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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 § WEDNESDAY, APRIL 13, 2022
§ 9:39 A.M.- 11:17 A.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 - DAY TWO

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; WEDNESDAY, APRIL 13, 2022; 9:39 A.M.

2 THE MARSHAL: All rise.

3 (Call to Court)

4 THE COURT: Good morning, please be seated. All
5 right. We're back for day two of our trial in Highland
6 Capital Management versus the advisors, Highland Capital
7 Management Fund Advisors and NexPoint Advisors.

8 All right. We have everyone here we need. We got
9 plaintiff -- well, debtor's counsel and the advisor's
10 counsel. All right. Do you have something to present,
11 counsel?

12 MS. WINOGRAD: Good morning, Your Honor, Highland
13 is calling the retail board.

14 THE COURT: Okay.

15 MS. WINOGRAD: And the representative Ethan Powell
16 hasn't yet arrived.

17 THE COURT: Okay.

18 MR. RUKAVINA: He's right here.

19 UNIDENTIFIED: He's right here.

20 MS. WINOGRAD: Oh, I'm sorry about that. Okay.

21 THE COURT: Okay. Is that our first --

22 MS. WINOGRAD: Yes.

23 THE COURT: -- witness today?

24 MS. WINOGRAD: Highland would like to call Ethan
25 Powell please.

1 THE COURT: Okay. Tell me the name again.

2 MS. WINOGRAD: Ethan Powell.

3 THE COURT: Ethan Powell. Okay. Welcome. If you
4 could approach our witness box. That box right there, if
5 you'll -- I'll swear you in before you take a seat. Please
6 raise --

7 MR. POWELL: Okay. So --

8 THE COURT: If you could stand and I'll swear you
9 in first.

10 MR. POWELL: Oh, sorry.

11 ETHAN POWELL, WITNESS, SWORN

12 THE COURT: All right. Now you may be seated.

13 THE WITNESS: Thanks.

14 DIRECT EXAMINATION

15 BY MS. WINOGRAD:

16 Q Good morning, Mr. Powell.

17 A Good morning.

18 Q My name is Hayley Winograd, I'll be asking you some
19 questions over the next few minutes. Thank you for being
20 here.

21 A Okay. Of course.

22 Q You're a member of the board of trustees or the board
23 of directors of certain retail funds, correct?

24 A I am, yes.

25 Q Can I refer to these retail funds as the funds?

1 A You may.

2 Q Are you familiar with an entity called Highland Capital
3 Management Fund Advisors LP?

4 A I am.

5 Q Can I refer to them as HCMFA?

6 A You may.

7 Q And are you familiar with an entity called NexPoint
8 Advisors LP?

9 A I am.

10 Q Can I refer to them as NexPoint?

11 A You may.

12 Q And can I refer to them collectively as the advisors?

13 A Sure.

14 Q These two entities -- the funds are managed by the
15 advisors, correct?

16 A Correct.

17 Q And I want to talk a little bit about the relationship
18 between the regional funds and the advisors. The funds
19 entered into certain investment advisory agreements with
20 each of the advisors, correct?

21 A Correct.

22 Q And pursuant to those advisory agreements, the advisors
23 provide advisory services to the funds, correct?

24 A Correct.

25 Q And the regional board was aware that Highland filed

1 for bankruptcy in October 19th of 2019, correct?

2 A Yep.

3 Q And the retail board is aware that Highland provided
4 certain shared services to the advisors, correct?

5 A Correct.

6 Q And Highland provided these services pursuant to
7 various shared services agreements, correct?

8 A Correct.

9 Q And the retail board was aware that these shared
10 service contracts enabled the advisors to satisfy their
11 obligations under the investment advisory contracts,
12 correct?

13 A Correct.

14 Q And the retail board was aware that at some point in
15 February of 2021 the shared services agreements between
16 Highland and the advisors were terminated, correct?

17 MR. RUKAVINA: Your Honor, at this time I will
18 object. We're past the preliminaries, counsel is leading,
19 this is not a hostile witness or a party opponent, so I
20 object on leading.

21 THE COURT: Sustained.

22 MS. WINOGRAD: Okay.

23 BY MS. WINOGRAD:

24 Q Can I refer to the period between Highland's bankruptcy
25 filing and the termination of the shared services agreement

1 as the relevant period?

2 A You may.

3 Q Okay. And during the relevant period, did the retail
4 board regularly hold meetings?

5 A We did.

6 Q Did the retail board keep minutes of its meetings?

7 A We do.

8 Q And did those minutes generally reflect the
9 conversations that were had at those meetings?

10 A Correct.

11 Q And one of -- did -- was one of the topics that was
12 covered at those board meetings Highland's performance under
13 the shared services arrangements?

14 A Collectively with the advisors, yes.

15 Q Okay. And do the board minutes reflect all material
16 communications between the retail board members concerning
17 Highland's performance under these shared services
18 arrangements?

19 A It represents the conclusions reached.

20 Q Okay. Can you think of any material communications
21 that weren't represented in those meetings?

22 A Well, the meeting minutes are --

23 Q In the meeting -- in the minutes, I'm sorry.

24 A Yeah, the meeting minutes themselves aren't intended to
25 be a transcript.

1 Q Uh-huh.

2 A And our meetings sadly can go very, very long. So
3 oftentimes there will be material considerations that are
4 presented that aren't necessarily documented in the meeting
5 minutes, but the conclusions reached are.

6 Q Okay. During the relevant period, did the retail board
7 ever allege that either of the advisors ever breached any of
8 their obligations owed to the funds under the investment
9 advisory agreements?

10 A Can you repeat that question?

11 Q During the relevant period, did the retail board ever
12 allege that either of the advisors breached their
13 obligations under the investment advisory agreements?

14 A No, we did not.

15 Q Did the retail board ever notify the advisors of any
16 breach of their obligations under the investment advisory
17 agreements?

18 A No.

19 Q From the retail board's perspective, were the advisors
20 fully able to perform their obligations under the investment
21 advisory agreements?

22 A Yes.

23 Q Do the board meetings substantively reflect the
24 communications between the board members and the advisors
25 concerning Highland's performance under these shared

1 services arrangements?

2 A Our assessment was never Highland versus the advisors,
3 it was always collectively. And we were always given
4 assurances that collectively they could fulfill the
5 obligations.

6 Q Do the board minutes materially reflect the
7 communications between the board members and the advisors
8 concerning the advisors' performance under the investment
9 advisory agreements?

10 A They do.

11 Q Now, I want to talk to you a little bit about the board
12 meetings and the minutes, and specifically the process that
13 went into them.

14 A Uh-huh.

15 Q Was there a process in place to prepare and finalize
16 the board minutes?

17 A There is.

18 Q And as part of this process, did the funds
19 administrator FTI send the draft minutes to certain
20 individuals and entities for review?

21 A They do.

22 Q Did one of these entities include the funds counsel?

23 A It did.

24 Q And did one of these entities also include the
25 advisors?

1 A Yes.

2 Q Was this to give the advisors the opportunity to review
3 the minutes before they were finalized?

4 A Yes.

5 Q And it was the -- was it the secretary of the advisors
6 who reviewed the board minutes on behalf of the advisors?

7 A I'm not sure.

8 Q Okay.

9 A But that would be typical.

10 Q Okay.

11 A Yeah.

12 Q Was that person, to the best of your recollection,
13 Lauren Bedford?

14 A She was the secretary during the period.

15 Q Did the -- did SCI send the draft board minutes to the
16 advisors to give the advisors the opportunity to provide
17 feedback on those minutes?

18 A They did.

19 Q Did they specifically do this so that the advisors
20 could confirm the accuracy of those minutes?

21 A They did.

22 Q Was this process for finalizing the board minutes
23 generally the same throughout the relevant period?

24 A It was.

25 Q I'm going to ask you now about the advisors'

1 representations to the retail board about Highland's
2 performance under the shared services arrangements.

3 Did the advisors provide regular updates to the retail
4 board concerning the quality and continuity of the services
5 provided to the advisors pursuant to these shared services
6 arrangements?

7 A Collectively with the advisors, yes, but individually
8 as HCMLP service provider, no.

9 Q I'm going to turn your attention to some documents that
10 I'll be referring to for a few minutes and those documents
11 are located in the binders as exhibits in front of you in
12 Volume 1 and 2. So I might ask you to open one.

13 Can you please turn to Exhibit 58?

14 A So that would be binder --

15 Q That would be Volume 2 I believe.

16 A Volume 2, all right. 58. I should have brought my
17 glasses. Okay.

18 Q Are these the June 18th to 19th of 2020 board minutes?

19 A They appear to be.

20 Q Okay. Can you please turn to page 20?

21 A Page 20. Okay.

22 Q Do you see there in a June 2020 board meeting Mr. Klos,
23 the advisors' chief compliance officer represented to the
24 board that the advisors were monitoring the level and
25 quality of the shared services being provided by Highland?

1 A Give me one second, I'm not finished reading.

2 Q Uh-huh.

3 A Yep, I see that.

4 Q Did the board rely on the advisors to monitor the
5 quality of those shared services?

6 A We did.

7 Q Does the retail board conduct an annual 15-C review
8 process?

9 A We do.

10 Q Is this the process whereby the retail board decides
11 whether or not to extend its --

12 MR. RUKAVINA: Objection, Your Honor, leading.
13 The proper question is what is that process.

14 THE COURT: Sustained.

15 BY MS. WINOGRAD:

16 Q What's the process whereby the regional board decides
17 whether or not to extend its investment advisory agreements?

18 A It's very long and arduous process, I don't think we
19 want to get into the details here but --

20 Q But is that called the 15-C process?

21 A It is the 15-C, yes, that's right.

22 Q Okay. Can you please turn to Exhibit 59?

23 A Okay.

24 Q Are these the August 13th of 2020 board minutes?

25 A They appear to be.

1 Q Can you turn to page 6 please? Do you see that Mr.
2 Norris, the executive vice-president of the advisors, quote,
3 "provided an overview of the 15-C review materials and
4 process and discussed the expected timeline with respect to
5 board consideration of approval of the renewals?" He noted
6 that there had been no issue or disruption in services as a
7 result of the HCMLP bankruptcy matter. Do you see that?

8 A I do.

9 Q Did the retail board rely on this statement?

10 A We would have.

11 Q Did the retail board expect that the statement was made
12 on an informed basis?

13 A We would have.

14 Q Can you please now turn to Exhibit 60? Do you see that
15 these are the board minutes from September 17th and 18th of
16 2020?

17 A I do.

18 Q Can you please turn to the bottom of page 12, which --
19 and going on to the rest of 13. In September of 2020, Mr.
20 Surgent, the chief compliance officer of the advisors
21 assured the retail board that it -- that in response to
22 certain 15-C follow-up questions that at that time, quote,
23 "it was business as usual with respect to the services
24 provided to the funds and that the board would be notified
25 immediately of any developments." Do you see that?

1 A Give me one second, finish reading.

2 I do see it.

3 Q Okay. As part of the 15-C review process, was the
4 retail board also required to assess the financial
5 wherewithal of the advisors?

6 A We were.

7 Q Can you please turn to Exhibit 22?

8 A 22, so that's Volume 1?

9 Q Yeah.

10 A Okay. I'm there.

11 Q Do you see that these are the advisors October 23rd of
12 2020 responses to questions raised by the retail board to
13 the advisors in connection with the 15-C review process?

14 A I do.

15 Q If you could turn your attention to question 2, please.
16 Do you see that the regional board asked the advisors
17 whether there were any amounts payable or due to Highland
18 from either of the advisors?

19 A I see that.

20 Q Do you see that the advisors represented in their
21 response to the regional board that as of the date of that
22 letter, all amounts owed by each of NexPoint and HCMFA
23 pursuant to the shared services arrangement with HCMLP have
24 been paid as of that date?

25 A I do see that.

1 Q Did the retail board rely on the accuracy of this
2 statement in making its decision as to whether or not to
3 extend the advisory agreements?

4 A We would have.

5 Q And did the retail board assume that that statement was
6 true and accurate?

7 A We would have.

8 Q Did the retail board assume that the statement was
9 based on the advisor's due diligence and actual knowledge?

10 A Correct.

11 Q Can you please turn to Exhibit 62?

12 A Yes. Okay.

13 Q These are the October 28th of 2020 board minutes. Do
14 you see that?

15 A I do.

16 Q Directing your attention to page 3 about halfway
17 through the second paragraph, do you see that the advisors
18 represented to the board at the end of October of 2020 that
19 quote, the quality and level of services provided to the
20 funds by the advisors and pursuant to the shared services
21 arrangements have not been negatively impacted to date?

22 A Oh, boy, I'm going to have to find that. Give me one
23 second.

24 (Pause)

25 Q Uh-huh.

1 A You said halfway through?

2 Q It's about halfway through the second big paragraph.

3 A Oh, the second paragraph --

4 Q Uh-huh.

5 A -- okay, I got you. Okay. I see it.

6 Q Did the retail board assume that this representation as
7 made on an informed basis?

8 A We would have, yes.

9 Q Did the retail board rely on this representation in
10 deciding whether to extend its advisory contracts?

11 A Among other things, but yes.

12 Q Was one of the retail board's concerns during the
13 relevant period related to the continuation of material
14 services to the funds?

15 A Correct.

16 Q Was one of the assurances the retail board had been
17 asking for related to the sufficient employees at Highland,
18 whether there was a sufficient amount of employees at
19 Highland to be able to provide services that the advisors
20 needed in order to fulfill its obligations under the
21 investment advisory contracts?

22 A It would have been at the advisors and Highland.

23 Q Uh-huh. Can you please turn to Exhibit 64? This is
24 December of 2020 minutes, correct?

25 A Yep.

1 Q If you could turn to page 7 at the very bottom. Do you
2 see there that the advisors assured the retail board that
3 there was sufficient personnel to continue the shared
4 services to the regional funds?

5 A I see that.

6 MS. WINOGRAD: Your Honor, can I confer with
7 counsel for a minute?

8 THE COURT: Sure.

9 (Pause)

10 MS. WINOGRAD: That's all I have. Thank you very
11 much.

12 THE COURT: Okay.

13 THE WITNESS: Thank you.

14 THE COURT: Pass the witness. Wait. I can tell
15 you don't do this very often, right?

16 THE WITNESS: I try not to to the extent possible.

17 THE COURT: All right. Mr. Rukavina, you have
18 questions?

19 MR. RUKAVINA: Yes, I do, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. RUKAVINA:

22 Q Mr. Paul, good morning.

23 A Good morning.

24 Q Just to confirm, you're on the board of those retail
25 funds, right?

1 A Correct.

2 Q Okay. And would Mr. Seery sometimes participate in
3 these board meetings during the period that counsel has
4 called the relevant period?

5 A He would.

6 Q Do you have an understanding as to why Mr. Seery would
7 participate?

8 A I do.

9 Q What's your understanding?

10 A To provide updates on the HMLP bankruptcy/implications
11 to HCMLP's services provided under the services agreement.

12 Q And what did you understand generally to be the
13 services that HCMLP was provided to the advisors under the
14 shared services agreements?

15 A Primarily back-office accounting, finance, HR, IT,
16 support services.

17 Q Was that of relevance to the funds?

18 A It would have been, yeah.

19 Q Why?

20 A So our primary focus is the nature and quality of
21 services being provided to the investors, particularly as it
22 relates to investment selection monitoring of the funds and
23 ensuring that the financial outcomes to our investors are
24 maximized.

25 There are lots of service providers involved and it's

1 our job to assess each service provider's role and whether
2 or not they are fulfilling their role within the context of
3 an agreement we have with them, we being the investors in
4 our funds.

5 So we have separate administration agreements with SCI
6 for example. They actually do fund accounting. Our
7 advisory contract with the advisor, their primary role is
8 investment selection. They need support staff in order to
9 help facilitate that. So we really looked to the advisor to
10 assess what they needed and whether or not they were getting
11 from HCMLP all of the, you know, various back office and
12 mid-office support services that they needed to order to
13 perform their primary function.

14 Q So we'll break that down just a little bit. So first
15 of all, let's give the judge an order -- an idea of the
16 order of magnitude of the assets under management that the
17 funds have that the advisors are advising for --

18 A For these?

19 Q Yes.

20 A 3 billion we'll call it.

21 Q How much?

22 A 3 billion.

23 Q 3 billion with a B?

24 A Uh-huh.

25 Q And you mentioned back-office services, you described

1 those -- you mentioned mid-office services, can you give a
2 generalized description of your understanding of middle
3 office service?

4 A Sure. Middle office would be trade settlement, trade
5 reconciliation, performing some of the fund analysis and
6 portfolio compensation analysis. Back office would be more
7 accounting and audit support services.

8 Q Have you also heard of the phrase front office
9 services?

10 A I have.

11 Q What's your understanding of that phrase?

12 A Front office is the primary investment selection and
13 monitoring decisions.

14 Q And I think you mentioned that's what the advisors did.

15 A Yes, correct.

16 Q Okay. Did you understand that that -- did you
17 understand that shared services, those contracts did not
18 include front office services?

19 A I did.

20 Q Okay. Have you heard of payroll reimbursement
21 agreements between the advisors and Highland?

22 A I believe so, yes.

23 Q And we'll go through those in some details. Are these
24 board meetings that counsel took you through, who actually
25 prepared those meetings?

1 A That would be SCI's regulatory administration group.

2 Q Okay. Did Ms. Bedford have a -- I can't pronounce her
3 name I apologize, I'm a foreigner, did Ms. Fedford have a
4 role in that?

5 A You did a good job on that. She would have, yeah.

6 Q Okay. Was she primarily the one that put it together?

7 A She would have been the primary review party from the
8 advisors.

9 Q Do you have an understanding with whose employee she
10 was?

11 A She was I believe HCMLPs, but it's also important to
12 note that lots of people had multiple hats and were employed
13 by multiple different entities.

14 Q And you mentioned multiple times or at least twice when
15 counsel was asking you about services being provided by
16 HCMLP, which we also call the debtor here, which is why.

17 A Uh-huh.

18 Q And you mentioned that what was interest -- of interest
19 to you was the services being provided by both the advisors
20 and the debtors. Do you remember testifying?

21 A Yes.

22 MS. WINOGRAD: Objection, leading.

23 MR. RUKAVINA: Well, I'm phrasing my next
24 question. I'm just phrasing -- it's a predicate to my next
25 question.

1 THE COURT: Overruled.

2 BY MR. RUKAVINA:

3 Q What did you mean by that when you said that for both
4 the advisors and HCMLP?

5 A So, yeah, our contract is primarily with the advisors
6 period. What they choose to do with what's called their
7 bona fide profits, which is their management fee is really
8 up to them, right.

9 A lot of fund complexes don't have multiple advisory
10 entities and it's just a single advisor without any sort of
11 shared services arrangement in and amongst the various
12 entities.

13 So we really just looked at the advisor to make sure
14 that first and foremost that the financial outcomes for our
15 investors were what we set out to provide them, right, and
16 that was front office.

17 To the extent that the front office function was using
18 HCMLP to support them it was somewhat ancillary because, you
19 know, as long as they had what they needed to perform their
20 job and the performance results were as intended, how they
21 got there and how they used the management fee that the
22 funds paid them was really up to them.

23 Q Did you have an understanding during what was described
24 as the relevant period as to whether the advisors had their
25 own employees?

1 A Yes.

2 Q Okay. What was your understanding as to the advisors'
3 own employees?

4 A That the advisors' employees that were, you know, very
5 experienced, capable financial professionals, capable of
6 stepping in as needed in the event that there was any, you
7 know, misstep from a shared services perspective.

8 Q And what was your understanding as to what services the
9 advisors own employees were providing during the relevant
10 period to the funds?

11 A In any --

12 Q You mentioned front office, middle office and back
13 office.

14 A Right.

15 Q Can you kind of put them into one or more of those
16 buckets?

17 A Oh, they were front office primarily, yeah.

18 Q And during this relevant period, were you concerned or
19 to your knowledge was the board concerned about Highland
20 employees leaving en masse?

21 A Yes.

22 Q Was that discussed internally?

23 A Yes.

24 Q Was that discussed with Mr. Seery?

25 A Yes, I imagine it was.

1 Q What was the concern, why were -- why was the board
2 concerned?

3 A Again, (indiscernible - 10:04:36) services you're
4 talking about a pretty public bankruptcy, it's a competitive
5 job market, you know, Highland has a pretty complex and
6 nuanced investment philosophy and strategy. So finding and
7 retaining quality candidates in any one of those three
8 buckets you outlined, you know, in that environment might be
9 difficult.

10 Q And you also mentioned that these meetings were present
11 the conclusions reached and you mentioned that the meeting
12 sometimes took a long time.

13 A Correct.

14 Q Can you help us understand some more the relationship
15 between the meetings and what was actually discussed during
16 these sometimes lengthy meetings?

17 A As it relates to the meeting minutes or?

18 Q Yes, sir.

19 A Right. So like I said the idea isn't that the meeting
20 minutes aren't a transcript because that would be cumbersome
21 and not productive. You know, at least on a quarterly basis
22 we would have two-day meetings. We, during the period, had
23 I don't even know how many meetings, but many, many
24 meetings.

25 And the idea of the meeting minutes was really to

1 memorialize the conclusions reached, material questions
2 asked and answered. And any supporting documentation that
3 may be relevant to reach those conclusions.

4 Q Could it be that things were discussed at those
5 meetings that did not end up in the minutes?

6 A Yes, absolutely.

7 Q Do you recall whether there was ever discussed with the
8 advisors that various employees at Highland pursuant to
9 certain payroll reimbursement agreements were no longer
10 there, were no longer providing services?

11 A At some point we did hear about that, yes.

12 Q And I asked you whether you'd heard of the payroll
13 reimbursement agreements.

14 A Uh-huh.

15 Q What is your understanding of the payroll reimbursement
16 agreements between the advisors and Highland?

17 A That part of the compensation under the shared services
18 agreement was to share in some of the costs of the actual
19 labor resources at HCMLP.

20 Q Did you understand the payroll reimbursement agreements
21 were separate from the shared service agreements or did you
22 just kind of think that they were one in the same?

23 A Yeah, they were one in the same as far as we were
24 concerned.

25 Q What -- the concern to you was that you were getting

1 the services that you needed and how they were contractually
2 done didn't necessarily matter.

3 A That's right. We did not dive into that and we did not
4 dive into the bankruptcy.

5 Q Do you recall ever at these meetings specifically
6 discussing the payroll reimbursement agreements themselves?

7 A Not in detail.

8 Q What is your best recollection about the discussion
9 that you said you do remember at some point in time about
10 Highland employees leaving and no longer being available to
11 the advisors? What do you remember?

12 A That there was some attrition and we really always come
13 back to how is the attrition impacting our investors. And,
14 you know, some of the quotes in the meeting minutes include
15 the assessment that, you know, as it relates to our
16 investors, either HCMLP debtor employees were picking up or
17 the advisors' employees were stepping in and performing
18 services.

19 Q Did you have an understanding that the advisors
20 actually hired a number of their own employees to provide
21 front office service?

22 A Yes.

23 Q Okay. Also briefly do you have an understanding --
24 well, strike that. I won't burden you with that.

25 Let's go through some of these same exhibits, please,

1 that counsel took you through. Please start with Exhibit
2 No. 57.

3 A 57.

4 Q Yeah.

5 A Okay.

6 Q Okay. So let's look at page 3 please, the bottom
7 paragraph. Are you there, sir?

8 A I am.

9 Q Okay. Mr. Norris discussed the shared services
10 arrangements that each advisor is a party to with HCMLP.
11 Did I read that correctly?

12 A You did.

13 Q Okay. Is there any mention of payroll reimbursement
14 agreements there?

15 A There is not.

16 Q Okay. And he concludes or he discusses further on that
17 the advisors may use employees from HCMLP for the provision
18 of various services such as human resources, accounting,
19 valuation, information technology services, compliance and
20 legal. Did I read that correctly?

21 A You did.

22 Q Please put those services into one or more of your
23 three buckets that you mentioned earlier.

24 A Okay. All right.

25 I'll go with human resources as back office, as with

1 accounting, information technology services and compliance
2 and legal. Valuation would be more of a mid-office
3 function.

4 Q None of those front office functions, are they?

5 A None of those are front office.

6 Q Okay. And let's go to Exhibit 58, please.

7 A Okay.

8 Q And, sir, if you'll back to page 20, the same one that
9 Ms. Winograd asked you about.

10 A Okay.

11 Q And it starts by Mr. Post also discussed the quality
12 and continuity of services provided to the funds by HCMLP,
13 pursuant to shared services agreements with the advisors.
14 Did I read that correctly?

15 A You did.

16 Q Anything in there about payroll reimbursement
17 agreements?

18 A There is not.

19 Q And Exhibit 59, we're going to burn through these. I'm
20 going to have the same question for every one.

21 A Okay.

22 Q Exhibit 59, page 6 please. Okay. Page 11 please. The
23 larger bottom paragraph it starts with Mr. Seery then
24 pointed out to the board a potential conflict of interest.
25 Do you recall what Mr. Seery was discussing? Please read

1 that to refresh your memory.

2 A Sure, yeah.

3 Q Do you have a memory of what was being discussed?

4 A I do.

5 Q What is it?

6 A We held a position in our funds that were also held as
7 debtor collateral in the bankruptcy and we had collectively
8 a large position and debtor was going to liquidate their
9 position and was interested in us joining the liquidation
10 and we were not.

11 Q So that's the complex that was created?

12 A Correct, yeah.

13 Q Do you know who Jason Post is?

14 A I do.

15 Q What was Jason Post's role during the relevant period
16 vis-a-vis the funds?

17 A He was the chief compliance officer.

18 Q Okay. Do you understand whether at some point in time
19 Mr. Post left HCMLP to join the advisors?

20 A I do.

21 Q Okay. Do you have an understanding as to why that
22 happened? Well, let me ask it this way. Did it have
23 anything to do with this conflict of interest?

24 A Not directly, but yeah, it was definitely a considering
25 factor.

1 Q This conflict of interest was identified, was it a
2 concern that there might be future ones?

3 A Yep, yes.

4 Q So was Mr. Post's reason, to your understanding, for
5 changing from HCMLP to the advisors to, in effect, remove
6 these potential conflicts?

7 A That's right.

8 Q Do you have an understanding as to whether Mr. Seery
9 approved Mr. Post leaving HCMLP to work for the advisors
10 directly?

11 A I believe he did, yes.

12 Q If we continue with these exhibits, Mr. Powell, Exhibit
13 60 please. And it's going to page 7 and it's the big full
14 paragraph, it's too long for me to read, but you see that it
15 talks about Mr. Seery discussing the shared services
16 agreements and services under the shared services
17 agreements. Do you see that, sir?

18 A Yes, I do.

19 Q Any mention in here of payroll reimbursement
20 agreements?

21 A Oh, boy, give me a second.

22 No.

23 Q Okay. And if we go to -- your answer was no, correct?

24 A No, that's correct.

25 Q And if you flip to the next exhibit, please which is

1 60, or I'm sorry, we're still on 60, aren't we?

2 A Yeah, we're on 60.

3 Q Go to page 12, review of the 15-C materials.

4 A All right.

5 Q And it talks about in there that Mr. Surgent, who did
6 you understand Mr. Surgent to be?

7 A Thomas Surgent, complex CCO.

8 Q Okay. CCO. And it talks about he provided the board
9 with a status update on the HCMLP bankruptcy and discussed
10 the impact of the HCMLP bankruptcy and the shared services
11 arrangements with the funds noting he does not expect that
12 the level and quality of services would change in the
13 immediate term. Did I read that correctly?

14 A You did.

15 Q Any discussion there about the payroll reimbursement
16 agreements?

17 A There's not.

18 Q Okay. Exhibit 61, please, sir.

19 A All right.

20 Q And if you'll flip to page 3.

21 A Okay.

22 Q And take as much time as you need to read, but it talks
23 about Mr. Sauder. Who did you understand Mr. Sauder to be?

24 A D.C. Sauder, one of the counsel for the advisor.

25 Q Mr. Sauder also discussed the status of the shared

1 services agreements, et cetera, et cetera. Any mention in
2 there about payroll reimbursement agreements?

3 A There is not.

4 Q And I'll spare the Court, we're going through the next
5 10 of these and I'll address them during closing, but do you
6 remember the advisors ever telling you that everything was
7 fine under the payroll reimbursement agreements, as opposed
8 to the shared services agreements?

9 A Yeah, we would have just said is everything fine
10 relative to the shared services.

11 Q The shared services.

12 A Yeah.

13 Q Okay. And let's look at Exhibit 22 real briefly before
14 we conclude. You looked at that earlier.

15 A Yeah. Okay.

16 Q So are you there, sir?

17 A I am.

18 Q "A-1, please provide to the extent practical the
19 contingency plans with respect to the services provided
20 under the shared services agreements." Did I read that
21 correctly?

22 A You did.

23 Q And then there's an answer. Anything in here about
24 payroll reimbursement agreements?

25 A No.

1 Q And then in number 2 at the end of the response, the
2 advisors respond to you, all amounts owed by each of
3 NexPoint and HCMFA pursuant to the shared services agreement
4 with HCMLP have been paid as of the date of this letter.

5 Did I read that --

6 MR. MORRIS: One second, please, Your Honor, what
7 exhibit is that?

8 MR. RUKAVINA: Exhibit 22, the supplemental 15-C.

9 MR. MORRIS: Okay. Can we please read that more
10 accurately?

11 MR. RUKAVINA: I'm sorry, I need new reading
12 glasses.

13 MR. MORRIS: Okay.

14 MR. RUKAVINA: I'm trying. It says, all --

15 MR. MORRIS: It doesn't say shared services --

16 MR. RUKAVINA: Arrangement, arrangement.

17 MR. MORRIS: It says shared services --

18 MR. RUKAVINA: Yeah, and I apologize.

19 MR. MORRIS: -- arrangement.

20 MR. RUKAVINA: That's true and I apologize.

21 Again, you'll see that I can't --

22 MR. MORRIS: No problem.

23 MR. RUKAVINA: I'm of that age where I need
24 reading glasses and I'm too embarrassed to admit it.

25 BY MR. RUKAVINA:

1 Q All amounts owed by each of NexPoint and HCMFA pursuant
2 to the shared services arrangement with HCMLP had been paid
3 as of the date of this letter. I apologize for my mistake.
4 Did I read that correctly now?

5 A You did, yes.

6 Q Any mention about payroll reimbursement agreements?

7 A There is not.

8 MR. RUKAVINA: Okay. Thank you, Mr. Powell, for
9 your time. Pass the witness, Your Honor.

10 THE COURT: All right. Redirect?

11 REDIRECT EXAMINATION

12 BY MS. WINOGRAD:

13 Q Mr. Powell, you were aware of the payroll reimbursement
14 agreements; is that right?

15 A Conceptually, yes.

16 Q Did you view them -- did you view the shared services
17 and the front office services as one in the same?

18 A Shared services and front office?

19 Q Uh-huh.

20 A No, we do not.

21 MS. WINOGRAD: Thank you.

22 THE WITNESS: Okay.

23 THE COURT: Any recross?

24 MR. RUKAVINA: No, Your Honor, thank you.

25 THE COURT: All right. Thank you, Mr. Powell,

1 you're excused now.

2 THE WITNESS: Okay. Thank you.

3 THE COURT: All right. Your next witness?

4 (Witness excused)

5 MR. MORRIS: Good morning, Your Honor, John Morris
6 from Pachulski Stang Ziehl & Jones for Highland Capital
7 Management.

8 Highland next calls Mr. James P. Seery, Jr.

9 THE COURT: Mr. Seery.

10 MR. SEERY: Good morning, Your Honor. Off the
11 record, I've been wearing a mask because I have a cold and
12 I've been testing, so I'm -- every day, so.

13 THE COURT: Well, you may have noticed I've
14 been sniffing a lot up here and I'm pretty sure it's
15 allergies.

16 MR. SEERY: My apologies. If the Court would like
17 me to wear the mask under testimony, I can do that,
18 otherwise, I will be a bit raspy.

19 THE COURT: Well, you know, it's up to you. I'd
20 say whatever makes each individual feel comfortable, so
21 please raise your right hand.

22 JAMES P. SEERY, WITNESS, SWORN

23 THE COURT: All right. Please be seated.

24 THE WITNESS: Thank you.

25 THE COURT: Okay.

1 DIRECT EXAMINATION

2 BY MR. MORRIS:

3 Q Good morning, Mr. Seery.

4 A Good morning.

5 Q You were appointed in January of 2020; is that right?

6 A As an independent board member, yes.

7 Q Okay. And at the time -- and you were appointed with
8 two other gentlemen, correct?

9 A Yes, Mr. John Dubell (ph) and Mr. Ruff Snelms (ph).

10 Q After the independent board was appointed on January
11 1st, 2020 did the independent board meet with Frank
12 Waterhouse to go after financial information concerning
13 Highland?

14 A Yes. We met with the whole team. Often individually
15 including Frank individually for the senior people and then
16 each group. So with finance and accounting it was Frank and
17 Dave Klos.

18 Q Okay. And do you recall the topics of discussion
19 during the early period after the independent board was
20 appointed that you had with Frank and with Mr. Klos?

21 A Yes.

22 Q Can you describe for the Court what you recall
23 generally about the substance of those discussions?

24 A These were multiple topics, multiple meetings starting
25 on the afternoon of the 9th and going forward I was in

1 Dallas most days usually at least Monday to Wednesday or
2 Thursday, sometimes Tuesday to Friday but most of the days
3 up until COVID hit. And we had in-depth conversations
4 regarding each of the funds that Highland managed, each of
5 the sources of revenue, each of the obligations that
6 Highland had, the employees, everything that rolled up to
7 Waterhouse and Klos, which included HR, which rolled up to
8 Waterhouse. And then we show up -- the investing in a
9 distressed company we show up in a bankruptcy it's like real
10 estate, there's three important things, liquidity, liquidity
11 and liquidity.

12 Q Did the issue of the relationship between Highland and
13 affiliates who were owned and/or controlled by Mr. Dondero
14 come up?

15 A Yes. Right out of the gate. So Highland, the way it
16 was set up --

17 MR. RUKAVINA: Your Honor, excuse me. Your Honor,
18 he's not allowed to testify narratively, he answered the
19 question, what do you recall about that topic.

20 THE WITNESS: So right out of the gate one of the
21 important considerations were what were the contractual
22 relationships that Highland had, what were the revenues you
23 could receive from those contractual relationships, what
24 were the obligations you had to do to manage those
25 obligations, and what were the risks with respect to those

1 obligations. Did they -- were they ultimately -- were they
2 worthwhile keeping, were they things you should think about
3 getting rid of, how to staff them, were there ways to manage
4 that exposure.

5 And the interrelationship of the Highland entities
6 was front and center in the case. So even from before the
7 case got transferred here, one of the big issues for the UCC
8 which was mentioned at a lunch we had with some of the UCC
9 members which I don't -- it may have been the day of the
10 appointment was issues with respect to is Dondero -- is
11 Dondero or are Dondero entities siphoning value from
12 Highland to the detriment to the creditors and to the
13 Highland estate.

14 BY MR. MORRIS:

15 Q And did that topic continue to be discussed between you
16 and the independent board and the committee into March?

17 A These are front and center major issue and the reason,
18 the reason it was is sort of obvious. But it was not just
19 ultimate value, but it would have to do with liquidity. So
20 when we considered the various contractual arrangements what
21 were the ways that we got revenue and was that revenue
22 important enough to keep.

23 So we thought about it as the big four in terms of
24 revenue. You had the 1.0 CLOs and they would pay management
25 fees based upon the fee stream that they had, which was at

1 that point simply just the management portion of the CLO
2 fee. And then you had the HCMFA which was paying a
3 combination of fees, flat fees under the -- about a flat
4 fee, a flat fee under the payroll reimbursement and a
5 relatively flat fee although it had a slight fluctuation, I
6 can go into detail on that, on the shared services. And
7 their flat fee from NPA on shared services and a flat fee
8 from NPA on the PRAs.

9 The structure of that, that was the vast majority of
10 the revenue on a regular basis that you'd get. Everything
11 else was kind of a rounding error.

12 Q Do you recall having a meeting in which Josh Carey (ph)
13 participated where the topic of the shared services and sub-
14 advisory or payroll reimbursement agreements was discussed?

15 A Well, Mr. Terry had a -- yes, and Mr. Terry --

16 Q Do you recall the meeting?

17 A Yeah.

18 Q I just want to satisfy counsel, let me just ask the
19 questions. Do you recall the meeting?

20 A I recall the meeting, yes.

21 Q Okay. Can you explain to the judge what you recall
22 about the meeting?

23 A It was actually multiple meetings. So it started at
24 this lunch which was we stayed at the Jewel the first night
25 of the first hearing and I think our lunch was there or

1 right in and around there. And Mr. Terry and his counsel
2 peppered us with information regarding their perspective on
3 certain things went on at Highland.

4 And Mr. Terry had a unique perspective because he was
5 part of the ASIS arrangement. So ASIS which managed the CLO
6 business, which had been Highland's business and then got
7 put off to ASIS, ASIS had a shared service arrangement.
8 ASIS had a -- didn't have a -- I don't think it had a PRA,
9 but it didn't really make a difference. If it did, it might
10 have been a nominal fee. And ASIS also had a sub-advisory
11 fee.

12 So ASIS was paying sub-advisory to Highland at a very
13 low rate. And ASIS was paying shared services amounts at a
14 very low rate and getting lots of value. How did Mr. Terry
15 know this? Because he was one of the partners in ASIS that
16 benefitted from this value transfer.

17 ASIS was getting value from Highland. When the ASIS
18 bankruptcy happened and it started stripping out assets,
19 they upped the fees on the management fee from I think five
20 bips to 25. ASIS was probably making around 40. So he knew
21 exactly that these arrangements and from his perspective
22 took value away from Highland for the benefit of these other
23 entities. That was ASIS and he was focused on HCMFA and NPA
24 because NPA's completely owned by Dondero through Dougaboy
25 (ph) and HCMFA had been completely owned by Dondero but then

1 it was owned by Dondero and Okada through entities.

2 Q And after having these conversations and leading up to
3 these conversations, did you communicate with Mr. Waterhouse
4 about the economics of the intercompany agreements that you
5 just described?

6 A Well, right out of the gate that was important, not
7 only for as I said earlier for Mr. Terry's inquiry, and it
8 became a larger committee inquiry, but because of the
9 liquidity issues.

10 So I needed to know what was coming in from each of
11 these contracts, what were the risks. The 1.0 CLOs while
12 they had a lot of assets under management, they were lumpy
13 because some of them didn't have cash. They -- we've talked
14 about it before, they weren't really CLOs. They're
15 basically closed in funds because they don't go buy any
16 assets, they don't have anything that's really income
17 producing.

18 They own reorganized equity, defaulted debt, so when
19 those paid off, then one would come in and get paid fees,
20 otherwise the fees accrued. So that was lumpy. Then you
21 had direct fees from HCMFA, in the form of the two
22 agreements, indirect fees from NPA.

23 And I had a very specific conversation with Mr.
24 Waterhouse and Mr. Klos and I recall it vividly, I'm
25 burdened by that, and I can picture Mr. Waterhouse on the

1 table telling me, well -- because I looked at the exhibits
2 and I said how do I know this money's coming in. And they
3 told me it was a flat fee coming in so we could count on
4 that.

5 And I asked about the specific schedule at the back of
6 these agreements and I said, who came up with this, where
7 Sirhan (ph) is 29 percent for one and 9 percent for another,
8 how do I know that that's an accurate number. And they said
9 well -- and it's going to keep coming in every month. They
10 said, well, that's a fixed number one day, it's just a plug,
11 it was topped down, don't worry about it, that comes in
12 every month.

13 And I said, well, HCMFA does that come in every month.
14 And the answer was, well, it has a variable on the shared
15 service by it's very small, it's 290 to 300,000 a month.

16 Q I just want to --

17 A So that was the focus on the first time we talked about
18 the shared service arrangements was liquidity. We didn't
19 talk about at that point whether Mr. Terry's concern that
20 value was getting sucked out. It was first how much money I
21 have to keep the lights on here.

22 Q Okay. And you were actually looking at the exhibits to
23 the payroll reimbursement agreements --

24 A Yeah.

25 Q -- do I have that right?

1 A Uh-huh.

2 Q All right. I'm not going to take the time to go
3 through that. Did --

4 A Yeah, you'll see each of them, he's the first guy. And
5 I remember, I just remember specifically asking 9 percent,
6 how did you guys come up with that, maybe I'm too simple,
7 but I think in 5s and 10s if I'm rounding and they laughed
8 and said it's a plug number, you needed to adjust it to get
9 the output.

10 Q Okay. Did either Mr. Klos or Mr. Waterhouse tell you
11 ever that the advisors were overpaying under the payroll
12 reimbursement agreements?

13 A Absolutely not.

14 Q Okay. You sat here yesterday. You saw the analyses
15 that Mr. Klos prepared in late 2019 before the independent
16 board was appointed. Did either Mr. Klos or Mr. Waterhouse
17 show you either one of the analyses that Mr. Klos prepared
18 in 2019?

19 A I never saw those until we started preparing for this
20 trial. And this was a front and center issue. So the
21 committee was pushing very early for Highland to terminate a
22 lot of employees. Because as I said, Mr. Terry knew the
23 arrangements and knew how it worked. And it worked as I
24 described. And the committee, other members, picked that
25 up.

1 And so the first meeting, we had a face-to-face meeting
2 on March 9th in New York City at the Pachulski offices.
3 What I remember it was the last chopper out of Saigon as
4 they say, it was the last meeting before COVID really shut
5 down New York and literally that night it was over. And it
6 was a very tense meeting for a whole bunch of reasons.
7 Including UBS issues which were separate, but Mr. Terry was
8 very focused and I don't recall if he was there, but it was
9 a packed conference room, so in hindsight felt very
10 unhealthy.

11 A lot of focus on the value being sucked out by Dondero
12 entities. And I was ill prepared. I don't show up very
13 often unprepared and I was not at my best and he was giving
14 it to me pretty good.

15 And so that became a major focus for us to start
16 figuring out how -- what are we burning cash on and why are
17 we burning so much cash and why don't these arrangements,
18 the big four, CLOs which were fixed, HCMFA, NPA, why don't -
19 - I forget the fourth, why don't we have enough money
20 because we knew by then we were burning cash.

21 Q Did you communicate with Scott Ellington (ph) and Isaac
22 Leviton (ph) during the six months after the appointment
23 about various matters?

24 A Absolutely.

25 Q Did either Scott Ellington or Isaac Leviton tell you at

1 any time in the history of the world that they had
2 information from Frank Waterhouse showing that the advisors
3 were overpaying under the payroll reimbursement agreement?

4 MR. RUKAVINA: Your Honor, that's going to be
5 hearsay, objection. Those are not our officers, not a party
6 admission.

7 THE COURT: Okay. Let me think through that.
8 Okay. Not a party opponent because they're
9 technically Highland employees, so.

10 MR. MORRIS: I want to know what the newly
11 appointed independent board knew, right, isn't it important
12 to know based on their entire case -- all right. I'll ask
13 this question.

14 THE COURT: Okay.

15 BY MR. MORRIS:

16 Q Did anybody in the world, anybody in the whole wide
17 world ever tell you or any member of the independent board
18 that Highland was overcharging the advisors under the
19 payroll reimbursement agreements?

20 A It didn't happen and it couldn't happen and the reason
21 it couldn't happen was because these arrangements were
22 massive money losers.

23 So the issue that Mr. Terry raised on the first day and
24 beat me up on March 9th on didn't stop on March 9th, it
25 continued. Again, the committee's focus was how do we stop

1 the burn. We did 13-week cash flow meetings every single
2 week. I am not comfortable with a 13-week cash flow where
3 the numbers have parenthesis around them. That means
4 they're negative. And so I don't like looking out five
5 weeks and see we're running out of cash.

6 So we were continually working to figure out why --
7 where we were burning cash, where we could offset, at the
8 same time not going through a wholesale firing of employees
9 because my view at the time and the board concurred with me
10 and held the same view, was that we should try to hold the
11 organization together and get a larger reorganization, which
12 would have required Mr. Dondero's participation and it
13 wouldn't have made sense for Mr. Dondero to participate if
14 the entity had lost all its employment and utility to him
15 and his companies.

16 Q If the contracts were losing so much money, why didn't
17 you just immediately move to reject? You were getting this
18 pressure from Mr. Terry, why didn't you just reject the
19 contracts?

20 A Well, precisely because we wanted to hold the business
21 together. So what we did was, we did -- by the time we got
22 to June-ish, May/June, we had really analyzed these
23 arrangements. And we found that the arrangement with DAF,
24 which was one of the big four was profitable, it had a
25 shared service but I don't think there was a fee under it,

1 but it was a typical 2 and 20 arrangement.

2 So you've got 2 percent of the assets under management
3 and then you've got 20 percent of the upside and I think it
4 was annual, I don't think it had an earlier advancement of
5 the profit up. So that was a good arrangement. You got a
6 good sense of where that was coming in. That was a
7 profitable arrangement.

8 The other contracts by the time we had the next meeting
9 with the committee were in the 8 to \$10 million loser range.
10 That's what we were burning at Highland ex-restructuring
11 costs. So not including counsel and committee counsel and
12 financial advisors.

13 Q Okay. Let's shift gears a little bit to the provision
14 of services. From your perspective, did Highland perform
15 the services required under the payroll reimbursement
16 agreements and the shared services agreements?

17 A Absolutely. That was what the employees did and it was
18 middle, front and back. And we didn't, to be fair, look and
19 say, oh, look at this one contract versus this one. They
20 were arrangements. They were the complete arrangement with
21 HCMFA.

22 And let's be clear about what we're talking about and
23 everybody else knows this, HCMFA and NPA aren't real
24 separate entities, they've now developed.

25 MR. RUKAVINA: Your Honor, I object. Now, this is

1 narrative, this is all kinds of legal conclusions, expert
2 conclusions that has no relevance to this.

3 THE WITNESS: This is factual.

4 MR. RUKAVINA: To say that my clients are not
5 separate legal elements -- entities, the man is just
6 narratively telling you a story that has some tangential
7 relevance. He should be asked questions and give clear
8 answers.

9 MR. MORRIS: Okay.

10 THE COURT: All right. Well, there is some
11 narrative but we've got two days for this trial, you know.
12 I mean, I'm trying to balance the narrative versus we don't
13 want this going on four days. So let's just try to keep it
14 in check.

15 BY MR. MORRIS:

16 Q Mr. Seery, from the date that the independent board was
17 appointed on January 9th, 2020 until November 30th, 2020
18 when Highland gave notice of termination under the shared
19 services agreements, did you -- do you recall receiving any
20 complaints about Highland's performance of back, middle and
21 front office services to -- withdrawn. I'm going to start
22 this differently.

23 Let's call that the relevant period from your
24 appointment until November 30th, 2020. Okay.

25 I'll start with the advisors. Do you recall receiving

1 any complaints at any time during that period that the
2 advisors -- that Highland was failing to perform back,
3 middle, or front office services under the three agreements
4 -- under the agreements?

5 A From the advisors?

6 Q Yes.

7 A Not at all, never, not once.

8 Q Not once.

9 A Not once.

10 Q Okay. Is there anybody in the world that you recall
11 complaining about the provision of services by Highland
12 during the relevant period?

13 A Yes.

14 Q Who made the complaint?

15 A John Holt.

16 Q Who's John Holt?

17 A He's the CEO of NexBank.

18 Q And do you recall the nature of the complaint, just
19 briefly?

20 A Yes. He thought he was being charged too much for his
21 various service arrangements and didn't think he was getting
22 quality service, particularly from the legal department, Mr.
23 Allenton (ph), Leviton, compliance, et cetera.

24 Q And did you -- what happened as a result of the
25 complaint that you received?

1 A I investigated it. I talked to Allenton and the rest
2 of the legal team. They came back with specifics that Mr.
3 Holt was in their opinion mistaken, that they had been
4 providing significant services for NexBank and that he may
5 not have been aware of them as the CEO.

6 They complained that he as paid on an EBITDA basis so
7 that his incentive was to reduce costs wherever he could and
8 get services for free. I found Mr. Holt to be a
9 sophisticated, straight businessman. We had a discussion on
10 the phone. We agreed to disagree and defer discussion on it
11 until we could figure out how to best separate the
12 relationship between Highland Capital Management and
13 NexBank.

14 Q Do you recall receiving a letter from D.C. Sauder (ph)
15 in mid-October, 2020?

16 A I believe I got a letter from Mr. Sauder. I'm not sure
17 if I even knew who he was when I got it. And it was right
18 after, I believe it was right after things had really gone,
19 I would say south with Mr. Dondero.

20 Q Do you recall -- when you say it went south, did there
21 come a time when Mr. Dondero resigned from Highland?

22 A Beginning of October.

23 Q Okay. And your recollection is that you received this
24 -- give me just one second.

25 A In or around that time.

1 MR. MORRIS: I apologize, but give me just one
2 second.

3 Q It's Exhibit 148 in your book, if you can get that.

4 THE COURT: I'm sorry, what number?

5 MR. MORRIS: 148.

6 THE COURT: Okay.

7 BY MR. MORRIS:

8 Q And if you could just take a look at that, Mr. Seery.

9 A I thought you said it was from Sauder. This says from
10 Norris. Did I miss --

11 Q Oh, no. I may just be mistaken, I apologize. This is
12 a letter from Mr. Norris.

13 A I don't think I knew who he was either.

14 Q Okay. So do you recall receiving this letter then?

15 A I recall getting a letter in or around this time from
16 NexPoint.

17 Q And can you take a quick look at that letter and see if
18 you can let the Court know if you recall whether Mr. Norris
19 put Highland on notice about any failure to provide back,
20 middle, front office services of any kind?

21 A It looks to me to be a complaint about the OmniMax
22 issue.

23 Q Is that -- do you understand that that's the issue that
24 Mr. Powell just testified about?

25 A He -- I heard Mr. Powell's testimony and he mentioned

1 the OmniMax issue. He -- to be clear, I was invited to the
2 board meetings. I didn't volunteer to go to the retail
3 board meetings and I said I would do that. And I did raise
4 the issue around the OmniMax transaction.

5 And what happened was Highland had a big position. The
6 retail funds had a small position. We thought the
7 transaction was a good transaction because the company --
8 this other guy is going to file and the buyer of the company
9 was willing to take out the whole piece.

10 I had been in discussions with Mr. Dondero. Mr.
11 Dondero had agreed to a price. When I came back with the
12 price, he said I never agreed to that price. I said fine,
13 we're going to trade these because this is a good price.
14 And the structure of the trade was such that with the buyer,
15 if need be, would be put into bankruptcy and the hold out
16 would be crammed down. And we were happy to do that.

17 Mr. Dondero ultimately held out. The funds held out.
18 They cut a deal with the buyer and then we had to pick part
19 of it because it was less expensive than filing the company
20 for bankruptcy.

21 Q And --

22 A So they got bought out at a little bit higher level.

23 Q Is it fair to say that there was simply difference in
24 investment strategy between you and Mr. Dondero?

25 A Yes, I think that's fair.

1 Q And is that when we talk about conflict is that what
2 you're talking about?

3 A That's correct.

4 Q Can you think of any other transaction -- oh. Was it
5 possible that conflicts would arise with respect to other
6 jointly held assets?

7 A Definitely could be.

8 Q And that's really -- did you understand that's what Mr.
9 Norris was referring to?

10 A I do.

11 Q In the second paragraph.

12 A That's what it looks like he's referring to. I'm not
13 remember spending that much time thinking about this letter
14 frankly.

15 Q Okay. Do you -- I'm -- do you recall receiving other
16 letters from the advisors and from their lawyers at K&L
17 Gates?

18 A Definitely lawyer letters, yes.

19 Q Do you recall whether any lawyer -- withdrawn.

20 Do you recall whether any letter because I don't want
21 to go through all of them, they speak for themselves, so I'm
22 asking for your recollection; do you recall receiving any
23 letter sent by the advisors or by their lawyers where they
24 made any complaint at all about the provision of front, back
25 or middle office services?

1 A Never received, other than the Holt complaint related
2 to NexBank, never received a complaint about the amount of
3 the services or the quality of the services that were being
4 provided front, middle or back. And it was all three.

5 Q In the administrative claim there's an allegation that
6 you instructed Highland's employees to stop providing
7 services in July 2020. Are you familiar with that
8 allegation?

9 A I'm familiar with the allegation.

10 Q Did you instruct anybody in July 2020 to stop providing
11 services to anybody?

12 A No, never happened.

13 Q Do you have any understanding or recollection as to
14 what you said at that time that they might be referring to?

15 A Very distinct recollection, yes.

16 Q Can you explain to Judge Jernigan what your
17 recollection is as to what you actually said?

18 A There was a discovery dispute between the committee and
19 Highland at the time. And the discovery dispute was
20 actually quite surprising to me because I'd instructed the
21 Pachulski team and the Highland team to produce information
22 because there was really no point in wasting a lot of time
23 fighting about discovery.

24 And frankly Mr. Levinson found a different way to deal
25 with discovery that was less than cooperative. And the

1 committee raised the issue about multiple parties wearing
2 multiple hats to the Court. And it was a bit Alice in
3 Wonderland in terms of Mr. Leviton and others saying, well,
4 I'm the advisor to the -- I'm the counsel to the advisor and
5 I have a fiduciary duty to them, you're our lawyer, you have
6 to do what we direct you to do. And it was very
7 manufactured.

8 And my recollection, and I took it very directly
9 because I was on video, but I took this as if the Court were
10 talking to me directly was that you better make sure you
11 have your house in order regarding people with conflicts
12 what they are doing, especially lawyers, who claim to be
13 wearing multiple fiduciary hats and forsaking their duties
14 to the debtor.

15 I left that hearing really informed and nervous isn't
16 the right word, but focused, that we needed to make sure
17 that everyone got the message. So I had a specific call
18 with the entire legal department. And the legal department
19 at Highland, it may be a misnomer, because there were a
20 number of non-lawyers in that department and they did
21 different things in the Cayman Islands or other places that
22 didn't have much to do with Highland.

23 And I had very direct discussion and I used the word
24 and it seems to show up now inimical but any -- taking any
25 adverse action to the Highland estate and if anybody felt

1 that they had a reason that they couldn't do something for
2 the Highland estate I better hear about it directly.

3 And it was a very direct discussion. I had then had
4 the same call with Mr. Waterhouse, Mr. Klos, Ms. Hendricks,
5 Mr. Darquentin (ph) may have been on it, he may have been
6 too junior, but very direct. And then a similar discussion
7 with Brian Collins, head of HR, that we better -- I better
8 not hear about this again because you do it, you be fired
9 for cause and we will take action. It was, I took it very,
10 very seriously.

11 Q So there was no direction to stop performing services?

12 A No, absolutely not. You still had to do your job and
13 if something raised a conflict, I needed to know about it,
14 like ultimately the OmniMax transaction which was after this
15 time, but if you didn't think you could produce documents
16 because you had some other duty, I needed to know about
17 that.

18 If you thought that you represented any other entity,
19 Dougaboy, whomever and that interest was averse to the
20 estate, I needed to know about it. And I was very clear.
21 And I think it had the desired effect. We had a larger call
22 with the team that was not nearly as forceful, but people
23 needed to know that this is an estate and as employees of
24 the estate, you have duties to the estate. And as officers
25 of the estate, you have fiduciary duties to the estate.

1 Q And did you -- going back you mentioned OmniMax, you
2 mentioned the possibility that there might be other
3 conflicts that arose as a result of jointly held assets.
4 Other than OmniMax did, in fact, any other conflict ever
5 arise prior to the termination of the agreements?

6 A Not that I recall. And just so we're clear, you used
7 the term jointly held assets. They're not actually jointly
8 held. Highland owns its own assets. The 1.0 CLO owned
9 their own assets. HCMFA had their assets in their name.
10 NPA, et cetera, Dougaboy, et cetera, DUC, DAF (ph).

11 Q So let me restate the question. Were there any other
12 issues that arose where Highland and another entity
13 controlled by Mr. Dondero owned assets of the same kind
14 where investment decisions diverged?

15 A Not that I recall. Certainly not during this period,
16 not that I recall at all.

17 Q Okay. Did there come a time that Jason Post left the
18 employ of Highland and became the chief compliance officer
19 at the advisors?

20 A Yes.

21 Q And when did that happen?

22 A It was right after Mr. Dondero resigned, right in that
23 time frame.

24 Q So sometime in October?

25 A I believe so.

1 Q So he served in that capacity for six weeks before the
2 notice of termination was given?

3 A Roughly, I believe.

4 Q And do you have any understanding as to why that move
5 was made by Mr. Post?

6 A The reason was they requested it. I agreed that it was
7 a good idea because it was evolving and becoming more and
8 more likely that there was not going to be a grand bargain
9 or a settled solution to this case. There wasn't a moment
10 in time where you knew that, but Mr. Dondero required to --
11 we had got through mediation, very successful vis-à-vis
12 settlement with ASIS, productive vis-à-vis UBS, wholly
13 unproductive for a global settlement. We continued to try
14 to work on those things, but it became less and less likely.

15 And so by October the plan, I don't know when we filed
16 it, but it was clear it was going to get filed if we had not
17 yet filed it. And where we thought that was the crucible to
18 bring a settlement, it was having the desired effect on the
19 creditors' side to have them think about compromising their
20 claims, it wasn't bringing Mr. Dondero and the creditors
21 close enough together. Although there were efforts, but by
22 that time it looked like the --

23 MR. RUKAVINA: Your Honor, again, this is just --

24 THE WITNESS: -- the advisors could have the
25 issue.

1 MR. RUKAVINA: -- just narrative now about
2 negotiations. The question was why did Post leave. He
3 answered that question.

4 THE COURT: Sustained.

5 BY MR. MORRIS:

6 Q All right. Let's talk about the payroll reimbursement
7 agreements. Do you recall that the Court-approved
8 Highland's disclosure statement in mid-to-late November
9 2020?

10 A Yes.

11 Q And do you recall that Highland gave notice of the
12 shared service agreements that it had with the advisors on
13 November 30th, 2020?

14 A Notice of termination?

15 Q Yes.

16 A Yes.

17 Q Was there a relationship between the Court's approval
18 of the disclosure statement in mid-to-late November and the
19 sending of the notices of termination concerning the shared
20 services agreements on November 30th --

21 A Yes.

22 Q -- 2020?

23 A Yes.

24 Q Can you describe the Court -- for the Court what the
25 relationship was between those two events?

1 A The relationship was purely timing so that once we knew
2 we had a disclosure statement approved, then we could set a
3 confirmation date, and we looked at where that confirmation
4 date is and we needed to be able to terminate the agreements
5 before we got to the confirmation date or right at and about
6 to that time. Then it would, assuming it got confirmed, it
7 would go to the monetization plan.

8 Q Is it fair to say that the termination of the shared
9 services agreements was consistent with the plan of
10 reorganization that Highland was hoping to get approved?

11 A Yes.

12 Q Okay. Did this -- did the debtor ever seek to assume
13 the payroll reimbursement agreements?

14 A No.

15 Q Did the debtor ever consider assuming the payroll
16 reimbursement agreements?

17 A No.

18 Q Why not?

19 A The arrangements with HCMFA and NPA, as I said, were
20 money losers. There was -- I think I was even asked about
21 it at the confirmation hearing, why not assume these,
22 because they're money losers. So there was never a plan to
23 do that. And we weren't going to keep around staff to be
24 able to work on retail funds. The idea was to focus on
25 assets that would produce value to the creditors of the

1 estate, not to provide money losing services to third-party
2 funds.

3 Q Are you familiar with the termination provisions in the
4 payroll reimbursement agreements?

5 A Generally.

6 Q Can we take a look at them just quickly? Go to Exhibit
7 6, please.

8 Do you have that in front of you? And we're on the
9 page ending in Bates Number 622. And I would direct your
10 attention down to Section 5.02.

11 A Yes.

12 Q If Highland had assumed the payroll reimbursement
13 agreements, is it your understanding that they have -- would
14 have had to assume the entirety of the agreement?

15 A I know Counsel doesn't like me talking about the law,
16 but that is the law.

17 Q Okay. And --

18 A (Indiscernible) as we say.

19 Q And so it would have had to also assume Section 5.02,
20 right?

21 A That's correct.

22 Q And what does Section 5.02 provide?

23 A It provides that either party can terminate on 60 days'
24 advance written notice. It -- I think it's the same in most
25 of the shared service arrangements as well.

1 Q Well, but I'm just focused on the payroll reimbursement
2 agreements.

3 A Yeah.

4 Q Okay. They could terminate on 60 days' notice. Is it
5 your understanding based on this agreement that the advisors
6 needed a reason to terminate?

7 A No, neither party needs a reason.

8 Q And that's -- and where do you get that idea from?

9 A There's no provision in 5.02 that would require a
10 reason.

11 Q It says, with or without cause, right?

12 A Yeah.

13 Q Just to close this topic, can you go to Exhibit 8,
14 please, which is the one -- 6, I think, was the next payroll
15 reimbursement agreement. 8 is the HCMFA payroll
16 reimbursement agreement. And does it also have the same
17 Section 5.02 that would have permitted the advisors or HCMFA
18 to terminate the payroll reimbursement agreement without
19 cause on 60 days' notice?

20 A Yes. These two agreements are identical say for the
21 party names and the actual amount paid each month.

22 Q Do you recall -- I'm not going to dig it up. I'm just
23 going to ask you if you recall that the plan specifically
24 provided that any contract not specifically assumed would be
25 deemed rejected?

1 A Yes. That's a pretty standard provision. You only
2 want to assume the agreements that you intend to assume.
3 Excuse me.

4 Q Okay. So how come -- are you aware of any -- did
5 Highland give notice of termination of the payroll
6 reimbursement agreements?

7 A I frankly don't recall. Mr. Rukavina asked me that at
8 my deposition. I thought we did with the tiered service
9 arrangements because they -- we viewed them as one in the
10 same. But apparently, I've now learned that we didn't, and
11 they were just rejected as part of the plan.

12 Q During -- were you involved in the discussions
13 concerning the transition of Highland's employees and assets
14 to the advisors that took place in early January/February
15 2020?

16 A Yes.

17 Q During those discussions did Highland make a demand to
18 keep the employees that were performing front office
19 investment advisory services?

20 A If I understand your question, did we make a demand to
21 keep the employees? No. We were going to terminate them.

22 Q Okay. And which employees were you intending to
23 retain?

24 A At that point I was working on my team, but I was not
25 going to have more than 10 to 15 employees. I didn't need

1 them.

2 Q And the team that you were constructing, was it a team
3 that was expected to provide front office investment
4 advisory services to the advisor's post-confirmation?

5 A No.

6 Q Okay. I just --

7 A I may not be understanding your question. I --

8 Q No, you are.

9 A -- apologize.

10 Q I mean, it's -- but that's -- that was suggested
11 yesterday.

12 I heard you say, I think, in October, you know, as part
13 of the Jason Post move you thought that part of the factor
14 was that negotiations didn't -- weren't bearing fruit with
15 Mr. Dondero. Is that just generally fair?

16 A Yeah. That's fair. I think it was --

17 Q Okay.

18 A -- just the idea that there was more and more tension
19 and that even though there had not arisen another conflict,
20 but OmniMax at that time that there could be one and that it
21 would be better for the advisors to have their own chief
22 compliance officer as opposed to -- Jason worked for Thomas
23 Surgent who provided -- I think Mr. Ethan testified that it
24 was found that Thomas was the CCO for the complex. He was
25 Jason's boss. And it just seemed -- they brought it to me.

1 I think -- I don't remember if Jason did or Thomas did. It
2 just seemed a better way that if another conflict arose,
3 that Surgent or someone else wouldn't be put in the position
4 that I had admonished people about in July.

5 Q Nevertheless, do you recall that really through
6 December up until the confirmation hearing, without
7 characterizing your views as to the likelihood of success,
8 did negotiations with Mr. Dondero continue?

9 A Yes.

10 Q Okay.

11 A Not with me directly because he wasn't allowed to talk
12 to me, which was all fine by me at some point in there, but
13 through counsel.

14 Q Through counsel. Did Mr. Waterhouse play any role in
15 those negotiations?

16 A None whatsoever. These are the negotiations with Mr.
17 Dondero around a larger plan.

18 Q Correct.

19 A Yeah. None whatsoever.

20 Q None. Did you ever ask him to prepare any kind of
21 analysis of profitability for the inter-company agreements
22 between the advisors and Highland for use in the
23 negotiations?

24 A Never.

25 Q You've sat here, you know, for more than a day and

1 you've heard about the allegations about overpayments. Do
2 you recall when the first time you heard about the issue of
3 overpayments?

4 A I think the first time I recall hearing about
5 overpayments was an allegation that Mr. Dondero put in a
6 January term sheet that was part of negotiations where he
7 basically said in addition to all the value I'm getting, I'm
8 going to pick up the \$14 million advisor admin claim. And I
9 wrote an acronym for something that basically indicates that
10 I was saying, what does this mean.

11 It was nothing I had ever heard of and it was -- that
12 was the first time was in January.

13 Q And the first time you heard it was --

14 A That I recall.

15 Q -- in connection with a proposed plan of reorganization
16 that Mr. --

17 A It was a pot plan.

18 Q Pot plan.

19 A Yeah. And I think at the time it was -- I can't
20 remember the exact date, but the first couple of weeks of
21 January. And I believe he and his counsel had filed a plan
22 under seal right around that time, and this was -- which I
23 never saw. This was the term sheet for it.

24 Q We can look at them, but I'll test your memory first.

25 So that's the first time. So is it fair to say that

1 you have no recollection of the issue of overpayments being
2 raised in any of the K&L Gates letters that were sent as
3 counsel to the advisors to Highland in December 2020?

4 A Not that I recall.

5 Q Do you recall if K&L Gates or any lawyer acting on
6 behalf of the advisors ever sent any kind of demand for the
7 return of money that they alleged was overpaid under the
8 payroll reimbursement agreements?

9 A They never did. And I'll just expand for a second
10 here. It didn't make sense because we were also negotiating
11 the transition. And as part of the transition I required --
12 I wasn't going to keep providing services for free. By this
13 time it's pretty hot in January and we required NPA and
14 HCMFA to pay the shared service amount and the PRA amounts
15 in January and February, and they were doing it by a weekly
16 basis. And our term sheet demanded that they pay the
17 November and December amounts that they had failed to pay.

18 And they came back and said, well, we're going to have
19 trouble with that with Mr. Dondero and they tried to agree
20 that they could pay it over time, and ultimately I acceded
21 to that. So the transition services arrangement that was
22 going to move the employees to either NPA or an affiliate or
23 an employee-owned entity contemplated that we were going to
24 get paid back the money from November and December. Nobody
25 ever said, we don't owe you that money. You've been

1 overpaying us or we've been overpaying you or some such
2 thing.

3 MR. MORRIS: I have no further questions, Your
4 Honor.

5 THE COURT: All right. Pass the witness.
6 Mr. Rukavina.

7 MR. RUKAVINA: Your Honor, may Mr. Morris and I
8 confer for a moment?

9 THE COURT: Sure.

10 (Pause)

11 MR. RUKAVINA: Your Honor, we've been conferring
12 about schedules and we've been, I think, very cooperative
13 with each other. We've told Mr. Dondero to be here at one,
14 so we have an hour right now and I hate to tell the Court
15 that we're -- we don't want to use that hour. I would like
16 to recall Mr. Seery when my case begins.

17 We will get done today.

18 MR. MORRIS: Oh, no. Why aren't you going to
19 cross-examine him?

20 THE COURT: No. I have to stop -- my presentation
21 starts at noon. They wanted me to patch in --

22 MR. RUKAVINA: Then I'll cross-examine Mr. --

23 THE COURT: -- 10 or 15 minutes early.

24 MR. RUKAVINA: I'll cross-examine Mr. Seery now.

25 THE COURT: Okay.

1 MR. RUKAVINA: And then --

2 MR. MORRIS: I thought you said you had five
3 minutes.

4 MR. RUKAVINA: Yeah, I do.

5 And then -- yeah. But I'm just telling the Court
6 that we're going to give you back some time, but it's
7 because we had agreed to have Mr. Dondero here at one.

8 THE COURT: Okay. Yeah. But I'll need to stop at
9 11:45.

10 MR. MORRIS: All right. But I just -- I need to
11 just clarify, the whole idea is to call witnesses once.
12 We're not going to --

13 MR. RUKAVINA: Yeah. I'll call --

14 MR. MORRIS: -- recall him in your case --

15 MR. RUKAVINA: Yeah. That's fine.

16 MR. MORRIS: -- later, right?

17 MR. RUKAVINA: That's fine.

18 MR. MORRIS: Okay.

19 THE COURT: Okay.

20 CROSS-EXAMINATION

21 BY MR. RUKAVINA:

22 Q Mr. Seery, good morning.

23 A Good morning.

24 MR. RUKAVINA: Mr. Berghman, if you'll please pull
25 up Exhibit 10 to Mr. Seery's deposition.

1 Your Honor, this is being printed and will be
2 couriered to the Court as a paper exhibit prior to 1:00.

3 THE COURT: Okay.

4 MR. RUKAVINA: So we'll just have it
5 electronically for now.

6 THE COURT: Okay.

7 MR. BERGHMAN: You said Exhibit 10, right?

8 MR. RUKAVINA: Yeah.

9 BY MR. RUKAVINA:

10 Q Mr. Seery, you'll have to scroll down through this, but
11 do you -- this is a December 11th letter from K&L Gates. Do
12 you recall having received this letter through your counsel?

13 And please take -- tell my partner just scroll down at
14 your pace.

15 A Okay.

16 Q Next page.

17 (Pause)

18 A Okay.

19 Q Next page, please.

20 A I'm skimming, just to be clear.

21 Q Well, you tell us when you want the next page, please.

22 A I -- do you want me to read the whole letter?

23 Q I want to ask you just about what's written in here
24 about PRAs and shared services. But you have the right to
25 read every word of this if you need to.

1 A Just can you go to the next page?

2 And then take me back to the top.

3 Ask away.

4 Q Do you recall receiving this letter through counsel on
5 or about December 11th, 2020?

6 A I don't specifically recall this letter. There's
7 another K&L Gates letter, I believe. I thought there were
8 multiple, but I may be --

9 Q Would you please pull up --

10 A -- I may be mistaken.

11 Q -- Mr. Seery's deposition transcript. See if I can
12 refresh your memory.

13 MR. RUKAVINA: Page 42, Thomas.

14 It's not going to be in there, Mr. Seery.

15 MR. MORRIS: What exhibit is this? I apologize.

16 MR. RUKAVINA: It's Exhibit 10 to his deposition.

17 This is an impeachment exhibit that is --

18 MR. MORRIS: Oh, okay.

19 MR. RUKAVINA: -- an exhibit to his deposition.

20 MR. MORRIS: Okay. Thank you. Can I have a copy?

21 MR. RUKAVINA: That's what I told the judge. It's
22 being couriered. Paper copies are being couriered. They'll
23 be --

24 MR. MORRIS: Thank you very much.

25 Go ahead.

1 MR. RUKAVINA: -- here before lunch.

2 MR. MORRIS: Go ahead. Yeah.

3 BY MR. RUKAVINA:

4 Q Mr. Seery, you're in the wrong binder, please. It's
5 not --

6 A Oh, you can do what you like. I got binders. Am I not
7 allowed --

8 Q But I'm telling you --

9 A -- to look at them?

10 Q I'm telling you this is not in those binders, sir.

11 A That's okay. I'm just thumbing through the binders.

12 Q Okay. No problem. No problem.

13 Mr. Seery, if you'll look, please, I asked you at your
14 deposition. We marked Exhibit 10. I asked, do you remember
15 seeing this letter on or about December 11th, 2020 and you
16 answer, yes. Does that refresh your memory that you did, in
17 fact, see this letter on or about December 11th, 2020?

18 A Truly I don't recall seeing this letter.

19 Q Okay.

20 A It -- because it deals a lot with the notes. I just
21 don't recall it. There's another K&L Gates letter that I'm
22 quite sure that I did get from counsel. They were not
23 addressed to me. I don't recall seeing this letter. So I
24 quoted I said, yes. If this is the same letter, I just
25 don't recall it.

1 MR. RUKAVINA: You can pull down this deposition
2 transcript, Thomas, and go back to the letter.

3 BY MR. RUKAVINA:

4 Q Would you like to revise your prior testimony, sir,
5 that at no point in time in the history of the world did
6 anyone for the advisors or their lawyers ever inform you of
7 alleged overpayments and alleged failure to provide
8 services?

9 A No. I wouldn't. I don't recall receiving this letter.
10 This letter does complain in the one paragraph I did read
11 about shared services, about some sort of failure of
12 services. Where's the overpayment section?

13 Q Go back to payroll.

14 And, again, sir, I apologize. We'll have this on paper
15 momentarily.

16 MR. RUKAVINA: Scroll down, Thomas.

17 MR. BERGHMAN: You want the next page?

18 MR. RUKAVINA: Yes.

19 THE WITNESS: I just don't -- you know, I don't
20 recall you giving me exhibits, correct? You just put them
21 on the screen during our deposition, right?

22 MR. RUKAVINA: Sir, I ask the questions, not you.

23 I did --

24 THE WITNESS: But I'm just --

25 MR. RUKAVINA: I did send them to your counsel

1 prior to the deposition.

2 THE WITNESS: Yeah. I didn't --

3 BY MR. RUKAVINA:

4 Q You see, sir, in --

5 A We looked at them on a screen.

6 Q You see, sir, in there that it talks about -- you can
7 please read it, but it talks about based on a preliminary
8 analysis -- this is near the bottom -- next point, HCMFA
9 believed they have over-reimbursed HCMLP under the payroll
10 reimbursement agreements of approximately \$5 million.

11 A I see that, yes.

12 Q You have no recollection of having heard about that on
13 or about December 11th?

14 A No, I don't.

15 Q Then let's go back to your deposition transcript,
16 please, Page 42. Well, not yet, but do you remember I asked
17 -- well, let me ask you right now.

18 Sir, do you remember whether in light of this letter
19 there were any negotiations to try to revise the amounts
20 under the payroll reimbursement agreements?

21 A There never were, no.

22 Q Okay. And I asked you about that at your deposition
23 and you said --

24 A Yes.

25 Q -- there never were any.

1 A Correct.

2 Q Okay. So let me ask you again. You don't want to
3 revise whatever prior testimony you gave that no one from
4 the advisors, no one at K&L prior to Dondero complaining in
5 January 2021. You never heard about potential overpayments
6 under the payroll reimbursement agreements?

7 A I don't recall ever hearing about potential
8 overpayments. Obviously, this December 11th letter was
9 received by my counsel. I am certain they gave it to me. I
10 do not recall it. So when you showed it to me at the
11 deposition I just missed because there is another K&L Gates
12 letter that's pretty lengthy in and around this time.

13 Q So when you said you were --

14 A There might be two or three.

15 Q So when you said you read it on or about December 11th
16 at your deposition, you're now saying that you were
17 incorrectly testifying at your deposition?

18 A That's correct.

19 Q You --

20 A Yes.

21 Q -- confused it with another K&L letter?

22 A Correct.

23 Q Okay.

24 A I just don't recall seeing this letter.

25 Q Okay. But --

1 A I'm sorry.

2 Q -- would you expect your professional counsel at
3 Pachulski to forward this to you, this letter --

4 A Absolutely.

5 Q -- or advise you of its substance?

6 A They certainly would have forwarded it to me. I'm --

7 Q Okay.

8 A I suspect they would have talked to me about it. I do
9 not recall those conversations, not because it's privileged.
10 I just don't recall having a discussion about this letter.
11 There were multiple letters at the time.

12 Q Okay. Do you think that the advisors could have
13 terminated the payroll reimbursement agreements or shared
14 services agreement post-petition without violating the
15 automatic stay?

16 A Absolutely.

17 Q Okay. You're a lawyer?

18 A Yeah.

19 Q And you've been a bankruptcy professional for decades?

20 A Yes.

21 Q And you're telling the Court that the automatic stay
22 does not prevent a counterparty to an unassumed executory
23 contract from terminating that contract?

24 A That's not what I said and that's not what you asked
25 me.

1 Q I asked you -- I'll ask it differently.

2 Do you think that had the advisors tried to terminate
3 these contracts, all four of them, post-petition, that that
4 would have been a stay violation?

5 A Not if they did it correctly, no.

6 Q And how would they have done it correctly?

7 A They would file a motion to terminate the contract and
8 set forth why --

9 Q That's a little different --

10 A -- they wanted to term --

11 Q That's a little different.

12 MR. MORRIS: Let him -- please let him finish his
13 answer.

14 THE WITNESS: Except what -- why?

15 MR. RUKAVINA: That's a little different.

16 THE WITNESS: You can fight with me all you want.
17 You asked me, could they do this, and the answer is yes.

18 MR. RUKAVINA: Is it --

19 THE WITNESS: You file a motion to terminate the
20 contract and they set forth their reasons. And even though
21 it's without cause, the debtor is protected. But that
22 doesn't give the debtor the right to just receive money and
23 not get services. That happens all the time. That's what
24 happens in Bankruptcy Court.

25 MR. RUKAVINA: Word plays, Mr. Seery. Word plays.

1 BY MR. RUKAVINA:

2 Q What about the January --

3 A It's not.

4 Q What about the January 9th injunction prohibiting Mr.
5 Dondero from causing any related entity from terminating a
6 contract?

7 A The --

8 Q Do you believe that that order would have prevented the
9 advisors from terminating these four contracts?

10 A No. They have to come in to the court and file a
11 motion.

12 Q Okay.

13 A Now I guess you're admitting that Mr. Dondero
14 completely controls --

15 Q Stop talking, sir.

16 A -- the advisors.

17 Q I've answered -- you've answered my question. I've
18 asked a question. You've answered it. Okay.

19 A Oh, I'm sorry.

20 Q You're not here to pontificate. You're here to answer
21 questions.

22 MR. MORRIS: Your Honor, I know Mr. Seery is a
23 seasoned professional, but there ought to be a limit to the
24 badgering.

25 THE COURT: Okay. Mr. Rukavina --

1 MR. RUKAVINA: I'm actually done --

2 THE COURT: -- I know you --

3 THE WITNESS: I'm okay.

4 THE COURT: -- can keep it in check here.

5 MR. RUKAVINA: Okay.

6 THE COURT: Okay.

7 BY MR. RUKAVINA:

8 Q And I think you testified that you never instructed
9 Highland employees not to provide services. Did I get that
10 correct? You never -- when Mr. Morris was asking you about
11 whether you ever issued --

12 A No. I never instructed any Highland employees not to
13 provide services. I did instruct Highland employees not to
14 take an adverse position to the estate, and if one arose,
15 they had to come to me.

16 Q Okay. You taught me a word that I never heard before.
17 It's a cool word. Inimical. Is that --

18 A You've got to expand your vocabulary.

19 Q I agree. You -- did you not issue instructions that if
20 any Highland employee undertook an action inimical to the
21 interest of Highland they would be fired?

22 A Yes.

23 Q Thank you.

24 MR. RUKAVINA: I'll pass the witness.

25 THE COURT: Redirect?

1 MR. RUKAVINA: And just so Your Honor knows, we'll
2 supplement the record with that Exhibit 10 to the deposition
3 as soon as it comes in.

4 THE COURT: All right.

5 MR. MORRIS: Just one question, Mr. Seery.

6 REDIRECT EXAMINATION

7 BY MR. MORRIS:

8 Q At no time prior to the termination of the shared
9 services agreements did you ever hear the word -- no. Let
10 me rephrase.

11 Did you ever hear the word, overpayment, at any time
12 prior to the date that Highland gave notice of termination
13 on November 30th, 2020?

14 A No.

15 Q At any time prior to November 30th, 2020 did anybody
16 ever tell you that Highland was failing to perform back
17 office middle office or investment advisory services on
18 behalf of the advisors?

19 A No.

20 MR. MORRIS: No further questions.

21 THE COURT: Any recross?

22 MR. RUKAVINA: Just very briefly.

23 RECROSS-EXAMINATION

24 BY MR. RUKAVINA:

25 Q Mr. Seery, I want to be very respectful, but I heard

1 you say earlier that you're cursed with apparently a very
2 good memory because you remember exactly how Mr. Waterhouse
3 was seated opposite of you when you were having that
4 discussion.

5 A Typically, yes.

6 Q So --

7 A When I tie the verbal to the visual, I actually have a
8 pretty good memory.

9 Q I'll share that with you.

10 But sitting here today you still don't remember the
11 December 11th K&L letter raising the overpayments and the
12 failure to provide services?

13 MR. MORRIS: Objection, Your Honor. Beyond the
14 scope of redirect. I asked questions going to November
15 30th, 2020, period, full stop.

16 MR. RUKAVINA: That's fair enough, Your Honor.

17 THE COURT: Okay. Sustained.

18 MR. RUKAVINA: Thank you.

19 THE COURT: All right. Mr. Seery, you're excused
20 from the witness stand.

21 Thank you.

22 THE WITNESS: Thank you, Your Honor.

23 THE COURT: Okay.

24 MR. MORRIS: So, Your Honor, as discussed with Mr.
25 Rukavina, respectfully we would like to break now.

1 THE COURT: Okay.

2 MR. MORRIS: What time do you think the Court will
3 be available to reconvene?

4 MR. MORRIS: I would say five after one.

5 MR. MORRIS: Okay. We'll --

6 THE COURT: I just, the meeting is supposed to --

7 MR. MORRIS: We'll --

8 THE COURT: -- stop at one and --

9 MR. MORRIS: We'll be back at five after one, and
10 after conferring with Mr. Rukavina, we do remain confident
11 that we're going to finish today. There are only two more
12 witnesses. I expect my examination of both Mr. Dondero and
13 Mr. Norris to be under an hour each --

14 THE COURT: Okay.

15 MR. MORRIS: -- for sure.

16 THE COURT: So we just have Dondero and Norris.

17 MR. MORRIS: Yeah. That's it.

18 THE COURT: All right. Thank you.

19 MR. MORRIS: All right. Thank you, Your Honor.

20 THE COURT: We'll see you at five after one.

21 THE COURT OFFICER: All rise.

22 (Recessed at 11:17 a.m.)

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
ETHAN POWELL	4	17	34	
JAMES P. SEERY, JR.	36	69	80	80

R U L I N G S

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None

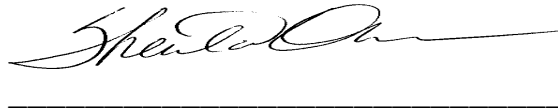
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C E R T I F I C A T I O N

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



SHEILA ORMS



April 14, 2022

Nancy B. Gardelli
Operating Manager