UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE:	.	Case No. 19-34054-11(SGJ)
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HIGHLAND CAPITAL MANAGEMENT, L.P.,	.	Earle Cabell Federal Building 1100 Commerce Street Dallas, TX 75242-1496
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Debtor.	.	
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	.	Adv. No. 21-AP-03010(SGJ)
HIGHLAND CAPITAL MANAGEMENT, L.P.,	.	
	.	
Plaintiff,	.	
	.	
v.	.	
	.	
HIGHLAND CAPITAL, MANAGEMENT FUND ADVISORS L.P., *et al.*,	.	
	.	
Defendants.	.	Wednesday, April 27, 2022
. . . . .	.	1:34 p.m.

TRANSCRIPT OF HEARING ON CLOSING ARGUMENTS
BEFORE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT JUDGE

TELEPHONIC APPEARANCES:

For Plaintiff Highland Capital Management, L.P.:	Pachulski Stang Ziehl & Jones LLP BY: JOHN MORRIS, ESQ. 780 3rd Avenue, 34th Floor New York, New York 10017
For Defendant Highland Capital Management Fund Advisors, L.P.:	Munsch, Hardt, Kopf & Harr BY: DAVOR RUKAVINA, ESQ. THOMAS DANIEL BERGHMAN, ESQ. 500 North Akard Street, Suite 3800 Dallas, Texas 75201
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Proceedings recorded by electronic sound recording, transcript produced by a transcript service.

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THE CLERK: All rise. The United States Bankruptcy Court for the Northern District of Texas Dallas Division is now in session. The Honorable Stacey Jernigan presiding.

THE COURT: Good afternoon. Please be seated.

All right. We are here for closing arguments in the Highland Capital versus Advisors matter, Adversary 21-3010. Let's get appearances first on the record for Highland first.

MR. MORRIS: Good afternoon, Your Honor. This is John Morris, Pachulski Stang Ziehl & Jones, for Highland Capital Management, L.P., and I'll be handling today's closing argument on behalf of my client.

THE COURT: All right. Thank you.

Now for the Advisors, who do we have appearing?

MR. RUKAVINA: Your Honor, good afternoon, Davor Rukavina and Thomas Berghman here for the Advisors, NexPoint Advisors, L.P., and Highland Capital Management Fund Advisors, L.P.

THE COURT: All right. Thank you.

All right. That should be all the appearances. We have lots of observers, I'm sure. I believe we allocated one hour each to Highland and then the Advisors collectively. Correct?

MR. MORRIS: That's right, Your Honor. And as the plaintiff, I'm hoping that I don't use my full hour. And whatever time remains from my allotted time, I'll reserve for

rebuttal.

THE COURT: All right. We will allow rebuttal if you have time.

All right. Well, with that, let's begin. It's 1:35 per the Court's clock. So, Mr. Morris, I'll hear your closing.

MR. MORRIS: All right. And I would ask Ms. Canti (phonetic) to put up our deck, our PowerPoint presentation that we sent to the Court and to Mr. Rukavina in advance of today's --

THE COURT: Okay.

MR. MORRIS: -- argument. So, okay, I'll begin the clock, Your Honor.

And thank you for hearing us this afternoon. Thank you for your patience the week before last in accommodating our travel schedules and allowing us to complete a pretty grueling two days of testimony. I think it was helpful.

And I'd like to begin if we could just turn the deck to the next slide and just remind the Court that at Docket Number 91, Highland filed its proposed findings of fact and conclusions of law. We stand by every work in that 68-page filing. I'm hoping to use my time here this afternoon to simply highlight certain facts that came out of the trial, as well as to kind of summarize where I believe the evidence landed and where I believe the Court ought to rule.

Just to quickly go through the claims, Highland's

claims are awfully straightforward. There's no dispute that the Advisors stopped paying for their services under the various agreements at very specific points in time. There's no dispute as to the amounts that are owed under those agreements. And so unless the Advisors can prove that Highland was in breach of one or more of the agreements, I think that there's an undisputed issue as to Highland's claim and as to the Advisors' liability under that claim.

We believe that the Advisors' claims are meritless, Your Honor. We believe that -- and I think there was kind of a sea change during the hearing. I think the Advisors kind of -- and we'll talk about this more in a moment -- shifted their theory of the case. And I believe that we now have an agreement that the contracts are indeed unambiguous.

As I'll talk about a little bit more, there really is no such thing, at least in the context of this case, of an overpayment. Even if the Court were to find there was an ambiguity, and I'll go through the evidence again as quickly as I can, the parole evidence --

THE COURT: Okay. Just a moment. My court reporter's saying we need to stop.

(Court and Clerk confer briefly)

THE COURT: I apologize. We are having a technical sound issue. I didn't observe it, but the court reporter equipment -- just bear with us a moment.

(Pause)

THE COURT: Okay. Just so we can let the lawyers know, how long do you predict this is going to take?

UNIDENTIFIED SPEAKER: Testing, testing.

THE CLERK: It's not coming through.

UNIDENTIFIED SPEAKER: Still not coming through.

THE CLERK: How long do you think it's going to take?

UNIDENTIFIED SPEAKER: I have no earthly idea. I'm not sure what's going on. Give me five minutes.

THE COURT: Okay. Lawyers, I apologize. They say give them five minutes. They hope they can get this sound issue. I greatly apologize, but give it five minutes.

(Off the record to handle technical issues with audio equipment)

(Back on the record)

THE CLERK: All rise.

THE COURT: All right. Please be seated. We're back on the record in the Highland closing arguments in Adversary 21-3010. All right.

Mr. Morris, we're just going to start the clock over in light of a disruption less than five minutes into your closing. So you may begin.

MR. MORRIS: Okay. Thank you, Your Honor. And again, John Morris, Pachulski Stang Ziehl & Jones for Highland.

As I had mentioned earlier, for the record, Highland

had filed at Docket Number 91 its proposed findings of fact and conclusions of law. We continue to believe that that document fairly sets forth and describes a mountain of documentary evidence that supports its claims and that defeats the Advisors' claims.

Just to summarize kind of where we are, we believe that there's no dispute as to Highland's claim. We don't believe there's any dispute as to the time in which the Advisors failed to pay for services or the amounts that were due under those contracts, so that unless the Advisors can prove that Highland is in breach, I believe that there's no dispute that Highland would be entitled to a judgment.

Highland believes that the Advisors' claims are frivolous. After some back and forth, I believe that the parties are in agreement now that the contract is unambiguous and that, as I'll discuss further, there really is no such thing as an overpayment under the circumstances that we find ourselves here.

Even if the contracts were ambiguous in any way, we believe the evidence firmly establishes that Highland's interpretation is the only fair and reasonable interpretation. That evidence includes parole evidence that led up to the execution of the relevant agreements, and it also includes the parties' course of dealing and the surrounding circumstances.

We believe the evidence will establish and has

established that Highland has fully performed, that the substance of the advisor's claims has changed so radically over time that the credibility of the claim itself is called into question, and their last-minute hail Mary to Frank Waterhouse is nothing but a fumble or an incomplete pass at best. Mr. Waterhouse's story will not withstand scrutiny.

If we can go to the next slide just to summarize and to highlight a couple of additional provisions of the relevant, and I'm focused here on the Payroll Reimbursement Agreement because that is the bulk of the Advisors' claims. Again, Section 2.01 of the agreement provided that not just NexPoint but HCMFA because the documents are identical, and they can be found at Exhibits 6 and 8, provided that the Advisors would reimburse Highland for the actual cost of certain employees, again with a capital A and a capital C.

Capital A and capital C actual cost is defined in the agreement to be a flat fee absent a change pursuant to Section 2.02. There's really no dispute about that. It's plain language (indiscernible) applied as such. Section 2.02 states that the parties may agree to modify the terms and conditions of the reimbursement. They may agree, they may not agree. Nobody can act unilaterally.

I believe earlier in this case there was a suggestion that Highland had some obligation to do something on its own. You can't find Highland's name in Section 2.02 because nobody

has the right or the obligation or the ability to act unilaterally.

Section 4.02 emphasizes that if somebody does want to make a modification, they have to notify the other party before the last business day of the calendar month. And that's critical, Your Honor, because it shows that the parties agreed that any change would be prospective. There wouldn't be a retroactive change because if there could be a retroactive change then you've just rendered the definition of actual cost absolutely meaningless. Right?

If at any time somebody can say, oh, I didn't like what I paid for the last three years, or in this case the last 12 months, then why even have a definition of actual cost. Right? So you've got to read the agreement together. Section 4.02 clearly establishes that any request for change under Section 2.02 is going to be prospective only.

Section 6.02 says that the agreement can only be amended by a writing of the parties. The parties knew that. We know that the evidence in dispute indisputably establishes that they exercised their right. They did agree to modify under Section 2.02 in December 2018, and we'll talk about that more. So the parties know exactly what they're doing.

And if you remember in my opining, Your Honor, I suggested that the definition of actual cost, we could have called it hamburger, we could have called it tofu if that's

your preference. And the reason that I said that, Your Honor, is because Section 6.07 exists. And Section 6.07 says the descriptive headings are for convenience, and they don't constitute a part of the agreement.

So again, you know, everything that I think the Advisors are relying upon are all of these headings. The only thing that matters is the definition of actual cost, Section 2.02, and that any agreement has to be prospective, not retroactive. We believe that that's what the Payroll Reimbursement Agreement shows.

If you go to the next chart, Your Honor, it's really just a summary of Mr. Klos' damage analysis. It is really incredibly straightforward. Under the next point, agreements, no payment was made in December or January. All three agreements were flat-fee agreements. We've simply multiplied the flat fee by the period of time that remained unpaid to get to the total.

The only wrinkle here is the HCMFA Shared Services Agreement. If Your Honor recalls, there's one -- that's the only contract of the five that isn't a fixed fee. But it stayed within a very narrow band of 300,000 to 310. So we just took an average because they didn't pay. And that's how we got to the 915 because they didn't pay. If you recall the testimony from Mr. Klos, they didn't pay November either for that particular contract because Highland had not yet prepared

the invoice. Okay?

So that's the damage calculation. We're entitled to costs, fees, and expenses. You know, in the joint pretrial order, the parties agreed that that issue would be resolved subsequent to the entry of a judgment, if one is entered on Highland's behalf. We'll just follow Rule 54 and come back in a couple of weeks for a calculation of our costs, fees, and interest.

If we can go to the next slide, I mentioned, Your Honor, from, you know, I think any fair reading of the Advisors' pleadings, you know, always changing, always trying to adapt to the evidence instead of coming in with a consistent story. You know? But we adapt and we respond. And this is where we are.

Their original claim which was filed over a year ago said, alleged that Highland stopped providing services in July 2020. Obviously, that makes no sense. It's contradicted by every single report to the Retail Board. They in fact relied on the wrong contract in their original administrative claim. They said that the NexPoint Shared Services Agreement was an actual cost sharing agreement. And they cited not to the applicable agreement, the one from January 2018, but they cited to the wrong agreement, the one from 2013.

And their entire argument on overpayment was simply that it was an overpayment because there were employees on that

Exhibit A were no longer employed by Highland, and it was incredibly outdated. This is just, if you just look at Paragraphs 16, 17, and 18 of their administrative claim, that's all they said.

We responded in the fall of 2021. The Advisors filed a response. They didn't really change their tune much on the overpayments. But they insisted that they could not possibly have waived any rights under any of the agreements because the issue didn't crystalize for them until November 2020. Okay? So they've shifted from July 2020 when we stopped providing services. One would hope that they would have known if we'd actually done that, to the issue not really crystalizing until November 2020.

And then on the eve of trial, we got a completely new and different story, a very contradictory theory. Instead of saying that the issue didn't crystalize until November 2020, all of a sudden we came up with Frank Waterhouse, not Dave Klos, but Frank Waterhouse noted the overpayments. There's no evidence that Frank Waterhouse did this.

But in any event, Frank Waterhouse noted the overpayments in late 2019 and asked Fred Caruso, then allegedly the CRO of Highland, to, quote, change the reimbursement amounts, but was told nothing could be done because of the automatic stay. Dustin Norris, right, he's quoted as having repeatedly discussed the matter with Highland's controller

starting in late summer or early fall of 2020.

I don't know how you can make that statement when just a couple of minutes before in your response you told the Court that the issue didn't crystalize until November 2020. Based on the pleadings, I don't think there's any way to actually figure out when they learned what because it just conflicts, all of the statements just conflict with each other.

But be that as it may, the important point is that on the eve of trial, they were forced into the 2.02 corner. Right? They had started out by saying Highland had the obligation to change the amounts that were due because they were in control under the Shared Services Agreement. When, you know, that become untenable because of the language of Section 2.02, they tried to go with the overpayment and just say the interpretation of the contract was that they shouldn't pay for employees who weren't there.

Now they're kind of, you know, last stop, last call. The agreement, Highland breached the agreement because it didn't negotiate in good faith under 2.02. Last call. Third try, last call.

Your Honor, we believe everything I'm about to say is irrelevant, if I can humbly say that, because the contract is clear and unambiguous. But to the extent that the Court has a different view, or to the extent the Court wants to get comfortable that the plain and unambiguous terms of the

contract mean exactly what they say, we're going to just summarize what the evidence was that led up to the execution of the Payroll Reimbursement Agreements.

I don't think there's any dispute that 2017 was a difficult year for Highland. In December of that year, if you look at Exhibit 30, Sean Fox and Tim Cournoyer discussed shifting NexPoint Shared Services Agreement to a flat monthly fee. It's a very significant development, has nothing to do with Dave Klos. I'm sure we're going to hear a lot of criticism of Dave Klos. But understand that Dave Klos was not involved at this point.

The following month, in January, Klos does get involved. And he testifies that he gets instructions from Mr. Dondero to increase from $1.2 million to $6 million the total paid by the Advisors to Highland. And they come up with an allocation for the services among NexPoint and its affiliates. And that is also in the Exhibit 130. And that happens on January 4th.

Within seven days, Frank Waterhouse executes on behalf of Highland and NexPoint three agreements, a subadvisory agreement, the new Shared Services Agreement, and the NexPoint Real Estate Advisors Shared Services Agreement. And when you add up the flat fees, there's no dispute, there can't be any dispute that these are three flat-fee agreements that when you add them up, it's $500,000. When you multiply it by 12 --

THE COURT: Mr. Morris, could you maybe close your email box? Every time you get an email, we get that tone, and it's kind of distracting.

MR. MORRIS: Sure. Okay. I'm just going to stop my watch for a second and I'll do just that. Give me just a moment, Your Honor.

(Pause)

MR. MORRIS: Okay. Can you hear me now?

THE COURT: Yeah. It's a little faint, but --

MR. MORRIS: Okay. But I think I solved the problem. Okay. So --

THE COURT: Okay. Good.

MR. MORRIS: So they've got this $6 million. It's three contracts, and they're all signed. If you look at Exhibit 30, you have three signed agreements, right? And we're going to hear criticism about Dave Klos and he's lying. But it doesn't matter because there's no dispute that three agreements are created. They equal the $6 million.

And Jim Dondero is told that because on January 26th at Exhibit 86, you have the deck from the annual review meeting. And Mr. Dondero and Mr. Okada are given a ton of information, including the fact that the Acis CLOs will be reset so that their useful life is extended for two more years, they're projected to generate more than approximately $10 million of revenue which is the second largest source of

revenue.

They're told explicitly that the assumption in the projections is that NexPoint and its subsidiaries will play a flat $6 million per year for subadvisory and shared services. And but that notwithstanding these changes, notwithstanding all of this, Highland is still going to lose $12 million in 2018. But that is the deal.

January 26th ends. They've got three signed agreements. It's $6 million flat. They're looking forward to getting this income from Acis. And if we turn the page, that's when the wheels start to come off. And this is all very important, right? This is both parole evidence as well as the surrounding circumstances because within days, Josh Terry commences the involuntary against Acis. That puts into -- that puts at risk the $10 million that was projected for the Highland complex in 2018.

So Mr. Fox and Mr. Cournoyer, not Mr. Klos, respond by creating a flat-fee agreement for HCMFA, a subadvisory agreement. Not a payroll reimbursement agreement. Nobody has ever uttered those words at this point. It is a flat fee subadvisory agreement based on the NexPoint template. And that can be found at Exhibit 87. This is the best parole evidence you can possibly have.

The wheels come off again. They think they solved the Acis problem. But on March 15th, Lauren Thedford informs

Fox, Surgent, Cournoyer, and Post, right? Mr. Post is a chief compliance officer for the Advisors. Ms. Thedford is not only a lawyer, she's an officer of the Advisors. She's the secretary of the Advisors. Dave Klos isn't even on this email chain yet. He's aware of this, but he's not participating in these conversations directly.

And Ms. Thedford informs the team, because this is a team approach, that these subadvisory agreements are not viable because they can't be retroactive, and they need Retail Board approval and an in-person meeting. There was some testimony from Mr. Norris I think about how -- I think he testified or maybe the Retail Board representative did that the Retail Board wasn't interested in front office services, or that they didn't need investment advisory services, or that, you know, Highland didn't supply.

Please. Look at Ms. Thedford's email. Why would they need to obtain the Retail Board's approval at an in-person meeting to enter into a subadvisory agreement if there was no expectation and intention that Highland would be providing subadvisory services to the advisors? It makes no sense. But that's going to be the theme of this presentation.

So after coming to that conclusion that you can't go retroactive and that you need the Retail Board's consent at an in-person meeting, they come up with the concept for the Payroll Reimbursement Agreement because it needs neither of

those things. Right? And otherwise, Highland is going to get no revenue through June. I think Mr. Klos testified that that number was about $4 million.

So she sends the draft of the PRA to Mr. Fox. And this is the coincidence, Your Honor. The only reason that Dave Klos gets involved is because Mr. Fox is on vacation. And you can just look at Exhibit 87. And he adds Mr. Klos to the email chain because Mr. Fox is out of the office. That's how Mr. Klos gets involved. He's not there thinking that in two years, Highland's going to be in bankruptcy and Jim Seery is going to come along.

He's doing his job as a loyal employee to this enterprise. And he tells Ms. Thedford that this isn't going to work, and this is in writing, Your Honor. It's just crystal clear. All of this analysis of actual costs involves subjective assumptions. It creates a ton of internal work that isn't adding any value to the overall complex. And that's how they viewed this.

It's part of the overall complex. And that's a word that we're going to hear a few times this afternoon. Mr. Klos suggests having a schedule as of January 1st, 2018 and say that Actual Cost with an uppercase A and C, shall be set out in the schedule, paid monthly in installments so that the exercise is only performed once. And then if nobody likes it, they can terminate or they can renegotiate.

That's exactly what happened. That's what the agreement now says. And Mr. Klos does create this $252,000 schedule, right? But again, that $252,000, that's just taken from the subadvisory agreement that has already been signed on behalf of NexPoint. Right? He says I backed into the number and I did the best I could using that number. No debate about that. You can't come up with those numbers, and we'll talk about that in a minute. It can't be an accident.

I'll say, Your Honor, that's kind of -- that's how we get to the agreement. And so on May 5th, I think, they signed these Payroll Reimbursement Agreements. I don't think there's any dispute that they do not exist. If Ms. Thedford doesn't give the legal advice that the subadvisory agreements, the flat-fee subadvisory agreements that have nothing to do with costs, that don't identify anybody, right, would never exist if those things were viable.

If we can go to the next slide, I've created some issues, Your Honor, that I think are just we ask the Court to consider because I think these issues and the testimony and the evidence establish that Highland's testimony and the case that we're presenting here is consistent, it is logical, and it is completely corroborated in contrast to the Advisors.

And just to go through some of the issues, why did NexPoint, why did their Shared Services Agreement change from a variable contract to a fixed contract as of the beginning of

2018? Mr. Klos testified that it was to fit within the realm of the $6 million. And remember, this is a 500 percent increase in the amount that NexPoint is paying. They're going from $1.2 million to $6 million. Okay?

The Advisors, I don't think, have much of an explanation as to why they went from variable to fixed. Mr. Dondero testified something about wanting to be compliant. I don't know if that's an acknowledgment that for the six years before that they weren't in compliance. But I don't understand how the basis on which it's paid, whether it's actual cost or assets under management or flat-fee, I don't see how one of those is compliant and one isn't. In any event, they don't really have any explanation as to why all of a sudden they went to a flat fee.

They have no explanation as to where the $6 million came from. Right? Mr. Dondero -- Mr. Klos stated that it came from Mr. Dondero. And you know, this is, you know, part of the burn the house down and not think about the consequences of what you're saying. There was a suggestion during the trial that somehow this was a fraudulent document.

We're not taking that position, Your Honor. We're not saying that Mr. Dondero did anything fraudulent. We're saying that there's business substance to this contract. Highland needed cash. They were providing services. Mr. Dondero had the opportunity to get a tax break. And so

they established a price.

Nobody's suggesting this is an arm's length negotiation. Nobody's suggesting that the Advisors went out and shopped this. There's no evidence to that. But there is economic substance of it. And I really -- I really caution the Advisors in throwing out things like tax fraud because you may try to undermine Mr. Klos, but he reported to Mr. Waterhouse. And Mr. Dondero is the ownership of the enterprise.

Mr. Waterhouse's signatures are on these documents. And there's so many other people involved when you take that kind of reckless approach. Right? Ms. Thedford, she's the drafter of the documents. She's a lawyer. Mr. Cournoyer, another lawyer, Mr. Fox. There are so many people involved in this that it is just reckless to suggest that this is tax fraud. We don't believe it. We want to enforce the contract, Your Honor.

The Acis bankruptcy, we say that that had a huge impact. And the undisputed evidence shows that because if you look at the annual review, there is absolutely no expectation on January 26th that HCFMA is going to pay any money for a subadvisory agreement. It's just not there. It's not in the projections, it's not in the assumptions. And the only reason that HCMFA winds up first with the subadvisory agreement and then with the Payroll Reimbursement Agreement is because of the Acis bankruptcy.

They don't have an explanation as to why HCFMA didn't sign one in January. They don't have an explanation as to why they suddenly signed one in May, right? We do. It's because of Acis. The surrounding circumstances we think are critical here, Your Honor.

The flat-fee subadvisory agreement, right, it was the subadvisory agreement signed by NexPoint, prepared by HCMFA. There's no question that that was flat-fee. There's no question it had nothing to do with actual cost. Why was it abandoned in favor of these Payroll Reimbursement Agreement? Not because somebody woke up one day and said oh, I only want to pay for actual costs, but for the reasons that Ms. Thedford said. Not Mr. Klos, Ms. Thedford, right, her email, can't be retroactive, need Retail Board approval at an in-person meeting.

They have no explanation as to why they -- they'll just ignore. I don't think you'll hear anything in the Advisors' presentation about the subadvisory agreement and why it was abandoned, and what's the genesis of the Payroll Reimbursement Agreements.

Dual employees, why weren't dual employees -- if costs were so paramount to the Advisors, why isn't there a provision that says dual employees should keep track of their time because we only want to pay for the time that they expend on the Advisors' matters. Nobody thought about it, nobody

cared about it. There's no evidence that it was ever done.

There is no infrastructure in place to calculate, other than subjective, and I think you heard this not from Mr. Klos, not just from Mr. Klos but from Mr. Waterhouse too, there is no way to do this except subjectively because nobody created the infrastructure that would actually allow somebody to figure out the actual costs. Very important point when you're here saying I should only pay for actual costs.

If we can go to the next slide, was it a coincidence that the actual costs under the Payroll Reimbursement Agreements matched the flat monthly fees under the subadvisory agreements? We say no. Right? Mr. Klos testified that the parties kept the flat fee the exact same, and backed into the number while, quote, trying to find a reasonable estimate that would also validate the outcome that was already known.

So you're trying to put a shoe, so you need a shoehorn. Okay. People use shoehorns, right, just like there's nothing wrong with taking tax issues into account. This is an agreement. Nobody's pretending it's an arm's length agreement, but it is an agreement of economic substance. There is no question that Highland is providing services. There's no question they're entitled to get paid for those services. Okay? And that's all that's happening here.

The Advisors have absolutely no explanation as to how the numbers in the Payroll Reimbursement Agreements, why they

match to the penny, the numbers that are in the subadvisory agreements. The December 2018, you know, was that a result of a true up? Again, the undisputed evidence is that it's not. Mr. Klos said there was no true up. Mr. Waterhouse says there was no true up. And it makes no sense if you just look at the economics. We'll look at this more in a few minutes. But I think nine of the dual employees ad already been terminated as of this time, and yet the advisors are paying substantially more money. Okay?

Mr. Norris said that Frank and Dave Klos told him that it was the result of a true up. I think Mr. Klos was probably hitting the nail on the head when he just said I think Mr. Norris is mistaken, okay, because the people who were actually involved, and Mr. Norris candidly admitted he has no personal knowledge about anything that happened in December 2018.

Why did the Advisors pay the flat fee in each of the Payroll Reimbursement Agreements for 35 consecutive months from January 2018 until November 2020, knowing that the dual employees were being terminated? We say it's because they understood that's what the agreement provided. They say I don't know. I don't know. I don't know. It's a mistake. I don't know. They have no explanation.

They didn't even file a proof of claim for the two years before the bankruptcy. Right? If their theory of the

case were right, where was their pre-petition claim? Right? Why didn't they move to amend for leave to file a pre-petition claim for the two years under Mr. Dondero's watch when Highland did exactly what they did in 2020.

Did the Advisors know the amounts that were being paid? The evidence is overwhelming. It includes the annual review. It includes the advisor's books and records. It includes the fact that the advisors gave the amounts paid to the Retail Board. It includes, remember all the testimony from Mr. Waterhouse about the 13-week forecast that included all of the payments that were anticipated to be paid.

And my favorite may be Exhibit 150, Your Honor. That's the April 14th, 2020, one-page cash-flow statement that was given to Mr. Dondero that showed in April, May, June, July, August, September, October, November, and December of 2020, NexPoint would pay, you got it, $500,000 or $6 million a year, the same number that was in Dave Klos' January 4th email, the same number that was in the contracts themselves, the same number that was in the annual review. No mystery here, Your Honor.

Did the advisors know when each dual employee left? Of course they did. Exhibits 88 to 127, every single month, all of the Advisors' officers, m. Waterhouse, Ms. Thedford, Mr. Norris, they're all getting these monthly reports that highlight all of the terminations.

So what do they do? They manufacture a dispute. If we can go to the next slide. Highland gives notice of termination of the Shared Services Agreements on November 30th. And this is where the rubber meets the road. Everybody knows what's happening now. Highland has just had its plan and its disclosure statement approved by the Court.

Everybody knows that Highland is going to be winding down. Everybody knows that if confirmed, right, all of these employees are going to be terminated. And they're supposed to be working toward shifting them to a new platform so that they can service the Advisors and the other non-debtor entities that Mr. Dondero owned and controlled.

And the very next morning at 8:53, Mr. Norris walks into the office and he starts sending the emails. And he states it's worth noting that the subadvisory fees were higher than the Shared Services fees. So need to make sure these agreements are fully understood. So on December 1st, this is Mr. Norris' task after notice of termination is given. Let's make sure we understand the agreements.

A couple of days later, Your Honor will recall, Highland filed a motion for a temporary restraining order and injunctive relief against Mr. Dondero to enjoin the threats that he was making, to enjoin the interference with Highland's business. And the next day, according to the document anyway, Mr. Klos sent Mr. Waterhouse what became the basis for this

claim here today.

Mr. Klos asked Mr. Waterhouse point blank, are you going to use this for an adverse purpose, and he was sure that he wouldn't. Mr. Waterhouse, to his credit, wouldn't take Mr. Klos on that. He simply said I don't have a basis to say one way or the other. I don't remember. Right? He didn't deny that.

Remember my questioning of Mr. Waterhouse? Why did you prepare this document? And he said that Mr. Dondero and Mr. Norris told him there were negotiations going on. And I pressed him harder. But you weren't involved in the negotiations. So why were you asking for this document. And he wound up saying because I like numbers. That was the story that Mr. Waterhouse told as to why he asked Mr. Klos to do this on December 8th.

Two days later, we obtained our TRO. And the next day, K&L Gates sent their letter. And they didn't send this letter under 2.02. Sure, they wanted to talk. The notes are discussed in there. The Shared Services Agreements are discussed in here. And what they're demanding in that letter, if you read it, Your Honor, isn't, you know, how can we, you know, change this going forward. They're trying to renegotiate the deal.

They're demanding exactly what the Advisors are demanding now, and that is we want to just pay for the services

of the employees who are on Exhibit A. That's not a 2.02 good faith negotiation. That's a demand that ultimately led to litigation very shortly thereafter.

By January 6th, in fact, we had commenced the lawsuit against the Advisors and against the funds for declaratory and injunctive relief. That was filed -- that's the adversary proceeding 21-03000.

So this is where we are. It's pretty tense. If Your Honor recalls, the notice of termination was the end of January. And Highland hadn't gotten paid in a couple months. And they told the Advisors that if you don't pay up, we're cutting you off. You haven't paid in months. And so Mr. Norris participated in a conversation with Mr. Waterhouse, Mr. Klos, and some others.

And he wrote a note to himself. And I think it's such a critical piece of evidence, Your Honor. I would have objected to it, but I think it's so good for Highland that I would rather actually have it into the record. At 2:22 a.m. in the wee hours of the morning, Mr. Norris sent a note to himself at a Gmail account in which he purports to record, as he said, true and accurately everything he remembered about this conversation.

Remember the moment in time. It's January 28th. We've already sued them for injunctive relief. They've already filed their administrative claim. We are two days away from

the confirmation hearing. Highland is telling the advisors if you don't pay, we're shutting you off. And let's look what Mr. Norris' notes say because they are priceless.

The overall tone was not friendly. It was adversarial from the beginning as J.P., that's J.P. Sevilla (phonetic), dove in with a very adversarial tone and a take it or leave it or lose your business approach. And there was a contentious back and forth throughout. Think about the tone of this meeting. Think about the tension.

I hope the Court, you know, has read the whole document because before you get to the next piece that I've highlighted, Mr. Norris makes a point of writing that he reminded Mr. Waterhouse that he was the signer of the Payroll Reimbursement Agreements on behalf of the Advisors. And then it continues in the highlighted, I reminded Frank that the only people paying the amounts each month had been Frank and Dave, and that no one else that I know of has the ability to process the payments.

And here is where Frank reached for the lifeline. Frank said they have known that these amounts were overpayments for over a year and tried to update them, but they couldn't due to the automatic stay. I pressed him. Imagine being pressed by Mr. Norris in this conversation under these circumstances, adversarial, not friendly, contentious. You're being told you signed the contracts. You're being told you messed up. I

pressed him on this. I was not aware at all of this fact.

So this is the first time Frank -- this is the circumstance under which Frank makes the disclosure. He said they had discussed it with inside and outside counsel, and there was nothing they could do now due to the automatic stay. Think about that, Your Honor. Where are the words Fred Caruso?

Frank Waterhouse was not afraid of Jim Seery. He was afraid of Jim Dondero. Frank Waterhouse had taken at least $500,000, but probably more of that $10 million undisclosed payment. The finger is being pointed at him. He signed these agreements. He approved the payments. And he says I told them. I told them. They said there was nothing they could do because of the automatic stay.

He doesn't mention Fred Caruso. Right? And remember when I cross-examined Mr. Waterhouse and I said Mr. Waterhouse, I was here with you in December of 2019. I was defending you in a deposition. You didn't tell me anything about this, isn't that right? And he said that's right. Did you tell anybody at my firm about this? No.

Mr. Norris pressed him. Right? He reminded him, reminded him of his obligations, reminded him of signatures on here, reminded him that he was in charge of the payments, pressed him on this new story that he'd never heard before. And this is what Frank came up with.

If we can go to the next slide, Mr. Waterhouse's

story, and you know, I feel badly for Mr. Waterhouse. He was put in a terrible position. And I'm not running over him, right? I think Mr. Waterhouse did his job. I think he did -- he signed the contract. The lawyers for the advisors, Ms. Thedford, drafted the contract.

The contract reflected the back and forth and the intent of the parties. Mr. Waterhouse was the fiduciary. He did his job. But they didn't like the result. They didn't like the result when they saw everything moving away from Mr. Dondero, when they saw the disclosure statement get approved, when they saw the entry of the TRO, when they saw the termination of the Shared Services Agreements.

And so now they're coming after Mr. Waterhouse. And Mr. Waterhouse says what he says, and it just makes no sense. It just makes no sense. His story is that in December 2019, he claims that he heard from Mr. Klos that the Advisors were overpaying under the Payroll Reimbursement Agreements, that he raised the issue with Mr. Leventon, Mr. Ellington, and Mr. Caruso and was told nothing could be done because of the automatic stay.

That is the story. That's their 2.02 you failed to negotiate in good faith because they raised the issue with Mr. Caruso. Let's look, let's test that theory just a little bit. If Your Honor remembers, Frank Waterhouse had nothing to do with the creation of the analysis in December of 2019. That

was Mr. Leventon and Mr. Klos.

Mr. Klos testified that he was trying to create an analysis that painted the agreements in their most positive light because the UCC was pressing on the inter-company relationships. If Mr. Klos had an analysis that showed that these contracts were wildly profitable, wouldn't he have given that to the UCC? Wouldn't he have shown it to Mr. Seery the next month?

Mr. Seery testified about the pressure he was under from the UCC for months. He testified about a conversation he had with the Committee in March where Josh Terry pressed him on these agreements. He didn't know anything about this amazing profitability of the PRAs.

Mr. Waterhouse never told anybody? Is that credible that Mr. Waterhouse never told a soul other than Mr. Ellington, Mr. Leventon, and Mr. Caruso? Never told the independent board, never told Mr. Dondero, never told an officer of the Advisors? Is that really possible? And when you hear his explanation when I cross-examined him, he said I had 20,000 other things to do. Really?

Mr. Ellington and Mr. Leventon never told Mr. Dondero? You have to believe that. If you buy their story, you must believe that Mr. Ellington and Mr. Leventon never told Mr. Dondero that they had been informed that the Advisors were overpaying the debtor because otherwise, it would

have appeared in the administrative claim. It would have appeared in the response. Maybe Mr. Dondero would have testified to it.

There's no evidence of that at all. And I'll remind the Court that in December 2020, even after the TRO was entered, Mr. Ellington and Mr. Dondero had free-flowing communications. But a year earlier, Mr. Ellington didn't raise this with Mr. Dondero? Makes no sense.

Mr. Waterhouse knew that Fred Caruso was not the CRO. It's crazy that they even suggest that. All they have to do is look at the documents. Mr. Waterhouse's name appears on 24 different monthly operating reports as the preparer of those documents. And right above every report, I did make a mistake in my deck here because I wrote until January 2021. It's actually until July 2020. But from October 2019 until July 2020, whose name appears above Frank's? Brad Sharp (phonetic) because Brad Sharp is the CRO.

Fred Caruso was an employee of DSI. So the whole notion that Fred Caruso was the CRO is just wrong. Mr. Waterhouse's testimony is obviously contradicted by Mr. Norris' notes because Mr. Norris' notes don't mention Frank Waterhouse. It -- Fred Caruso. It mentions inside and outside counsel.

Do you really believe that if Mr. Waterhouse knew that there were overpayments being made, he wouldn't write it

down, he wouldn't make a memo to himself, he wouldn't look to confirm what he was told, he wouldn't do -- there's no evidence. How is that possible?

But here's the best part, Your Honor. Fred -- according -- right? Jim Dondero testified Frank was the fiduciary. He's the person in charge for administering the contracts. And this Court has to believe, if you're going to buy the Advisors' position that Frank Waterhouse learned in December 2019 of the overpayments. And you know what he did? Not only didn't he tell anybody, but he just kept authorizing those payments month after month after month after month.

I don't know why they're putting Frank into this vice. This is the burn the house down strategy. They don't care. They'll take no prisoners here, Your Honor. This is just, it's wrong. It's just wrong.

I just want to finish by pointing to the evidence that shows that Highland fully performed here. If we can go to the next page, what I've done here, Your Honor, is the Payroll Reimbursement Agreements were in effect for three years, 2018, '19, and '20. Right? Each year has 12 months. 2018, 2019, undisputed evidence Mr. Dondero was in control of the whole enterprise. He was actually in control until January 9th, 2020.

And what I've done here is I've taken Exhibit 14 which is the Advisors' responses to the interrogatory and I've

overlaid the month in which each of the employees on -- the dual employees on Exhibit A was terminated. And the red signifies an important event so that you can see May 2018, that's when the Payroll Reimbursement Agreement is entered into.

From the minute that Frank Waterhouse puts his ink on the signature, right, with the advice of Ms. Thedford, the Advisors' secretary, officer, and a lawyer, and fiduciary, the minute he puts his name on the document they're already overpaying according to them. Right, because four people have been terminated and yet they're paying a flat fee based on January 1st, 2018.

By the end of the year, four more people have left. They enter into the amendments, right? No adjustment at all to the flat monthly fee. Instead, they pay more money even though there's nine people gone. By the time you get to the petition date, five more people are gone. They're still paying the flat monthly fee. For two consecutive years, the Advisors paid millions and millions and millions of dollars to Highland for services rendered because they were getting front office advisory services.

Let's go to the next slide. And here's the proof. You only need three documents, Your Honor. Right? You're going to hear probably, you know, a reliance on Mr. Norris' uncorroborated testimony about how they didn't, you know, they

had a change in business model and they didn't need the advisory services, and the retail funds didn't need the advisory, and nobody needed anything.

They kept paying, right? Just I don't know who's more negligent here. But somebody was. Somebody on behalf of the Advisors if they continued to pay all of this money for services they don't need. The truth of the matter is, Your Honor, that's all a fiction. There's not a single document that's going to support any of that testimony, any of that argument.

The documents that actually completely contradict it are three. You start with Exhibit 14. In the right-hand column, those are the dates of departure that the Advisors have admitted to. You next go to Exhibit 85. Exhibit 85 is -- it was a request from the Retail Board in January of 2020. So Mr. Dondero has just stepped aside. The independent board is put in place. And the Retail Board sends a request to Highland, please provide an updated organizational chart relating to the Highland complex. Right?

They want to know the whole complex because the whole complex, there's that word again, the whole complex is serving the Advisors. The whole complex is serving the retail funds. The retail funds wouldn't be asking for organizational charges and information relating to the Highland complex if they didn't rely on the Highland complex. And there would be no reason to.

There would be no reason for the Advisors to provide information about the Highland complex if the Highland wasn't serving the retail funds.

And what information did they provide? They provided, you'll see at Exhibit 85, Your Honor, a list of every single employee in the Highland complex. And they specifically delineate whether the employee was back office, or investment professionals. And you won't be surprised to learn, Your Honor, that every person on this list in front of you was identified as an investment professional, not providing back office services.

So the Advisors told the Retail Board in January of 2020 these are the people in the Highland who are providing -- these are the investment professionals. That's one moment in time. And the best is that eight months later in August, the Retail Board follows up and they ask again who was doing what work, what's happening.

And if you look at Exhibit 17, one of the questions the Retail Board asks is what's happening with the bankruptcy. And you'll see at Page 2 of this memo the Advisors describe the bankruptcy, and then they say -- and this is dated August 13. It's in response to a 15(c) request. And the Advisors say, quote, we continue to treat HCMLP and its affiliates as the Advisors' affiliates for purposes of discussions with the board.

Okay? So the Advisors are telling the Retail Board that Highland and its affiliates are still affiliates of the Advisors for purposes of discussions with the Retail Board. But wait, there's more. They identify every one of the investment professionals again. And it's all footnoted here. And not only every single one of these investment professionals who the Retail Board was told in January was an investment professional, every one of them in January was still there in August with the exception of Trey Parker.

And what's also interesting, Your Honor, and consistent with both Mr. Waterhouse's emails and Mr. Klos' testimony, you'll see that there are several people there that weren't identified as dual employees. They weren't identified on Exhibit A. But they're still providing investment professionals. And do you know why they aren't on Exhibit A? Because they were hired after the Payroll Reimbursement Agreements were signed. It's that simple.

And so people's responsibilities changed. And if you note, even Trey Parker, a dual employee, it shows that he left on February 28th, 2020. There's a whole -- I don't have the Exhibit numbers handy, Your Honor. But there's a whole slew of title changes where a whole bunch of people got elevated to investment advisory-type positions.

And that's what's happening here. He leaves and his responsibilities are divvied up among other Highland employees.

This is what they're telling the Retail Board. These are not our documents. These documents were produced by the Advisors and by the retail funds. So don't take my word for it, take their word for it.

There is a reason that the Advisors are telling the Retail Board that these are our investment professionals in January, these are our investment professionals in August, because these are the people in the Highland complex who are doing work for you, because otherwise, this makes no sense and I'll be waiting patiently to hear an explanation as to why all of this information is being provided to the Retail Board if the Advisors don't need these people, the Retail Board doesn't need these people, and that everything's changed.

At the end of the day, Your Honor, again, whacking moles. I'm just whacking moles. Highland performed, the contracts are unambiguous, the Frank Waterhouse story is beyond belief. It's contradicted by Mr. Norris' own notes. And we respectfully request that the Court grant Highland a judgment in the amount set forth in the slide up above subject to a collection of attorneys fees, and deny the Advisors' claims in all respects. Thank you, Your Honor.

I believe that's 48 minutes by my count.

THE COURT: Let me check with my law clerk. He had 49. Okay. We'll call it 48 and a half. All right. Mr. Rukavina, I'll hear from you.

MR. RUKAVINA: Thank you, Your Honor.

And, Mr. Berghman, if you'll please put up my slides.

Your Honor just heard 49 minutes of irrelevancies, misdirection, and smear. Now let's look at some facts and law. Overall, there are two facts and conclusions that cannot be contradicted.

First is that there is no support for the allegation that the Payroll Agreements were, quote, pay for services agreements. You heard that in opening, that they were pay for services, meaning that we have to pay them because the services are allegedly being provided regardless of the terms of the agreements.

The only possible evidence on that was from Mr. Klos when he was testifying about how the numbers were arrived at. And as you can see there, it's on his transcript. I asked him very clearly about that. And he said it would be just speculation. So, Your Honor, there is no support for any pay for service agreements, $5 million and $6 million per year as a funding mechanism.

And more importantly, you heard Mr. Morris state that we agree there is no ambiguity in these contracts. Mr. Morris took you what he admitted was parole evidence after parole evidence. He called one document the best parole evidence. That is not admissible to contradict the terms of these contracts. Next slide, please.

On the issue of the bona fides of the contracts --

THE COURT: All right. I am not -- I'm not seeing the shared content. Are other WebEx participants seeing it?

MR. MORRIS: I am, Your Honor.

THE COURT: Mr. Morris? I'm sorry, you said yes you have it?

MR. MORRIS: Yes. I can see it on the screen. I didn't receive a copy, but I can see it on the screen.

THE COURT: Yeah. We have a frozen picture of Mr. Rukavina's face on what's supposed to be the shared screen. Mike, do you have it? Yeah. Okay. Well --

MR. RUKAVINA: You know what, this happened -- can you hear me, Your Honor?

THE COURT: Yes. I can hear you and see you fine on my screen.

MR. RUKAVINA: Yeah, this happened before. This happened before. Can you see it now?

THE COURT: Oh, wait. Now something is happening. It's --

MR. RUKAVINA: This happened to Mr. Morris last week. And I think Ms. Alaysia (phonetic) would just close the PowerPoint and reopen it. Can the Court see?

THE COURT: Okay. Yeah. Right now I've just got a blank screen, a black screen. So is Ms. Canti turning something off?

MR. RUKAVINA: No. Mr. Berghman just turned it off and -- try again, Thomas. Just close the screen share and then restart the screen share.

Can the Court see it?

THE COURT: I can't see it. No. But everyone else can see it apparently, except me, right?

Mr. Morris, you see it?

MR. MORRIS: I do, Your Honor.

THE COURT: Okay. Do we have a hard copy of this? Was it --

MR. RUKAVINA: We do not. I emailed it to Mr. Morris an hour a go. Let me email it, Your Honor, if you would like --

THE COURT: Ms. Ellison.

MR. RUKAVINA: Yeah, Ms. Ellison. Let me just --

THE COURT: Okay. If you'll email it to her, then she can email it to me and I'll pop it up on my other screen.

MR. MORRIS: And just to be clear, it was emailed to me 14 minutes ago at my request. Thank you.

(Pause)

MR. RUKAVINA: I sent it to you at 1:49, John. But it doesn't matter. Ms. Ellison should have it momentarily.

THE COURT: Okay. Traci, are you out there on the WebEx?

UNIDENTIFIED SPEAKER: Yes, Your Honor. I'm here.

THE COURT: Okay. While we're waiting, Mr. Rukavina, just to confirm, we don't have a dispute that the agreements are ambiguous. You don't think they're ambiguous. You just have a different interpretation of what they mean. Correct? **Crystal

MR. RUKAVINA: I don't know that I have a different interpretation. They are unambiguous, and I think Mr. Morris and I agreed on the four provisions or so that govern. My argument is that we properly and timely trigger those provisions.

Mr. Berghman, can you --

THE COURT: Oh, I've got it now. I've got it now. The shared screen is working now. Go ahead.

MR. RUKAVINA: Just let me --

MR. BERGHMAN: Your Honor, it's in a PDF as opposed to a PowerPoint. Maybe that's the technology issue, so I think this may work.

THE COURT: Okay. Good deal.

MR. RUKAVINA: Okay. Maximize the deck, Thomas, because we're seeing your other stuff on there. No. No. Your Honor, I'm going to mute this and call my partner.

(Pause)

THE COURT: Yeah. Mr. Rukavina, I don't know if you're on hold or you can hear me. I've got the PowerPoint version up that you emailed to Traci which she emailed to me,

so if --

MR. RUKAVINA: Okay.

THE COURT: -- that helps what you're doing, I've got a PowerPoint version up.

MR. RUKAVINA: Okay. Thank you then. Let's resume. Mr. Berghman, please pull it up like you had it originally. Everyone else can see it and Judge Jernigan, we'll just follow Your Honor manually. I would ask you to advance it.

THE COURT: Uh-huh. Okay.

MR. RUKAVINA: So, Your Honor, the first slide, we are now in the second slide called Advisors' administrative claim.

THE COURT: Okay.

MR. RUKAVINA: And you see I have a listing of eight points. So, you know, what I was discussing is to go back to the bonifieds of these contracts. Mr. Klos testified very clearly that he prepared the underlying reimbursement allocations in good faith and reasonably. Yes, there's some subjectivity, but accountants and controllers and financial types know how to take those account.

Both Waterhouse and Dondero testified that those amounts were arrived at through a good faith process by Highland's team. And let me just add something to what Mr. Morris keeps mentioning here, somehow that Highland always wears the white hat and the Advisors always wear the dark hat

here. Let's not forget that this is the same Debtor that participated in the drafting of these contracts. Its employees drafted these contracts. As we said, these are not arms length negotiations.

So for him to say or ask questions like, the Advisors have no explanation for this or the Advisors can't explain that and I can't wait for an explanation. He should ask that of his own client, of his own self. It takes two to tango, Your Honor, and they stand in the shoes of the Debtor.

You know for a fact that Highland was actually able to track employee time because you saw in my Exhibit 88 that every month they sent invoices under the HCMFA Shared Services Agreement where they tracked Highland time. Ms. Thedford would not have used outside counsel to advise on these contracts if there was something funny about these contracts.

Mr. Waterhouse and Mr. Dondero both testified that outside auditors and legal advise was used. At no time until he testified did Mr. Klos raise any red flag regarding any of what he did or his analyses or these contracts. And you heard from him that -- and from everyone else -- that he was the most credible man in that trial.

So, again, all that is just to say there is no ambiguity. There is no red flag. The contracts are what they are and they should be interpreted according to their terms. If we can advance the slide, Your Honor, please.

The second main fact that the Court should consider is that the fact of overpayment is incontestable. There can be -- we can argue under the law whether we're allowed to get the overpayments, but the fact of overpayment is incontestable. We all know what reimbursement means. We all know what actual cost is defined at. You can only be reimbursed for your actual out of pocket costs for the employees. There is no profit.

There's no dispute that many employees were not there. We were paying for 20 employees out of 25 that were not there. Please don't fall for the misdirection, Your Honor, that, well, four of the employees weren't there when the contracts were signed. Recall from Mr. Klos that he was preparing that list as of January 1, 2018, which was the effective date.

So, yes, those four employees weren't there in May, but they were there in January. And again, Mr. Klos prepared the list of 20 employees. If there was something funny about this, he, the most credible man in the courtroom, would not have done that.

You have the December 2019 analysis. This is post-bankruptcy. The Debtor is a fiduciary. The Debtor has an outside financial advisor. Mr. Klos, that financial advisor, and Mr. Waterhouse, internally calculate that the Debtor is making a $3 million profit that's a snapshot in time under these contracts. And they shared that information with the

committee. That's their own work product. There's no funny business there. There's no funny math.

Mr. Klos' December 2020 analysis shows that the profit as a snapshot in time had ballooned to $6.6 million. It doesn't matter why Mr. Waterhouse asked him to prepare that analysis. It doesn't matter. Mr. Klos can invent whatever reason he thinks Mr. Waterhouse did. Mr. Waterhouse prepared a professional analysis for his bosses. And he calculated $6.6 million.

His current attempt to discredit his own work is unbelievable. He doesn't like the conclusion that he reached. He doesn't like the fact of overpayment because now he's the Debtor's CFO, so he tries to discredit himself. That was not credible at all. And his evasiveness on my cross-examination was disturbing. The assumptions that Mr. Klos used were utterly reasonable. He used the actual number of employees at that point and time and he used the fact that there were no bonuses being paid.

Now Mr. Norris, in hindsight, calculated the $2.6 million delta as opposed to 6.6 million. Now, let's look at very briefly why Mr. Norris' calculations are accurate and reliable. Highland stipulated that his underlying source of data and his math were correct. Your Honor will recall that whereas Mr. Klos assumed no bonuses, it's true that certain bonuses were paid to non-insiders. Well, Mr. Norris took that

into account. He didn't give you an artificially inflated number. He said, okay. Some bonuses were paid, so the number is going to go down.

Mr. Norris' calculation is cumulative. What Mr. Klos did was a snapshot in time, but not all the employees were gone at the same time. So Mr. Norris, as I told you, went month by month and looked at which employees were there and how much were they actually paid.

Another very important thing, Your Honor, Mr. Klos' analysis included certain replacement employees, again, under this theory that Payroll Reimbursement Agreements are actually service agreements in addition to the service agreements. So Mr. Klos, I think there were six or seven employees who he unilaterally replaced. Well, that can't be. As Mr. Norris testified, none of those employees were front office investment advisory employees.

So you have -- oh, and Mr. Norris used David Klos allocations. Mr. Klos again testified that those allocations were reasonable. That was not rebutted. And Mr. Norris confirmed that those allocations were reasonable. But even if the Court says for those five employees it should have somehow been 100 percent allocation, we still overpaid $4.4 million, but the Court shouldn't do that. The fact of the matter is that Mr. Norris' calculations were never rebutted. He wasn't even cross-examined about them. If we could go to the next

slide, please.

And Highland knew of the overpayments. Again, we have the facts of DSI. We have the fact of the committee. We have Mr. Klos' email where he writes to my client that the fact that there's fewer employees has increased the profitability of these contracts from Highland's perspective.

You have multiple other admissions from Mr. Klos of the overpayments and you have a very strong item of circumstantial evidence that you got no explanation for from anyone, which was why did Highland terminate the Shared Services Agreements right around December 1, but did not terminate the Payroll Agreements until the very end of February, and only after being demanded to do so by my client. Because they were making a profit that they knew that they shouldn't have been making.

Your Honor should expect more of a fiduciary, more of a debtor-in-possession, more of people that my client was paying big money to every month to perform services. They can't just stick their head in the ground, make millions of dollars of profit extra contractually, and not do anything about it. Next slide. Your Honor, if we can go to the next slide.

So my first argument, Your Honor, is that we don't have to look at the contract. We look at what is an administrative claim. Basically, if my clients provided value

to the estate that they did not receive return consideration for, then that is an administrative claim. That's the Supreme Court. That's Judge -- former Judge Lynn in the Northern District. And you also have the fact that these were unassumed and unrejected contracts. And the breach of contract, separate and apart from an overpayment, a breach of contract is an administrative claim unless and until the contract is rejected.

So that is our most simple argument. We provided value in the form of cash money to the Debtor post petition for which we did not receive services. As we've always pled, there's been no changing of our story as has been alleged. That's absurd. There's been a refinement of our numbers through discovery, which is how the process should work.

If we can go to the next slide, please, Your Honor.

If the Court concludes that you actually have to look at the contracts, you can't just rely on what is an administrative claim, you have to look at the contracts, then the fundamental purpose of these contracts is to reimburse for actual costs. Again, I think we agree on that, Mr. Morris and I. That is the overriding purpose. And the word reimbursement is used many times in here.

It is true that those contracts define what actual cost is on a monthly basis unless those number are changed as set forth in Section 2.02. That is true. So, as long as no change is made, then the preset numbers control. And that's

okay.

Your Honor will recall from Mr. Klos' and Ms. Thedford's email exchange that it was very cumbersome to figure this out. So Mr. Klos is the one who suggested, well, let's just make it a monthly amount and if we have to change it, we'll change it. We can go to the next slide, Your Honor, please.

The problem now is, as Mr. Morris correctly pointed out, it's Section 2.02. So Section 2.02 needs to be triggered in order to modify the pre-settlements. And Section 4.02 also bears a role. But let's not forget what Section 2.02 says, the last line. The parties will negotiate in good faith the terms of such modification. The Debtor very conveniently ignores that.

And Section 4.02 says that either party may make a request for a modification. It doesn't say how that request must be made. It doesn't say it must be formal, in writing. It says either party may make a request for a change.

Therefore, I think the contractual analysis is very, very simple. Unless and until a request for a change is made by either party such as to trigger the requirement for good faith negotiation under Section 2.02, the preset monthly amounts control. If we can go to the next slide, Your Honor, please.

Now there are three reasons that we maintain why we

comply with these contracts, with these requirements. First you have the course of conduct. Course of conduct is not parole evidence. As we briefed, whether a contract is ambiguous or unambiguous, the Court can look at the course of conduct to determine how the parties interpreted their own contract.

Second, you have Mr. Waterhouse and later Mr. Norris and others actually saying, hey, we've got to revise these numbers. And Highland did not negotiate in good faith. As Mr. Seery testified, there was zero negotiation. And then our third argument is that under the Shared Services Agreements Highland was the one obligated to monitor and review and advise us with respect to our payables. And if we can go to the next slide, Your Honor, please.

THE COURT: Okay.

MR. RUKAVINA: So Your Honor has the December 2019 amendments, the ones pursuant to which my clients ended up paying Highland $2.5 million. Those are unambiguous. There's no reason, fact, or logic as to why the Court can or should look behind them. And they expressly state that upon reviewing the actual costs, my clients underpaid and they owed more. It doesn't matter that there might have been fewer employees there.

Frankly, no one has told us why my clients ended up paying more even though there were fewer employees, but you

heard that it's possible, that because of everything that was going on, certain employees were devoting far more of their time to my clients than Mr. Klos had estimated they would.

It doesn't matter. The contracts say we underpaid after an annual review and we ended up paying more. Those contracts cannot be swept under the rug, or those amendments, by the Debtor. They can't be ignored. Those contracts or those amendments are evidence of an annual true up.

Mr. Waterhouse testified to this. It's on Page 140 of the transcript that there was a general policy at Highland to review long term contracts on an annual basis. As he said, it was just too onerous to true up agreements on less than a yearly basis. So yearly is kind of more the practice. And if we can please go to the next slide, Your Honor.

This is also --

THE COURT: Okay.

MR. RUKAVINA: If the Court wants to look at the formation emails, this is what Mr. Klos wrote to Ms. Thedford. This is Exhibit K. And he writes, this is where he says, look, this is going to be really cumbersome. Let's have a predefined amount payable every month. Then he says, beyond a year.

So again we're -- he's thinking, just like Mr. Waterhouse said, of an annual review. After a year either party could terminate and or renegotiate for an amended agreement. Well, that's exactly what they did at the end of

2018.

So regardless of the fact that the contract talks about a monthly analysis, the parties, both of them, changed it or they understood it to actually be a one year analysis, at least with respect to a retrospective analysis as opposed to a prospective change.

And that's something that's very important as well, Your Honor. In Section 2.02, Mr. Morris is correct. It applies prospectively. But nothing in these agreements prevents a retrospective analysis or a true up or a refund, nothing. The only reason why a true up wasn't done in 2019 was because of the bankruptcy. If we can please go to the next slide.

THE COURT: Okay.

MR. RUKAVINA: Now let's talk about Mr. Waterhouse's testimony. Mr. Waterhouse testified that he told Mr. Caruso, clearly an agent of the Debtor, and that he told the Debtor's other officer, general counsel, that there were these overpayments. The overpayments were discovered, as Your Honor will recall, because the committee requested an analysis of intercompany contracts. All of these men, Mr. Caruso and Mr. Klos, in good faith performed that analysis.

So there is circumstantial evidence, Your Honor, to confirm that what Mr. Waterhouse said is true. His testimony was never rebutted, for one thing. You know, Mr. Morris was

always fond of saying, well, why isn't someone else here? Why isn't someone else here? Mr. Caruso could have rebutted this testimony. He made millions of dollars in this case. He never testified here and said, whoa, whoa, whoa, Frank never told me that.

And why wouldn't Mr. Waterhouse say to Mr. Caruso what he did? The gentleman had just performed the analysis. It's not, Your Honor, like I'm trying to suggest that Waterhouse just called up Caruso one night over a glass of wine and said, oh, I just got this idea in my head. They just performed this analysis. And the fact at that time of $3 million in annual overpayments was learned.

Isn't it logical that the CFO and the treasurer would go to the general counsel and a financial advisor and say, guys, we've got to do something about this?

So this is credible testimony. And what Mr. Waterhouse did triggered Section 2.02, the duty to negotiate in good faith. The Debtor said, we can't because of the automatic stay. Whether that's right or wrong as a matter of law is irrelevant.

Mr. Waterhouse was entitled to rely on what the financial advisor, a bankruptcy expert of 30 years, and of what the internal lawyers told him. He reasonably relied on that and what more was he to do? He talked to the lawyers. He talked to the bankruptcy experts.

We also have to point out that the Payroll Agreements, Your Honor, contain anti-waiver provisions. So not only is there no set method by which a request to modify must be made, there's anti-waiver provisions. Even if Your Honor does not find Mr. Waterhouse's testimony and what he did to rise to the level of flagging the issue and requesting a change, you have beginning in October of 2020 -- I'm sorry. Yes, October of 2020.

Mr. Norris and Mr. Klos having numerous discussions regarding these matters as Mr. Norris became involved with the process. Mr. Norris was very credible, very credible. And of course he and Mr. Klos discussed this. And you see even in that email where Mr. Klos is admitting that these contracts have become even more profitable for Highland.

So, yes, Mr. Klos admitted to Mr. Norris that Highland was making profits, that there were overpayments. Mr. Norris was upset. He said, we've got to change it. Again, the message came back automatic stay. It'll be dealt with in due course.

If the Court doesn't find that credible or rising to the level of anything, you have the absolute fact of the December 11, 2020 letter from K&L Gates, who at that point and time represented the Advisors saying it looks like there's about $5 million in overpayments. We've got to do something about that. If we can go to the next slide please, Your Honor.

THE COURT: Okay.

MR. RUKAVINA: So what we have, Your Honor, right or wrong, legally appropriate or not, Highland not negotiating a change in the reimbursement rates, whether from late 2019 or October 2020 or December 2020.

What is my client supposed to do? Again, it takes two to tango. If they're required to negotiate in good faith and they know and they don't, Mr. Morris is right. My client can't unilaterally change the reimbursement rates, but the requirement to negotiate in good faith is in these contracts. The Court cannot read that out of the contracts. And the Debtor, for whatever reason, did not negotiate in good faith. The Debtor breached Section 2.02 and it's a frustrational purpose.

How are we supposed to change the reimbursement rates when the counter-party breaches an obligation to negotiate in good faith? Well, it becomes a little bit circular here, Your Honor, because the damages from that breach or the fact that you didn't change the reimbursement rates, but it doesn't even matter because once a party breaches, as the Debtor did here, it cannot insist on the strict application prospectively of that contract.

What happened, Your Honor, is that once my clients raised the issue, when they triggered the process, the preset reimbursement rates no longer controlled. The parties were

required to figure out what the actual costs were in good faith. If you can go to the next slide please, Your Honor.

THE COURT: Okay.

MR. RUKAVINA: And then our third theory, Your Honor, is under the shared services. You heard -- well, you saw -- that in these Shared Service Agreements the Advisors were paying Highland to monitor contracts, monitor payables, ensure that appropriate payable amounts were being paid.

Mr. Waterhouse confirmed that these services -- I mean, you can look at the contract. You don't need his testimony. But that these services included scrubbing the Advisors bills to make sure that the bills were proper, that there weren't refunds due, that there weren't overpayments. And Highland certainly knew of the overpayments. Again, we have the December 2019. You have the report from DCI going to the committee. Highland knew.

We go back to the Payroll Agreements which provided should either party -- that's key -- should either party determine that a chance is appropriate, then either party may request a modification. Consistent with its duties to assist and advise the Advisors, Highland should have done so. As we'll talk in a moment, no employee of the Advisors or agent of the Advisors knew of the overpayments who was not at the same time also an employee or an agent of Highland.

Does the Court really believe or can anyone really

believe that these people, Klos, Waterhouse, Caruso, that they all just really did nothing about this, ignored it, that Highland sat back there and knowingly was taking $6.2, $6.6 million from my clients?

Or is it far more likely that, in fact, they all believed in good faith that the automatic stay prevented any kind of negotiation or modification? It goes back again to the truth. The most credible explanation is that Klos and Waterhouse knew what was going on, but were told by the bankruptcy experts, we can't do anything about it, because of the bankruptcy stay.

The alternative is, again, that they sat there, violated their duties under the Shared Services Agreements, acted ridiculously as a debtor-in-possession by knowingly taking millions of dollars in profits not entitled to under the contract.

Either way, Highland knew about it, had an obligation to do something about it, and did nothing about it. It cannot now exploit any delay or any advantage as a result of its own fault. Your Honor, if we can advance to the next slide, please.

THE COURT: Okay.

MR. RUKAVINA: What does Highland say back? Well, you waived your rights. Okay. We might have over billed you by $6.6 million. We might have known about it. We might have

had an obligation to tell you about it, but you waived your rights. Well, the contracts contained anti-waiver provisions. Waiver has to be knowing and intentional.

Mr. Waterhouse is the only person who is an agent of the Advisors that knew of the overpayments, but as we briefed, under Texas law when you're an agent to two principals, his knowledge cannot be imputed to one to be used against the other. The other people involved, Mr. Klos, DSI, Mr. Caruso, they were never agents of the Advisors.

So the Advisors -- there's no evidence that the Advisors knew of the overpayments in order to be able to make a knowing and intentional waiver. Of course the Advisors knew that certain employees weren't there. That's a given. Mr. Norris was very clear about that. But that is a separate issue from knowing that every month, every month, Highland was billing us for those employees that were no longer there. Only Highland employees knew that.

Also, Your Honor, these statements to the board, the funds boards, again, misdirection. All those communications, all those board minutes, we went through a dozen of them one by one with Mr. Powell. All of those are referring to the Shared Services Agreements in which case, yes, Highland was providing services to us under the Shared Services Agreements. None of those talked about the Payroll Reimbursement Agreements.

And the fact, Your Honor, that we stopped paying

right after Mr. Norris learned about it was further evidence that there was no waiver. And when I talk about waiver, Your Honor, I mean, common law waiver. I mean, contractual interpretation waiver. That's separate from whether we sat by and did nothing under Section 2.02 and 4.02 of the contract. We're going to go to the next slide please, Your Honor.

THE COURT: Okay.

MR. RUKAVINA: Likewise, the voluntary doctrine payment does not apply. As we briefed, it doesn't apply in Texas to the contract claims. It only applies where there's full knowledge of material facts. And again, we did not know of the overpayments. The only one who did was Waterhouse and he did what he could.

And it's also a critical factor here, Your Honor, as you've heard, that we did not actually write a check or initiate a wire transfer for these payments. Highland employees did so. Highland employees, pursuant to the services they were providing, had access and control to our bank account and Highland employees paid themselves.

Mr. Waterhouse approved those payments. That is true. But he approved them as the CFO of Highland. It's very clear. You have Ms. Hendrix's emails to him. She's writing to his -- to her boss, pardon me -- saying, hey, boss, under all these obligations, under all these contracts, the following Advisor fees and bills are due. And he says approved.

Even if he was wearing his Advisor hat, again, there's no voluntary payment because he was told that the automatic stay prevents anything from being done about this. And we all know that a legal disability, like the automatic stay, for example, tolls limitations. A legal disability is not voluntary. It is not a waiver.

So, Your Honor, that rounds off the discussion on why the Advisors have legitimate administrative claims. They have been quantified by Mr. Norris in a calculation where the Debtor has conceded that his numbers and his math are correct. His number is not dissimilar from Mr. Klos' number, which should add further support and credibility.

And really, it just comes down to the contract and how the Court interprets the contract in light of the parties' prior annual true up and in light of Mr. Waterhouse's discussions with Highland personnel saying, there's overpayments. We've got to do something about those overpayments, which triggered the requirement to negotiate in good faith, which never happened. If you can go to the next slide, please.

Now I'd like to discuss Highland's claims back against us. So first, let's discuss the claim for attorney's fees because I don't think I am being absurd when I smell that it's going to be a huge number, given that they had five lawyers during this trial in Court and on the video.

These contracts surprisingly -- and this has not been addressed by Highland -- have no fee shifting provision. They don't. Now, we know in Texas that's not fatal because even if your contract doesn't have a fee shifting provision, Section 38.001 still allows you to recover attorney's fees under a written contract.

But you have to comply as a condition precedent with Section 38.002 which requires that you give presentment of the claim and that the Advisors do not pay a just amount owing prior to 30 days after that. And we know as a matter of law that the filing of a suit is not a presentment of the claim.

Also, the PRAs and SSAs, all four contracts, contain mandatory notice provisions. And these -- this is a very similar case, Your Honor. That's not true. It's not a similar case. It's a similar principle. This City of Alamo vs. Garcia case -- in that case, Your Honor, there was -- well, it was an arbitration provision and the arbitration provision required that notice to arbitrate be sent in a particular form to a particular person. And that provision was not complied with.

In this court, the Texas Appellate Court said, okay, well, is that requirement of notice following the notice provision? Is that a condition precedent or is that just a covenant where you get a breach of contract? And that Court said that, no, when the notice provision itself, meaning notice shall be sent to this person by such means by such date, when

it's a condition precedent then it defeats the condition for failure to follow.

So because Section 38.002 is a condition precedent to recovering the 38.001 and because Highland did not follow the notice provisions in the contracts, they have no claim under 38.001. If we can please advance to the next slide, Your Honor.

THE COURT: Okay.

MR. RUKAVINA: There is -- first of all, it's amazing. There is no evidence in front of you of any presentment of the claim at all. I understand maybe because New York lawyers aren't familiar with Section 38.002, but I would have thought there'd be a letter from Mr. Seery just like we've seen in all the note cases saying, hey, you bad guys, you're not paying. You owe me money. Pay now or we'll sue.

I've actually had to scrub Highland's exhibits for an scintilla of any evidence of a presentment. And all that you have is the Highland Exhibit 28. This is an email. It's a part of negotiations. It's an email to Mr. Norris. It's not even from the Debtor. It's from DSI or I'm not even sure who.

The Court has it. It's Exhibit 28. And here he says -- I'm not even sure I know who this man is -- you guys owe the following amounts. It's an email. It is done prior to filing suit, but again it does not follow the notice requirements in the contracts, meaning it's not sent to the proper party. It's

emailed to Mr. Norris. It's not sent as the contracts require.

And interestingly, when you read the email in chambers, Your Honor, this gentleman is saying, you Advisors have to pay all of these funds, $5.4 million, in order -- that's how much you owe us. Notice there's no demand that there will be suit filed. There's no demand for attorney's fees.

Now, it is true that when the Court studies Section 38.002 the Court will find that there's no prescribed method for the notice that has to be provided unless the contract provides the method, right?

So, all things being equal, this email might suffice as a presentment of the claim. I've already argued why it doesn't because it didn't follow the notice provisions of the contract, but there's another reason, as Judge Rhoades explained in this case I cite down here before. And you have to go back to Section 38.002.

It can't just be a presentment of a claim. It has to be a presentment of the just amount owed. Why in the world is this person who sent this email requiring Mr. Norris to pay alleged amounts owing by all these other people? You'll see when -- you'll see, Your Honor, when you read this email. Mr. Norris writes back and he says, what is this? I don't even represent or know about most of these entities.

So there's no presentment because this isn't

sufficient. If it is sufficient, it didn't follow the condition precedent notice requirement of the contracts. Therefore, Section 38.002 is not complied with. And even if it did, this is not a claim for a just amount. Why in the world would the Advisors pay amounts from Dugaboy and NexBank, Ohio State Life Insurance.

The Debtor, Your Honor, just messed up. And as a result, we revert to the American rule and it does not get its attorney's fees. If we can advance to Slide 6, Your Honor.

THE COURT: Okay.

MR. RUKAVINA: This is now, unlike Mr. Klos' broad, sweeping statements, oh, you owe all this money. And unlike Mr. Norris -- I'm sorry, Mr. Morris -- just going over this. Let's look at the facts of the matter when we're talking about millions of dollars in alleged damages.

So first, HCMFA they say didn't pay for the November, December, and January amounts. Your Honor will recall that that agreement is different than the rest. It requires -- it's not a set amount. It requires that an analysis be done, a calculation. It requires a statement. And I've only taken part of Section 5.01 there, Your Honor, because honestly I'm not good with PowerPoint. I don't know how the take the rest of it. Certainly the Court can and will read the whole Section 5.01.

But notice the language. Each service provider --

Highland shall furnish the other parties hereto with a written statement in which they detail the actual costs. Highland never did that for January. And Highland, by the way, never gave you the evidence for November and December. I did in my Exhibit AA. Highland did give us an invoice for November and December, but never for January.

So, Your Honor, they lose the January argument for two reasons: one, the form of this contract because they never provided the invoice; two, more importantly, because there's no evidence of what the actual cost is. We're now talking about their claims against us.

It's their burden of proof. They never came. Mr. Klos never said, you know what? I did the analysis and it's $300,000. There is no evidence as to what the actual cost for January is. If we can go to the next slide, please.

THE COURT: Okay.

MR. RUKAVINA: Now I want to discuss the Payroll Agreements again. We can discuss them at the same time. It ties into my argument on the administrative claim.

Whether it's early -- I'm sorry. Whether it's late 2019 or October 2020 or December 2020, Highland never negotiated in good faith. As I've argued, that means that the preset amounts no longer control. We revert to what is the actual cost. We are only required to reimburse for actual cost. It's Highland's burden of proof. They never even

attempted for the months of December and January to quantify their actual costs. They never even attempted to do so, Your Honor, on their burden of proof.

Even if the Court considers the December 11th letter as the last or as the only trigger, that would still negate then the January numbers. So it is our argument that Highland, for lack of evidence at this trial, for lack of even trying to quantify actual costs in December and January, fails, lack of evidence. Those discussions from Mr. Waterhouse, Your Honor, and that letter from K&L Gates must have had some impact on Highland's duty under these contracts.

Again, all that we have to do is request a change and then the parties shall -- not may -- shall negotiate in good faith. And Mr. Seery told you there was no negotiation. So, again, the argument is the monthly amounts do not control and there's an utter lack of evidence on what the actual costs are.

Now it is true that we did not pay under the NexPoint Shared Services. That's $168,000 per month. We owe them $336,000. We do. Now, Klos testified that it's $500,000. Please don't fall into that trap, Your Honor. Mr. Klos was very intentionally, and I believe manipulatively, including a subsidiary of Highland, a subsidiary of NexPoint called -- I think I have it in here -- called NexPoint Real Estate Advisors.

That's not in the contract, Your Honor. The NexPoint

Shared Services Agreement spells out it's $168,000 per month, so we owe them $336,000, not 500. And then if we can go to the final slide, Your Honor.

This is what the Court should conclude -- pardon me. You should award us the $6.2 million in overpayments. You should award us the million dollars in Shared Services overpayments. This, Your Honor will recall, is Mr. Klos' analysis. Mr. Klos, from December 2019 -- I'm sorry -- December 2020, at that point and time recall, Your Honor, that the Debtor was not providing legal services anymore to the Advisors. The Advisors had hired their own, at least one of their own, regulatory and compliance people.

Mr. Klos calculated $1 million in profit under the Shared Services Agreements, which again do not permit of a profit. HCMFA does have a provision for a 5 percent markup. NexPoint does not, but that's different from profit. Your Honor should award us $425,000 in cover damages, as Mr. Norris testified to. We had to go out and hire two employees. That's three months worth of their -- or maybe four months. I don't remember right now. Mr. Norris testified about that. Of their compensation.

The Court should deny all parties' attorney's fees. Again, these contracts do not provide for attorney's fees provisions and Section 38.002 was not complied with. The Court should deny the claim for the January HCMFA Shared Service

Agreement because, again, the Debtor did not calculate actual cost or present an invoice. There's no evidence of what the proper amount payable for January of 2021 should have been.

The Court should deny the Debtor amounts unpaid under the Payroll Reimbursement Agreements because the Debtor refused to negotiate in good faith and the Debtor, again, presented no evidence on what actual cost for those months should be on what is the Debtor's burden of proof.

We admit that we owe -- that HCMFA did not pay Shared Services in November and December. There are those invoices. Again, I was so kind as to provide evidence of that. The Debtor didn't even provide evidence of that. We admitted we owe that. That's -- and I'm ignoring dollars, Your Honor. I'm rounding to the thousand. We admit that we owe $596,000. And we admit that NexPoint owes for December and January, $336,000, for a net resulting administrative claim after nettings and set offs of $6,693,000.

Your Honor, I will leave you with this final thought that I also mentioned.

You can close that now, Mr. Berghman.

I'll leave you with this final thought that I mentioned during opening. This has been a contentious case. We all know that. Your Honor has mentioned that numerous times. We know that the Court might not think highly of Mr. Dondero. The Court has sanctioned Mr. Dondero. We know that

the Court may think very highly of Mr. Seery and the Debtor. Certainly the Court has found Mr. Seery very credible in the past.

But this is a court of equity. It ought to bother this Court some, if not a lot, that an entity under your Court's, under Your Honor's protection, with duties of candor and fiduciary duties was billing my client monthly for 20 employees that were not there and they knew about it and they did nothing about it. There has to be a remedy for that harm. Thank you, Your Honor.

THE COURT: All right. Thank you.

Mr. Morris, you have, what did we say, 11-1/2 minutes of rebuttal.

MR. MORRIS: Okay. So as quickly as I can, Your Honor, Number 1, I'm not prepared to address attorney's fees. We'll do that if and when the Court enters a judgment. I promise we'll file our motion and we'll address these matters.

With respect to damages, we did offer all the proof we needed to, Your Honor, and they're the contracts because they're all fixed rate contracts with the exception of the HCMFA contract.

And I appreciate Mr. Rukavina putting in the exhibits because if you take a look at them, if you take a look at Exhibit AA, you'll see that Highland actually reduced the amount it was charging for compliance services in November and

December precisely because Mr. Post transferred from Highland to the Advisors.

You'll see that in October -- in September, the compliance fee was $92,819. That's in Exhibit AA at Bates Number 590. And that the same is true in October. But yet in November, that amount is reduced to $66,900, right? The legal fees are still the same $10,000 they had been for years. They're paying $10,000 a month. Yes, it's an actual cost on track. And the same $66,000 is charged in December. Highland has already taken into account the transfer of Mr. Post from one side to the other.

Quickly, Mr. Klos didn't raise any red flags in his testimony. In fact, he did just the opposite. What he testified to was that here was a rational basis for the numbers in the documents. What he testified to was that Highland provided services and that they were entitled to get paid for it. So I don't know what red flags Mr. Rukavina was referring to. They continually refer to profits and the profits that Highland was making. Completely irrelevant under the contract.

If they wanted a contract that limited Highland's profits or that protected Highland from the down side, right? We're only concerned about profits here. They're only concerned -- they aren't concerned about all the money we were losing, I guess, under the same analysis that we're relying on, that they're relying on frankly, right?

If they wanted, they know how to do that because the HCMFA Shared Services Agreement is cost plus 5 percent. Their whole theory is kind of suspect for the simple reason that they're trying to say that Highland somehow agreed to give the employees to the Advisors for cost. What business would do that? Why would anybody be in business to simply have somebody pay for their employees? It makes no sense to me. The whole theory makes no sense to me.

And that brings me to a very big point, Your Honor. I absolutely do not agree that the contract is to be a reimbursement for cost. I absolutely will never agree to that. That's not what the contract says. That's what they're trying to get you to do. They're trying to rewrite the very plain terms of the agreement.

The very plain terms of the definition of actual cost is that it's a fixed amount unless the parties agree otherwise, period, full stop. Hamburger, tofu, call it whatever you want. It's a fixed amount until the parties agree otherwise. I have absolutely no agreement with Mr. Rukavina that the purpose of the contract is to pay actual costs.

Annual true up, Your Honor, he pointed to some generalized statement from Mr. Waterhouse. The fact of the matter is there's absolutely no evidence that the December 2018 amendments were the result of any true up. In fact, I asked Mr. Waterhouse the question. This is at Page 140 of the

afternoon, I guess, of the first day hearing.

"Q Do you have any specific recollection that it was an annual true up like the -- just like for the two Payroll Reimbursement Agreements?

"A I don't. From what I recall, I don't think there was a true up in the agreements."

This is his testimony about the agreements at issue. Mr. Rukavina may point to some generalized statement about true ups. This is his testimony at the bottom of Page 140, the top of Page 141, that he has no knowledge of any true up ever being done with respect to the Payroll Reimbursement Agreements.

The notion that they didn't get services. I think there was a suggestion that somehow they didn't get services. Again, Your Honor, we'd refer to the retail board minutes. The attempt to somehow slice this so fine to say the retail board minutes was only referring to Shared Services and it didn't have anything to do with front office.

There's numerous places in those minutes that refer not to Shared Service Agreements, but shares services arrangements. And you heard no explanation as to why the Advisors are repeatedly telling the retail board throughout 2020, here are our investment professionals.

They did it in January. They did it in August. And they don't do it for no reason. They do it in response to the retail board's specific request for information as to who was

providing services to them, okay. The evidence is just -- it's beyond dispute. Mr. Rukavina threw out somehow that Highland was a fiduciary. A fiduciary to whom?

The only fiduciaries that matter in this case are Mr. Dondero, Mr. Waterhouse, Ms. Thedford, and Mr. Norris. They're the fiduciaries of the Advisors. Highland had a contract. It did not owe a fiduciary duty to the Advisors. And it's just -- I don't know where this stuff comes from, but there's no basis to find that Highland owed anybody on the Advisors side a fiduciary duty.

Anti-waiver. He points to the waiver provision. We have ample case law in our briefing, Your Honor, that you can waive even a waiver provision. And why does it apply here? Because they waived it 35 times. Every single month from the beginning of 2018 until the end of November 2020, 35 consecutive times, Frank Waterhouse authorized the payment of the fixed fee under the Payroll Reimbursement Agreement with knowledge that many of the dual employees had been terminated.

That is a waiver. That is a waiver 35 times. That is a waiver so strong that it overcomes anything the Advisors might come up with here.

Mr. Rukavina suggests, oh, what can we do? Poor us. They wouldn't negotiate. No. As Mr. Klos said, as the contract provides, if you don't like what's happening, you can terminate without cause on 60 days notice, period, full stop.

That's why that provision is in there. There's no requirement that somebody agree. There's certainly no requirement that somebody agree to a retroactive change. In fact, that would read out of the whole contract the definition of actual cost.

Again, you're trying to rewrite an agreement that they lived with for two years under the Dondero regime. We just want to be treated the way Highland was treated for the two years that Jim Dondero was in control. Why do the rules change? Because Dustin Norris wakes up on December 1st after we give notice of termination and they freak out and they say, oh, my gosh. We've got to do something here. That's not a basis to change the terms of the parties' agreement.

No mention of Lauren Thedford, right? Where is Ms. Thedford? Mr. Rukavina keeps saying, it's the Highland employees. It's the Highland employees. Mr. Dondero gave all of these people multiple hats. I've heard Mr. Rukavina refer twice now to some case law that says if you wear multiple hats you can't impute knowledge from one to the other. Is that really true when the same person is giving them multiple roles? How does Mr. Dondero get to hide behind the fact that he put Mr. Waterhouse and Ms. Thedford into these conflicting positions?

And then he gets to say, oh, he was acting on behalf of Highland, not the Advisors. That cannot possibly be the law, Your Honor. That would be the biggest injustice of all,

that they get now to decide which hat Mr. Waterhouse and Ms. Thedford was wearing. And please don't forget Ms. Thedford. An officer, a fiduciary, a secretary, a lawyer, the person who drafted the contracts.

Bankruptcy experts. Again, now we've moved away from Mr. -- we keep pushing them into the corner even further. Now Mr. Caruso is no longer referred to as the CRO. Now he's just an agent. He's a so-called agent, right? He's not a bankruptcy expert, as humbly as I can say it, my colleagues and me. This is what we do for a living, right. If Mr. Waterhouse was with us all the time. The testimony is clear. Looked him right in the eye. Frank, you didn't tell me, did you? No, I didn't tell you, John. I didn't tell you.

Yeah. I'll just end where Mr. Rukavina ended and that is the notion that this is a court of equity. It may be a court of equity, but it's also a court of law. And we want the Court to simply enforce the contract as it's drafted. And on an equitable basis, there's absolutely positively nothing wrong with that. Why is there nothing wrong with that? Because we provided the services. We're entitled to get paid. The contracts are unambiguous.

And I just showed you in Exhibit AA, in the Advisors AA, we even went so far as to reduce the cost of the compliance services when Jason Post was moved from one side to the other. We even went so far as to do that.

That's equity. Equity says you reward people who are abiding by the rules. We abided by the rules. We shifted Mr. Post from one side to the other and we eliminated the cost for him. They don't get to double dip. They have no claim here, Your Honor.

Their whole case is based on Frank Waterhouse's story that he made up at the very last second that isn't -- that, as recorded by Mr. Norris, doesn't even mention Fred Caruso. And then, of course, we have the K&L Gates letter sent the day after the TRO was entered, right, that's based on the analysis that Frank Waterhouse gave to Mr. Dondero the day before. This is all manufactured.

And let me just finish on this point. Highland did not breach its obligation to negotiate in good faith because there was no reason or opportunity to do that. We don't believe what Frank Waterhouse testified to has any truth to it, but even if it did, an offhand statement to Fred Caruso isn't all of a sudden going to get them some kind of windfall. That's Number 1. Number 2, this K&L Gates letter, think about the circumstances that existed at the time.

And, finally, Your Honor, even if the Court were to find that Highland failed to negotiate in good faith, which I don't think it can under the circumstances, even if you found that, how are there damages a complete rewriting of the contract? Because we had no obligation to agree to their

theory.

Why do they get their theory now? We could have negotiated in good faith and said, Frank, we're not doing -- I mean, we're not doing anything retroactive. The contract doesn't require us to do anything retroactive.

At best, maybe they can make a claim for January. I don't know. I don't think it makes any sense. I don't want it to be seen as a concession, but they had no obligation. Highland had no obligation to agree to their theory. And now they're going to get their theory that completely rewrites the contract. It makes no sense. Thank you, Your Honor.

THE COURT: Okay. Thank you.

All right. Well, this one is going to be second in the queue. We were working on the note adversary proceedings report and recommendation. So we will try not to keep you waiting too long on a ruling on this.

You could make my life easier in one regard. If you all will send to me, send to Traci Ellison a Word version of your proposed findings of fact and conclusions of law, each of you, that way I can copy and paste where I want to copy and paste in my ruling. So if you could do that.

MR. RUKAVINA: Your Honor, may I interject? The scheduling order didn't require a proposed findings. It contemplated trial briefs. I filed a trial brief. The Debtor filed proposed findings.

THE COURT: Right.

MR. RUKAVINA: I'm happy to draft proposed findings if you want me to. I just want you to be aware of that.

THE COURT: Okay. Well, so I get Mr. Morris referred to his at Docket Entry 91.

So send me, Mr. Rukavina, your trial brief, the Advisors' trial brief. I say send me -- send it to Traci.

And then, Mr. Morris, you can send me your findings and conclusions which have obviously both facts and law. And so, again, that will speed up our process here in chambers, I hope, tremendously if I can copy and paste where I think it makes sense to copy and past in my ruling, all right.

All right. Well, I wish I could give you a date by which this will be done, but all I can say is we're working as fast as we can back here on our different projects, and so we'll try not to keep you waiting too late. All right.

MR. MORRIS: Thank you, Your Honor.

THE COURT: Thank you. We're adjourned.

MR. RUKAVINA: Thank you.

THE CLERK: All rise.

(Proceedings concluded)

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

We, DIPTI PATEL, CRYSTAL THOMAS, and MICHELLE ROGAN, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.

/s/ Dipti Patel

DIPTI PATEL, CET-997

/s/ Crystal Thomas

CRYSTAL THOMAS, CET-654

/s/ Michelle Rogan

MICHELLE ROGAN

LIBERTY TRANSCRIPTS DATE: May 5, 2022