS funds
3 that were part of that allocation and then would disappear
4 within the matter of months.

5 Q If the number in the subservice -- the subadvisory
6 agreement was not 352, but 452, let's say it was 500, twice
7 as much, would you have used the same allocations that are
8 in Exhibit A?

9 A No, the allocations would have been different, up to
10 some boundary. There would be some point where the
11 allocations would get just -- at some point the allocations
12 would get beyond a hundred percent, right, but within the
13 boundaries, yes.

14 Q Is it fair to say that the allocation that you came up
15 with was a reasonably good faith estimate in the bounds of
16 the restrictions of 252?

17 A Yes.

18 Q Okay. Just one or two more questions here going back
19 to December '19 the analysis that was given to the UCC.

20 A Yes.

21 Q I think you've testified pretty extensively that it was
22 a very subjective analysis. Do I have that right?

23 A Yes.

24 Q And can you just remind Judge Jernigan what your goal
25 was in preparing that analysis?

1 A Yes. The main thing is, more time and demonstrate that
2 on the whole these are neither making nor losing a
3 tremendous amount of time and with the focus on the whole.
4 What was presented to the UCC, was the total costs, the 16.1
5 if I remember correctly. So focusing on the fact that
6 putting our best foot forward with them, these contracts are
7 neither making you nor losing you significant amounts of
8 money to give time for what I understood to be a process of
9 trying to work through the bankruptcy fairly quickly.

10 Q Did you ever expect when you prepared those analyses in
11 late 2019 that they would somehow be used as the basis for
12 the advisors to claim profitability under the payroll
13 reimbursement contracts?

14 A No, absolutely not.

15 Q Was it prepared for that purpose at all?

16 A No.

17 MR. MORRIS: I have no further questions, Your
18 Honor.

19 THE COURT: All right. Recross?

20 RE-CROSS-EXAMINATION

21 BY MR. RUKAVINA:

22 Q Under the payroll reimbursement agreements the advisors
23 are paying for 25 employees, correct?

24 MR. MORRIS: Objection to the form of the
25 question. No, it's okay.

1 THE COURT: All right. I think he withdrew his
2 objection.

3 MR. MORRIS: Withdrawn.

4 THE WITNESS: They were paying -- no, there may be
5 25, I don't know the exact number, but there are
6 approximately 25 people on the schedule to the PRAs.

7 BY MR. RUKAVINA:

8 Q And of those approximately 25 by the end, 20 had been
9 gone, correct?

10 A Of the original 25 around that. I don't have the
11 number --

12 Q Around that?

13 A -- memorized, but yeah, in that ballpark.

14 Q And you don't have a single problem with that, that for
15 more than a year your department was billing the advisors
16 for about 20 employees that weren't there anymore? You
17 don't have any problem with that?

18 A I have no issues with that whatsoever --

19 Q Okay.

20 A -- because if I may --

21 Q No, you may not.

22 A Okay.

23 Q Was your department not charged under the shared
24 services agreements to periodically review the advisors'
25 contracts with vendors and advise the advisors about

1 potential overpayments, set-offs, credits, et cetera?

2 A I don't recall those provisions specifically, no.

3 Q Okay. Well maybe Mr. Waterhouse will.

4 Go to Exhibit A, please, my Exhibit A, Section 5.02,
5 please. That's about termination. Termination on at least
6 60 days advanced written notice, do you see that?

7 A Yes, I see that.

8 Q So if it was Highland's intent to terminate these
9 agreements contemporaneously with the shared services
10 agreements why in the world wouldn't they have sent us
11 notice at least 60 days in advance?

12 MR. MORRIS: Objection, Your Honor, assumes facts
13 not in evidence.

14 MR. RUKAVINA: He testified --

15 THE COURT: Overruled. He can answer.

16 BY MR. RUKAVINA:

17 Q Go ahead.

18 A Sorry, again please.

19 Q Yeah. You testified on redirect there was no master
20 plan to keep sucking money out of the advisors by not
21 terminating these, I'm exaggerating obviously, but that's
22 basically what you testified about, right? That there was
23 no plan to just keep charging the advisors. Let me just ask
24 it again.

25 A I don't --

1 Q I'm going to ask it again, Mr. Klos, because you
2 can't --

3 A I don't know what the plan was.

4 Q But when Mr. Morris asked you, you said that you knew
5 that there was no plan.

6 A It would -- it struck me as --

7 Q Are you just answering whatever he asks you?

8 A No.

9 Q Okay. So can you think of a reason why Mr. Seery would
10 not have sent a notice terminating the payroll reimbursement
11 agreement contemporaneously with the notice terminating the
12 shared services agreement?

13 A I don't know the reason behind --

14 Q Okay.

15 A -- it.

16 Q That's what I wanted to know, because I think a lot of
17 things you've testified about today are speculation.

18 MR. RUKAVINA: Thank you.

19 THE COURT: All right. You are excused, Mr. Klos.

20 THE WITNESS: Thank you.

21 (Witness excused)

22 THE COURT: All right. We should take a break.

23 You're going to call Mr. Waterhouse next?

24 MR. MORRIS: Yes, Your Honor.

25 THE COURT: You said he needs to finish today.

1 MR. MORRIS: Yes.

2 THE COURT: Do we have a time estimate?

3 MR. MORRIS: I'm hoping it's an hour or less.

4 MR. RUKAVINA: I'll have an hour or less.

5 THE COURT: Okay. We'll take a ten-minute break.

6 THE MARSHAL: All rise.

7 (Recessed at 3:35 p.m.; reconvened at 3:51 p.m.)

8 THE MARSHAL: All rise.

9 THE COURT: Please be seated. All right. We're
10 back on the record in Highland. Mr. Morris, are you ready
11 to call Mr. Waterhouse?

12 MR. MORRIS: Yes, Your Honor.

13 THE COURT: You may.

14 MR. MORRIS: Highland calls Frank Waterhouse.

15 THE COURT: Mr. Waterhouse, please approach the
16 bench and the witness box.

17 MR. WATERHOUSE: Right here?

18 MR. MORRIS: Yeah.

19 THE COURT: Please raise your right hand.

20 FRANK WATERHOUSE, WITNESS, SWORN

21 THE COURT: All right. Please be seated.

22 DIRECT EXAMINATION

23 BY MR. MORRIS:

24 Q Good afternoon, Mr. Waterhouse.

25 A Good afternoon.

1 Q Just get comfortable for a moment. Okay. So in front
2 of you are a few witness -- a few exhibit binders. We try
3 not to bind our witnesses.

4 Exhibit binders, so that the two big ones are
5 Highland's exhibits, the smaller one to your right are the
6 advisor's agreement -- exhibits and I may ask you to refer
7 them time to time, just so you know what they are there.

8 Okay?

9 A Okay.

10 Q Mr. Waterhouse, prior to February 2021 you were
11 Highland's CFO, correct?

12 A Yes.

13 Q And you held that position for roughly a decade; is
14 that right?

15 A Yes.

16 Q And as Highland's CFO you were responsible for
17 overseeing Highland's corporate accounting group, correct?

18 A Yes.

19 Q And Mr. Klos, David Klos was in that corporate
20 accounting group, correct?

21 A Yes.

22 Q And Mr. Klos reported directly to you, correct?

23 A Yes.

24 Q You were his boss, right?

25 A He -- yes.

1 Q Okay. You wore many hats when you were at Highland,
2 right?

3 A I don't know what many hats is but I managed several
4 different teams.

5 Q You served as an officer of more than a half a dozen
6 entities; is that fair?

7 A I don't recall how many entities that I was an officer
8 of.

9 Q You don't recall if it's more or less than a half a
10 dozen?

11 A It's around that. I mean, I don't recall, John.

12 Q Do you know how many entities for which you served as
13 an officer today?

14 A Three or four.

15 Q Okay. And among them, are NexPoint advisors and HCMFA?

16 A Yes.

17 Q And you served as the treasurer of those entities,
18 right?

19 A Yes.

20 Q And you served as the treasurer of those entities from
21 at least some time before January 1st, 2018, correct?

22 A I'm sorry, did I serve as treasurer prior to January
23 1st, 2018 for those entities?

24 Q You've been -- let me try to be clear. You've been
25 serving as the treasurer of the advisors on a continuous

1 basis from some time prior to January 1st, 2018 until today,
2 correct?

3 A Yes.

4 Q Okay. And is the treasurer of your advisors, you're
5 personally the person responsible for the advisors'
6 accounting, correct?

7 A No.

8 Q As the treasurer, you're not the person who's
9 responsible for the advisors' accounting?

10 A I don't -- I don't believe I'm personally responsible,
11 you know, again it's -- there's a team of people, right,
12 that are involved in putting together other books and
13 records for the advisors and things like that. Yes, I am
14 the treasurer, but I'm not a lawyer, but I don't know if I'm
15 personally responsible. There's a team of people that does,
16 you know, put together -- you know, it's quite an endeavor.

17 Q And they -- and that whole team reports to you,
18 correct?

19 A Are you saying in 2018 or what time period?

20 Q That's fair.

21 Let's focus on the period January 1st, 2018 until the
22 time you left Highland a little bit more, you know, February
23 of 2021. Okay. So that three plus year period. I'll call
24 it the relevant period; is that fair?

25 A Okay.

1 Q Okay. During the relevant period, you were the officer
2 of the advisors who was responsible for the advisors'
3 accounting, correct?

4 A Yes.

5 Q Thank you. You were the person acting on behalf of the
6 advisors who was expected to make sure that the advisors
7 paid the proper amount due under the advisors' contracts,
8 correct?

9 A Yeah, I would say, I mean, that is a team approach as
10 far as -- I'm not processing payables or every contract or
11 things like that. Yes, I'm the treasurer, but, yeah, I'm
12 not personally responsible.

13 Q Can you identify the officer of the advisors who was
14 responsible for making sure that the advisors only pay the
15 proper amounts due under the advisors' contracts? Who is
16 responsible for that if it's not you?

17 A I mean, as treasurer, I mean, I guess I'm referring to
18 it is a team approach, right, so I'll just say.

19 Q I appreciate that. I'm not asking you to identify
20 every person who does work in connection with the advisors'
21 accounting. I'm asking you if you are the officer who is
22 ultimately responsible for making sure that the advisors'
23 pay the proper amounts due under the advisors' contracts.

24 A Yes, I mean, look at the other officers, I would be the
25 one.

1 Q Thank you very much.

2 And among those contracts that you had responsibility
3 for making sure were properly administered, were the
4 intercompany agreements with Highland, correct?

5 A There were intercompany agreements. I mean, yes.

6 Q And during the relevant period that three-year period,
7 2018, '19 and '20 there were shared services agreements
8 between Highland, NexPoint, NexPoint Real Estate Advisors
9 and HCMFA, correct?

10 A There were shared service agreements between Highland
11 and NexPoint advisors and Highland and Highland Capital
12 Management Fund Advisors.

13 Q And there was also a shared services agreement between
14 Highland and NexPoint Real Estate Advisors, correct? That
15 \$80,000 monthly, does that ring a bell?

16 A Yeah. Well, you're refreshing my memory from my --
17 from the deposition, yeah, I forget about that one.

18 Q And there were also what became known as the payroll
19 reimbursement agreements, right?

20 A Yes.

21 Q Okay. And I'm going to refer to those contracts that
22 we just identified as the intercompany agreements, okay?

23 A Okay.

24 Q Okay. And so you were responsible for making sure that
25 the advisors paid the proper amount under the intercompany

1 agreements, correct, on behalf of the advisors?

2 A Yes.

3 Q Okay. Do you know Dustin Norris?

4 A I do.

5 Q Mr. Norris is the advisors' executive vice-president;
6 is that right?

7 A I don't recall his exact title.

8 Q But you do know that he's an officer of the advisors,
9 correct?

10 A Yes.

11 Q And he didn't have any responsibility for administering
12 the advisors' intercompany agreements with Highland, did he?

13 A Not that I'm aware.

14 Q Okay. You're not aware of Mr. Norris having had any
15 responsibility for drafting any of the intercompany
16 agreements with Highland, correct?

17 A Not that I'm aware.

18 Q You're not aware of Mr. Norris having any involvement
19 at all in determining in the ordinary course of business how
20 much was due under the intercompany agreements, correct?

21 A Not that I'm aware.

22 Q Is it fair to say that until late 2020, you never
23 discussed with Mr. Norris how the amounts paid under the
24 intercompany agreements with Highland were going to be
25 determined?

1 A It's hard to -- can you repeat that, please?

2 Q Sure. I'm just thinking time, right, you left Highland
3 in February of 2021, correct?

4 A Yes.

5 Q Do you remember in December of 2020, Highland had just
6 given notice of the termination of the shared services
7 agreements and there were a number of communications among
8 people about the consequences of that?

9 A Yes.

10 Q Okay. Up until that month, December '20, December 2020
11 you had never discussed with Mr. Norris how amounts paid
12 under the intercompany agreements were going to be
13 calculated, correct?

14 A I had a conversation with Mr. Norris about
15 overpayments. That's what I recall.

16 Q And that took place in December 2020?

17 A It was in Q-4 of 2020, I don't recall the -- it was at
18 the end of 2020.

19 Q Okay. But prior to that time, you've never had a
20 conversation of any kind with Mr. Norris about how amounts
21 under the intercompany agreements with Highland would be
22 calculated, correct?

23 A Not that I can recall.

24 Q Okay. Let's talk about the NexPoint shared services
25 agreement. If you can open up one of the binders that has

1 Exhibit 3. Do you have that, Mr. Waterhouse?

2 Can you just confirm if you look at the signature page
3 that you signed this document? It's the last page of the
4 document.

5 A This is the NexPoint amended restated.

6 Q Yes.

7 A Yes.

8 Q Those are your signatures, right?

9 A Yes.

10 Q And you signed this document on behalf of both Highland
11 and NexPoint, correct?

12 A Yes.

13 Q And you don't recall ever seeing any drafts of this
14 agreement before you signed it, correct?

15 A I don't recall.

16 Q And you don't recall going through the terms and
17 conditions of this agreement within in-house counsel or
18 outside counsel before you signed it, correct?

19 A Yeah, I don't recall.

20 Q You have no recollection whether this agreement was the
21 subject of any negotiations, correct?

22 A I don't recall.

23 Q To the best of your recollection, the advisors never
24 considered obtaining shared services from the source other
25 than Highland, correct?

1 A Yeah, I don't recall.

2 Q And if you take a look at Section 3.01 which is on the
3 page ending in Bates number 637, you understood when you
4 signed this agreement that Highland was going to receive a
5 flat monthly fee of \$168,000 for shared services from
6 NexPoint, correct?

7 A Yeah, it's what it says in Section 3.01, correct.

8 Q And NexPoint paid that exact flat fee each and every
9 month from the time you signed this agreement until the time
10 it was terminated, notice of termination was given in -- at
11 the end of 2020, correct?

12 A I don't believe that's right.

13 Q You don't think NexPoint paid \$168,000 for each and
14 every month from January 1st, 2018 until November 2020?

15 A I thought you said through December of 2020. There was
16 a time in Q-4 in 2020 where payments on these intercompany
17 agreements were suspended.

18 Q Okay. We'll talk about that in a minute.

19 Do you know why you signed this agreement in 2018?

20 Withdrawn.

21 Before you signed this agreement there was already in
22 place an agreement with NexPoint, right?

23 A Yes.

24 Q And there was an agreement between NexPoint and
25 Highland for the provision of shared services, correct?

1 A We reviewed an agreement from 2013. If that is that
2 agreement, that's what's coming to mind, but I don't
3 remember who. If that was NexPoint or HMFA, but if it's a
4 2013 agreement that you're referring to, there was an
5 agreement. I don't remember what entity that was with.

6 Q Do you have any recollection as you sit here right now
7 as to why the new agreement was entered into with NexPoint
8 in early 2018 for shared services?

9 A I don't recall.

10 Q Let's go to Exhibit 8 please. Before we do that, let's
11 go to Exhibit 5. Do you know what Exhibit 5 is?

12 A It says a sub-advisory agreement between NexPoint
13 advisors and Highland Capital Management LP.

14 Q And if you can go to the page ending in Bates number
15 580.

16 A Okay. Is that your signature, sir?

17 A Yes, it is.

18 Q And did you sign this agreement on behalf of Highland
19 and NexPoint?

20 A Yes.

21 Q And if you go back to the first page, do you understand
22 that this agreement was effective as of January 1st, 2018?

23 A That's what it says in the first paragraph.

24 Q Okay. Do you have a recollection as to why you signed
25 this document?

1 A I don't recall.

2 Q You don't recall? Do you recalling have any
3 discussions with anybody at any time concerning the sub-
4 advisory agreement that you signed on behalf of Highland
5 and NexPoint?

6 A I mean sub-advisory agreements are in place to provide
7 front office services, but I don't remember -- I don't
8 recall why we put this agreement in at that time.

9 Q Okay. Can you turn to page 3 please? Do you see that
10 the compensation is \$252,000 a month? I apologize, it's
11 page 3 of Exhibit 5.

12 A Yes.

13 Q Do you know how that number was arrived at?

14 A I don't.

15 Q Did you do any analysis to determine the value of the
16 sub-advisory services that Highland was going to be
17 providing pursuant to this agreement?

18 A I didn't perform an analysis, but there was an analysis
19 that was performed as part of, you know, when there's
20 amounts like this in agreements there's a back-up. Dave
21 Klos would typically do something like this.

22 Q I know he might typically do it; I'm asking you
23 specifically if you have a recollection of Dave Klos
24 preparing an analysis to justify the \$252,000 number that's
25 reflected in this document?

1 A I don't.

2 Q Okay. Do you recall any discussion with anybody at any
3 time about this particular agreement?

4 A I just recall generally that, you know, there's -- an
5 agreement was needed, but I don't -- I mean, I don't recall
6 anything else about it.

7 Q Okay. Do you recall if a sub-advisory agreement was
8 ever prepared for Highland Capital Management Fund Advisors
9 LP?

10 A I don't.

11 Q Do you have any recollection at all of having any
12 conversations about the creation of a sub-advisory agreement
13 for HCMFA?

14 A I don't.

15 Q Okay. Let's go to Exhibit 8 now. Do you see this is a
16 payroll reimbursement agreement for NexPoint? Oh, I
17 apologize, this is --

18 A It says Highland Capital --

19 Q -- for HCMFA.

20 A -- Management Fund Advisors.

21 Q Let's get the one for NexPoint, so we stay consistent.
22 I apologize.

23 Can you go to Exhibit 6? Do you see this is a payroll
24 reimbursement agreement for NexPoint and its effective
25 January 1st, 2018?

1 A Yes.

2 Q Do you have any knowledge as to why NexPoint entered
3 into this agreement after you signed the sub-advisory
4 agreement on its behalf?

5 A I don't recall. I think I said that earlier.

6 Q Do you have any recollection as to why this agreement
7 was entered into on May 1st, 2018 effective as of January
8 1st, 2018?

9 A I don't.

10 Q Do you have any recollection that personnel at Highland
11 had received advice that the sub-advisory agreement couldn't
12 be used because it couldn't be made retroactive and it
13 couldn't be approved unless approved in an in-house, in-
14 person meeting by the retail board. Does any of that ring a
15 bell?

16 A It doesn't.

17 Q Do you recall that ASIS, that Josh Carey (ph) filed the
18 involuntary petition against ASIS at the end of January
19 2018?

20 A I don't remember dates in the ASIS case.

21 Q So back to the payroll reimbursement agreement, even
22 though you signed it, you don't recall anything about why
23 this agreement was prepared in the spring of 2018 other than
24 it was a general need for it, correct?

25 A Yeah, I don't recall.

1 Q And you don't remember having any conversations with
2 anybody at any time concerning the substance of this
3 agreement prior to the time you signed it other than the
4 fact that it was needed, correct?

5 A Yes.

6 Q You don't recall receiving any legal advice before
7 signing this agreement, correct? I'm sorry?

8 A Prior to signing documents, I mean, if a document is
9 left at my office, I have a cover sheet which if it's a
10 legal document which basically says legal reviewed and
11 approved this document or someone walks in with a document
12 like this for signature, I always ask them has legal
13 reviewed and approved this document.

14 Q Okay. But you personally didn't receive any legal
15 advice before you signed it, correct?

16 A Not that I recall.

17 Q You don't recall seeing any drafts of this agreement
18 before you signed it, correct?

19 A Not that I recall.

20 Q You never provided any comments to this agreement,
21 correct?

22 A Not that I recall.

23 Q You don't know who drafted this agreement, correct?

24 A Aside from what I mentioned earlier about Highland or
25 in-house counsel reviewing and approving it, I don't know.

1 Q Okay. Do you see in the definition of actual costs it
2 says, quote, absent any changes to employee reimbursement as
3 set forth in Section 2.02, such costs and expenses are equal
4 to \$252,000 per month? Do you see that?

5 A Yes.

6 Q And is it your understanding that NexPoint paid
7 \$252,000 each and every month from the beginning of 2018
8 until the time Mr. Dondero gave his directive to stop
9 paying?

10 A Yes.

11 Q Okay. You don't remember how that \$252,000 number was
12 calculated, correct?

13 A I don't recall.

14 Q Okay. Can you turn to Exhibit A -- you know, we'll get
15 to it. We'll get to Exhibit A. Yes, turn to Exhibit A of
16 this agreement. Do you recall that you also signed a
17 payroll reimbursement agreement on behalf of HCMFA and
18 Highland at the exact same time that you signed this one?

19 A We'd have to look at the document, I don't -- you say
20 Exhibit A?

21 Q Yeah. You know before we do that, let's just stick
22 with that binder that you had and go to Exhibit 8. And do
23 you see that this is the payroll reimbursement agreement
24 that was also entered into on May 1st, 2018 but this one was
25 entered into between Highland and HCMFA?

1 A I do.

2 Q And if you turn to the document with Bates number 602
3 and 603, those are your signatures, correct?

4 A It is.

5 Q And do you have any recollection of any facts and
6 circumstances concerning the preparation and your review of
7 this document before you signed it that differs from the
8 questions that I just asked you about, the NexPoint payroll
9 reimbursement agreement. Is there anything different about
10 this?

11 A No, not that I recall.

12 Q Yeah, I'm just trying to speed this up a little bit.

13 A Okay.

14 Q You don't recall getting legal advice, correct?

15 A I don't.

16 Q You don't recall providing any comments to this
17 document, correct?

18 A I don't.

19 Q You don't recall having any discussions with anybody at
20 any time about this document before you signed it, correct?

21 A I don't.

22 Q You don't recall why it was signed, correct?

23 A Aside from a general need, I don't recall.

24 Q Okay. So now let's look at Exhibit A, it doesn't
25 matter which agreement, let's just take a quick look at

1 Exhibit A. Before you signed it, did you know -- I
2 apologize. It's Exhibit A to the agreement, so whether
3 you're at Exhibit 6 or Exhibit 8, the last page is something
4 called Exhibit A. Do you have that?

5 A Yes.

6 Q That's a list of employees.

7 A Uh-huh.

8 Q Did you know that Exhibit A was attached to these
9 agreements before you signed it?

10 A I have a general recollection that there was an exhibit
11 to this agreement with employees, yes.

12 Q You don't know who prepared the Exhibit A that's
13 attached to each of these agreements, correct?

14 A I don't.

15 Q You don't know how the exhibits were prepared, correct?

16 A I don't know the person who specifically put this
17 together.

18 Q And you don't recall discussing the Exhibit A's with
19 Mr. Klos before you signed these two payroll reimbursement
20 agreements, correct?

21 A Correct. This was again four years ago, I don't
22 remember.

23 Q Okay. And you have no recollection of ever discussing
24 Exhibit A with anybody at any time, correct?

25 A I don't recall.

1 Q And at around the time you signed this agreement you
2 didn't have any discussions with anybody about whether the
3 parties would make an effort to determine the dual employees
4 -- to determine whether the dual employees were spending the
5 allocated percentages set forth on this document, correct?

6 A I mean, there was a general understanding. If it's in
7 a document of this type, I mean, it's not -- you know, there
8 aren't just going to be numbers that are thrown into an
9 exhibit.

10 Q Well, you had no expectation that Exhibit A's would
11 ever be updated, did you?

12 A I don't -- I mean, potentially.

13 Q Well, you don't recall ever instructing Mr. Klos to
14 update Exhibit A, did you?

15 A I don't recall.

16 Q You're not aware of anybody in the world who ever
17 instructed Mr. Klos to update Exhibits A, are you?

18 A I'm not aware.

19 Q And you have no recollection of anybody ever updating
20 Exhibits A, correct?

21 A I'm not aware.

22 Q And just more broadly, you have no recollection of ever
23 asking anybody in the world at any time to update this
24 chart, correct?

25 A Well, in Q-4 in 2019, you know, this agreement and

1 others were brought to the attention of Fred Caruso at DSI
2 after Highland filed. And You know, at the time, Dave
3 brought up the -- Mr. Klos brought up the overpayments by
4 the advisors on the various agreements. This was presented
5 to Mr. Caruso at the time.

6 So again, I -- you said there was no intent to ever
7 update these numbers. I mean, there was an analysis put
8 together and presented to basically the person in charge of
9 Highland at the time because we were educating Mr. Caruso
10 and DSI on everything Highland in Q-4 of 2019 and trying to
11 get him up to speed as quickly as possible and this was one
12 of the items.

13 Q And did you ever see a draft of the revision to Exhibit
14 A at any point?

15 A Not that I recall.

16 Q Okay. No records exist today that could be used to
17 determine whether the dual employees actually spent the
18 allocated time working for the advisors; isn't that correct?

19 A Aside from going through work product, e-mails, or
20 having discussions of that nature.

21 Q So it'd have to be a forensic examination?

22 A I mean, if you're saying today to go back in time, I
23 mean, you know, none of the employees are there, so yeah,
24 you'd have to do an estimate and again, on this Exhibit A
25 there's a percentage allocation to HMFA to determine what

1 that allocation is.

2 Q Did you do anything to satisfy yourself that Exhibit A
3 was accurate before signing this agreement?

4 A I remember generally having conversations on these
5 allocations, but again like I said it was four years ago.
6 If I didn't feel comfortable with these allocations at the
7 time, I wouldn't have signed the document.

8 Q Okay. Nobody was at -- none of the dual employees were
9 ever instructed to keep track of their time, so that
10 somebody could actually determine the allocations with
11 accuracy, correct?

12 A Not that I'm aware.

13 Q And you never personally -- and you personally never
14 instructed any dual employee to keep track of their time so
15 that an accurate determination of their allocation could be
16 made, correct?

17 A Not that I recall.

18 Q And because no one was instructed to keep time records,
19 you're unaware of any records that exist today that could be
20 relied upon to accurately determine how much time the dual
21 employees spent working for the advisors, correct?

22 A As I said earlier, aside from e-mails or work product
23 or things like that that existed -- that exists on
24 Highland's systems, you know, I don't know of any -- I don't
25 know anything outside of that.

1 Q Before you signed this agreement, did you make any
2 determination as to whether there was any prohibition or
3 limitation on Highland's ability to make a profit under the
4 payroll reimbursement agreements?

5 A That -- well, it's a payroll reimbursement agreement,
6 right, as you described, so this agreement from the advisors
7 to Highland is to basically reimburse Highland for any costs
8 incurred by Highland Capital Management LP.

9 Q So then why did you personally authorize the advisors
10 to pay the fixed fees that are set forth in each of the
11 agreements each and -- for each and every of the 35 months
12 between January 1st, 2018 and the end of November 2020 or Q-
13 4?

14 MR. RUKAVINA: Object, Your Honor, there's no
15 predicate, there's no foundation that he personally
16 authorized any such payment.

17 THE COURT: Response?

18 MR. MORRIS: I'm happy to do that right now. I'll
19 just skip to that and then we'll come back to it.

20 THE COURT: So I'll sustain.

21 BY MR. MORRIS:

22 Q Remember earlier you agreed that as the treasurer of
23 the advisors you were responsible for making sure that
24 Highland paid -- that the advisors paid the proper amounts
25 under their intercompany agreements with Highland?

1 A Yes.

2 Q Okay. One of the ways you did that was by approving
3 the payments in advance, correct?

4 A I mean, I think I said earlier payments and things of
5 that nature are a team approach, but the -- yes, I mean, I
6 do approve, you know, I do approve payments.

7 Q You did. In fact, you approved -- withdrawn.

8 It was your practice to approve every payment under the
9 intercompany agreements before they were made; is that fair?

10 A I don't know if I approved every single one of these
11 payments under these agreements. I would have to go back
12 and see if I actually made approvals. I don't know.

13 Q Okay. And that's why I framed it as I did. I
14 appreciate the fact that you can't testify with specificity
15 as to every single payment, but your practice was to do
16 that; is that fair?

17 A The team would communicate payments to myself on a
18 weekly basis, you know, for again the purpose was to provide
19 transparency into what was being paid for the week, provide
20 another set of eyes on, you know, what payments are going
21 out and since it's a team approach there may be payments
22 that were inappropriate or left off of the list that others
23 may know about.

24 So it was -- there was a review process in that regard,
25 yes.

1 Q And at the end of that process Kristen Hendricks (ph)
2 would send you an e-mail with a list of the payments that
3 were going to be made on behalf of the advisors and she
4 would seek your approval before effectuating those payments,
5 correct?

6 A It may not have always been Kristen and it depends on
7 -- I don't know what time period you're talking about; it
8 may not have always been Kristen. There may have been
9 others involved and, you know, again hopefully their list
10 was accurate and complete.

11 Q Okay. So without regard to any particular individual,
12 is it fair to say that the practice was to have somebody
13 from the corporate accounting group during the three-year
14 relevant period prepare a list of wire transfers that were
15 going to be made, to send that list to you and to seek your
16 approval before the wires were transferred. Was that the
17 practice even if it didn't happen every single day, even if
18 somebody different did it every single day?

19 A Not always, no.

20 Q Not always, but was it the practice?

21 A No.

22 Q Okay. Can you turn to 147 in your binder please?

23 A 147.

24 Q Uh-huh. It may be the other book. Can you explain to
25 Judge Jernigan what Exhibit 147 is?

1 A This is an e-mail from Kristen Hendricks dated Tuesday,
2 February 11th, 2020 and it's subject -- and it's cc'ing
3 David Klos, subject is wires for today. It has HCMFA and is
4 an HCMLP amount of \$300,797 for shared services and as
5 amounts under NexPoint advisors, it says GPM Dugerboy (ph)
6 for \$209,790.05 with a note of Trip Grosa (ph) --

7 Q Okay. We don't have to -- I'm going to apologize for
8 interrupting, but is this an e-mail from Kristen to you
9 seeking approval for the initiation of wire transfers one of
10 which is on behalf of HCMFA for the purpose of paying shared
11 services that were due?

12 A This e-mail is, yes.

13 Q Okay. And at the bottom of it, do you see just above
14 her name, it says, okay to send?

15 A Yes.

16 Q Did Ms. Hendricks have a practice of sending e-mails to
17 you with wire transfers in which she sought your approval
18 before initiating?

19 A Yes, but I said again, I said no earlier because this
20 is unique. This is unique because you've -- this is from
21 February of 2020. Prior to filing at Highland, Highland
22 didn't have a bank account at East West. They needed an
23 East West bank account because of the bankruptcy, right, it
24 needed a special bank account.

25 So because of that, the -- there were wires that were

1 sent by the advisors to the East West bank account. Prior
2 to filing, Highland did not have an East West bank account.
3 It had a bank account at NexBank. So the advisors had bank
4 accounts at NexBank as well.

5 Those payments weren't sent by wire. They were
6 typically like a book -- like an ACH or they're a different
7 form. And I don't recall Ms. Hendricks or Mr. Klos on every
8 single one of them, a lot of ACHs were done without my
9 knowledge.

10 Q And that would've been prepetition?

11 A That'd be prepetition, right, because the East West
12 bank account was set up after we filed in October of 2019,
13 that is a new bank account. And there's a new process in
14 place.

15 Q And describe the process for Judge Jernigan that was
16 put in place after the petition date.

17 A What -- the process for Highland wires?

18 Q For HCMFA and NexPoint wires.

19 A So this e-mail is descriptive of that process to, you
20 know, again post-petition if there were wires that was sent
21 out, yes, I was made aware of those wires.

22 Q You weren't just made aware, but your approval was
23 sought, correct?

24 A I was made aware; I didn't go back and recalculate this
25 \$300,797. Again, like for the shared service or any of

1 these other payments. Again, you know, this is a team
2 approach. These look routine and customary.

3 Q Okay. So routine and customary and you respond by
4 telling Kristen, okay, correct?

5 A I -- yes, it's in this e-mail.

6 Q And under the process that was put in place after the
7 petition date, could Ms. Hendricks or any person in the
8 accounting team were they expected to initiate these wire
9 transfers without obtaining your approval?

10 A That was the expectation, but I don't -- I mean, I
11 don't think that -- if they didn't get my answer timely, I
12 think it's my understanding that, you know, wires did go out
13 from time to time.

14 Q And do you recall if that ever happened where you
15 learned about it and you told them you made a mistake, you
16 shouldn't have executed that wire, I've looked at it now,
17 I've seen what you've done and you shouldn't have done that?

18 A I don't recall.

19 Q Go to Exhibit 152, please. Is it fair to say that this
20 is just another example of the process that you just
21 described having been put in place after the petition date
22 with the corporate accounting group would create a list of
23 the proposed wires and seek your approval?

24 A Yes.

25 Q Okay. And, in fact, this one specifically relates to

1 the HCMFA sub-advisory agreement in the amount of \$416,000,
2 right?

3 A For 416,000, yes.

4 Q So you personally approved in April of 2020 a payment
5 of \$416,000 which is exactly the number that was in the
6 payroll reimbursement agreement that you signed back in May
7 of 2018, correct?

8 A I said okay after reviewing it. Again, this is after
9 being aware of this I said, okay.

10 Q And the thing is, Mr. Waterhouse, this wasn't coming
11 into an -- this wasn't coming to you in a vacuum. You
12 expected to get these wired requests. You expected them to
13 be at the numbers that you received, right? You knew this
14 was going to happen before you even got this e-mail from Ms.
15 Hendricks, correct?

16 A What do you mean I expected to?

17 Q Well, your accounting group prepared 13-week forecasts
18 in the ordinary course of business; isn't that right?

19 A Yes.

20 Q And those 13-week forecasts detailed every single
21 payment that was projected to be made under the intercompany
22 agreements during the three-year relevant period, correct?

23 A Yeah, I mean, more or less, yes.

24 Q What's less?

25 A Again, if something was missed here or there, but yeah,

1 13-week forecasts were prepared on a weekly basis. I can't
2 remember if everyone was done a hundred percent accurately,
3 but yes, that was done on a weekly basis.

4 Q Can you describe for Judge Jernigan any recollection
5 you have of there being a payment under any of the
6 intercompany agreements during the three-year relevant
7 period that wasn't properly recorded in one of the 13-week
8 forecasts?

9 A So you're -- I mean, that's over 150 13-week forecasts.
10 I can't recall every single thing over that -- going back
11 three years.

12 Q I appreciate that.

13 A You know.

14 Q But you also can't remember one error that was ever
15 made with respect to a forecasted payment that was due under
16 any of the intercompany agreements, correct?

17 A What I can recall over the relevant time period is yes,
18 there were times where there were updates and comments made
19 on 13-week cash or things that were left out or misbucketed
20 or things of that nature or people not made aware.

21 I don't recall, you know, related to these agreements,
22 but that doesn't mean to say it didn't happen.

23 Q Okay. These 13-week forecasts they were sent to you on
24 a weekly basis and reviewed in group meetings, right?

25 A Yes. We -- yes.

1 Q And prior to the petition date the 13-week forecasts
2 were also sent to Mr. Dondero, correct?

3 A The -- Mr. Dondero received them on a very ad hoc
4 basis.

5 Q Well, for the first few months of the bankruptcy you
6 and DSI routinely went through the 13-week forecasts with
7 Mr. Dondero when Highland filed for bankruptcy, correct?

8 A I don't recall meeting with Mr. Dondero and DSI on a
9 weekly basis for 13-week cash.

10 Q Okay. I'll just ask the question again.

11 For the first few months of the bankruptcy, you and DSI
12 routinely went through the 13-week forecast with Mr. Dondero
13 once Highland was in bankruptcy, correct?

14 A I recall a meeting here and there with Mr. Dondero and
15 Mr. Caruso and Mr. Klos. I wouldn't say it was routine or
16 on a weekly basis.

17 Q All right. Do you remember the deposition that we had
18 a couple of weeks ago?

19 A Yes.

20 Q Okay.

21 MR. MORRIS: Your Honor, do you want to follow the
22 transcript?

23 THE COURT: Do I want to follow the transcript --

24 MR. MORRIS: Yeah, as I cross-examine with it?

25 THE COURT: Well, I guess I can.

1 MR. MORRIS: Okay. That was a loaded question.

2 THE COURT: Yeah.

3 UNIDENTIFIED: John, I don't mind putting it on
4 the screen.

5 MR. MORRIS: Yeah, you don't have to.

6 UNIDENTIFIED: Okay.

7 MR. MORRIS: Mr. Rukavina has it, correct? Okay.

8 BY MR. MORRIS:

9 Q Mr. Waterhouse, do you remember attending the
10 deposition with me virtually a couple of weeks ago?

11 A Yes.

12 Q And my only question is whether you remember being
13 asked this question and giving this answer. And I'm looking
14 at page 173 and its line 20 through page 174, page 3 (sic).

15 "Q Did Mr. Dondero ever receive any of the
16 forecasts that you've just described?

17 "A Yeah, I mean, we, we would walk Jim through
18 cash, the 13-week cash from time-to-time. We did
19 -- I mean, that was one thing. We met with Mr.
20 Dondero and DSI and went through 13-week cash
21 routinely with Mr. Dondero once we were in
22 bankruptcy."

23 Was that -- is that -- did you give that answer to that
24 question?

25 MR. RUKAVINA: Well, and Your Honor, I think he's

1 entitled to know that on line 7 he said,

2 "It was sporadic. So I wouldn't say it was
3 every week."

4 So let's have optional completion.

5 THE COURT: Okay.

6 MR. MORRIS: We're going to get to that.

7 No, I actually had the context --

8 MR. RUKAVINA: I just think the witness should
9 have a copy of the transcript.

10 MR. MORRIS: Yeah, okay. Asia, can you put it up
11 on the screen please because I'm going to get to that very
12 point. Here you go, Mr. Waterhouse.

13 BY MR. MORRIS:

14 Q Sir, if you can turn to page 173, my next question was
15 actually going to be do you recall that in the beginning of
16 2020 Mr. Dondero surrendered control of Highland to the
17 independent board?

18 A This says deposition of Dustin Norris, is this the
19 right one?

20 MR. RUKAVINA: No, actually. We have one.

21 THE WITNESS: Okay.

22 Q So do you recall that -- I'm sorry, Mr. Waterhouse,
23 take your time, I don't need to rush you. You're at 173?

24 A I am.

25 Q And I just asked you that question that began at the

1 bottom of 173 and then continued to the top of 174. And
2 now, if you could just look at me because I'm going to ask
3 you a couple of foundational questions, Mr. Waterhouse.

4 A Okay.

5 Q Do you recall that after -- in January 2020 Mr. Dondero
6 surrendered control of Highland to an independent board,
7 correct?

8 A Yes.

9 Q Okay. And thereafter as the calendar turned to 2020,
10 you still went over the 13-week forecast with Mr. Dondero
11 just on a less frequent basis, correct?

12 A I'm trying to -- we probably met with Mr. Dondero -- I
13 don't recall how many times we met with Mr. Dondero at the
14 end of 2019, but it doesn't feel like a lot. Going into
15 2020, we did meet with Mr. Dondero I think a few -- you
16 know, I think a few times versus at the end of 2019.

17 Q And that's my point. In the first few months of the
18 bankruptcy when he was still in control, you met with him as
19 you testified -- you met with him routinely. And then when
20 the independent board was put in place, you met with him
21 sporadically is the word; is that fair?

22 A I don't recall meeting with Mr. Dondero at any time for
23 cash after Highland filed. Mr. Dondero was very busy at the
24 time with the filing and all that happened around the
25 filing. So I don't recall having any meetings with Mr.

1 Dondero at the end of 2019.

2 Q Okay. Then I'm just going to go back and read the same
3 testimony I just did if that's where we are. Page 173 --

4 MR. RUKAVINA: Your Honor, I object. Object,
5 first of all this is now five minutes, there's no relevance
6 to this. Mr. Morris hasn't established any relevance as to
7 how many times that he might have met with Mr. Dondero on
8 13-week cash forecast, has anything to do with this admin
9 claim. Moreover, good -- the goose and the gander rule. He
10 has not stated anything that requires impeachment from a
11 prior deposition, the testimony is identical.

12 THE COURT: Response?

13 MR. MORRIS: Number one, I can't imagine too many
14 more relevant issues than the person who's in control of the
15 advisors receiving 13-week forecasts that deal every single
16 payment that the advisors were projected to make under the
17 intercompany agreements during the relevant period,
18 including during the period in question, that's number one.

19 Number two, I thought we had an agreement based on
20 his deposition testimony that, in fact, Mr. Waterhouse and
21 DSI routinely went over this stuff after the bankruptcy
22 filing in 2019 and I'm -- I just want to establish that Mr.
23 Dondero continued to receive 13-week forecasts on a sporadic
24 basis in 2020 and continued to meet with the independent
25 board and Frank to go over it. That's what the testimony

1 is. I could just read it into the record if you'd like.

2 THE COURT: Okay. I overrule the objection.

3 BY MR. MORRIS:

4 Q So, Mr. Waterhouse, in 2020, Mr. Dondero continued to
5 receive the 13-week forecast, even if it was sporadically,
6 correct?

7 A He -- yes.

8 Q And, in fact, it's fair to say that Mr. Dondero
9 personally participated in the review of the 13-week
10 forecast with the independent board from time to time,
11 correct?

12 A I don't recall Mr. Dondero and the independent board
13 meeting together for a 13-week cash.

14 Q Can we go to page 175 please? Lines 4 to 13, were you
15 asked these questions and did you give these answers?

16 "Q And then in 2020 once the board was
17 appointed, the board also got involved in the
18 review of the 13-week forecast, correct?

19 "A Correct, so they were part of that process
20 as well.

21 "Q And Mr. Dondero, I'll just say from time to
22 time also participated in that process; is that
23 correct, is that fair?

24 "A Yes.

25 "Q And the 13-week forecast would, if a

1 payment was due under either the shared
2 services agreement or the payroll reimbursement
3 agreements those projected payments would be
4 included in the forecast, right?

5 "A It would."

6 Did you give those answers to my questions a couple of
7 weeks ago?

8 A Yes, it's in the testimony, I mean, my understanding at
9 the time of your questions were did the independent board
10 get involved in reviewing the 13-week forecast, correct,
11 yes. We -- and when you said Mr. Dondero, did he
12 participate in the process I didn't link the independent
13 board with Mr. Dondero. I -- this -- Mr. Dondero did see
14 cash from time to time, like I said sporadically. But I
15 don't recall Mr. Dondero and the independent board in a room
16 reviewing 13-week cash together.

17 Q Okay. As the CFO you were generally aware -- let's
18 shift gears a little bit to the question of hires and
19 terminations, right, and staffing at Highland.

20 As the CFO, you were generally aware each time there
21 was a new hire in the Highland complex, correct?

22 A Yes.

23 Q And you were also generally aware of all employee
24 terminations from the Highland complex, correct?

25 A Yes.

1 Q The human resources department had a process that it
2 used to communicate to the operational groups when someone
3 was terminated or resigned from the Highland complex,
4 correct?

5 A Yes.

6 Q And in 2018 and 2019 Mr. Dondero personally approved
7 the compensation for every team in the Highland complex,
8 right?

9 A I believe so, yes.

10 Q And that would include salary, bonuses and deferred
11 compensation if any, correct?

12 A Yes.

13 Q And you would walk him through every single employee
14 and he would have to personally approve their compensation;
15 is that correct?

16 A Yes.

17 Q Okay. And every month, the human resources department
18 prepared a monthly head count report; isn't that right?

19 A Let me go back to the prior question about me walking
20 Mr. Dondero through every single employee. I didn't walk
21 him through every single employee. There were certain
22 groups that I did not participate, but Mr. Dondero -- I did
23 walk Mr. Dondero through several employees.

24 Q Can you go to page 96 of your transcript please?

25 A Sure.

1 Q Were you asked this question and did you give this
2 answer, tell me when you're there.

3 "Q But to the best of your knowledge as the
4 CFO Mr. Dondero would have had to personally
5 approve any changes in compensation including
6 salary, bonus, and deferred compensation for
7 anybody in the Highland platform, correct?

8 "A Yes. He -- well, he reviewed all
9 employees' base salary, bonuses, cash bonuses
10 and deferred and we walked him through every
11 single employee, you know, he would approve it,
12 make changes, do what he needed to do at his
13 discretion."

14 Is that the answer you gave a couple of weeks ago?

15 A Yes, that's the answer. I guess when I referred to we,
16 we means myself and other Highland employees. So that we
17 wasn't -- so when you asked did you personally walk him
18 through every single employee, I didn't personally. There
19 were others that participated in the process that I did not
20 participate in.

21 Q Okay.

22 A And that's the we.

23 Q Okay. Thanks for the clarification.

24 A Sure.

25 MR. MORRIS: Ms. Canty, can you put up on the

1 screen the spreadsheet that is Exhibit 93?

2 Q And while she does that, let's look at the document.

3 If you can turn to Exhibit 93. And do you see that that's

4 an e-mail from Kelly Stevens (ph) to a bunch of people?

5 A I see it.

6 Q And did Ms. Stevens work in Highland's human resources

7 department during the relevant period?

8 A Yes.

9 Q And did Ms. Stevens send each and every month a head

10 count report, an effective head count report?

11 A That's my general understanding.

12 Q Okay. It was the general practice that she would

13 distribute an effective head count report at the beginning

14 of each month or at the end of each month for the prior

15 month, correct?

16 A Yes.

17 Q And you received those in the ordinary course of

18 business, correct?

19 A I did.

20 Q And Mr. Norris, to the best of your recollection, would

21 have received that in the ordinary course each and every

22 month, correct?

23 A Again I think we went through this in -- I don't know

24 if Mr. Norris was on every single one of these e-mails that

25 Ms. Stevens sent during the relevant period. He is on this

1 e-mail dated March 4th, 2019.

2 Q Okay. And Jason Post and Lauren Bedford, would they be
3 people that in your recollection you would have expected to
4 receive information of this type?

5 A I don't know how this distribution was -- got formed,
6 but they're on the -- they received this e-mail. They are
7 in the to line.

8 Q Okay. And that monthly head count report identified
9 every single person who was employed in the Highland complex
10 as of the date of the e-mail, right?

11 A These have graphs of the head count.

12 Q But there was always a spreadsheet attached, correct,
13 an Excel spreadsheet?

14 A There were spreadsheets, yes.

15 Q And the spreadsheet identified each and every employee
16 in the Highland complex, right?

17 A I believe so.

18 Q And --

19 A I didn't really -- I think I said in my deposition I
20 didn't really pay much attention to these reports.

21 Q Okay. You didn't pay attention to it, but you got it,
22 right?

23 A I'm on the to line, yes.

24 Q And so if you had just clicked it open, you would've
25 seen a list of all the employees in the Highland complex,

1 correct?

2 A From what I recall, I don't -- again, I didn't -- I
3 don't remember (indiscernible) every single one of these, I
4 didn't pay a lot of attention to these e-mails.

5 Q Okay. And do you recall that these reports
6 specifically identified every single person who was
7 terminated from the Highland complex and the date of
8 termination?

9 A Yes. Actually you walked that tab -- I remember that
10 in our deposition, I said that was the first time I've ever
11 actually clicked on that tab and walked through what was on
12 that tab.

13 MR. MORRIS: Thank you, Ms. Canty.

14 Q We've got the exhibit up on the screen and this is the
15 attachment to the document we're just looking at, so it's
16 the head count report for 2/28.

17 MR. MORRIS: And, Your Honor, I just want to spend
18 a minute or two on this or three, so that -- because there's
19 three dozen of them in the exhibit binders and the evidence
20 as to who it was distributed, those documents have been
21 admitted so you can see, you know, I believe -- well, I
22 won't make any representations.

23 Can we click, Ms. Canty, on the tab that says
24 terms? And just scroll to the top.

25 Q Do you see that it has a list of people there, Mr.

1 Waterhouse? You're not familiar with this information
2 that's on this sheet?

3 A These are terminations, again like I said, I had never
4 clicked on this tab to my recollection until we went through
5 it in my deposition a few weeks ago.

6 Q Okay. So do you see that there's a list of people and
7 in columns B and C are the dates of hire and the dates of
8 termination?

9 A I see that.

10 MR. MORRIS: And can we scroll down to the end of
11 this document?

12 Q Okay. And do you see that it shows -- it highlights in
13 yellow the two people that were terminated in February 2019?

14 A It has two individuals that have a term date in
15 February 2019.

16 Q Does that refresh your recollection that these head
17 count reports that were sent every single month specifically
18 highlighted every single employee who was terminated in the
19 prior month?

20 A That is what's detailed in this spreadsheet.

21 Q Okay. Now --

22 MR. MORRIS: We can take that down off the screen.

23 Q I believe you testified and I may not get this
24 accurate, I don't mean to characterize your testimony, but I
25 think you testified that in or around December 2019 you had

1 a conversation with Mr. Klos where you reached a conclusion
2 that there were overpayments on the payroll reimbursement
3 agreement. Do you remember that just generally?

4 A Yeah, I believe I testified, you know, in Q-4 of 2019
5 or could have been early Q-1 of 2020, yes, I had a
6 conversation with Mr. Klos. I believe I testified that Mr.
7 Klos identified the issue and we had a subsequent discussion
8 with Mr. Caruso. Again, I -- we were educating DSI and Mr.
9 Caruso because they were in charge of Highland at the time
10 and we were trying to get them up to speed on everything
11 Highland.

12 You know, as you went through the approval process for,
13 you know, or they're approving all these payments, we were
14 taken through all the revenue contracts, I mean, just you
15 know, everything at the time.

16 Q Okay. You were not aware at that time that one of the
17 UCC's initial focuses was on the business relationships
18 between the debtor and other non-debtor entities that were
19 controlled by Mr. Dondero, correct? You didn't know at that
20 time that that was the UCC's focus, correct?

21 A I don't recall that ever being communicated to us.

22 Q Okay. You don't recall any discussions at any time
23 about the UCC and FTI's interest in knowing about the
24 economics between Highland and the Advisors; correct?

25 A I don't recall.

1 Q You don't recall having any discussion in October,
2 November, or December 2019 with Mr. Klos about preparing an
3 analysis for the UCC and FTI that would attempt to show how
4 Highland's costs compared with its revenues under its
5 agreements with the Advisors. You don't have any
6 recollection of that at all; isn't that correct?

7 A I don't have a recollection. At the time, you know,
8 DSI was getting information from the various teams. They
9 were interfacing with Mr. Klos tremendously. I am not aware
10 of that coming -- myself having that conversation with Mr.
11 Klos.

12 Q And you have no recollection of ever participating in a
13 meeting with the UCC or FTI in November or December of 2019
14 or January 2020 where the topic of the profitability of
15 Highland's agreements with its affiliates was discussed;
16 correct?

17 A I don't recall.

18 Q You don't recall ever discussing with Mr. Klos whether
19 he ever made a presentation to the UCC and to FTI concerning
20 Highland's profitability under its agreements; correct?

21 A I don't recall.

22 Q Did Mr. Klos tell you -- did Mr. Klos prepare the
23 analysis that you just referred to as having discussed with
24 Mr. Caruso?

25 A Are you referring to the analysis of -- that outlined

1 overpayments?

2 Q Sure.

3 A Yes. Mr. Klos did prepare that.

4 Q Do you know why he prepared it?

5 A Yeah. My general recollection is he wanted to make DSI
6 aware that there were overpayments on these agreements.

7 Q What would be the purpose of doing that?

8 A Again, amending the agreements to reflect, you know,
9 the actual costs incurred by Highland.

10 Q Why would that be in Highland's interest at that moment
11 in time?

12 A I -- we felt like we needed to make him aware of it. I
13 mean, again, these are, you know, these are agreements that
14 we felt that weren't, you know, that needed change and we
15 alerted Mr. Caruso to that fact.

16 Q Who's we?

17 A Myself and Dave.

18 Q It's your testimony that Dave Klos said that he thought
19 the agreements needed to be changed at the end of 2019 or
20 the beginning of 2020?

21 A It's my testimony that we had a meeting with Mr.
22 Caruso, notified him of the overpayments that were related
23 to these agreements. You know, again, nothing came of the
24 meeting. There were no changes or anything. And I don't --
25 I don't recall specifically talking about hey, you know,

1 Highland needs to amend these agreements. But we made him
2 aware of these overpayments that were related to the
3 agreements, saying it was primarily the payroll
4 reimbursement agreement.

5 Q Were Mr. Leventon and Mr. Ellington present in this
6 meeting?

7 A No, they were not.

8 Q But you told them the same thing; didn't you?

9 A Well, so in that discussion with Mr. Caruso, Mr. Caruso
10 said we -- that nothing could be changed, right? There was
11 an automatic stay as part of the bankruptcy so you know,
12 like thank you for letting me know this issue, but nothing
13 can be changed. There's an automatic stay.

14 I, you know, at some point after that, I talked to
15 Mr. Leventon and Mr. Ellington to ask them, you know, is
16 there an automatic stay in place? And yeah, I mean, they --
17 that's what they told me.

18 Q Did you tell them that there were overpayments?

19 A Yeah, I told them that there were, you know, agreements
20 between the advisors and Highland that, you know, were --
21 there were overpayments. And, you know, and DSI said we're
22 going to -- a stay and like I'm not a lawyer, and you know,
23 this -- this process was obviously new to myself and a lot
24 of team members at Highland. And Mr. Leventon and Mr.
25 Ellington were closer to, you know, they're lawyers and so I

1 asked them as well.

2 Q Did you tell them the magnitude of the overpayments?

3 A Not that I recall.

4 Q Did you tell them, do you know now when the
5 overpayments started?

6 A I mean, if it's related to the payroll reimbursement
7 agreement, it would have been at the time of any -- if there
8 were any costs incurred by Highland, or costs not incurred
9 by Highland, that the advisors reimbursed for, so I mean, it
10 could have been as early as 2018. But if you look at the
11 list of employees on your Exhibit A, the higher-dollar
12 employees like Mr. Okada and Mr. Parker that had just left,
13 that issue -- those, if something hadn't changed, those
14 overpayments would become larger over time.

15 Q Are you aware that under the theory you just described,
16 the advisors were overpaying Highland the very second you
17 signed those agreements?

18 A I think in my deposition, you had -- you had pointed
19 out an employee that had left prior to the signing of the
20 payroll reimbursement agreement but yet -- but it was a --
21 it was that they were employed after the effective date.

22 Q There were four dual employees who were terminated
23 before you signed that agreement; isn't that right?

24 A Yes. The agreement was dated January 1, 2018, so I
25 mean, you know, I think we established that's why we signed

1 as of that date.

2 Q And you understood that the agreement included the
3 compensation for every one of the employees on Exhibit A
4 regardless of whether or not they were terminated; correct?

5 A Yes.

6 Q And in fact, half of the employees had been terminated
7 before anybody heard of Jim Seery or the independent board;
8 isn't that right?

9 A I don't remember the -- the total number.

10 Q Did you ever try to do an analysis of Highland's
11 profitability under the payroll reimbursement agreement
12 until Mr. Klos did it in late 2019?

13 A I did not.

14 Q Was it ever a concern of yours as to whether or not
15 Highland was making a profit under these payroll agreements
16 until Mr. Klos prepared this analysis at the end of 2019?

17 A I don't -- I don't recall that.

18 Q Did you share Mr. Klos's analysis with Mr. Leventon and
19 Mr. Ellington? Did you give them a copy?

20 A I did not.

21 Q Did you tell Mr. Dondero, there's overpayments here?

22 A I did not.

23 Q You didn't tell Mr. Sauter. You didn't tell Mr.
24 Norris. You didn't tell Ms. Fedford. You didn't tell any
25 officer or control person of the advisors about these

1 overpayments when you learned about them in November and
2 December or January 2020; right? Late 2019, 2020. You
3 didn't tell anybody in the world except for Mr. Leventon and
4 Mr. Ellington and Mr. Caruso; isn't that right?

5 A Yes. I mean, I told Mr. Caruso. Like my expectation
6 was Mr. Caruso was in charge of Highland so if he needed to
7 speak to Mr. Dondero or others, that was Mr. -- Mr. -- that
8 was Mr. Caruso's, you know, purview.

9 Q Did you believe that Mr. Caruso had the authority to
10 renegotiate agreements on behalf of Highland?

11 A I mean, he -- he was in charge. I mean, that's -- I
12 mean, that's how we treated him from my group's perspective.

13 Q Do you know who Brad Sharp is?

14 A Yes.

15 Q Do you know Brad Sharp was actually the CRO, not Fred
16 Caruso?

17 A I mean, Fred Caruso was the person we -- he was in the
18 office every day that we talked to and were educating on
19 everything Highland. We were not educating Brad Sharp on
20 everything Highland. We were educating Fred Caruso, and
21 then Fred Caruso was, you know, doing whatever he was doing
22 with that.

23 You know, I -- Fred, my understanding, started DSI. He
24 had 30 years of experience in bankruptcy. I, you know, I
25 had no reason not to rely on Fred and his expertise in

1 communicating with Brad Sharp or anyone else.

2 Q Okay. I'm asking you what the base -- you believed
3 that Fred Caruso had the authority to renegotiate these
4 agreements with the advisors. Is that your testimony?
5 That's your belief?

6 A If Fred Caruso felt like it was something that was
7 important, then yeah, he could have -- if he said talk to
8 Brad Sharp, who's CRO, or others, or he had a relationship
9 with Mr. Dondero, yes. I mean, if that was something that
10 needed to be done, yeah. Mr. Caruso was -- was involved on
11 a day -- he was -- he was on the ground at that time.

12 Q The independent board got put in place on January 9th,
13 2020; correct?

14 A Yes.

15 Q And you spent an awful lot of time with Mr. Seery and
16 the independent board, getting them up to speed too. You
17 kind of had round two. Isn't that fair?

18 A That's fair.

19 Q You never told the independent board about these
20 overpayments; correct?

21 A I didn't.

22 Q And there's no question in your mind that the
23 independent board was in control of Highland as of January
24 9th, 2020; correct?

25 A They were in charge.

1 Q And this is really at the -- I mean, you said it could
2 be late 2019, early 2020. This conversation with Mr. Klos
3 and with Mr. Caruso could have happened really after the
4 independent board was appointed; isn't that right?

5 A No. Because this was when, I mean, the independent
6 board wasn't there, so if it was January 9th, it would have
7 been prior to the independent board being appointed.
8 Because it was - Fred was there on a daily basis and we
9 were, I mean, educating Fred, and you know, the board -- the
10 board wasn't there. And if -- if the board was there, and
11 they were in charge at the time, you know, after that
12 period, it would have made more sense than to have gone to
13 the independent board. So again, we went when Fred was in
14 charge. We viewed Fred, you know, as being in charge.

15 Q So the conversation didn't happen in January 2020. Now
16 you're sure it happened in December 2019?

17 A Well, if the date was January 9th of the independent
18 board, yes. I mean, it -- it -- that date was right after
19 the new year. And again, what I'm saying is, is that
20 conversation with Fred didn't happen with the independent
21 board so having that date as kind of more, of a frame of
22 reference, would, you know, in my mind pushes that
23 conversation more to Q4 of 2019.

24 Q Was there any question in your mind that on January
25 9th, 2020, the independent board-controlled Highland and not

1 Fred Caruso?

2 A The independent board was in charge.

3 Q No question; right?

4 A Yes.

5 Q And that happened, at most, a couple weeks after you
6 had this conversation with Mr. Klos and Mr. Caruso; correct?

7 A I -- again, it was in Q4 of 2019, so yes it could have
8 been a couple weeks. It could have been a month. I don't
9 -- I don't, you know, again --

10 Q Did the thought occur to you that maybe you ought to
11 tell the independent board?

12 A Like -- we had communicated. I had communicated that
13 to Mr. Caruso. Mr. Caruso was talking to the independent
14 board and also getting them up to speed from their
15 perspective. Mr. Caruso had every opportunity to let the
16 independent board know as well. I did not tell the
17 independent board.

18 MR. MORRIS: Move to strike, Your Honor. I'm
19 going to do this because I want to move this along.

20 THE COURT: Sustained.

21 BY MR. MORRIS:

22 Q Did the thought occur to you for you to tell the
23 independent board of what you learned?

24 A No. because I thought it was Mr. Caruso's
25 responsibility.

1 Q Okay. You met with the independent board on a weekly
2 basis throughout at least the first -- for most of 2020;
3 right?

4 A Yes.

5 Q And part of those weekly meetings would be to go
6 through the 13-week forecast; right?

7 A Yes.

8 Q And the 13-week forecast would include all the payments
9 that were projected to be made by the Advisors under each of
10 the intercompany agreements that it had with Highland;
11 correct?

12 A Yes.

13 Q And at no time during those 52 meetings that you had
14 approximately -- whatever weekly meetings you had with the
15 independent board, at no time during the meetings, did it
16 occur to you that you might want to alert the independent
17 board that there were overpayments; right?

18 A No. It didn't occur to me, because as I found out with
19 talking to Mr. Caruso, and Mr. Leventon, and Mr. Ellington,
20 that Highland was under an automatic stay and nothing could
21 be changed in relation to these agreements. So when I deal
22 with board members that I served, you know, with board
23 members, I want to focus them -- I don't want people, you
24 know -- my energy and time need to be spent on things that
25 can be changed and we can work on.

1 So my energy, again, at the end of 2019, once I learned
2 that nothing could be changed, I was dealing with the 20,000
3 other things that I had to deal with, with the bankruptcy as
4 I testified earlier. And so I treated the independent board
5 in the same manner. They stepped into Highland not knowing
6 anything and we were educating them as you just -- we had a
7 round two.

8 So as part of that education, I didn't feel like it was
9 a need to educate them on something that they couldn't
10 change. I focused -- board members' time is valuable, and
11 so it's more -- you know, my view was, let them focus on
12 things that they can change or you know, that they need to
13 work on. And if Mr. -- again, I viewed it as Mr. Caruso's
14 responsibility. If you want to tell the independent board
15 and have them focus on things that couldn't change and
16 really didn't matter, at the time, then that was his
17 responsibility.

18 Q Did you ever tell them, gee, Highland's making a lot of
19 money on those contracts without even talking about
20 overpayments? Did you characterize the payroll
21 reimbursement agreements to the independent board as a real
22 positive asset for the estate?

23 A I don't -- I don't recall that.

24 Q You didn't tell them that either? You don't have a
25 recollection of telling them that?

1 A I don't recall.

2 Q Do you recall putting anything in writing that
3 memorialized the conversations that you had with either Mr.
4 Caruso or Mr. Klos about the overpayments? Did you ever
5 send anybody an email and say, I just want to confirm, or I
6 just want to memorialize what I've been told and what I've
7 heard from Mr. Caruso?

8 A Mr. Morris, you have all my email records. I -- I
9 don't recall.

10 Q You don't recall doing that, right?

11 A But -- you have all my email records, sir.

12 Q And did the thought occur to you that you might want to
13 save your own butt by sending an email to Mr. Caruso that
14 says, "hey, Fred, I told you about these overpayments but
15 you told me nothing can be done about it because of the
16 automatic stay and I'm relying on you."

17 Did you ever think that maybe you should do something
18 to protect yourself?

19 A No. It was -- it was a collaborative work process. I
20 don't -- I don't view working with people as saving butts.
21 I mean, it's a collaborative work process.

22 I've always had a collaborative work process with
23 everyone that I work with. And you know, at any time, I
24 never felt threatened by Mr. Caruso or anyone at the
25 independent board. So I didn't feel the need, again,

1 because it was a collaborative work process. And Mr. Caruso
2 was very appreciative of all of the efforts of myself, Mr.
3 Klos, and others were doing to get him up to speed.

4 Q By the way, so is Mr. Seery. Okay. I don't -- we're
5 having a cross-examination here but I don't want you to
6 think that the independent board wasn't also appreciative of
7 your efforts.

8 Let's speed it up. December of 2020, Q4, you don't
9 remember exactly but you have a conversation with Mr.
10 Dondero where Mr. Dondero instructs you not to make any
11 payments to Highland. Do I have that right?

12 A In Q4 of 2020?

13 Q Correct.

14 A Yes.

15 Q And that's the only reason that the Advisors stopped
16 paying the amounts that were due under the intercompany
17 agreements that it had with Highland, correct?

18 A Yes.

19 Q It was Mr. Dondero's specific instruction, correct?

20 A Yes.

21 Q Okay. Later in December, you asked Mr. Klos to update
22 that analysis we've been talking about that he prepared in
23 December 2019. Do you remember that?

24 A Yes.

25 Q And you did that because you understood that the

1 Advisors were in negotiations with Highland; correct?

2 A They're -- I was -- I was made aware that there were
3 negotiations by the advisors. I -- my asking Mr. Klos to
4 update the analysis, I think was predicated on those
5 negotiations. That there were negotiations going on.

6 Q And you were told that by the Advisors? Who at the
7 advisors told you about these negotiations?

8 A I recall Mr. Dondero and Mr. Norris.

9 Q And Mr. Dondero and Mr. Norris ask you for information
10 that they could use in these negotiations?

11 A Not that I recall.

12 Q Is that what prompted you to ask Mr. Klos to update his
13 analysis?

14 A Not that I recall.

15 Q But you asked Mr. Klos to update the analysis because
16 the negotiations were ongoing; correct?

17 A There were negotiations that were ongoing. I didn't --
18 I don't recall asking him to update the analysis
19 specifically because of the negotiations.

20 Q Ca you turn to Page 344 of your transcript, please?
21 Lines 11 through 14. You were asked this question, and did
22 you give this answer?

23 "Question: What prompted you" -- I'm going to start at
24 the prior question for context, at Page -- at Line 6.

25 "Just a last question or two. You said that

1 in December 2020, you asked Mr. Klos to update the
2 analysis that he had done the prior December. Do
3 I have that right?

4 "Answer: Yes.

5 "Question: What prompted you to ask him to
6 do that?

7 "Answer: Again, it was these negotiations
8 that were going on with the Advisors and
9 Highland."

10 Have I read your answers correctly to my questions?

11 A Yeah, you have.

12 Q And so you asked Mr. Klos to update this analysis for
13 use in the negotiations, correct?

14 MR. RUKAVINA: Your Honor, that's not a prior
15 inconsistent statement. What prompted hm to do it is
16 different from why he asked him to do it. So I don't think
17 that this is a fair impeachment or a fair characterization.
18 I think he was prompted to do something for one reasons, you
19 do it for other reasons.

20 THE COURT: Overruled.

21 BY MR. MORRIS:

22 Q What prompted you to ask him to do that was the
23 negotiations that were ongoing; correct?

24 A There were ongoing negotiations. Again, like I -- I
25 mean, there were ongoing negotiations. You know, like I

1 testified, Mr. Dondero and Mr. Norris did not ask me to do
2 it for these numbers. And you know, and it was, you know,
3 as I testified earlier about like the payroll reimbursement
4 program, the overpayments on the payroll reimbursement
5 program would likely grow over time as the high-dollar
6 employees -- you know, as payments were made throughout the
7 year to the high-dollar employees that just left Highland
8 prior to filing. So you know, it's just -- it's just
9 knowing numbers and updating analyses that I think that --
10 knowing that there are negotiations that are going on.

11 Q You weren't participating in those negotiations;
12 correct?

13 A I was not.

14 Q And Mr. Seery didn't tell you about these negotiations;
15 did he?

16 A Not that I recall.

17 Q Nobody other than Mr. Dondero and Mr. Norris told you
18 about these negotiations; correct?

19 A Again, not that I recall.

20 Q Okay. So when you asked Mr. Klos, you were prompted to
21 ask Mr. Klos to update the analysis that was done at the end
22 of 2019 for use in negotiations that you weren't
23 participating in; correct?

24 A They weren't used in the negotiations. You know,
25 again, I wasn't participating. I didn't communicate, you

1 know, any of Dave's -- Mr. Klos's analysis to Mr. Norris or
2 Mr. Dondero. Yet negotiations were going on at the time.

3 Q So explain to Judge Jernigan why you would ask Mr. Klos
4 to update an analysis for a negotiation that you weren't
5 participating in, and that you didn't give to anybody. Why
6 did you ask him to do this?

7 A Again, I mean, people that know me, that work with me,
8 I like to know numbers. I'm a CFO. I'm an accountant. I'm
9 a CPA. And you know, knowing that there were negotiations
10 go on, again, it's kind of just my nature to be curious and
11 say, okay, well, we did an analysis last year. Oh, you
12 know, what is this number now, look like today?

13 Q When you asked Mr. Klos to update the analysis, he
14 asked you if you were going to use it for an adverse reason;
15 didn't he?

16 A I don't recall talking to Mr. Klos about that.

17 Q But if Mr. Klos testified that he believed that you had
18 an ulterior motive for asking him to update the report, by
19 eliminating dual employees who had been terminated, your
20 view is that he's entitled to his opinion; correct?

21 A Mr. Klos is entitled to his opinion. You know, I -- I
22 would never put Mr. Klos in a position, and it was never my
23 practice of putting him in a position where he was doing
24 something wrong or incorrect.

25 Q How much money did you receive from NexPoint after the

1 petition date?

2 A Approximately \$90,000.

3 Q And you didn't disclose that to the independent board;
4 correct?

5 A I did not.

6 Q And you don't recall why you got that money; correct?

7 A Correct.

8 Q And you spoke with Brian Collins. He's the one who
9 told you you'd be receiving the money; correct?

10 A Correct.

11 Q And he also told you that Isaac Leventon and Scott
12 Ellington and Thomas Surgent were also going to be receiving
13 payments from NexPoint; correct?

14 A That's correct.

15 Q And you don't recall him explaining to you why this
16 money was coming to you from NexPoint?

17 A I don't.

18 Q Do you recall if the payments had anything to do with
19 the bonuses that were not going to be paid as a result of
20 the Court's decision?

21 A I wasn't aware of the Court's decision.

22 Q You don't recall that in the spring of 2020, there was
23 a motion to pay bonuses and an order was entered, permitting
24 all bonuses to be paid to all employees except for the
25 senior four?

1 A I -- I wasn't aware of that. It was my understanding
2 that the senior employees were still eligible.

3 MR. MORRIS: Just one second, Your Honor.

4 I have no further questions, Your Honor.

5 THE COURT: Pass the witness, Mr. Rukavina.

6 CROSS-EXAMINATION

7 BY MR. RUKAVINA:

8 Q Mr. Waterhouse, it's unusual that I examine my own
9 officer without a chance to prepare you but have you and I
10 -- have we met before in person?

11 A Not in person. Just over Zoom.

12 Q And through all the times that we met on Webex, was it
13 at depositions?

14 A Correct.

15 Q I have not had a chance to prepare you before today;
16 have I?

17 A You have not.

18 Q Okay. This 90 --

19 MR. MORRIS: I'm sorry.

20 BY MR. RUKAVINA:

21 Q This \$90,000 payment; the insinuation is that somehow
22 that motivated you to take actions that you wouldn't have
23 otherwise. Is there any merit to such an insinuation?

24 A No.

25 Q Is \$90,000 material to a man like you that makes over

1 seven figures every year?

2 A It's not.

3 Q Okay. Whose idea was it that the \$90,000 be paid?

4 A It's my understanding Mr. Dondero authorized it.

5 Q But do you know whose idea it originally was to ask Mr.
6 Dondero to authorize the payment? Was it your idea?

7 A It was not.

8 Q Was it Mr. Surgent's idea?

9 A I don't know whose idea it was.

10 Q Okay. And that payment happened sometime prior to your
11 December 2020 interaction with Mr. Klos; is that correct?

12 A Yes.

13 Q Okay. So just very clearly, did that \$90,000 payment
14 have anything to do with your discussion with Mr. Klos to
15 walk forward his prior analysis for FTI and DSI?

16 A No.

17 Q Did that -- could that payment have any -- have had
18 anything to do with the results that Mr. Klos reached?

19 A No.

20 Q Did Mr. Klos receive some kind of bonus or hidden
21 payment or whatever they want to call it? From the
22 Advisors?

23 A Not that I'm aware.

24 Q So even if somehow you were on the take, which is
25 offensive, Mr. Klos certainly wasn't; was he?

1 A I'm not aware of any payments to Mr. Klos.

2 Q And are you aware that one of the assumptions that Mr.
3 Klos used in his December analysis was to use current
4 headcount? Do you want to see that email to refresh
5 yourself?

6 A Yeah. I think that'd be --

7 Q I think that would be fair to you. It's Exhibit Q in
8 the small binder.

9 (Witness reviews document)

10 BY MR. RUKAVINA:

11 Q You'll remember this, sir. We discussed it at your
12 deposition. You see that one of the things that Mr. Klos
13 says is that changes from that analysis -- that analysis
14 serves the prior DSI analysis; right? That you talked
15 about?

16 A Yes.

17 Q Okay. And Mr. Klos says, "reflects current headcount.
18 Terms removed, new hires added." Do you see that?

19 A Yes.

20 Q Okay. Did you tell Mr. Klos to make that assumption?

21 A Not that I recall.

22 Q If one was trying to get an accurate sense of the
23 profitability of the payroll reimbursement agreements to
24 Highland, can you think of anything wrong with using the
25 current, then real-world, headcount?

1 A So if I'm understanding you right, again, he only had
2 -- reflects current headcount on the payroll reimbursement
3 agreement.

4 Q Yes, I'm asking you as a CPA, as a professional, as a
5 CFO of a very large company, what's wrong with making that
6 assumption? Whoever's idea it was, what's wrong with it?

7 A I'm just -- if this is the payroll reimbursement
8 agreement, look, I -- I honestly don't, as I sit here today,
9 know what the current headcount relates to --

10 Q Mr. Waterhouse, I'm not asking you that. I'm saying,
11 as the CFO, you asked your subordinate to walk forward a
12 prior analysis of profitability. Is that accurate?

13 MR. MORRIS: Your Honor, I'm going to object as
14 leading. Mr. Rukavina may have never met Mr. Waterhouse.
15 He is the advisors' officer. He is their treasurer today.
16 He should not be leading this witness.

17 THE COURT: Sustained.

18 MR. RUKAVINA: Your Honor, I'm not really leading.
19 I'm just bringing him up to the next question. I'm allowed
20 to recap prior -- to set -- to phrase the next question.

21 THE COURT: I think it was leading. Sustained.

22 MR. RUKAVINA: Okay. Okay.

23 BY MR. RUKAVINA:

24 Q Well, listen to my question, okay.

25 A Okay

1 Q So I'm not going to lead you, okay? Why did you ask --
2 you already testified, but we already spent a half an hour
3 on this, so why did you ask Mr. Klos to walk forward his
4 December 2019 analysis?

5 A Again, I just wanted to see what those numbers
6 reflected.

7 Q Did you want his analysis to be reasonable?

8 A Yes.

9 Q What did you expect him to do when you gave him that
10 instruction?

11 A To again walk forward the analysis that was done in the
12 prior year.

13 Q Did you expect him to do it in good faith?

14 A Yes.

15 Q As a professional?

16 A Yes.

17 Q What about what numbers should he have used? What
18 would have been your expectation if you were looking for a
19 real-world analysis?

20 A I mean, he would have used, again, --

21 Q Well, we know --

22 A -- he would have used all, again, he would have used
23 all costs in relation to this analysis. So if there were,
24 you know, again, if there were terms that renewed but costs
25 that were incurred for those terms; right, that would have

1 been if you're looking at costs that were incurred by
2 Highland and would be paid in the reimbursement program, it
3 would have been inappropriate to remove those costs.

4 Q Okay. That's not the question though. The question is
5 as follows: The assumption there says reflects current
6 headcount. Do you see that?

7 A Mm-hmm.

8 Q So I'm asking you, as his boss, as a CPA, as a
9 professional man for a long time, can you think of anything
10 wrong with using the current headcount for what Mr. Klos was
11 doing for you?

12 A Again, if -- if there were prior headcount that should
13 be used in the analysis --

14 Q Please look at the analysis. It's in the binder.

15 A -- that should be used in the analysis, then you know,
16 those prior employees likely should have been included in
17 the, you know, in the analysis.

18 Q Did you think that Mr. Klos's analysis was reasonable
19 when you received it?

20 A I -- I didn't -- when Mr. Klos sent me this analysis, I
21 didn't look at the -- at any of the detail or the backup to
22 this analysis.

23 Q What did you think when you got this from Mr. Klos?

24 A You know, I thought that Mr. Klos made some assumptions
25 that he put in.

1 Q Okay. And stop that -- stop there. What did you think
2 about his assumptions? Were they fair? Were they unfair?

3 A Well, if you are looking at the costs incurred on the
4 payroll reimbursement program, let's take that one for
5 example. That agreement is -- was put in place, again, to
6 reimburse Highland for costs that it incurred, right? And
7 to reimburse them. And that was a -- a fully loaded cost.
8 So if there were costs that were excluded from that
9 analysis, yeah, they may not have been appropriate.

10 Q What would you have expected Mr. Klos to do with
11 respect to those potential costs, removed from that
12 analysis? In other words, would you have expected him to
13 account for that or not account for it?

14 A No, I mean, those cost should have been accounted -- I
15 mean, again, if you -- if we're looking in, for -- this is
16 done in December of 2020, you look at all of the costs that
17 were incurred by Highland for the relevant employees if
18 we're talking about the payroll reimbursement program. And
19 that would include, on a cash basis, any bonuses or anything
20 else that were paid to those employees. Because that was
21 incurred. That was cash paid to those employees by
22 Highland; right? And the agreement is going to reimburse
23 from the Advisors for those costs that were actually
24 incurred.

25 Q Did Mr. Klos tell you anything about is analysis other

1 than what's in this Exhibit Q? That email?

2 A I don't recall having -- I don't recall discussing
3 anything outside of this.

4 Q Did Mr. Klos tell you anything to the effect of that
5 his analysis might be unreasonable or unreliable?

6 A No. I mean, Mr. Klos put -- detailed assumptions that
7 he used in this analysis. Mr. Klos and I have, over the
8 years, he's put together hundreds of analyses and pro
9 formas, and there are, you know, certain things that can be
10 assumed in an analysis, and you know, I mean, maybe it's
11 right. Maybe it's wrong.

12 Q One more question, Mr. Waterhouse, and then we'll move
13 on, because I don't think you're understanding my question.

14 The insinuation is that for your \$90,000 payment,
15 somehow you had Mr. Klos prepare an unreliable document for
16 an ulterior motive. And I'm asking you, even if you had any
17 such motive, which I find, and you find offensive, what
18 could you have told Mr. Klos to do that would have made his
19 resulting analysis unreliable? Did you tell him to lie?

20 A No.

21 Q Did you tell him to fabricate numbers?

22 A No.

23 Q Did you tell him to have a prearranged result in sight?

24 A No.

25 Q Did you tell him to have any particular result or

1 conclusion in mind?

2 A No. I --

3 Q You told him to walk forward the numbers. Is that
4 correct?

5 A Bless you.

6 Q Is that correct?

7 A Mm-hmm.

8 Q You have to say yes or no.

9 A Yes.

10 Q And maybe you told him to use these assumptions, maybe
11 you didn't. You don't remember; right?

12 A I don't recall.

13 Q And very quickly now, one more thing that caught my
14 attention. Look at Exhibit I, please, in my binder. And go
15 to the last page.

16 Now keep that open and go to Exhibit 147 in Mr.
17 Morris'. This is going to get a little bit complicated but
18 go to Exhibit 147 in Mr. Morris'.

19 Now, you asked about this. You see that there is a
20 transfer of \$300,000 -- \$300,797. Do you see that, sir?

21 A I do.

22 Q Okay. And you see the date that Ms. Hendrix (ph) is
23 asking you about that? What's that date?

24 A It's Tuesday, February 11th, 2020.

25 Q And that's the same date that you went back to her in

1 the morning or I'm sorry, what time did you go back? 12:34
2 p.m.?

3 A Yes.

4 Q Now in Exhibit I, can you locate that same \$300,797
5 transfer? It's in the top third.

6 A Yes.

7 Q What's that date?

8 A February 10th.

9 Q And what's the --

10 A 2020.

11 Q What's the heading of that column?

12 A Receipt date.

13 Q Do you have any idea how Highland could have received
14 that letter the day before Ms. Hendrix sought your approval
15 and you gave it?

16 A I don't.

17 Q Okay. Returning to the payroll reimbursement
18 agreements, let's go through some things rather quickly. Do
19 you know, sir, how the monthly preset reimbursement rates
20 were arrived at in those two agreements?

21 A I don't.

22 Q Okay. Do you know whether anyone in particular set
23 those numbers?

24 A I don't. I think I testified earlier that, you know,
25 there's an analysis to back up numbers that are put into

1 these agreements.

2 Q And did you believe that that analysis had been done in
3 good faith?

4 A Yes.

5 Q And did you believe that that analysis was a reasonable
6 estimate of the actual reimbursable amounts that should have
7 been payable to Highland?

8 A Yes.

9 Q Would you have signed those agreements if you believed
10 that there was anything misleading or deceptive about them?

11 A No. I would not have.

12 Q Okay. I have the same question with the shared
13 services agreements. Do you know how the monthly payable
14 amounts were arrived at in those agreements?

15 A I don't.

16 Q And before signing or -- I'm sorry. You didn't sign
17 those agreements. But do you know whether or do you have
18 any idea of whether an analysis was actually done for what
19 those monthly reimbursable rates should be?

20 A Same as I answered earlier. An analysis, you know,
21 again, is put together to support these numbers. I think I
22 also, you know, I testified earlier in my deposition, that
23 you know, for contracts of this type, when we're audited,
24 you know, we have to provide support to auditors for these
25 -- for these numbers. Again, you know, there is an analysis

1 that is there for those purposes.

2 Q Did you ever hear Mr. Dondero just pick a number and
3 tell anyone that that's -- unilaterally, that that's the
4 number that should be used for those monthly or annual
5 reimbursement rates?

6 A I don't -- I don't recall.

7 Q And I think you were asked about this but those payroll
8 reimbursement agreements and shared services agreements, do
9 you know whether they were approved by the internal lawyers
10 at Highland, the Highland legal department?

11 A I don't but I testified earlier about you know, if I
12 have a document that is dropped off at my office, for
13 signature, there is a section which asks, you know, has
14 Legal reviewed it and approved, or if someone walks a
15 document of this nature into my office for signature, I
16 would ask them that -- the same.

17 Q And go to Exhibit C, please. C and D are very similar.
18 You can look at both of them. They're identical except one
19 is for HCMFA and one is for NexPoint, and they're in
20 different amounts. Do you recall these two documents? I
21 mean, from your deposition, do you recall these two
22 documents?

23 A I do.

24 Q And you signed these two documents; right?

25 A Yes, I did. d

1 Q So do you know how the \$1.2 million amount in one
2 agreement and the \$1.3 million amount in the other agreement
3 was arrived at?

4 A I don't recall.

5 Q Did you ever hear Mr. Dondero or anyone else say
6 something like we need tax deductions at the advisors so
7 let's channel some money over to Highland?

8 A I don't recall.

9 Q If Highland -- if there were a series of promissory
10 notes with Highland and various insiders, you're generally
11 aware of that; correct?

12 A Yes.

13 Q And from time to time, as Highland's finances were not
14 doing well and Highland would need some cash, did sometimes
15 some of these note parties prepay certain obligations on the
16 most of Highland in order to get Highland cash?

17 A There were promissory notes between Highland and the --
18 you know, and the insiders. I don't recall every -- you
19 know, I don't recall --

20 Q Sure.

21 A -- every instance where money was lent to Highland.

22 Q Okay. But I'm asking on occasion, if Highland needed
23 immediate liquidity, would sometimes Highland ask one of
24 these note parties to prepay or pay quicker its obligations?

25 A Yes.

1 Q Okay. And that was a way sometimes for Highland to get
2 immediate liquidity?

3 A Yes.

4 Q So can you think of a reason why someone would have
5 done these Exhibits C and D to get \$2.5 million to Highland,
6 as opposed to just working on one of the notes?

7 A I don't recall.

8 Q Okay. So these -- both of these contracts here say
9 that the payments are a one-time payment of estimated
10 additional actual costs owed to HCMLP for additional
11 resources used by HCMFA. Do you see that, sir?

12 A Uh --

13 Q It's the second whereas.

14 A Yes, I see that.

15 Q Okay. Do you have any reason to disbelieve that what
16 this here says is true?

17 THE COURT: I apologize. What exhibit are you on?

18 MR. RUKAVINA: I'm on Exhibit C. C and D are,
19 again, identical.

20 BY MR. RUKAVINA:

21 Q Do you have any reason to believe that what Exhibit C
22 says there in the second whereas is not true?

23 A I don't.

24 Q Okay. What about Exhibit D? Do you have any reason to
25 disbelieve that what Exhibit D says is true? The second

1 whereas.

2 A I don't.

3 Q Okay. Now, you don't have -- I'm sorry. Do you have
4 any specific recollection of these two amendments: C and D?

5 A I don't. I don't recall.

6 Q Okay. So separate from these two, was there a process
7 at Highland, whereby Highland would periodically review or
8 true up or reconcile long-term contracts?

9 A I mean, if it was stated -- yes.

10 Q Okay. What was that process, generally, before we talk
11 about any particular contract?

12 A I mean, if there was, you know, something stated in an
13 agreement, you know, and needed -- you know, needed truing
14 up, yes. I mean, things like that would be trued up on a
15 periodic basis.

16 Q And what was that -- what is the general practice of
17 that period? What was the period?

18 A I just remember generally, but it is -- I mean, that
19 would be, like, more on a yearly basis. From what I recall,
20 in years past, there were -- it was just too onerous to true
21 up agreements on less than a yearly basis. So yearly is
22 kind of more of the practice. But again, this is just a
23 general recollection.

24 Q Do you have any specific recollection that there was an
25 annual true-up like that for the two payroll reimbursement

1 agreements?

2 A I don't -- from what I recall from the DIPs, I don't
3 think there was a true-up mechanism in the agreements.

4 Q Okay. You're, of course, familiar with the services
5 agreements and the services that Highland was providing to
6 the advisors under those agreements, are you?

7 A Yes. I'm generally aware.

8 Q Okay. So the services that Highland is providing to
9 the advisors under shared services, would those services
10 have related to reviewing the advisor's payables?

11 A There was a list of shared services or services to be
12 provided to the advisors that were in the agreements and
13 detailed in the shared services agreements. Yeah, I mean,
14 the advisor did not have back-office personnel, so payroll
15 review or things of that nature would be covered.

16 But again, there's a list of shared services to be
17 provided to the advisors by Highland Personnel that's
18 detailed in those agreements.

19 Q And did those services, to your understanding, include
20 reviewing invoices and bills to the advisors for whether
21 those invoices and bills were proper and payable?

22 A Yes.

23 Q Did those services include reviewing the advisor's
24 contracts for whether rebates, setoffs, or deductions were
25 appropriate?

1 A I mean, if there were items of those -- of that nature,
2 you know, in an invoice, yeah. I mean, it would have been
3 the team's responsibility to look at items of that nature.

4 Q Well, you talked about the overpayments. When you
5 learned about the overpayments, you took them, and you told
6 Mr. Caruso about that. Did you feel like you had some duty
7 as the Highland employee under the services agreements to
8 tell Mr. Caruso about that?

9 A Wait. I don't know -- I'm not a lawyer, and I don't
10 know about duty, but I provided services. We provided
11 services under those agreements. And that's what we --
12 that's what I was providing, and that's what others on the
13 team were providing, the services that were detailed under
14 the agreements. We felt the need to tell Mr. Caruso in Q4
15 of 2019, because we felt it was important when we were
16 educating him on all things Highland for him to be made
17 aware of this.

18 Q Okay. The services that Highland was providing to the
19 advisors, as you understand them -- forget about the
20 contract. Forget about the law. You're not a lawyer. As
21 you understand, and understood those services for almost ten
22 years, would they have or should they have included catching
23 alleged overpayments that the advisors were making to some
24 vendor?

25 MR. MORRIS: Objection to the form of the

1 question.

2 MR. RUKAVINA: Form is a deposition objection, not
3 a trial objection, Your Honor.

4 MR. MORRIS: Fine. It assumes a fact not in
5 evidence.

6 MR. RUKAVINA: It's a hypothetical question
7 intentionally.

8 THE COURT: Overruled. Overruled.

9 BY MR. RUKAVINA:

10 Q Do you remember my question?

11 A No.

12 Q Okay. Again, not based on you being a non-lawyer or
13 the contracts, just based on your experience of providing
14 shared services as Highland's CFO for almost ten years, do
15 you -- would you have expected that those services would
16 have included Highland reviewing advisor contracts with
17 vendors for potential overpayments that the advisors might
18 be making?

19 A I mean, it should have been applied to all -- you know,
20 any vendors, any invoices, that the advisors were paying. I
21 mean, it was, you know, again, the advisors don't have these
22 back-office personnel, so it's the Highland employees that
23 are providing those services, if they're overpayments to
24 vendors or, you know, other third-party contracts as well.

25 Q Okay. And we saw from that example, Exhibit 147, where

1 Ms. Hendricks is sending you a list to approve. To
2 summarize, did Highland accounting employees under your
3 direction have access to the advisor's bank accounts post-
4 petition?

5 A Yes.

6 Q Okay. Did they have the ability to cause the advisors
7 from the advisor's bank accounts to wire funds to vendors,
8 when approved of by you and other people?

9 A Yes.

10 Q Okay. And is that how the advisors paid Highland post-
11 petition under the payroll reimbursement agreement and the
12 shared services agreement? Meaning that Highland employees
13 would basically pay Highland from the advisor's bank
14 accounts?

15 MR. MORRIS: Objection to the form of the
16 question.

17 MR. RUKAVINA: Again, Your Honor --

18 THE COURT: Overruled.

19 THE WITNESS: I think he said was it -- it was --
20 sorry, back to your question. I think you said it was the
21 advisor's employees that effectuated --

22 BY MR. RUKAVINA:

23 Q Let me start again. Let me start again. Was it the
24 practice -- strike that.

25 The Advisors paid Highland under the payroll

1 reimbursement agreement and the shared services agreement by
2 wiring funds to Highland. We've established that, correct?

3 A Yes.

4 Q Which human beings actually facilitated those wire
5 transfers? Actually inputted them and actually made them?

6 A It would have been members on the corporate accounting
7 team, which were Highland employees.

8 Q That's my point. Were they also advisor employees at
9 that time?

10 A They were not.

11 Q So if we can summarize, Highland employees would make
12 sure that the advisors would pay Highland under these
13 agreements, but from the advisor's funds.

14 MR. MORRIS: Objection. Leading.

15 MR. RUKAVINA: I'm just summarizing, Your Honor.

16 THE COURT: Overruled.

17 THE WITNESS: That's correct.

18 BY MR. RUKAVINA:

19 Q And I think you mentioned, did the advisors themselves
20 have any employees prior to the termination of these
21 agreements that would have or could have facilitated the
22 payment of invoices?

23 A Mr. Dondero is authorized signatory on the advisor
24 accounts, but he doesn't -- I mean, he's never sent a
25 payment, to my knowledge.

1 Q And going back briefly to those shared services
2 agreements, you established that one of the services that
3 Highland should have or could have been providing was
4 reviewing payables. Is that something that you personally
5 would have done?

6 A I wasn't reviewing invoices or payables. That was the
7 team's responsibility.

8 Q You were a C-level executive?

9 A Yeah. I did that earlier in my career.

10 Q Sure. Sure.

11 A But as CFO, I did not do that.

12 Q So if there were alleged overpayments from the advisors
13 to Highland, is that something that you feel like you
14 personally should have gone investigating and figured out?
15 Or something that someone lower level than you should have
16 brought to your attention?

17 A Yeah. I mean, I'm not reviewing all the invoices or,
18 you know, things to that degree. Like I said, it's a team
19 effort. If there's others that were aware of that, yes --

20 Q Okay.

21 A -- they need to be brought to, you know, my attention
22 and things of that nature.

23 Q So that's my point. If there are alleged overpayments,
24 would you have known about it without one of your team
25 members bringing it to your attention?

1 A Unless I was intimately aware, yes -- I mean, it -- I
2 would have relied on my team members for that.

3 Q But were you aware of these overpayments prior to Mr.
4 Klos bringing it to your attention in Q4 2019?

5 A I don't -- no, I don't remember being concerned or
6 anything to that effect.

7 Q Okay. And based on what Mr. Klos told you, you talked
8 to Mr. Caruso, and the two lawyers, just to be clear, Mr.
9 Scott -- Ellington. He was the general counsel of Highland,
10 was he?

11 A I believe that was his title.

12 Q And what was Mr. Leviton? Associate General Counsel?

13 A I don't know.

14 Q So just -- I'm asking you. You're now the CFO of
15 Highland. And the COO and the GC, the general counsel, tell
16 you about the automatic stay, and you mentioned that after
17 that, you felt that there was nothing really more to
18 discuss. Do you remember that?

19 A Yes.

20 Q Okay. Who else could you have gone to if you suspected
21 the voracity of these people's -- these experts' statements
22 to you?

23 A I didn't feel the need to talk to anybody else. Again,
24 as I testified earlier, nothing could have changed based on
25 what I was told by, you know, the firm that was now in

1 control, and Mr. Caruso, by in-house counsel, and you know,
2 there was so much going on at that time. Again, I wanted to
3 focus my efforts, my team's efforts on things that we needed
4 to work on, or we could change, or you know, we could be
5 helpful on.

6 Q Did you discuss with Mr. Caruso or these two lawyers
7 that these overpayment issues would be addressed in due
8 course in the future?

9 A That was my understanding.

10 Q Okay. Do you remember anything that any one of them
11 told you about that, specifically?

12 A He was just, you're under a stay, and you know --

13 Q And there's nothing that can be done.

14 A Nothing can be done, and it would be, you know, again
15 addressed, you know, down the line.

16 Q So let me ask you now. Now, you're wearing your
17 treasurer hat for the advisors, okay? Are you following me?
18 Now, you're not the CFO of Highland. Now, you're the
19 treasurer of the advisors, okay? Who would you have gone to
20 seek legal advice from, having heard what you just heard
21 about the automatic stay? Who was providing legal services
22 to Highland at that time?

23 A Highland in-house counsel.

24 Q The same two people we just mentioned?

25 A Yes, amongst others.

1 Q So both as the CFO of Highland and the treasurer of the
2 advisors, it would have been the same people, who would have
3 told you the same thing; is that correct?

4 A That's correct.

5 Q Okay. Did you have any reason to disbelieve what they
6 were telling you about the automatic stay?

7 A No. I'm not an attorney, and they are. And I'm going
8 to my general counsel, and others that are intimately
9 involved with the bankruptcy. I had no reason to doubt them
10 or think otherwise.

11 Q Did you rely on what they told you about the automatic
12 stay?

13 A Yeah, 100 percent.

14 Q Did you believe, based on what they told you, that it
15 would eventually be worked out in the bankruptcy?

16 A Yeah. I didn't have reason to believe otherwise.

17 Q And I think you mentioned also that you did not discuss
18 the matter with Mr. Dondero until sometime in late 2020,
19 correct?

20 A That is correct.

21 Q Okay. And is that also for the same reasons that you
22 just mentioned, because you felt that there was nothing that
23 could be done?

24 A That -- yes. I mean, again, I think I testified
25 earlier, Mr. Dondero was very busy with the bankruptcy. And

1 if nothing can be done, you know, and again I said Mr.

2 Caruso wanted -- and Sarah wanted to talk to Mr. Dondero,

3 they certainly could have.

4 Q How did you find Mr. Klos to be as your employee for

5 years and years? As far as his professional abilities.

6 A I always found Mr. Klos as a tremendous employee. I've

7 enjoyed working with him for many years. He's a great

8 individual.

9 Q Okay. Would you have expected him to inform you of any

10 red flags that he would see or suspect?

11 A What do you mean by red -- like just --

12 Q Issues. Would you have expected him to flag issues to

13 raise with his boss if he found them?

14 A Yes. I mean, Mr. Klos is very good at doing things

15 like that.

16 Q Would you have expected Mr. Klos to advise you that

17 perhaps certain numbers or analysis are less reliable than

18 they should be, for whatever reason?

19 A Mr. Klos was always good when he would put together a

20 pro forma estimate. He would list the assumptions in his

21 analysis. Yeah. And if there were some that maybe were --

22 if he made an assumption and maybe he's like okay, you know,

23 maybe this isn't the best assumption to make, but I did do

24 it, it'd be something that we would discuss over time, or we

25 would discuss -- we would discuss that assumption when he

1 would go through the analysis of the pro forma. You know,
2 again, I'm speaking generally over the years.

3 Q Because some of what you guys do, by definition, is
4 subjective, right?

5 A Yeah. There are always estimates, or you put together
6 pro formas, there are certain assumptions that need to be
7 made.

8 Q So did Mr. Klos ever tell you that there was anything
9 with respect to the December 2019 DSI analysis that we
10 discussed? Did he ever tell you that there's anything in
11 there that he red flagged for you as potentially a problem?

12 A Not that a recall.

13 Q What about the December 2020 analysis he did at your
14 direction, Exhibit Q?

15 A In the December 2020, Dave changed assumptions versus
16 the 2019 analysis, that he detailed in the email.

17 Q But he told you what those changes were.

18 A Yes. It was detailed in that email.

19 Q Yeah. Did he tell you that those assumptions might be
20 dangerous, or unwarranted, or anything like that?

21 A I don't recall having a conversation with Mr. Klos
22 about that.

23 Q Okay. And Mr. Morris asked you when you were
24 suggesting to Mr. Caruso that the payroll agreements be
25 updated or changed, he asked you how that could possibly be

1 in the best interest of Highland. Do you remember that?

2 A Yes.

3 Q But if Highland was contractually obligated under the
4 shared services agreement to do that, then do you have a
5 different answer?

6 A I mean --

7 Q I mean, Highland might lose 7 or \$8 million a year, but
8 what would be the appropriate business ethics thing to do in
9 your mind?

10 A Look, I don't -- I mean, again, I go back to there was
11 an automatic stay put in place. And I don't know what
12 could've been changed.

13 Q So was Mr. Morris's question to you academic because
14 nothing could be changed anyway?

15 A Yeah. I mean, that's what -- again, that's what we
16 found out in these discussions, right, that there was an
17 automatic stay. And so at that point, again, I didn't worry
18 about it. I can't speak for Mr. Klos, but, you know, we
19 moved on to other things.

20 Q Okay.

21 MR. RUKAVINA: Thank you. I'll pass the witness,
22 Your Honor.

23 THE COURT: All right. Redirect.

24 REDIRECT EXAMINATION

25 BY MR. MORRIS:

1 Q Mr. Waterhouse, do you understand that my firm is a
2 bankruptcy boutique?

3 A Yes. You all deal with bankruptcies.

4 Q Do you understand that we're bankruptcy specialists,
5 right?

6 A Yes.

7 Q And you communicated with me and my colleagues in late
8 2019 and early 2020 about a lot of things, right?

9 A Yes. It was primarily around -- was it the first day
10 or day one filings. That was primarily my involvement with
11 communicating with you all.

12 Q I spent a lot of time with you. I defended you in a
13 deposition that was taken by the UCC after this case got
14 transferred here to Dallas, right?

15 A Yes.

16 Q And you never asked me, or any of my colleagues if the
17 automatic stay would somehow prevent the redress of these
18 overpayments, right?

19 A I did not.

20 Q You understand that neither Mr. Ellington, nor Mr.
21 Leviton are bankruptcy lawyers, right?

22 A They aren't bankruptcy lawyers, but they were talking
23 -- again, they had -- Mr. Ellington and Mr. Leviton were
24 talking to Mr. Pomerantz and others on a routine basis. But
25 again, I'll go back to when I was informed by Mr. Caruso

1 that we were in a stay, the counsel I talked to in-house, if
2 I remember right, hired Pachulski, right, and recommended
3 Pachulski. So I had no reason not to believe Mr. Ellington
4 or Mr. Leviton.

5 Q Okay. Last question on the topic. Just to be clear.
6 At no time did you ask any bankruptcy lawyer that was
7 retained by your employer, about the automatic stay in the
8 context of these overpayments, correct?

9 A I did not.

10 Q Okay. Thank you. Mr. Rukavina asked you a bunch of
11 questions about shared services and who was responsible for
12 certain services. Do you remember that?

13 A Yes.

14 Q Okay. You are not aware of any specific service under
15 the shared services agreement that Highland failed to
16 provide at any time from the petition date until the
17 agreements were terminated in early 2001, correct?

18 A Yeah. I'm not aware.

19 Q Okay. You never had any conversation with anybody at
20 any time about Highland's failure or alleged failure to
21 provide any services under the shared services agreement at
22 any time from the petition date until they were terminated
23 in early 2021, correct?

24 A Yeah. I'm not aware.

25 Q Okay. The issue of overpayments, it's pretty simple,

1 right? There's only two pieces of information that one
2 needs to know if the advisors are paying for employees who
3 are no longer employed, right?

4 A I mean, so if you break down every agreement -- the
5 payroll reimbursement agreement, you need to know what costs
6 were incurred by Highland, and then any -- the time
7 allocation that was in the Exhibit A. And if I remember
8 correctly from our deposition for one of the HCMFA or it was
9 the HCMFA shared service agreement, there was a calculation
10 done with a markup that you walked me through. So there's
11 more to that calculation.

12 Q All right. Maybe I'm being too simplistic. One of the
13 things you have to know is how much money was paid. If you
14 want to know if there was an overpayment, you have to know
15 how much money was paid, correct?

16 A Yes.

17 Q Okay. And if you just want to know if the advisors
18 were paying for dual employees who had been terminated, all
19 you have to do is know which employees were terminated,
20 right, and then you could back out their compensation from
21 the analysis?

22 A I'm sorry. I'm trying to follow your question. You're
23 saying the advisors are making payments, right, on a monthly
24 basis. And you're saying there are -- if you want to see if
25 they overpaid, I mean, you have to look at the costs that

1 were incurred by Highland, you know, during that time
2 period.

3 Q Correct. And one way to do that is to say I'm not
4 going to pay for dual employees who have been terminated,
5 right? Isn't that part of why you think there was an
6 overpayment, because the advisors were paying for dual
7 employees who were terminated? Isn't that the bulk of this
8 analysis, if not the entirety?

9 A Yes. And a time allocation as well.

10 Q Okay. But if they had been terminated, the time
11 allocation is irrelevant, right?

12 A That is correct.

13 Q So if you know how much money was paid, and when the
14 dual employees were terminated, you'll be able to know that
15 there was an overpayment if the advisors had been paying for
16 these terminated employees, right?

17 A Correct.

18 Q Okay. Can you think of one single payment that was
19 made after the petition date on account of any of the
20 intercompany agreements that the advisors had with Highland
21 that you questioned? Where you questioned the execution of
22 the payment. Where you said that payment shouldn't have
23 been made; or that payment was made for too much.

24 A No, because we were in an automatic stay.

25 Q Okay. Did you -- I may have misheard you. Did you

1 testify a moment ago that you actually discussed the issue
2 of overpayments with Mr. Dondero in December 2020?

3 A I don't think I said that. I mean, I --

4 Q So let me ask you the question. Did you discuss the
5 issue of overpayments with Mr. Dondero at any time in the
6 year 2020?

7 A Yes. I mean, Mr. Dondero, when he -- we talked earlier
8 with what I talked with Mr. Rukavina, Mr. Dondero instructed
9 me to not make any additional payments from the advisors to
10 Highland. In that conversation, he said there were
11 overpayments that had been made.

12 Q Okay. Mr. Rukavina spent a fair amount of time on the
13 \$90,000 that you received from NexPoint. Do you remember
14 that?

15 A Yes.

16 Q And you testified that that wouldn't influence you in
17 any way because it didn't really matter to somebody who --
18 of a man of means, like yourself?

19 A Yes.

20 Q Did you receive any other payments from any other
21 entities that are owned indirectly or directly by Mr.
22 Dondero or Mr. Ellington in 2020?

23 A Yes.

24 Q How much more money did you receive from them?

25 A I don't recall the exact amount.

1 Q Was it more than a half a million dollars in total?

2 A Yes.

3 Q Okay. Is that an amount of money that causes you to
4 think about what you're doing?

5 A No.

6 MR. MORRIS: I have no further questions, Your
7 Honor.

8 THE COURT: Any recross?

9 MR. RUKAVINA: One moment, Your Honor.

10 (Pause)

11 MR. RUKAVINA: I have no further questions, Your
12 Honor.

13 THE COURT: All right. You are excused, Mr.
14 Waterhouse.

15 (Witness excused at 6:17 p.m.)

16 THE COURT: All right. Well, we're going to stop.
17 It's 6:17 p.m. Do you think you're going to be able to
18 finish tomorrow?

19 MR. MORRIS: I expect at some point during the day
20 I might move for a directed verdict. But if not, if I
21 decide not to do that, I still remain optimistic that we'll
22 finish tomorrow. That is definitely my goal.

23 THE COURT: Okay. Are you optimistic, Mr.
24 Rukavina?

25 MR. RUKAVINA: Not if he makes a motion for a

1 directed verdict. That's the first I've heard of that. And
2 I would note that because we're going out of sequence, it
3 would be a little bit unfair.

4 But provided that that doesn't happen, then yes,
5 we'll be finished with the witnesses and closing arguments
6 tomorrow.

7 THE COURT: Okay. All right. Well, we'll go
8 ahead and start at 9:30 in the morning. And I'll let you
9 know that I do have to give a CLE presentation, a Zoom
10 presentation, at noon tomorrow. So I've got to take the
11 full one-hour lunch tomorrow. We'll probably stop at about
12 11:45 to allow me to get hooked in.

13 MR. MORRIS: All right. So just to keep the Court
14 informed, while I had suggested that we would call Mr. Seery
15 this afternoon if time permitted, we're going to be calling
16 the retail board first, because it's a third-party witness
17 and --

18 THE COURT: Okay.

19 MR. MORRIS: -- I want to be respectful to them.
20 I expect it to be a relatively brief examination and then
21 we'll go to Mr. Seery.

22 THE COURT: Okay. All right.

23 (WHEREUPON, the proceeding adjourned at 6:18 p.m.)

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
DAVID KLOS		3	55	61
FRANK WATERHOUSE	65	126	152	

R U L I N G S

PAGE

None

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C E R T I F I C A T I O N

We, Sheila Orms and Nancy B. Gardelli, Court approved transcriptionists, for Acorn Transcripts, LLC, certify that the foregoing transcript is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

FOR ACORN TRANSCRIPTS, LLC April 14, 2022

/s/ 

SHEILA ORMS

/s/ 

April 14, 2022

Nancy B. Gardelli
Operating Manager