

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

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)	Case No. 19-34054-sgj-11
In Re:)	Chapter 11
)	
HIGHLAND CAPITAL)	Dallas, Texas
MANAGEMENT, L.P.,)	July 27, 2022
)	1:30 p.m. Docket
Reorganized Debtor.)	
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HIGHLAND CAPITAL)	Adversary Proceeding 21-3082-sgj
MANAGEMENT, L.P.,)	
)	
Plaintiff,)	
)	
v.)	MOTION FOR SUMMARY JUDGMENT
)	[45]
)	
HIGHLAND CAPITAL)	
MANAGEMENT FUND ADVISORS,)	
L.P.,)	
)	
Defendant.)	
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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

For the Plaintiff:	John Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
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For the Defendant:	Deborah Rose Deitsch-Perez Michael P. Aigen STINSON, LLP 2200 Ross Avenue, Suite 2900 Dallas, TX 75201 (214) 560-2201
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Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062
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Transcribed by: Kathy Rehling
311 Paradise Cove
Shady Shores, TX 76208
(972) 786-3063

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transcript produced by transcription service.

1 DALLAS, TEXAS - JULY 27, 2022 - 1:40 P.M.

2 THE COURT: All right. We have an oral argument in
3 Highland versus HCMFA, Adversary 21-3082, Motion of Plaintiff
4 for Summary Judgment.

5 Mr. Morris, I see you out there. You're appearing for the
6 Plaintiff today?

7 MR. MORRIS: Yes, I am. Good afternoon, Your Honor.
8 John Morris; Pachulski Stang Ziehl & Jones; for the
9 reorganized Highland.

10 THE COURT: All right. Thank you.

11 Ms. Deitsch-Perez, are you going to be the one appearing
12 for HCMFA?

13 MS. DEITSCH-PEREZ: I am, Your Honor. Good
14 afternoon.

15 THE COURT: All right. Good afternoon.

16 Any other lawyer appearances?

17 (No response.)

18 THE COURT: All right. Well, as I said, we're here
19 on Plaintiff's Motion for Summary Judgment. This is more note
20 litigation, not to be confused with the five adversaries that
21 involved I guess 16 different notes. We're now here with a
22 more recently filed adversary against HCMFA regarding two
23 demand notes.

24 Mr. Morris, you may proceed.

25 MR. MORRIS: All right, Your Honor. I just, I want

1 to be mindful of the Court's time. I think we had agreed to
2 limit each side to 30 minutes. I don't know if it was 35 or
3 45. I just want to be clear because I don't want to --

4 MS. DEITSCH-PEREZ: I believe we had limited each
5 side to 45 minutes.

6 MR. MORRIS: Okay. If that's okay with the Court,
7 I'm happy with that, too.

8 THE COURT: All right. Forty-five minutes each side
9 is fine. And Courtney, I'll ask you to monitor that. And I
10 assume, Mr. Morris, you'll want to reserve some of that for
11 rebuttal, just so we know in advance.

12 MR. MORRIS: I think that's right. I don't expect to
13 use 45 minutes.

14 THE COURT: Okay. Well, it's 1:42. You may proceed.

15 MR. MORRIS: Good afternoon, Your Honor. John
16 Morris. I've got a small deck that I'd like to use in my
17 presentation, and I'd ask Ms. Canty to put it up on the
18 screen.

19 We're here, Your Honor, --

20 THE COURT: All right. Mr. --

21 MR. MORRIS: -- this is a --

22 THE COURT: Mr. Morris, I'm going to let you know,
23 your voice is more faint than we're used to with you. So I
24 don't know if it's your volume on your computer or where
25 you're sitting in relation to the microphone, but we could use

1 a little louder volume here.

2 MR. MORRIS: Okay. I will -- I will try to speak
3 loudly, and --

4 THE COURT: That's better.

5 MR. MORRIS: -- and if you can't hear me, I'll just
6 -- okay. Fine. Thank you, Your Honor.

7 So, this is a follow-up companion litigation where
8 Highland is suing HCMFA to collect on two notes that HCMFA
9 issued, the first one in 2014, the second in 2016.

10 THE COURT: Yes. We're having a little trouble
11 hearing you once again. I thought it was better, and now it's
12 still a little faint, so --

13 MR. MORRIS: I'm going to switch devices, if you
14 could just bear with me for just a moment.

15 THE COURT: Okay.

16 (Pause.)

17 MR. MORRIS: Okay. Can you hear me now, Your Honor?

18 THE COURT: Much better.

19 MR. MORRIS: Okay. Super.

20 THE COURT: Okay.

21 MR. MORRIS: So, this is a follow-up litigation where
22 Highland is suing on two additional notes against HCMFA. And
23 as we explained in our papers, the reason that these two notes
24 were not part of the main notes litigation is because they
25 were subject to a prepetition -- I'll just call it, for ease

1 here, a forbearance agreement. And Highland has honored that
2 agreement and didn't make a demand on these notes until that
3 agreement expired.

4 As Your Honor knows as well as anybody, the Court just
5 last week issued a Report and Recommendation on the notes
6 litigation, and I think that that's particularly relevant for
7 this matter, because the primary defense is the same, the same
8 oral agreement that was asserted by the Defendants in the main
9 notes litigation.

10 This action was commenced in November of 2021. And as the
11 Court may be aware, the District Court *sua sponte* consolidated
12 this particular action with the other five notes litigations
13 that were already consolidated in the District Court.

14 As I mentioned, the defense here is substantively the
15 same. The notes are substantively the same except for the
16 identity of the maker, the principal amount, the interest
17 rate, and the dates.

18 And the record is the same, with the exception of certain
19 new evidence, some of which we believe further supports
20 Highland's case and some of which we believe doesn't do
21 anything to move the needle on behalf of the Defendant. And I
22 want to spend, you know, much of my time here this afternoon
23 just talking about the new evidence.

24 But before we do that, if we can go to the next slide.

25 We have, as Your Honor may have seen in our moving brief,

1 largely adopted the predicate facts in support of our motion
2 for summary judgment. Specifically, we believe that the
3 evidence is beyond dispute that there were valid notes, they
4 were signed by the Defendant in this case, there is an amount
5 due, a demand was made, and no action was taken to meet that
6 demand.

7 As this slide shows, Your Honor -- if we can go to the
8 next slide, please -- the evidence of the existence, the
9 validity, and enforceability of the notes is and remains
10 overwhelming. My citations here are to our moving brief or to
11 specific evidence. But just as the Court found in its recent
12 Report and Recommendation, the evidence here shows that the
13 pre-2019 notes were carried as assets in Highland's audited
14 financial statements. Again, those audited financial
15 statements were based on management representation letters
16 from Mr. Dondero and Mr. Waterhouse.

17 The HCMFA notes were also carried on liabilities -- as
18 liabilities on HCMFA's own balance sheet and financial
19 statements. And that can be found at Exhibit 80 -- 45, at
20 Pages 2, which is the balance sheet, and Pages 13 and 14,
21 which specifically describe each of the notes at issue.

22 These notes were also part of the presentation that HCMFA
23 made to the Retail Board in October 2020. Highland's books
24 and records again carried these notes as assets, without
25 exception and without discount.

1 Highland told the world in the fall of 2020 that it
2 intended to pay creditors in part with the proceeds from the
3 collection on these notes, and yet HCMFA and Mr. Dondero
4 remained silent.

5 We believe additional evidence shows the existence,
6 validity, and enforceability of the notes by the fact that
7 HCMFA actually paid off just over 50 percent of the principal
8 amount, again, proving the existence, validity, and
9 enforcement of the notes.

10 And finally, in the acknowledgement form, Mr. Dondero
11 admitted both that the loans were made to finance HCMFA's
12 ongoing operations and that Highland would not demand payment
13 until May of 2021.

14 I just want to put a couple of exhibits up on the screen,
15 Your Honor. Exhibit 238 is a stipulation that goes (audio
16 gap) Number 6 that I just made. And in that stipulation, if
17 we can go down to Paragraphs 1 and 2, you'll see, Your Honor,
18 that the parties agreed that Exhibit C was prepared by
19 Highland's accounting group and it showed how each of the
20 payments on the relevant notes were made and that the parties
21 stipulated and agreed that Exhibit C would be admissible into
22 evidence.

23 It accurately set forth the date -- dates and amounts of
24 the payments that were made on the applicable notes, and it
25 accurately set forth the application of the payments against

1 the outstanding principal and interest.

2 And if we could just drop down to Exhibit C, because it's
3 really -- it's pretty interesting. Your Honor, you can see
4 just from this document that the box on top addresses the 2014
5 note, and you can see the substantial payments that were made
6 in the six months prior to the petition date. In 2019, I
7 think \$2.375 million was paid on the first note, and over \$2
8 million had been paid on the 2016 note.

9 And so we think that this just corroborates the
10 overwhelming evidence that already exists that HCMFA knew the
11 notes existed, they knew the notes were valid, they knew the
12 notes were enforceable, and indeed they made payments against
13 those notes.

14 So all of that, I think, goes to prove beyond any genuine
15 dispute of fact that Highland has met its *prima facie* case.

16 HCMFA here is pressing the conditions subsequent
17 agreement, the oral agreement that HCMFA contends was made.
18 And if we could just go to the next slide, you'll see, Your
19 Honor, in Paragraphs 84 through 96 we provide again the
20 evidence that we relied upon in the main notes litigation to
21 prove that no reasonable trier of fact could conclude that the
22 alleged agreements existed.

23 But I did want to highlight for the Court some of the new
24 facts that relate to these particular notes, because it's not
25 -- I appreciate that it wasn't -- it may not have been easy to

1 see what was new in our brief from what was old. The new
2 material is found in Paragraphs 76 through 83, and then again
3 in 97, 98, 99, and 100. And they relate to four additional
4 facts that we believe make it even, you know, not just less
5 likely, but make it clear that no reasonable trier of fact
6 could conclude that the alleged agreements existed.

7 The first one, Your Honor, which is Point 2 on the chart,
8 is that Mr. Dondero's testimony in his deposition actually
9 conflicts with HCMFA's answer. The answer was adopted
10 verbatim from the answer that has been the subject of
11 litigation for more than a year now, and it's really -- it's
12 just, it's pretty surprising that they still can't get the
13 answer right. And the reason that the answer is wrong is that
14 -- because it parrots the original affirmative defense, or not
15 the original affirmative defense, the final version of the
16 affirmative defense that was asserted in the main litigation.
17 They forgot to take into account that Ms. Dondero, Nancy
18 Dondero, wasn't even the Trustee of Dugaboy at the time the
19 first alleged oral agreement was entered into. So in the
20 depositions, and we've cited to all of this -- it's in
21 Paragraphs 76 through 83, and again in 97 -- we cite to the
22 evidence that proves that the testimony differs from even the
23 answer that they have. And I think, I think that's -- would
24 just be another piece of evidence that we would put into -- in
25 front of the jury to establish that these -- this defense is

1 completely fabricated.

2 The second piece, Your Honor, as I already mentioned, is
3 that HCMFA paid 50 -- more than 50 percent of the principal
4 amount -- again, something that is completely inconsistent
5 with an agreement for compensation.

6 The next one is really, really important, Your Honor. The
7 undisputed evidence in the record now is that HCMFA actually
8 paid off three other promissory notes. And neither Mr.
9 Dondero nor HCMFA provides any explanation for why they did
10 that.

11 And we believe that that fact is critical, because as Your
12 Honor has already found in the Report and Recommendations, Mr.
13 Dondero was unable to identify the notes that were the subject
14 of each particular oral agreement. And now that there is
15 undisputed evidence that there were notes that were fully paid
16 off, it makes his inability to identify the notes that much
17 more problematic. So he can't simply say, All of the notes
18 that I had were subject to the oral agreement, because some of
19 them were paid off. And so we think that's a very critical
20 factor, and it's something that, you know, no reasonable jury
21 would ignore in trying to assess whether these agreements
22 existed.

23 And finally, Your Honor, in a very short deposition, I
24 followed up with a deposition of Alan Johnson, who is Mr.
25 Dondero and HCMFA's expert. You'll see at the very end I just

1 shut the deposition down after I got such clean answers. He
2 testified that, notwithstanding the fact that he is a
3 compensation expert and that he has spent his whole career
4 giving advice in the area of executive compensation, he has
5 never advised a company to forgive a loan that was made to a
6 corporate affiliate for the purpose of compensating an
7 executive, and he's not aware of any company that has ever
8 done so.

9 I think in their opposition papers, you know, they take me
10 to task for asking confusing questions. I would respectfully
11 disagree. I would encourage the Court, if it's inclined to do
12 so, to look at Page 19, Line 2, to Page 20, Line 18. I think
13 my questions were very clear. I think you'll see that it was
14 Mr. Johnson who was a bit confused. And when he made that
15 known to me, we clarified it, and the testimony on this point
16 could not be clearer. He has never advised a company to do
17 what Mr. Dondero and HCMFA are asking this Court to approve,
18 and he is not aware of any company that's ever done so.

19 So, let's just finish up here with the new evidence that
20 HCMFA is relying upon, if we can go to the next slide. You
21 know, we believe that we proved that neither HCMFA nor any
22 other party to the alleged oral agreement ever disclosed the
23 terms or the existence of that agreement to anybody. And
24 HCMFA has cited to certain new evidence and certain old
25 evidence that they contend somehow constitutes disclosure.

1 I do, before I get to the evidence, I skipped over one
2 document that I think is worth putting on the screen, and
3 that's Exhibit 220. Exhibit 220 is HCMFA's written responses
4 to discovery.

5 And Ms. Canty, if you could just put that up. And if we
6 could go to responses to the requests for admission, beginning
7 with No. 13.

8 You'll see -- that's requests for production. Just scroll
9 down another page or two. There you go.

10 So, in Requests 13 and 14, HCMFA has admitted that no
11 document was created prior to February 1, 2021 that
12 memorializes the terms or existence of the alleged agreement.
13 That's 13 and 14. And then if you go down to 17 and 18,
14 you'll see that HCMFA admitted that HCMFA did not disclose the
15 terms or the existence of the alleged agreement to the
16 Bankruptcy Court prior to February 1, 2021. And then if you
17 see Requests for Admission I guess it's No. 20 -- I may have
18 made a mistake -- but 20 and 21, you'll see that HCMFA gave
19 their unqualified admission that they did not disclose the
20 terms of the alleged agreement or the existence of the alleged
21 agreement in connection with the bankruptcy case. So, never
22 did it. And yet -- and yet they try to rebut the undisputed
23 fact that it was never disclosed by relying on a proof of
24 claim.

25 And if we can go to Defendants' Exhibit 4-D, let's take a

1 look at that proof of claim. Because, you know, okay, so this
2 is a proof of claim that was filed by Mr. Dondero. It was
3 filed on his behalf by the Bonds Ellis firm. I don't know if
4 you're aware of this, Your Honor, but I believe a week or two
5 ago Mr. Dondero and Dugaboy sued Bonds Ellis and John Bonds
6 and others for malpractice in this case.

7 But that's the firm that prepared this proof of claim.
8 And HCMFA now contends that this proof of claim somehow
9 divulged the terms or the existence of the alleged agreements,
10 even though the written responses to the requests for
11 admission that they tendered just months before said no
12 document existed, said nothing was ever disclosed to the
13 Bankruptcy Court, and said nothing was ever disclosed in the
14 bankruptcy case.

15 I would also note, Your Honor, that neither Mr. Dondero
16 nor any defendant in the main notes litigation saw fit to
17 identify this document as somehow proof of the disclosure of
18 the defense that they're now pressing.

19 So, you have to start with that. You have to start with
20 the fact that they -- that they said there was nothing in
21 writing, that they said they never told the Bankruptcy Court,
22 that they said there was nothing in the bankruptcy case, that
23 no other defendant has identified this document, but this is a
24 document that they produced two hours before the deadline for
25 filing their opposition.

1 And let's take a look at what the substance of it says.
2 If we can go to Exhibit A, I think it's the last page of the
3 proof of claim.

4 You'll see, Your Honor, the proof of claim here in Exhibit
5 A says simply that in the event collection efforts are made to
6 collect on the notes, James Dondero asserts that the notes
7 were issued by him for funds advanced in lieu of compensation.
8 Nancy Dondero is not mentioned. Dugaboy. Agreement. Oral
9 agreement. Conditions subsequent. Trust res. MGM.
10 Cornerstone. There is nothing in the affirmative defense
11 that's set forth in the answer that is reflected on this
12 Exhibit A. And there is nothing in this Exhibit A that even
13 says that the notes might be forgiven, because that's the way
14 it characterized in the opposition papers that this proof of
15 claim put the world on notice that the notes might be
16 forgiven. Even the word forgiven doesn't appear here.

17 I will concede that this exhibit shows that Mr. Dondero
18 was aware of these notes, that he knew that they were in
19 existence, that he knew that they were part of Debtor's
20 assets, and he was trying to come up with a defense. I agree
21 that Mr. Dondero put the world on notice that he didn't want
22 to pay.

23 But the point here is not whether he put the world on
24 notice that he didn't want to pay. The point here is did he
25 put the world on notice of the existence of the alleged

1 agreements? And that, the answer I think is easily and
2 categorically no.

3 But this document is very important for another reason.
4 As Your Honor will recall in the main notes litigation,
5 Highland sued to collect on two notes that were signed by
6 HCMFA in May of 2019, so after the date of the acknowledgement
7 that we looked at.

8 MS. DEITSCH-PEREZ: Excuse me, Your Honor. I hate to
9 interrupt Mr. Morris, and I generally would not, but he's
10 going into a case for which the counsel is not present, and I
11 don't think that's fair. He's going into the old HCMFA case
12 that Your Honor has already ruled on, and Mr. Rukavina is not
13 here to respond to any comments that Mr. Morris may be making.

14 So if he wants to reopen that case and make an argument, I
15 ask that he do it on notice to Mr. Rukavina, who can then be
16 available to respond.

17 MR. MORRIS: If I may, Your Honor?

18 THE COURT: You may.

19 MR. MORRIS: Number one, it's the same defendant.

20 Number two, Mr. Rukavina was on notice of the argument
21 that I'm making because it was in our papers.

22 Number three, the argument is based on the document that
23 they produced, it's in their exhibit, and that they relied
24 upon.

25 Number four, the cases have all been consolidated.

1 So, so I don't see for the life of me how anybody could be
2 prejudiced here. It is their document. It is their defense.
3 The cases are consolidated. They've had notice. And I would
4 respectfully ask the Court to allow me to proceed.

5 THE COURT: Okay. Objection --

6 MS. DEITSCH-PEREZ: Your Honor, it would be --

7 THE COURT: Objection is overruled. You may proceed.

8 MR. MORRIS: Okay. So, Your Honor, if you recall,
9 the 2019 notes had an original face amount, I think it was
10 \$7.4 or \$7.5 million. And these pre-2019 notes had an
11 original face amount of approximately \$6 million. We just saw
12 from the evidence, we saw from the stipulation, frankly, that
13 the parties agreed that the pre-2019 notes were paid down to
14 about \$3 million.

15 This document shows that every defense that was asserted
16 in the main notes litigation was fabricated. And I'm not
17 accusing Mr. Rukavina of doing anything wrong or Ms. Deitsch-
18 Perez. There's three law firms that were involved. Right?
19 The only person who actually knows everything is Mr. Dondero.
20 This is his proof of claim, and he wrote a proof of claim
21 trying to defend against collections against HCMFA for notes
22 in excess of \$10 million. You cannot get to that \$10 million
23 number without including the May 2019 notes. It is
24 inconceivable. There is just no way to do it.

25 So, as a matter of undisputed fact, Mr. Dondero asserted a

1 defense to the May 2019 notes that HCMFA contended were issued
2 by mistake and without authority and contrary to Mr. Dondero's
3 intent. You cannot reconcile those two positions.

4 The entire defense in the main notes litigation with
5 respect to those notes was fabricated, and this document
6 proves it. HCMFA --

7 MS. DEITSCH-PEREZ: I would ask Your Honor, --

8 MR. MORRIS: HCMFA --

9 MS. DEITSCH-PEREZ: -- that's a different --

10 MR. MORRIS: Please. Please.

11 MS. DEITSCH-PEREZ: Because this is not -- this is --
12 that is a different case than -- what was noticed was a motion
13 for summary judgment on the complaint on the two notes, and
14 Mr. Morris has now vastly exceeded that. I understand Your
15 Honor has overruled my objection, but it is terribly unfair to
16 Mr. Rukavina and to HCMFA.

17 THE COURT: Let me just ask. I really don't
18 understand your objection, because this is an attachment to
19 the proof of claim. I think it's No. 188. Right? The --

20 MR. MORRIS: Yes.

21 THE COURT: The new evidence, if you will, that HCMFA
22 has put in the summary judgment record. And the way I view
23 this, it's just a comment on HCMFA's own summary judgment
24 evidence. Why is it anything more than that?

25 MS. DEITSCH-PEREZ: I can explain. Because this was

1 filed back in March of 2020. And Mr. Rukavina's -- one of Mr.
2 Rukavina's main points in the argument was that a mistake was
3 made. These amounts that were transferred were recorded as
4 notes. And so everybody, until they looked into it in
5 connection with the litigation, was under the mistaken belief
6 that these were loans. And Mr. Morris is taking advantage of
7 Mr. Rukavina's absence to make an argument in a case that is
8 not presently before Your Honor on this argument.

9 THE COURT: Okay.

10 MR. MORRIS: Your Honor, with all due respect, I had
11 no idea whether Mr. Rukavina was going to be here or not, nor
12 do I think it's relevant. They can divide the arguments
13 however they want. This is their document.

14 MS. DEITSCH-PEREZ: It's not a document in this case.

15 THE COURT: Okay.

16 MR. MORRIS: Okay. I'll wait for Your Honor.

17 THE COURT: I over --

18 MR. MORRIS: Yeah.

19 THE COURT: I overrule the objection. I don't think
20 there is any sort of unfair lack of notice, bringing in
21 arguments from other litigation. It's, in this Court's view,
22 merely commenting -- making a comment on the summary judgment
23 evidence of HCMFA.

24 All right. You may proceed.

25 MR. MORRIS: The next piece of evidence that HCMFA

1 cites to in order to rebut what we believe is the undisputed
2 fact that the alleged agreements were kept secret -- and they
3 weren't kept secret, because they didn't exist -- but they
4 point to Mr. Dondero's discussions with Mr. Waterhouse. And
5 we would -- we would just encourage the Court to look at that
6 the deposition testimony, because, again, even Mr. Dondero
7 doesn't claim that he told Mr. Waterhouse about an agreement,
8 about Nancy, about Dugaboy, about conditions subsequent.
9 Nothing of that nature appears in Mr. Dondero's own
10 description of what he told Mr. Waterhouse. And of course,
11 Mr. Waterhouse says that he didn't have any conversation of
12 this type until after the lawsuit was filed.

13 And then, finally, we get to Mr. Lynn's letter, Your
14 Honor. They cite to that. If we can just put that up on the
15 screen. It's, again, Defendant's exhibit. It's Defendant's
16 Exhibit 4-C.

17 And, you know, the entirety of the substance of the letter
18 is at the end of the first paragraph, where Mr. Lynn writes,
19 in addition to other unidentified offenses, "Mr. Dondero views
20 the notes in question as having been given in exchange for
21 loans by Highland made in lieu of compensation to Mr.
22 Dondero."

23 And it's not surprising that Mr. Lynn would use language
24 consistent with the proof of claim that he prepared on behalf
25 of his client. But what's more important here is that, again,

1 there is nothing on this document, of course prepared after
2 the litigation began, that suggests or would cause any reader
3 to conclude that an oral agreement was entered into pursuant
4 to which the notes might be forgiven pursuant to, you know,
5 some fulfillment of conditions subsequent. It's just, it
6 relates to a different defense that was never pursued, is the
7 way I would characterize it.

8 So, in short, Your Honor, we don't believe that they've
9 come forth with any evidence to change the Court's conclusion
10 that the notes were never disclosed or recorded in any way.

11 The next piece that they try to attack is this notion that
12 Highland had a practice of forgiving loans. Again, I'm not
13 even sure that this is a material fact, but I still don't
14 believe that there's a genuine dispute. They have put forth
15 the declaration of Mr. Hurley. That can be found as
16 Defendant's Exhibit No. 6. Mr. Hurley was identified in the
17 Rule 26 disclosures as some -- a former employee who might
18 have knowledge about Highland's forgiving loans.

19 If you just look at the declaration, Your Honor, you'll
20 see Mr. Hurley was never a Highland employee. He worked for
21 somebody else. And that the loan was forgiven not by Highland
22 but by HCMFA.

23 So I have no objection to the declaration coming into
24 evidence, but the Court should afford it no weight because it
25 has nothing to do with whether or not Highland ever forgave a

1 loan to anybody, let alone a former employee, because Mr.
2 Hurley was neither a former employee nor did he have a loan
3 forgiven by Highland.

4 So, you know, the record otherwise stands as it was.

5 And, finally, you know, we pointed out in the summary
6 judgment papers, and I think the Court found as a matter of
7 fact in the Report and Recommendation, that HCMFA had carried
8 the notes as liabilities on its balance sheet. And the other
9 document that they produced a few minutes before filing their
10 motion for summary judgment was Exhibit 4-E, and I think we
11 ought to just take a look at it so the Court can see, you
12 know, what they're doing here.

13 4-E purports to be a balance sheet for HCMFA that was
14 prepared in April of 2022. And if you look down in the
15 footnote, it says that, as of 3/17, the notes were discharged
16 due to a portfolio company sale. However, due to active
17 litigation with HCMLP, the notes are still reflected on the
18 balance sheet.

19 I don't know what it means to discharge it, but this is
20 just self-serving postpetition machinations that we believe
21 the Court should afford zero weight and the Court should
22 maintain its conclusion that, prior to the commencement of
23 litigation, HCMFA carried these notes as liabilities on its
24 own audited balance sheet and financial statements, and that
25 should be the end of it.

1 I've really got nothing further, Your Honor, unless the
2 Court has any questions. I just don't think that there is
3 anything new here. And to the extent there is new evidence,
4 it just, it just helps us further. It just helps us further.

5 THE COURT: All right. No questions at this time.
6 Ms. Deitsch-Perez?

7 MS. DEITSCH-PEREZ: Okay. Mr. Aigen is going to pull
8 up a PowerPoint.

9 THE COURT: And by the way, I'm going to request that
10 each of you send by email attachment to my courtroom deputy
11 your PowerPoints after the hearing.

12 MS. DEITSCH-PEREZ: Yes, Your Honor. It'll take us
13 --

14 MR. MORRIS: Will do, Your Honor.

15 MS. DEITSCH-PEREZ: -- a couple minutes to get rid of
16 our notes that are embedded --

17 THE COURT: Okay. That's fine.

18 MS. DEITSCH-PEREZ: -- in the notes and comment
19 section.

20 THE COURT: That's fine.

21 MS. DEITSCH-PEREZ: But then we'll -- we will do
22 that.

23 Okay. So, Michael, you can flip through the -- there we
24 go.

25 So, I'm going to first give you a summary, and then we'll

1 go through some of the -- we'll go quickly through the
2 evidence that is the same as in the prior case, and then we'll
3 spend a little more time with the new evidence, and then we'll
4 spend a lot of time with the cases that have been cited,
5 because it's really important.

6 And the thing to keep in mind throughout this entire
7 argument is that, in a summary judgment, the Court is not
8 entitled to weigh credibility and to decide who's right or who
9 makes more sense or who's more credible. There's no balancing
10 involved. If there's a genuine issue of fact raised, even if
11 the Court doesn't believe the witness, thinks the witness is
12 full of it, that's not for a court to decide, it's for the
13 ultimate fact finder, the jury, to decide.

14 And that you will see there are many, many, many cases
15 where summary judgments are granted where the court is
16 saying, oh, that's a conclusory, self-serving declaration,
17 which is like what Your Honor said about the declarations
18 here. But the Fifth Circuit very -- as recently as 2019, and
19 we'll look at this, has said, you know, that's not fair,
20 because every declaration that a party puts in evidence to
21 support its position is, by its nature, self-serving. That's
22 the point. They're putting it in to support their position.
23 And so that is not enough to condemn evidence and have it not
24 considered.

25 And then we'll also look at what's conclusory -- at what

1 conclusory means and what it doesn't mean.

2 But just to summarize what we're going to look at, there
3 is deposition and declaration testimony that supports the
4 agreements. Mr. Morris makes a big deal about -- in the
5 papers about Mr. Dondero not having immediately declared the
6 notes forgiven when a little bit of MGM stock was forgiven.
7 He didn't because, one, that transaction was not something
8 that he was a part of, and it was a tiny bit of the stock. It
9 was not the same event that happened in March of this year.
10 And when the sale of MGM, the big sale of MGM happened, HCMFA
11 did reflect that in its books.

12 So it's not something *post hac* for the litigation. It's
13 because the triggering event happened in March of 2022.
14 That's why it turns up in the change in the balance sheet from
15 March to April.

16 We'll spend only a little time talking about Nancy
17 Dondero's competence. The Debtor's argument that she was not
18 competent is just plain silly. In order to not be competent,
19 someone has to not be -- you have to be a minor or a drunk or
20 someone who is mentally deficient. She is none of those
21 things. And the fact that she is not as sophisticated as
22 perhaps the most sophisticated person, or even as an average,
23 she's not investment banker, but she also doesn't have to be
24 one in order to make the agreement.

25 The arguments, Mr. Morris jumps up and down about -- about

1 the Defendant having raised some new things in this case.
2 Well, the Debtor has raised completely new arguments about the
3 limited partnership agreement, contending that certain
4 provisions in it preclude the agreements. And we'll show you
5 that that's not true. And also the limited partnership
6 agreement hasn't changed over the last year. And so if
7 anything is to be considered an eleventh-hour argument, it is
8 that.

9 Mr. Morris makes a big deal about the supposed -- about
10 the difference between the interrogatory answers and the
11 requests for admissions, saying they admit that all of the
12 details of the agreements were not given to the Court. Well,
13 that was true, but it's also true that the idea here, which is
14 that these notes were potentially compensation for Mr.
15 Dondero, that was not a secret. And the reason that we point
16 out the proof of claim, you know, addendum in the back and the
17 letter from Judge Lynn is because it is inconsistent with the
18 Debtor's contention that this was all a secret.

19 So, yes, it's true, the two -- the discovery responses and
20 those pieces of evidence can easily coexist. The nitty-gritty
21 details were not disclosed, but the notion that these notes
22 might never be repaid because they were potentially
23 compensation to Mr. Dondero, that was disclosed. And so if
24 anybody had a question about that, they just had to raise
25 their hand and say, uh, Mr. Dondero or Judge Lynn, what do you

1 mean by that? And they didn't.

2 The Debtor makes a new argument that the agreements were
3 required to be in writing. That's just not true. There's --
4 they support -- they cite nothing in support.

5 They argue that the agreements were not supported by
6 consideration. Given how little is required to be
7 consideration, if anything, the Defendant should be able to
8 get summary judgment on that point. But at least there is an
9 issue of fact, given the substantial consideration that is
10 mentioned in the testimony.

11 The Debtor says the agreements must not exist because
12 Nancy didn't negotiate very hard. Well, agreements don't have
13 to be hotly negotiated to be valid.

14 Despite what Mr. Morris just presented, you will see that
15 the Plaintiff has a history of forgiving loans as executive
16 compensation. Even Mr. Seery admitted that, and we'll show
17 you his testimony.

18 You know, the Debtor went from, oh, they've never done it,
19 to, well, they haven't done it in a decade. And most
20 recently, when we -- in response to the Debtor saying, well,
21 they haven't done it in a decade, we asked Mr. Hurley to do a
22 declaration because the forgiveness of his loan was in 2013.
23 So now the Debtor is, well, they haven't done it in something
24 close to a decade, for whatever that's worth.

25 It should be no surprise that Mr. Dondero would try and

1 structure his compensation in a way that was tax-efficient.
2 And you've seen the testimony of the tax expert who explained
3 how you would structure a loan and its potential for
4 forgiveness to be an appropriate tax structure. And you've
5 seen Mr. Johnson's testimony that said that Mr. Dondero did
6 not have market compensation.

7 And then, finally, Mr. Morris puts a lot of weight on the
8 fact that these loans, particularly these HCMFA 2014 and 2016
9 loans, were substantially paid off. Well, there's an
10 explanation for that. If that were true with no explanation,
11 maybe he would have a point. But Mr. Dondero testified that
12 even though he might not have to pay or his companies might
13 not have to pay these loans off if the condition in fact was
14 met, as long as it was uncertain, there was some utility in
15 paying them down.

16 And in addition, he cared about Highland, and so he was --
17 if Highland needed money, he would pay down these loans so
18 that Highland wouldn't have to go borrow money elsewhere.
19 This was an efficient way of putting cash in for Highland.

20 And so because these payments are explained, they are in
21 no way evidence that the agreements did not exist.

22 So let's move on, Mike.

23 Okay. I'm not going to beat this dead horse, but we have
24 -- there's deposition and declaration testimony that the same
25 agreement that was at issue in the first set of cases were

1 used for the 2014 note and the 2016 note.

2 And in both cases, it's the Dugaboy trustee that's making
3 the agreement for Highland, and that has not changed
4 throughout.

5 Okay. So, as I said when we started, the nonmovant in a
6 summary judgment motion always gets the benefit of the doubt.
7 And so we cite many, many cases citing the standards, but it's
8 not just as many of the Debtor -- the Debtor cites many cases
9 that have nice language, but they don't help the Debtor
10 because the Court may do something different than what the
11 Debtor is hoping to achieve here.

12 Every single one of the cases on Slide 7, every single one
13 of these are cases reversing improper grounds of summary
14 judgment. And I ask the Court to go look at them. But we'll
15 take a closer look at a couple on Slide 8.

16 Okay. The first that I want to point to is *Al-Saud*,
17 because this is actually a loan case, and so it is the closest
18 of any of the cases cited by either party. Although I will
19 also discuss the *In re Heritage* case that the Court cited in
20 its Report and Recommendation, which also has something to do
21 with a loan and which is helpful to the Defendants here.

22 But in *Al-Saud*, plaintiff moved for summary judgment on a
23 loan, and the defendant provided testimony that the parties
24 had agreed to a schedule for repayment that was different than
25 what was contained in the loan documents. Very similar to

1 this case. And the plaintiff denied having reached an
2 alternative repayment agreement with the defendant. And the
3 court held that whether or not the parties actually agreed to
4 the alternative payment arrangement, that the declaration and
5 the testimony to that effect created an issue of fact that had
6 to be decided by a jury. This is no different.

7 And then you have Reeves. That's the U.S. Supreme Court
8 case. It's a discrimination case, so it's not a loan case.
9 But, again, the Supreme Court overturned a lower court
10 granting summary judgment, holding that the lower court had
11 impermissibly substituted its own judgment concerning the
12 weight and credibility of the evidence.

13 And with all due respect, that is what is happening here,
14 with declarations and deposition testimony being disregarded
15 in favor of events that have multiple explanations.

16 So, for example, if the Court says, I'm not going to
17 believe Mr. Dondero and Ms. Dondero because in all of the
18 financial statements there was no mention of the potential
19 forgiveness of the loan, well, if that was utterly
20 unexplained, Your Honor, I still think that it would not be
21 proper to weigh those. But in fact, it is explained. Mr.
22 Dondero explained that he did not consider the subsequent
23 agreement material, one, in light of the size of Highland and
24 its operations, and also in light of the fact that it was a
25 contingency that might never happen.

1 And there was some -- Mr. Morris asked PWC about this, and
2 at first got him to say something like, gee, I would have
3 liked to have known that. But when Mr. Aigen cross-examined
4 the PWC witness, he said, no, no, no, no, I would want to know
5 if the forgiveness event happened, not that it was a
6 possibility.

7 So whether Mr. Dondero was right or wrong about whether or
8 not the information should have been in the financials is
9 irrelevant if in fact that's what he thought and it's an
10 explanation for them not being there.

11 The same thing with the much-touted evidence of paydowns
12 of the loan. If it were utterly unexplained, then, I don't
13 know, maybe it would have more weight. But, here, there is an
14 explanation for it, and a good explanation, and so it's not a
15 basis to ignore other testimony.

16 Finally, the last case that we have here, the *Legacy RG*
17 case, and this was a he-said/he-said dispute over whether
18 particular compensation was agreed upon. And that's also
19 somewhat like this case. And the Fifth Circuit said the court
20 was not free to credit plaintiff's affidavits and reject
21 defendant's, potentially making a credibility determination.

22 Let's move to the next slide, Mike. Next one. I'm going
23 to go quickly here. There is -- there are declarations in
24 support of the agreement.

25 Next slide. And there's deposition testimony from Mr.

1 Dondero.

2 Next slide. And there is Nancy Dondero declaration.

3 Next slide. And there is also Nancy Dondero testimony.

4 So now we go to the Debtor's arguments. So, one I
5 mentioned in the summary, which was the fact that Mr. Dondero
6 didn't immediately declare the notes forgiven when the little
7 bit of MGM was sold is irrelevant, especially since the Debtor
8 -- it was so small and so negligible an event the Debtor in
9 its interrogatory answer denied that any MGM has been sold.
10 So that can't be evidence of anything.

11 Fifteenth. Okay. And then Mr. Morris showed you HCMFA's
12 March to April balance sheet. Well, of course it's after the
13 fact that -- that the balance sheet has changed. That's
14 because the event didn't happen until March of -- March 17th
15 of 2022. So of course that's when the balance sheet would
16 show that the forgiveness event had occurred.

17 Go to 16. This is the capacity argument. I argued that
18 before, and I think it's plain.

19 Let's go to 17. This is more on the capacity. I ask Your
20 Honor to look at this and then look at the cases on capacity.
21 Nancy does not need to be an expert in order to have the
22 authority to act within the confines of an agreement that gave
23 her power to do certain things. And we'll get to that in a
24 minute.

25 Next. Next page, Mike. Okay. Here's what is

1 indisputable. The LPA gives Dugaboy the right to approve
2 compensation for the general partner and affiliates of the
3 general partner. It's in the document. If you read the
4 words, you can see the general partner and the affiliates, and
5 any affiliates would include Strand and Mr. Dondero, and they
6 -- their compensation, they shall receive no compensation
7 unless approved by a majority interest. Majority interest is
8 defined as the owners of more than 50 percent of the Class A
9 limited partners. Class A limited partners are shown on an
10 exhibit to the LPA. There's no question that it's the Dugaboy
11 Investment Trust. So when Mr. Morris says the LPA doesn't
12 authorize the agreement, that's flatly contrary to the
13 agreement itself.

14 And I recognize that, Your Honor, in a footnote in the
15 Report and Recommendation said that -- something like
16 Defendant's argument is bizarre, that Nancy, through Dugaboy,
17 could approve the compensation. But that's how the agreement
18 was structured.

19 Maybe Your Honor thinks they shouldn't have structured it
20 that way, that someone should have poked up their head at the
21 beginning and say, boy, is this a sensible way to do this?
22 Yeah or nay on that, it doesn't matter. That is the agreement
23 that the parties struck. And the Debtor isn't seeking to have
24 this -- to have this stricken or disregarded as
25 unconscionable, but the Debtor is just saying, oh, well, it

1 doesn't authorize the agreement, and that -- the agreements,
2 and that's just not true. Nancy was the Dugaboy trustee in
3 2016, and Mr. Dondero was the Dugaboy trustee in -- in -- for
4 the 2014 agreement.

5 Let's go on to the next one. Okay. So this is the
6 argument that the Debtor is making, as best I could tell. The
7 Debtor says Article 6.2, 3 -- 310(a), which was the
8 compensation paragraph, and 4.1(e)(2), when strung together,
9 somehow means that the agreements have to be in writing, that
10 Dugaboy does not have the authority to execute an agreement,
11 and must be fair by an objective standard.

12 So, let's actually look at those sections to see if they
13 say any such thing.

14 Okay. 6.2 is about notices having to be in writing.
15 There's no requirement in 6.2 -- let's go back -- there's no
16 requirement in 6.2 that an agreement to potentially increase
17 compensation has to be in writing. It's only about notices in
18 writing and certified mail. So there is nothing here that
19 supports the Debtor.

20 Let's go to the next one. Okay. And I had to quote what
21 Plaintiff says about this, because otherwise it's hard to even
22 rebut it. The Plaintiff argues, Pursuant to the LP agreement,
23 the limited partners only have the authority to approve
24 agreements for compensation, not to execute them. And the
25 Debtor cites Article 310(a). And we've put 310(a) here down

1 on the slide, and the word execute does not -- or any synonym
2 for execute is not present in this paragraph. So I don't know
3 whether that was maybe a typo in the -- in the Plaintiff's
4 brief, but there is absolutely nothing here to support its
5 contention.

6 Let's go to the next one. Okay. And then the Debtor also
7 relies on Article 4.1(e)(2), saying the GP or its affiliates
8 may enter into an agreement with the partnership to render
9 services, and any service rendered shall be on terms that are
10 fair and reasonable to the partnership.

11 Well, okay. Whether agreements are fair and reasonable is
12 undoubtedly a question for a jury, but that's not what the
13 complaint in this case says. There's nothing about whether
14 the agreements were fair or unfair. It's Debtor's contention
15 that they just don't exist. So, Article 4 doesn't help
16 Debtor, either.

17 Let's go on. And I would ask Your Honor to consider how
18 silly those arguments are in deciding whether or not the
19 Debtor's complaints are well founded.

20 Now moving on to the argument that the agreements must not
21 exist because they were kept secret. First of all, the Debtor
22 has no authority for the fact that, if an agreement is secret,
23 it must not exist. I think I gave an example before. If I
24 agree to sell Mr. Aigen my car and we don't tell anybody about
25 it, that's not evidence as against a creditor later that that

1 agreement didn't exist. It either exists or it doesn't. The
2 fact that it was a secret is neither here nor there.

3 And the point of showing Your Honor the proof of claim and
4 the letter is to say the notion that these notes were
5 potentially compensation was not something that was a secret,
6 and that is some evidence -- I'm not saying to you that is the
7 strongest evidence that the Defendant has -- but that is some
8 evidence that what Mr. Dondero and Ms. Dondero said happened
9 happened. And Mr. Dondero also indicated to Mr. Waterhouse,
10 in a context having nothing to do with litigation, that the
11 notes were forgivable.

12 So let's go to the next page. Okay. And here we have the
13 testimony that Mr. Morris said you should go look at. And let
14 me read this. Did there come a time when you were proposing
15 some potential numbers? And this was in connection with the
16 pot plan. And Mr. Dondero said something to you like, well,
17 why are you including payment for the related-party notes?
18 Those, you know, were likely to be forgiven as part of my
19 deferred executive compensation. And Mr. Waterhouse said,
20 yes, we did have that conversation. And he agreed that it was
21 part of the discussion about the pot plan. And then, because
22 he had -- Mr. Morris had previously gotten him to say it was
23 in 2021, because he didn't -- Mr. Waterhouse wasn't sitting
24 there with a calendar, Mr. Waterhouse said, yes, remembering
25 -- recalling that context reminded him that those discussions

1 were in 2020, so before there was litigation on the horizon
2 that someone might have been, you know, according to the
3 defense, according to the Debtor, making something up. So
4 this happened pre-litigation.

5 Next slide. Okay. We've talked about the proofs of
6 claim. Enough said. It's not meant to say, as the discovery
7 responses said, that this was -- this gave chapter and verse.
8 It's meant to show that the issue that the notes were
9 potentially going to be forgiven as compensation, the threat
10 of that was out there in the world.

11 26. Okay. And, again, the letter. This wasn't a secret.
12 If it was a secret, there wouldn't have been a letter saying
13 something about the loans potentially being compensation.

14 27. The Debtor says the agreements were required to be in
15 writing. I'm sure Your Honor will have noticed they don't
16 cite anything in support of that, and that's because in Texas,
17 except for certain kinds of contracts, the elements of written
18 and oral contracts are the same, and oral contracts, you know,
19 are rather famously enforceable in Texas.

20 28. Consideration. There are many, many, many cases
21 saying consideration is a question of fact for the jury. And
22 if you'll remember the old adage, a peppercorn is good
23 consideration, even if -- even if the promisee doesn't like
24 pepper and even if he's going to throw away the corn. It
25 doesn't take very much for there to be consideration.

1 And here, Jim Dondero forewent seeking additional cash
2 compensation at the comp period of each year and made the
3 agreements instead. And so there is testimony to that, and I
4 -- you'll have this deck and it will remind you where to look
5 for the testimony on that.

6 In addition, the Debtor positively makes fun of the other
7 part of the consideration, which is the increased focus by Mr.
8 Dondero because he had some -- some consideration on the come,
9 some contingent consideration. But if you are going to make
10 light of that and disregard it, you are disregarding the
11 practice of an entire industry. Are they all wrong?

12 And not only one industry. Famously, the securities, the
13 Wall Street, people are compensated on the basis of success.
14 And that is true in many, many industries. And so does that
15 mean they're all wrong, that those -- that all those people
16 who are getting bonuses at the end of the year shouldn't be
17 getting them because they should be working hard anyway? Of
18 course not. People believe, Mr. Dondero believed, that
19 incentive compensation works. And I -- and there's no
20 evidence in this case, no expert evidence that that is not
21 true. And so that is a factor that should be considered in
22 denying summary judgment.

23 The Debtor continues to insist there's no history of
24 forgiven loans. There is deposition and declaration testimony
25 that various executives had loans forgiven. The Debtor said,

1 oh, well, those are smaller. It doesn't matter. There's a
2 practice that this forgiveness of loans is part of incentive
3 compensation. And even Mr. Seery acknowledges that, which
4 we'll get to in a slide or two.

5 Now, then Mr. Hurley. Mr. Hurley's forgiveness is
6 particularly apt because initially he worked for a separate
7 company, and that was brought into the Highland family of
8 companies, and eventually the debt of his that was brought
9 into Highland, and then instead he ended up working for
10 NexPoint, the debt of his company was forgiven basically, as
11 Mr. Hurley says, to compensate him. And that was in 2013.

12 So that rebuts the Debtor on a number of bases. One, this
13 is much more recent. Two, it was forgiving the debt of a
14 company, not a debt of a person. And three, it was for the
15 benefit of the then-employee. And it -- the fact that it was
16 HCMFA and not Highland is really of no moment, given how the
17 Debtor says, well, you have to -- you look at all of these as
18 a group. So, looking at all of these as a group and
19 considering the practices and whether that would be something
20 in Mr. Dondero's mind, you have to consider what happened with
21 Mr. Hurley.

22 And then 35. There's the testimony of Mr. Johnson. So
23 let's look at what he actually said. And they told you about
24 the -- he's talking about he interviewed a number of
25 employees. And Mr. Morris asked him, They told you about the

1 four loans that were forgiven in whole or in part? And he
2 said, I would answer that yes, they said it, and Mr. Dondero
3 mentioned it as well. And they told you there was a use of
4 forgivable loans as a non-business practice at Highland,
5 right? And he said yes.

6 I'm not sure what Mr. Morris meant by non-business
7 practice, but it was a practice at Highland.

8 And he said -- and then another part was he -- have you
9 ever advised a company to forgive a forfeit loan as part of an
10 executive's personal compensation package? He said, yes, I
11 have. And did you tell them it would be appropriate to do
12 that? Yes, I have. Is that a case other than Highland? It
13 would be other clients, yes.

14 So Mr. Johnson generally talked about forgiveness of loans
15 being part of executive compensation. Did he see
16 circumstances exactly like the ones here? Perhaps not, but
17 similar enough so that it is a practice in the industry.

18 Let's go on to 36. And so this was I think Mr. Aigen
19 taking a deposition of Mr. Seery, and Mr. Seery was required
20 to admit that he did see in the records that there had been
21 executive loans forgiven in whole or in part. He says, It
22 looks like they had, but it was more than 10 or 12 years ago,
23 and they had not been to a founder or more than five hundred.
24 But that's just those particular loans.

25 So, despite the Debtor saying over and over it didn't

1 happen, when push came to shove they had to admit it.

2 37. Okay. And I have covered this, but Mr. Dondero
3 testified that he prepaid many of the loans because Highland
4 needed the money. And so Mr. Morris's point is not much of a
5 point at all. He says, well, look, there were some loans that
6 were -- that were paid in full. How could there be -- how can
7 Mr. Dondero keep track?

8 Well, it was very easy to keep track and he didn't need a
9 list because what happened was, if there were loans that, by
10 the time of the compensation period were still outstanding,
11 they became part of this -- of these, the ones in the prior
12 case or the ones here, agreements that they would be
13 potentially forgivable on the occurrence of a -- the
14 conditions subsequent.

15 So he didn't need a list. He could at any time call his
16 CFO and say, okay, what loans are outstanding as of the, you
17 know, the end of the year or the start, the start of the next
18 year, and those would be the loans. It wasn't something
19 random. It was he would pay down loans if they needed -- if
20 Highland needed money. And if it -- and if Highland didn't,
21 then he didn't have to. If a -- if one of these agreements
22 was made in the comp period at the end of that year, it would
23 become a potentially forgiven loan. It wasn't hard to keep
24 track of at all.

25 And so Mr. Morris's point that there wasn't a list really

1 has no weight.

2 Next. Okay. And here again, in Texas, even if only one
3 side to an agreement testifies to it, that's enough to create
4 an issue for summary judgment.

5 Let's go to the next page. Okay. And here we have -- I
6 talked about these in the last hearing so I'm not going to do
7 it again, but in each of these cases, even if one side says,
8 yes, we agreed on *x*, and the other side says, we didn't agree
9 on *x*, that's enough to defeat summary judgment.

10 Next. Next slide, Mike. Okay. So let's talk a little
11 bit about all of the --

12 THE COURT: Let me just ask you a question about
13 that. Is it your position that, as long as a party submits an
14 affidavit saying, you're wrong, there's no way a court can
15 ever grant summary judgment?

16 MS. DEITSCH-PEREZ: No. I'm not saying that. And,
17 actually, this slide was designed to answer exactly that
18 question. Okay. Because the cases -- and we'll get -- we'll
19 look at them specifically. The cases where there is an issue
20 about that is where the affidavit is purely conclusory. So if
21 Mr. Dondero put in a declaration that said, the Debtor is
22 wrong, you're absolutely right, Your Honor, that would not be
23 enough.

24 So, and here's a -- here's a good definition. A statement
25 is conclusory if it does not provide the underlying facts to

1 support the conclusion. And that's a Texas case. And we are
2 talking about Texas law here.

3 So let's look at some examples. The first two we just
4 made up, you know, to give examples. And the third one is
5 really out of the case. But, so, on the one hand, if somebody
6 says the condition for the agreement was sufficient, that's
7 all that was in their declaration and the issue was
8 consideration, consideration, that would probably be
9 considered conclusory. That might not be enough.

10 On the other hand, if the declaration says the
11 consideration for the agreement was \$100 and a can of Dr.
12 Pepper, that would be enough. No question.

13 On the conclusory side, if the -- if the declarations had
14 said, we agreed I would work for him, that might not be
15 enough. But if it said, I said that I wanted to be hired as
16 his general counsel for \$400,000 a year for five years, and he
17 said, I agree to your terms, that would be enough.

18 If you had a declaration that simply said, he breached the
19 agreement, that would probably be conclusory. On the other
20 hand, if it said, he did not make the payments on the notes,
21 that would be not conclusory.

22 And how do I know that one? That's because there is a
23 case where a no-summary-judgment summary judgment was reversed
24 and the Court held that a statement that a party did not make
25 the payments on a note is not conclusory but is instead

1 competent summary judgment evidence that there's an
2 outstanding balance.

3 So what -- what -- the dividing line between conclusory
4 and not conclusory is are there facts to support the position?
5 And we'll -- in a minute, we'll get to the other sort of
6 often-misused phrase, which is self-serving, and we'll get to
7 some court cases on that.

8 Next slide. Okay. So, here is -- here is one of the
9 cases cited in the Plaintiff's reply. And this is a *pro se*
10 plaintiff. Brought a suit against the defendant. And this
11 suit breached the plaintiff's own termination settlement
12 agreement, because in that settlement agreement she released
13 the plaintiff for all causes of action related to her
14 employment and promised not to sue the plaintiff. She was
15 represented by counsel and received \$32,000. And defendant
16 won summary judgment because the plaintiff provided only a
17 conclusory unsworn statement, so not like the declarations and
18 deposition testimony here. It was all unsworn and didn't say,
19 you know, it had no appropriate (indecipherable), no
20 appropriate under penalty of perjury, saying she did not sign
21 the release and argued that her signature was forged, and
22 apparently not explaining away her acceptance of the
23 settlement proceeds. And the Fifth Circuit granted -- granted
24 summary judgment and characterized the plaintiff's statement
25 as conclusory and self-serving and insufficient.

1 But here, HCMFA has put in non-conclusory sworn
2 declarations from two, actually three witnesses, which are
3 supported by other evidence in the record, and so this is an
4 inapposite case.

5 But let's -- it's important for another reason, because
6 *Tyler*, if you look at the *Tyler* case, on the top left-hand
7 corner of the first page it has a warning for negative
8 treatment. That's because it was criticized by the Fifth
9 Circuit in *Bargher v. White* in 2019. And *Bargher* reversed the
10 District Court that had relied upon *Tyler* to grant summary
11 judgment and particularly criticized the very language that
12 the Debtor quotes about a self-serving, conclusory
13 declaration.

14 The court says, Simply being self-serving does not permit
15 a party's assertions from creating a dispute of fact, noting
16 that evidence proffered by one side or the other is basically
17 always self-serving.

18 And the court gave a great example. It said, A plaintiff
19 in a car wreck case who asserts that she had a green light and
20 the defendant ran a red light is also making a highly self-
21 serving -- highly self-serving statements, but no one would
22 say that a District Court can ignore them.

23 But that's what this Court would be doing if it grants
24 summary judgment by disregarding the Donderos' allegedly, you
25 know, self-serving testimony, meaning that the Debtor says,

1 well, this is self-serving. Of course it's self-serving.
2 It's proffered in support of a particular side. And so 2019
3 --

4 THE COURT: Okay. This is your five-minute warning,
5 okay? Go ahead.

6 MS. DEITSCH-PEREZ: Okay. We're close.

7 Next slide. Okay. Another case that the Plaintiff relies
8 on -- and I'll just get to the point. The problem with this
9 case -- with this case was not simply a vague, self-serving,
10 conclusory affidavits, affidavit, which is not what we have
11 anywhere, but with the fact that the plaintiff in that very
12 case made a sworn statement that he hadn't made false
13 representations, but he had been convicted for those very
14 statements, and so he was collaterally estopped from
15 contending otherwise. So this case is not authority for
16 summary judgment here.

17 Next. *BMG* is -- is also another similar case where there
18 was an admission that property was transferred for no
19 consideration, and the defendants' defense was an
20 interrogatory answer. They transferred property to appease
21 his father. Long story. But there was no statement from the
22 father. This would be as if Jim had put in a declaration and
23 Nancy was conspicuously silent. That's not what happened
24 here. So, again, this is not an apt case. It actually shows
25 the opposite.

1 Next. Next slide. *United States v. Lawrence* is a case in
2 which the one party said that somebody else had paid his loans
3 for him and he didn't put any evidence in about the loans and
4 there was absolutely no other evidence in the case. And here,
5 the difference is, as we've shown you, HCMFA has many pieces
6 of evidence. Its balance sheet. The proof of claim. The
7 letter. The deposition testimony of three witnesses.
8 Declarations. The existence of other forgiven loans. The tax
9 expert who says how to structure compensation using loan
10 forgiveness. The inadequacy of Mr. Dondero's compensation
11 without the potentially-forgiven loans. The course of dealing
12 in the plan. And the disclosure of the potential forgiveness
13 to Mr. Waterhouse. So, again, nothing like the *Lawrence* case.

14 Next slide. I'm going to ask Your Honor to read these
15 because I want to get to the last case, so go on to the next
16 one.

17 I mean, again, this is a *pro se* case that the Plaintiff
18 relies on where the sole defense was a single sentence saying,
19 Defendant must use exercise force as Defendant Warner was not
20 properly trained, all in the scope of his employment. That
21 was the sole defense, and summary judgment was granted.
22 That's nothing like this case.

23 Next slide. *DIRECTV*. This is another case where there is
24 a declaration, and the problem wasn't that it was supposedly
25 conclusory and self-serving, is that it didn't go to the issue

1 in the case, which was constructive knowledge. All the
2 affidavit did was rebut specific intent to commit piracy. So
3 it was no evidence, is all, so not applicable.

4 *Hinsley* was very much like the *DIRECTV* in that the
5 affidavit that was put in didn't go to the issue in the case,
6 and so it was no evidence at all. Also inapt.

7 You know, like a -- like a lawsuit, which, really, the
8 Debtor should know better, citing words in a case that cite a
9 standard, when the case doesn't do what you're aiming to have
10 the Court do, really doesn't help you.

11 Let's go on to the next. I ask you to read *Salama* because
12 it really -- it suggests -- it's in favor of the Defendant on
13 the issue of consideration. Even if it's not the
14 consideration that it should have been, any little
15 consideration is enough.

16 Go on to the next one. I'd ask Your Honor to read this.
17 But go on to the next one, Mike.

18 Okay. This is one of the Report and Rec -- the -- I have
19 a couple of cases from the Report and Recommendation, and I
20 think this is really important.

21 THE COURT: Okay. Time. So let's wrap it up in a
22 few seconds.

23 MS. DEITSCH-PEREZ: Okay. Then let me go -- I will
24 ask you to please look at *Scott, Scott v. Woolney*, because the
25 issue here is that while there was a declaration, it wasn't on

1 the issue that was important, which is that the defendants
2 would pay.

3 And let's go to the last one, Mike. Okay. *In re*
4 *Heritage*, which is one of the cases that Your Honor cites in
5 the Report and Recommendation at some length because it is a
6 promissory note case. So I thought it was important to look
7 at that.

8 And that was a promissory note case where the defendant
9 argued that a promissory note was subsequently modified by an
10 oral agreement. Again, pretty interesting to us. And the
11 Court did reject that argument, but in a way that validates
12 HCMFA's position here. And this is what the Court, Judge
13 Houser said: Moreover, while the summary judgment evidence
14 does raise a genuine issue of material fact about what might
15 have happened if the appraisal process resulted in a higher
16 determination of value than the value implicitly agreed upon
17 by the parties when the fee was liquidated in the note, there
18 is no evidence that supports a finding that the parties agreed
19 after the note's execution to reduce the amount due under the
20 note, the triggering event that occurred, which is the
21 substance of the oral agreement defendant now seeks to
22 enforce.

23 So, look at that. The Court said, yes, there is an
24 argument that an oral agreement changed the terms of the note,
25 and there was testimony that they did agree, they -- that if

1 the appraisal process --

2 THE COURT: All right. You need to wrap it up. I've
3 let you go over.

4 MS. DEITSCH-PEREZ: Okay. I'm just about done. The
5 Court said, the testimony that -- that there was an agreement
6 that if the appraisal process resulted in a higher
7 determination of value, that would prevent a finding of
8 summary judgment because that would create an issue of fact.
9 The problem in the case is they were trying to argue that a
10 lower valuation entitled them to lower the note, and the Court
11 said, well, there's no evidence of that because that's not
12 what you raised in your declaration.

13 If they had done what was done here and put in evidence in
14 support of the agreement, that would create an issue of fact.

15 THE COURT: All right.

16 MS. DEITSCH-PEREZ: Thank you, Your Honor.

17 THE COURT: Thank you.

18 MS. DEITSCH-PEREZ: So, *Heritage* helps. Helps the
19 Defendant.

20 THE COURT: Okay. Before I allow the rebuttal, let
21 me just make sure I understand the summary judgment evidence
22 from HCMFA that creates a genuine dispute here. You've got
23 the declarations of James Dondero, of Nancy Dondero.
24 Deposition testimony of each of them. The withdrawn Proof of
25 Claim No. 188 of James Dondero, with the language about the

1 notes were issued by him for funds advanced in lieu of
2 compensation. And then the Michael or Micheal Hurley
3 declaration.

4 MS. DEITSCH-PEREZ: Okay. There's also the evidence
5 of the expert that Mr. Dondero's compensation was below
6 market. The evidence that giving loans that could be
7 potentially forgiven is a thing, as Mr. Morris would say, is a
8 thing that happens.

9 THE COURT: Okay. Just the pieces of evidence, not,
10 you know, describing them, but --

11 MS. DEITSCH-PEREZ: Those are pieces of evidence.

12 THE COURT: The expert --

13 MS. DEITSCH-PEREZ: That's -- that's evidence.

14 THE COURT: -- declaration. Or deposition. Anything
15 else?

16 MS. DEITSCH-PEREZ: Yes. The other expert, which
17 said that this is what you have to do to create tax-efficient
18 compensation, this is how you would do it. The fact that
19 that's a thing that you can do that. The fact that --

20 THE COURT: Who's the other expert?

21 MS. DEITSCH-PEREZ: Bruce -- I'm sorry, Michael.
22 Help me out. I've forgotten his name.

23 THE COURT: Okay. I'll find it. I remember Alan
24 Johnson, but I don't remember who the other one is.

25 MS. DEITSCH-PEREZ: Yes.

1 MR. AIGEN: Sorry. I was on mute. McGovern. That's
2 --

3 MS. DEITSCH-PEREZ: Bruce McGovern. Bruce McGovern.

4 THE COURT: Okay. Any other summary judgment you
5 think creates a genuine dispute?

6 MS. DEITSCH-PEREZ: Well, there -- and there's also
7 the summary judgment evidence that undermines the Debtor's
8 contentions. The LPA itself. The --

9 THE COURT: Okay.

10 MS. DEITSCH-PEREZ: The fact that Mr. Dondero sought
11 to make sure Highland always had sufficient funds. And Your
12 Honor, there's -- there's much summary judgment --

13 THE COURT: Okay. I just wanted a succinct list of
14 here is the summary judgment evidence.

15 MS. DEITSCH-PEREZ: Yeah, those are the main things,
16 but I would urge you to look at our brief and our appendix --

17 THE COURT: Okay.

18 MS. DEITSCH-PEREZ: -- for the full complement.

19 THE COURT: Yes. I've looked at that. I just -- all
20 right. Mr. Morris, your rebuttal?

21 MR. MORRIS: Thank you, Your Honor. I just want to
22 begin by saying that I really regret the way that presentation
23 was personalized. I don't appreciate the personal attacks,
24 and I hope that in the future Counsel can find a way to make
25 an argument without coming after me.

1 Having said that, I think she completely misunderstands
2 and mischaracterized our position in numerous respects. We're
3 not saying that the failure to disclose or memorialize the
4 agreement in writing or to disclose it to other people in and
5 of itself renders the agreement nonexistent. Your Honor is
6 probably familiar with the phrase badges of fraud. I won't go
7 that far. I'm going to use indicia of fabrication. And the
8 indicia of fabrication is overwhelming. And it begins,
9 frankly, with the proof of claim that they rely upon that says
10 nothing about an agreement. It begins -- it continues with
11 whatever conversation that Mr. Dondero claims he had with Mr.
12 Waterhouse postpetition, any settlement discussions where he's
13 saying, I don't want to pay on the notes. Never uses the word
14 agreement. Never uses the word Nancy Dondero. Never uses the
15 word Dugaboy. Never uses the words conditions subsequent.
16 It's -- all he's saying is, I don't want to pay, I thought it
17 was compensation. No disclosure of this agreement.

18 Same thing with Mr. Lynn's letter. Done after the
19 fact. This is the stuff that they're relying on? Their
20 balance sheet created three months ago? That's not self-
21 serving? Mr. Lynn's letter is not self-serving? Mr.
22 Dondero's proof of claim is not self-serving?

23 The indicia of fabrication begins with how they crafted
24 this defense. It was all laid out in our papers in the
25 original summary judgment motion. It's all part of the record

1 here. Your Honor will recall that in his original answer Mr.
2 Dondero said that the loans were forgiven. And then when we
3 asked him if he paid taxes, he had to admit that he
4 didn't. So he said it's a condition subsequent. When we
5 asked him who entered into the agreement, he said he did. And
6 when we came and mocked that story in open court, then they
7 brought in Nancy Dondero. And then all of the other corporate
8 defendants, who had never asserted this defense at all, jumped
9 on board. That is indicia of fabrication.

10 Putting the notes in your balance sheet and representing
11 to your auditors that they're valid and enforceable, and now
12 claiming that they're not. That's indicia of fabrication.

13 Everything that's there, Your Honor, on Slide 3 is indicia
14 of fabrication.

15 I'm told that Mr. Seery and I deny that a loan was ever
16 forgiven. We have never said that. Your Honor can read our
17 papers. What we are is very clear, and that is relying on Mr.
18 Dondero's own testimony when he says any loan that was ever
19 forgiven was in the audited financial statements. We've put
20 the audited financial statements in the record. And Mr.
21 Johnson, upon reviewing them, concluded that no loan had ever
22 been forgiven for almost a decade prior to the petition date
23 by Highland. That no loan had ever been forgiven for more
24 than \$500,000. Right?

25 And I would also point the Court, I think it's Exhibit 24,

1 which is Mr. Dondero's written responses to requests for admit
2 early in the case, where he says at Appendix Page 524, I think
3 it's Page 11 of the written responses, where he specifically
4 admits that no loan to him has ever been forgiven and no loan
5 made to any entity owned or controlled by him has ever been
6 forgiven.

7 They point -- I mean, you know, other than Mr. Dondero's
8 and Ms. Dondero's declarations and testimony, there literally
9 is not a scintilla of evidence to support them. Not a
10 scintilla of evidence. There's no disclosure. There is
11 nothing that's consistent with it. How do you not tell your
12 CEO, your CFO, about these agreements in real time? How is
13 that possible? How do you not tell your auditors in real
14 time?

15 This is indicia of fabrication. And I think that that is
16 -- that it's just overwhelming. Again, how the whole defense
17 was created and crafted, and it took months, and amendments
18 and amendments and motions to get to this point, is the best
19 evidence there is of fabrication.

20 (Pause.)

21 MR. MORRIS: Just looking at my notes here, Your
22 Honor. Just one moment.

23 You know, you can't just say stuff, say we now have a
24 dispute of fact. And I want to give a couple of examples.
25 You can't just say, I didn't disclose it because I didn't

1 think it was material, and say, see, we've got a genuine issue
2 of fact, because that's what HCMFA is saying. Yes, Mr.
3 Dondero responded to every argument we made. That doesn't
4 make it a genuine dispute of fact at all. He says it wasn't
5 material, and on that basis the Court should say we've got a
6 dispute here that's worthy of going to the jury?

7 PricewaterhouseCoopers defined materiality for purposes of
8 the audit. Mr. Dondero is an accountant. \$70 million is
9 about \$68-1/2 million above the materiality threshold for
10 PricewaterhouseCoopers.

11 And I would point out, Your Honor, that \$70 million of
12 notes is a very substantial portion of the Debtor's asset
13 base. It's not one percent. It's not two percent. It's a
14 substantial portion of the Debtor's asset -- how does Mr.
15 Dondero's flippant remark that he didn't disclose this to
16 anybody at any time because he didn't think it was material,
17 how does that create a new dispute of fact? It cannot. It
18 cannot. It cannot go to the jury on the basis of those types
19 of self-serving statements.

20 Yes, he has an answer for everything because he always
21 does. The job for the Court is to decide whether there is a
22 genuine dispute of fact. And I'm sorry to say part of the job
23 of the Court, based on the case law that we've cited, is to
24 see whether or not a reasonable jury can reach the finding
25 that's being urged by the Defendant. And we don't think

1 there's any basis to do that, Your Honor. We don't think
2 there's any basis at all.

3 The evidence -- they've done nothing to rebut our case.
4 The evidence in support of our case on Page 2 is overwhelming.
5 And the very, very limited evidence that they rely upon
6 doesn't do anything to change -- to move the needle. The
7 proof of claim doesn't.

8 And I do have to point out, Your Honor, that if the proof
9 of claim is what they say it is, an assertion of a defense,
10 they withdrew it with prejudice. Why do they even get to
11 assert the defense now?

12 And that's part of the evidentiary record. There is
13 exhibits towards the end of our appendix where there's a
14 stipulation where Mr. Dondero withdrew the proof of claim with
15 prejudice to refileing. Why is he even permitted to assert
16 this defense now, if, as they contend -- if, as they contend,
17 that proof of claim somehow disclosed a defense? If that
18 defense -- if that proof of claim disclosed a defense, then
19 Mr. Dondero has withdrawn it with prejudice. And he ought to
20 be held to that.

21 This is a case to sue on promissory notes, Your Honor.
22 Just because he and his sister respond to every argument that
23 we make doesn't make it a genuine dispute of fact. And we
24 believe, Your Honor, based on our pleadings, based on the
25 evidence, based on the lack of evidence that corroborates

1 anything they say, we think summary judgment should be granted
2 for the Plaintiff.

3 Thank you, Your Honor.

4 THE COURT: All right. Thank you.

5 All right. A couple of things. I hadn't really focused
6 on this before coming out, but you all mentioned this. This
7 adversary proceeding, it was *sua sponte* consolidated with the
8 other five by Judge Starr?

9 MR. MORRIS: Yes.

10 MS. DEITSCH-PEREZ: Yes, Your Honor.

11 MR. MORRIS: And that's -- that's at Docket 44 of the
12 adversary proceeding. There was a *sua sponte* order issued on
13 April 20, 2022 that consolidated this with the -- with the
14 main adversary -- with the main notes litigation.

15 THE COURT: Okay. I had just not focused on that.

16 Okay. So that's important information.

17 So you're both going to send to me, or send to Traci, your
18 PowerPoints.

19 And I'll let you know that the last time you all were here
20 before me and I took something under advisement I think was
21 the HCMFA administrative expense claim, and I committed we'll
22 try to get you an answer and not make you wait too long. And
23 I probably overpromised on that. I think I had five or six
24 matters under advisement in the queue when I said that.

25 But we're finally almost caught up. And in fact, the only

1 thing I have in our under-advisement queue is that very
2 matter, the HCMFA administrative expense, and now this.

3 So we're going to try to get on these as fast as we can,
4 especially this one. Now that I know it's administratively
5 consolidated with the others, I'd like Judge Starr to have
6 these close together in time to make it more efficient for
7 him.

8 So, --

9 MS. DEITSCH-PEREZ: In fact, Your Honor, we had
10 thought that you were -- when it took a while to get the
11 Report and Recommendation, our suspicion -- obviously wrong --
12 was that you were waiting to do it all at once. But --

13 THE COURT: Yes.

14 MS. DEITSCH-PEREZ: -- I guess that was not the case.

15 THE COURT: Well, we just had -- we've had a very
16 busy year, and we just had a lot of things ahead in the queue
17 that we were working on getting out. So, yes, I really want
18 Judge Starr to have this one pretty soon so he can maybe look
19 at them all at the same time. So, that is my commitment to
20 you.

21 Anything else as far as housekeeping matters? I guess we
22 haven't heard anything from the Fifth Circuit in the big
23 appeal. I'm not always any ahead of the parties in getting
24 word on that kind of thing, but I know you all had oral
25 argument in March or something like that. So, still waiting

1 on that?

2 MR. MORRIS: That is correct, Your Honor.

3 THE COURT: Okay. All right. Well, if there's
4 nothing further, we'll have this under advisement, and we're
5 adjourned. Thank you.

6 (Proceedings concluded at 3:17 p.m.)

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CERTIFICATE

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

22 **/s/ Kathy Rehling**

08/08/2022

23

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

24

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