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No. 22-10889

In the
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

In the matter of Highland Capital Management, L.P.,

Debtor.

James Dondero, Defendant in the above-captioned adversary proceeding and a creditor, indirect equity holder, and party in interest in the above-captioned bankruptcy case,

Appellant,

v.

Highland Capital Management, L.P., Plaintiff in the above-captioned adversary proceeding and the Debtor in the above- captioned bankruptcy case,

Appellee.

Appeal from the United States District Court
for the Northern District of Texas, Dallas Division
Honorable David Godbey, United States District Judge
No. 3:21-cv-01590-N

APPELLANT'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS

No. 22-10889, *James Dondero v. Highland Capital Management, L.P.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5TH CIR. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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REQUEST FOR ORAL ARGUMENT

Pursuant to 5TH CIR. R. 28.2.3, Appellant James Dondero requests oral argument. This is an appeal from an order of contempt against Dondero awarding Appellee Highland Capital Management, L.P. attorney's fees of $450,000—perhaps the largest contempt sanction in this Court's history. The grounds for contempt are built on a record of smoke and mirrors—a far cry from the clear and convincing evidence this Court requires to support an order of civil contempt. Although this unprecedented order should be summarily reversed based on straightforward legal principles, Dondero believes that oral argument will be beneficial because his appeal presents serious policy issues that have broader significance beyond this case.

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JURISDICTIONAL STATEMENT

This case originates from a contempt order issued after judgment in an adversary proceeding initiated on December 7, 2020 (ROA.6800), which arose out of the Chapter 11 bankruptcy of Highland Capital Management, L.P. filed on October 16, 2019. (ROA.6629-30) The Bankruptcy Court had jurisdiction over the Chapter 11 proceeding under 28 U.S.C. §§ 157(a)-(b), 1331, and 1334(a), and had jurisdiction over the adversary proceeding under 28 U.S.C. §§ 157 and 1334(b). In the adversary proceeding, Highland sought injunctive relief against James Dondero, Highland's former president and CEO, alleging that such relief was necessary to prevent him from improperly interfering with the bankruptcy proceedings. (ROA.6809) That made the adversary proceeding a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O).

The Bankruptcy Court entered a temporary restraining order against Dondero in the adversary proceeding on December 10, 2022. (ROA.6873 [RE 5]) On January 7, 2020, Highland filed a motion in the adversary proceeding seeking to hold Dondero in contempt of the TRO. (ROA.7186) The Bankruptcy Court entered judgment resolving the adversary proceeding on May 18, 2021, but "reserved jurisdiction to rule on the earlier-filed Contempt Motion." (ROA.268) The Bankruptcy Court issued a memorandum opinion granting in part the contempt motion on June 7, 2021. (ROA.251 [RE 4])

That order was final and appealable because it concluded the only issue over which the Bankruptcy Court had retained jurisdiction after judgment and because a sanctions award is a final, appealable order collateral to the adversary proceeding. *See Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 398, 400 (5th Cir. 1987).

On July 8, 2021, Dondero timely appealed the contempt order to the District Court (ROA.16), which had jurisdiction over the appeal under 28 U.S.C. § 158(a)(1). The District Court issued an order affirming the contempt order in part on August 17, 2022. (ROA.11636 [RE 3]) Dondero timely appealed that order to this Court on September 15, 2022. (ROA.11651 [RE 2]) This Court has jurisdiction over the appeal under 28 U.S.C. §§ 158(d) and 1291-92.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the Bankruptcy Court err in imposing, and the District Court err in affirming, a contempt sanction against Appellant James Dondero for violating Section 2(c) of the temporary restraining order ("TRO"), which prohibited him from "[c]ommunicating with any of the Debtor's employees, except as it specifically relates to shared services currently provided to affiliates owned or controlled by Mr. Dondero," when:

a. Dondero restricted his communications with the Debtor's employees to routine matters governed by the Shared Services Agreements between the Debtor and companies Dondero owned and controlled;

b. the TRO's "shared services" exception did not clearly or unambiguously prohibit this conduct; and

c. the Debtor offered no evidence, much less clear and convincing evidence, that Dondero's communications with the Debtor's employees deviated either from the services covered under the Shared Services Agreements or the services historically and customarily provided by the Debtor to Dondero's companies?

II. Did the Bankruptcy Court err in imposing, and the District Court err in affirming, a contempt sanction against Dondero for violating Section 2(d) of the TRO, which prohibited him from "[i]nterfering" with "the Debtor's business," when:

a. Dondero's only act of "interference" that the Debtor claimed to be a violation of this provision occurred before entry of the TRO, and therefore did not violate the TRO;

b. there is no clear and convincing evidence demonstrating otherwise; and

c. the Bankruptcy Court's contrary conclusion was based on a clear misunderstanding of the evidence?

III. Did the Bankruptcy Court err in imposing, and the District Court err in affirming, an attorney's fee award of $450,000 as a sanction for the alleged violations of the TRO, when:

a. the Bankruptcy Court failed to restrict the award to fees resulting from the alleged violations of the TRO because the award included fees related to events that predated the TRO and accusations of contempt that the Bankruptcy Court rejected; and

b. the Debtor offered no proof of the reasonableness of the fees?

INTRODUCTION

Injunctions are one of the law's most powerful weapons, and contempt powers are one of a federal judge's most awesome responsibilities. A judge's power to declare conduct unlawful in an injunction, and then sanction a party for violating the injunction, presents a serious threat to individual liberty and great risk for potential abuse. That is why the Constitution prohibits a court from sanctioning a person for violating an injunction or restraining order unless it provides the "elementary due process requirement of notice." *Scott v. Schedler*, 826 F.3d 207, 212 (5th Cir. 2016) (quoting Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 2955). And fair notice requires that the injunction inform restrained persons of the conduct it prohibits so that they can conform their behavior to the law. *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) ("founding of a contempt citation" will not occur "on a decree too vague to be understood").

To ensure compliance with this constitutional command, Congress has directed, and the federal rules require, that every injunction or restraining order must "state its terms specifically" and "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." FED. R. CIV. P. 65(d)(1)(B) & (C). These restrictions serve to prevent litigants from overreaching against their opponents—"hold[ing] the club of contempt forever over the other's head," *Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762, 771 (3d

Cir. 1994)—and to prevent judges from acceding to those overreaching demands out of a sense of frustration or vengeance. Such judicial abuse of vague injunctions would "transform the contempt power from a 'potent weapon' into a 'deadly one.'" *New York Tel. Co. v. Commc'ns Workers of Am., AFL-CIO*, 445 F.2d 39, 48 (2d Cir. 1971) (quoting *Int'l Longshoresmen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967)).

Despite these longstanding principles, the Bankruptcy Court in this case gave in to exactly the sort of overreaching demand for contempt sanctions based on a vague, ambiguous restraining order that the law prohibits. Throughout this case, which centers on the bankruptcy of Highland Capital Management, L.P. (ROA.6623), the Debtor and the Unsecured Creditors Committee undertook a series of increasingly aggressive measures to squeeze out James Dondero, who co-founded Highland in 1993 and ran it for nearly 30 years, and to prevent his competing plan of reorganization from gaining traction. (ROA.6661) They forced him to step down as CEO, fired him as an employee, and then obtained a temporary restraining order (the "TRO") prohibiting him from contacting Highland's employees and interfering with its business. (ROA.6873) These moves culminated in a motion for contempt that was so petty as to seek sanctions for allegedly failing to "read" the TRO or pay sufficient attention during the TRO hearing, and so overreaching as to rely on deliberately manufactured evidence and sleight of hand. (ROA.7199-7201)

In addressing Highland's contempt motion, the Bankruptcy Court expressed frustration with the "contentious, protracted, and unpleasant" conduct from both sides in this litigation, likening itself to a family judge in a "corporate divorce." (ROA.252) And while the Bankruptcy Court rejected many of Highland's grounds for contempt, it nonetheless accepted some of the most unwarranted of them—sanctioning Dondero for conduct that did not clearly and convincingly violate the TRO, or did not occur at all. Then it awarded Highland "compensatory" fees and expenses totaling $450,000—an amount far beyond what was necessary to compensate Highland for the allegedly contemptuous conduct. That decision, and the District Court's affirmance of it, violated basic standards of Due Process and Rule 65(d), and must be reversed.

STATEMENT OF THE CASE

I. Factual History

When Highland filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on October 16, 2019 (ROA.6629-30), all stakeholders in the bankruptcy desired to keep Dondero at the helm of the company—an operation so sprawling as to encompass more than 2,000 entities that were not in bankruptcy. (ROA.256) Yet Dondero soon faced resistance from the U.S. Trustee, Highland, and the Unsecured Creditor's Committee ("UCC") that made this arrangement impossible.

A. Highland and the UCC seek to squeeze out Dondero, who had continued dealings with Highland through shared services agreements.

The bankruptcy proceeding took on a familiar pattern. On one side, Highland's creditors (and those aligned with them) wished to wind down Highland's operations and sell its assets to maximize their recovery. On the other side, Dondero wished to preserve Highland's assets for investors, leaving a window open for a potential recovery through a new entity or one of his existing companies. (ROA.302)

Highland and others vehemently opposed Dondero's plan and his efforts to advocate for it, claiming they presented a conflict of interest. (ROA.254) To resolve their concerns, and to expedite Highland's reorganization, Dondero agreed to resign as Highland's CEO and to have Highland placed under the control of a board of independent directors—one of whom, James P. Seery, eventually became CEO. (ROA.254-55, 324) Dondero also agreed to stay on as an unpaid employee and portfolio manager for several non-debtor investment vehicles. (ROA.11638)

Yet the disagreements continued. After Dondero objected to a settlement between Highland and several key creditors and raised concerns that Seery was mismanaging one of Highland's subsidiaries (ROA.208, 257, 6922-23), Highland's new management determined that it was untenable for Dondero to remain an employee, and he agreed to resign on October 9, 2020 (ROA.263).

But even after his resignation, Dondero's relationship with Highland continued as a matter of necessity. His interests were so intertwined with Highland that the documents related to one of his personal trusts, the "Dugaboy Trust," were previously located on Highland's servers. (ROA.288) And even after resigning from Highland, Dondero continued to own and control numerous non-debtor entities that were part of the Highland enterprise. These included NexPoint Advisors, L.P. ("NexPoint") and Highland Capital Management Fund Advisors, L.P. ("HCMFA") (together "the Advisors"). (ROA.257-58) The Advisors also managed certain publicly traded mutual funds in which Highland had an interest (ROA.257), but as is typical of subsidiaries in the financial services industry, the Advisors shared many services and personnel with Highland under an arrangement that was formalized in two different Shared Services Agreements—one for each company. (ROA.8630, 8649, 8093-100, 10071)

Under these Shared Services Agreements, Highland provided the Advisors with "Back- and Middle-Offices" services, including "finance and accounting," "operations," "bookkeeping," and "telecom." (ROA.8632-33, ROA.8651) Highland also provided "[a]ssistance and advice with respect to legal issues" and "litigation support," and it supplied "Shared Employees" to perform these functions. (ROA.7703-04, 8651) And as president of the Advisors, Dondero routinely conferred with Highland's employees concerning these services. (ROA.8093-8100,

10071-72) These employees would often wear multiple hats while providing services for both Highland and the Advisors. (ROA.10055-56)

Yet even these routine communications and shared services became a concern for Highland's new management and the UCC. Highland accused Dondero of interfering with its operations by preventing Seery, Highland's new CEO, from authorizing the sale of certain securities known by the stock tickers "SKY" and "AVYA" on November 24, 2020 that were held in a series of collateralized loan obligations ("CLOs") that Highland managed. (ROA.265-65, 7023-31) Highland also claimed that on December 3, 2022, Dondero sent a threatening message to Seery following Seery's attempt to collect on demand notes that Dondero and certain Dondero-related entities owed to Highland, saying "Be careful what you do—last warning." (ROA.260, 266, 7354, 7521)

B. Highland seeks and obtains a TRO.

On December 7, 2020, Highland moved for a TRO and preliminary injunction against Dondero (ROA.6815), which the Bankruptcy Court granted after a hearing on December 10, 2020 (ROA.6873). Paragraph 2 of the TRO enjoined Dondero from:

> (a) communicating (whether orally, in writing, or otherwise), directly or indirectly, with any Board member unless Mr. Dondero's counsel and counsel for the Debtor are included in any such communication;
>
> (b) making any express or implied threats of any nature against the

> Debtor or any of its directors, officers, employees, professionals, or agents;
>
> (c) communicating with any of the Debtor's employees, except as it specifically relates to shared services currently provided to affiliates owned or controlled by Mr. Dondero;
>
> (d) interfering with or otherwise impeding, directly or indirectly, the Debtor's business, including but not limited to the Debtor's decisions concerning its operations, management, treatment of claims, disposition of assets owned or controlled by the Debtor, and pursuit of the Plan or any alternative to the Plan; and
>
> (e) otherwise violating section 362(a) of the Bankruptcy Code.

(ROA.6874-75 [RE 5]) And paragraph 3 of the TRO further enjoined Dondero from "causing, encouraging, or conspiring with (a) any entity owned or controlled by him, and/or (b) any person or entity acting on his behalf, from, directly or indirectly, engaging in any Prohibited Conduct." (ROA.6875)

II. Procedural History

A. Highland moves for contempt against Dondero.

Dondero materially adjusted his conduct to comply with the TRO. (ROA.9980) But within a month, Highland filed a motion for contempt accusing him of violating it. (ROA.7186) Some of the accusations it levied against Dondero had no apparent connection to the TRO's terms at all. These included bizarre accusations that Dondero refused to "read" the TRO or "listen" to the TRO hearing; that he threw away his cell phone in an attempt to evade discovery; that he "trespass[ed]" on Highland "property"; and that he supposedly "interfer[ed]" with the UCC's requests

for documents. (ROA.7200-23) The latter accusation was based on nothing more than Dondero's request for a subpoena before he would turn over information relating to the Dugaboy Trust, which was located on a Highland server. (ROA.233)

Other accusations seemed nominally connected to the provision in Section 2(c) of the TRO that prevented Dondero from contacting Highland's employees under certain circumstances. The contempt motion accused Dondero of communicating with Highland's lawyers Scott Ellington and Isaac Leventon (concerning a variety of legal matters); Highland's IT employee Jason Rothstein (concerning Dondero's cell phone); and Highland's executive accountant Melissa Schroth (concerning the production of documents relating to the Dugaboy Trust). (ROA.286, 288, 294, 7202, 7204-05)

But Highland made no attempt to demonstrate that these communications fell outside the exception in Section 2(c) of the TRO, which permitted Dondero to communicate with Highland's employees about subjects relating to "shared services currently provided to affiliates owned or controlled by Mr. Dondero." (ROA.6874-75) To Dondero, that exception seemed to reference the Shared Services Agreements between the Advisors and Highland, preserving Dondero's right to communicate with Highland's employees about the services it was contractually obligated to provide the Advisors. And the communications that Highland challenged concerned the very sorts of "finance and accounting" services, "telecom" support including

"cell phones," and "legal issues" covered under the Shared Service Agreements and carved out of the TRO. (ROA.8632-34, 8651)

The contempt motion's remaining accusation was suspect for other reasons. Highland accused Dondero of violating Section 2(d) of the TRO by "personally interven[ing] to prevent the Debtor from executing certain securities transactions" in SKY and AVYA on December 22, 2020—the very conduct Dondero had engaged in during the period leading up to the TRO. (ROA.7203) But Highland presented no evidence from documents or third-party witnesses showing that such "intervention" actually occurred after the TRO was entered on December 10, 2020. The only "evidence" it offered was Dondero's previous testimony from his deposition and a prior hearing that he had "instruct[ed] the employees of the Advisors not to execute" trades that "Seery" had authorized. (ROA.7709, 8044, 9979-80) But at the contempt hearing, Dondero clarified that this previous testimony was based on a mistake about the timing of the event in question. While he admitted interfering with trades "[t]he week before Thanksgiving"—*i.e.*, *before* Highland had sought and obtained the TRO—he vehemently denied doing so "on December 22"—*i.e.*, *after* the TRO was entered. (ROA.9980; *see also* ROA.9978-79 [insisting the accusation that he had interfered with trades after entry of the TRO was "absolutely not true" and he had tried to "correct this half a dozen times"]) Dondero was simply confused about the dates in his earlier testimony, and testified that "[o]nce the TRO was in effect, I

respected the TRO. I respected the Court. I did not call anybody." (ROA.9980) And at the contempt hearing, Seery tacitly admitted that Dondero's previous testimony, which Dondero had recanted, was not accurate because none of the trades that Highland alleged Dondero had "prevented" in December 2020 were actually cancelled, and all had been executed as scheduled. (ROA.10149, 10154)

B. The Bankruptcy Court holds Dondero in contempt and awards a $450,000 sanction.

On March 22 and 24, 2021, the Bankruptcy Court held a hearing on Highland's contempt motion. (ROA.9901, 10194) Although the Bankruptcy Court granted that motion on June 7, 2021, it nevertheless found that Highland overreached in several respects. The Bankruptcy Court concluded that Dondero's supposed "willful ignorance" of the TRO and "trespassing" on Highland property were not violations of the TRO, which did not "specifically enjoin" such conduct. (ROA.299) The Bankruptcy Court also determined that it could not "find contempt of the TRO" based on allegations that Dondero improperly disposed of his cell phone, concluding that the TRO lacked "specificity" about whether it covered such conduct. (ROA.296-98)

But the Bankruptcy Court still adopted some of the contempt motion's most tenuous accusations. It concluded that all of the challenged communications between Dondero and Highland's employees violated Section 2(c) of the TRO and did not fall within its "shared services" exception. Specifically, the court determined that

Dondero's communications with Highland's lawyers were "about all kinds of things post-TRO other than shared services" (ROA.286), apparently believing those communications fell outside the "shared services" exception because Highland's lawyers seemed to be advancing "Dondero's interest" and "Dondero's own personal litigation strategies" in a manner that was "adverse to the Debtor's interest." (ROA.293-94) This was despite the fact that the Shared Services Agreements broadly gave Dondero and the Advisors a right to receive "legal services" from Highland regardless of the purpose for which those legal services were sought. The Bankruptcy Court similarly concluded that Dondero's communications with Highland's accountants regarding the production of Dugaboy Trust documents did not fall within the "shared services" exception because there was "no shared services agreement between the Dugaboy Trust and Highland" (ROA.300), even though the Shared Services Agreements between Highland and *the Advisors* covered the services at issue. The Bankruptcy Court likewise found that Dondero's communications with Jason Rothstein about Dondero's cell phone fell outside the "shared services" exception (ROA.299), despite the Shared Services Agreements' promise to provide "telecom" and "cell phone" services to the Advisors, and Dondero's contractual right to communicate with Highland employees concerning those services.

The Bankruptcy Court also found that Dondero violated Section 2(d) of the TRO by "interfer[ing] with the Debtor's trading of Highland CLO Assets" after entry of the TRO. (ROA.286) The Bankruptcy Court rejected Dondero's contention that "he may have interfered with the Debtor's trades the week of Thanksgiving, but he did not after entry of the TRO," concluding that "[t]he evidence does not seem to support this story." (ROA.282) But the "evidence" the Bankruptcy Court relied on in rejecting Dondero's testimony (ROA.281-82) did not actually show that Dondero engaged in any *post*-TRO interference with the trades in SKY and AVYA. It instead reflected his admitted *pre*-TRO interference in "November" with the trades in those securities (ROA.281-82, citing 7697, 7701-02), and conduct that had nothing to do with trades in SKY or AVYA at all—*i.e.*, the "warning" that Dondero had given to Seery after the latter tried to collect on notes that Dondero and his companies owed to Highland (ROA.260-266, citing ROA.7354, 7519, 7533). Accordingly, the Bankruptcy Court paradoxically held that Dondero had *violated* the TRO by engaging in the single act that Highland had invoked to *obtain* the TRO.

Based on these purported violations of the TRO, the Bankruptcy Court decided to award compensatory civil sanctions intended to "reimburse the injured party for the losses and expenses incurred because of their adversary's noncompliance." (ROA.301) But here the Bankruptcy Court overreached again, concluding that Dondero should have to pay all the attorney's fees and expenses

related to both the TRO and the contempt motion (*id*.)—even though any fees and expenses *resulting* from "noncompliance" with the TRO could not have come from conduct *predating* the TRO. The court also overreached in calculating the attorney's fees related to those two motions because it decided to award fees to Highland, the UCC, and local counsel, even though only "the Debtor presented invoices incurred by its primary bankruptcy counsel." (ROA.302) But these invoices were woefully insufficient to support an attorney's fee award. (*Id*.) The Bankruptcy Court therefore made an "estimate" of the fees related to the "TRO and Contempt motion," without demanding that Highland segregate fees incurred "related to its attorney time devoted to the Contempt Motion" from those involving "other litigation matters," and without trying to segregate fees related to the grounds for contempt on which Highland was successful from the many grounds on which it was not. (ROA.302) Those estimates yielded the colossal sum of $450,000. (ROA.303) And on top of that, the Bankruptcy Court "add[ed] on a sanction of $100,000 for each level of [unsuccessful] rehearing, appeal, or petition for certiorari that Mr. Dondero may choose to pursue with regard to this order." (ROA.304)

C. The District Court affirms virtually all of the contempt order.

On appeal, the District Court overturned the $100,000 penalty "for each unsuccessful appeal," but affirmed the remainder of the Bankruptcy Court's contempt order. (ROA.11636) It rejected Dondero's contention that there was no

evidence "of interference in any [stock] dispositions occurring after the TRO went into effect," instead affirming the Bankruptcy Court's conclusion that Dondero violated Section 2(d) of the TRO by interfering with trades post-TRO. (ROA.11640-41) The District Court thus concluded that the Bankruptcy Court was entitled in its role as "fact finder" to "weigh[]" Dondero's "credibility" as a witness and credit the testimony he unequivocally recanted, failing to recognize that the Bankruptcy Court's determinations about Dondero's credibility were based upon an erroneous view of the evidence. (ROA.11641)

The District Court also upheld the Bankruptcy Court's conclusion that Dondero violated Section 2(c) of the TRO through his communications with Highland's employees. (ROA.11642) Dondero contended that this provision violated Rule 65(d)(1)(B) because the scope of its "shared services" exception could be understood only by "referring" to other "document[s]"—the Shared Services Agreements. But the District Court concluded that Section 2(c) did not violate Rule 65 because the "shared services" exception "does not expressly refer the reader to any written agreement at all" but instead was intended to memorialize current practice—"operational reality"—"the way Highland and the relevant entities had conducted themselves previously." (ROA.11642) The District Court concluded that the "shared services" exception, as it interpreted that provision, "stat[ed] the conduct it prohibits with adequate specificity" because Dondero had subjective knowledge

of that "operational reality": "[T]he enjoined individual was the long-time chief executive of the Highland empire and had sufficient insight into how services were shared between Highland and the related entities to enable him to comply." (ROA.11643)

And other than the $100,000 appellate penalty, the District Court upheld the remainder of the compensatory award. Although the District Court acknowledged that the Bankruptcy Court "could only award fees that would not have been incurred but-for [Dondero's] November misconduct," the District Court concluded that the Bankruptcy Court could permissibly award fees in pursuing both the TRO and the contempt motion because they were both part of an entire "new phase of litigation" that "began with Dondero's November misconduct which resulted in the issuance of a TRO." (ROA.11646-47, citing *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1188 (2017)) The Court likewise rejected Dondero's contention that the Bankruptcy Court could not award Highland its fees for pursuing grounds for contempt that were ultimately found to be "non-contemptuous." (ROA.11647) It considered this argument to be "unworkable" and "nit-picky" because attorneys generally do not "segregate their billing" by "factual allegation." (*Id.*) Instead, the District Court decided that the Bankruptcy Court could employ "estimates" (*id.*, quoting *Fox v. Vice*, 563 U.S. 826, 838 (2011))—even though the Bankruptcy Court

never even tried to estimate the amount of attorney time spent on "work addressing factual allegations ultimately found noncontemptuous" (*id.*).

SUMMARY OF THE ARGUMENT

The contempt sanction issued against Dondero is ultimately the product of Highland's overreach on many fronts. And by giving in to that overreach, the Bankruptcy Court made basic and fundamental errors that went unchecked by the District Court. The order of contempt and award of sanctions must be reversed.

The overreaching began with Highland's accusation that Dondero's routine communications with Highland employees constituted a violation of the TRO. Highland failed to carry its burden to demonstrate by clear and convincing evidence that any of those communications were clearly and unambiguously prohibited by Section 2(c) of the TRO. Highland could not do so because Section 2(c)'s "shared services" exception is hopelessly vague and ambiguous. On its own, the phrase "shared services" is meaningless. An ordinary person viewing it from the outside would have no idea what conduct is permitted or forbidden. And even those on the inside have been unable to ascribe any definitive and unambiguous meaning to it. If, as Dondero assumed, the phrase "shared services" refers to the services Highland was contractually obligated to provide to Dondero and his companies under the Shared Services Agreements, then vagueness and ambiguity still remains, because the Shared Services Agreements are themselves ambiguous about the "services"

being "shared"—one of many reasons that Rule 65(d) prohibits injunctions from referencing such outside "document[s]" to determine "the act or acts restrained or required."

On the other hand, if, as the District Court assumed, the "shared services" exception does not refer to the contractually required services Highland was obliged to provide, but merely referenced the "operational reality" of how "services" were currently "shared" between Highland and Dondero's companies, then the TRO's meaning cannot be known to anyone other than potentially Dondero, and therefore cannot be enforced through a contempt sanction. The indeterminacy is only multiplied if the shared services exception can have *either* of these two meanings. And regardless of which meaning might ultimately prevail, Highland cannot prove that Dondero violated it. Highland offered no evidence—much less the clear and convincing evidence required for a contempt sanction—to demonstrate that Dondero's communications with Highland employees deviated either from past practice *or* the services covered under the Shared Services Agreements. For all these reasons, the Bankruptcy Court's conclusion that Dondero violated Section 2(c) of the TRO cannot stand.

Highland's overreach is also ultimately responsible for the Bankruptcy Court's erroneous conclusion that Dondero violated Section 2(d) of the TRO, because Highland's accusation that he violated that provision by interfering with

certain securities trades is an absolute fabrication. In concluding otherwise, the Bankruptcy Court simply confused events occurring in two different periods. It mistook evidence relating to Dondero's *pre*-TRO interference with trades in SKY and ANYA as occurring *post*-TRO, which Dondero vehemently denied and which no evidence supports.

Although Dondero himself was initially confused and made the same mistake in his previous deposition testimony, he unequivocally corrected himself at the contempt hearing. And only Dondero's later testimony is consistent with the evidence, including the admission of Highland's CEO that all the post-TRO trades he authorized were made as scheduled. The Bankruptcy Court's choice to believe Dondero's earlier, recanted testimony was based on an erroneous view of the evidence and is clear error. There is no evidence, much less clear and convincing evidence, that the TRO was in effect when Dondero engaged in the challenged conduct, or that he violated the TRO after it went into effect. Accordingly, the District Court's conclusion that Dondero violated Section 2(d) of the TRO also cannot stand.

The particular sanction that the Bankruptcy Court chose—a $450,000 attorney's fee award—presents separate problems, violating basic rules for compensatory attorney's fee awards resulting from a contempt finding. Such fee awards are permissible only to the extent they compensate a party for attorney's fees

incurred as the result of the contemptuous conduct. The Bankruptcy Court therefore erred in granting fees that predated the TRO, which did not and could not result from any violation of the TRO. It erred again in granting fees for Highland's pursuit of allegations that the Bankruptcy Court rejected, which similarly did not result from any TRO violation. And it erred yet again by awarding these fees in the absence of any proof of their reasonableness. For all these reasons, the sanctions award must be reversed along with the contempt order itself.

ARGUMENT

I. Standard of Review

In an appeal from a contempt order issued by a bankruptcy court, the bankruptcy court's "contempt findings" and "assessment of monetary sanctions" are both reviewed for abuse of discretion. *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787, 792 (5th Cir. 2013); *In re Bradley*, 588 F.3d at 261. But such "review is not perfunctory." *Hornbeck Offshore*, 713 F.3d at 792. While this Court, "[l]ike the district court," reviews the "bankruptcy court's findings of fact for clear error," *In re Bradley*, 588 F.3d 254, 261 (5th Cir. 2009), "'the interpretation of the scope of the injunctive order[] is a question of law to be determined by the independent judgment of this Court.'" *Hornbeck Offshore,* 713 F.3d at 792 (quoting *Drummond Co. v. Dist. 20, United Mine Workers,* 598 F.2d 381, 385 (5th Cir. 1979)). And a bankruptcy court will "necessarily abuse its discretion if it based

its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990).

II. The Bankruptcy Court erred in concluding that Dondero engaged in conduct that violated the TRO.

The first problem with the Bankruptcy Court's contempt order is that Highland failed to demonstrate that Dondero committed a violation of the TRO that would support a contempt sanction. As the party seeking an order of civil contempt for violation of an injunction or restraining order, Highland was required to establish, by "clear and convincing evidence," that "(1) the injunction was in effect at the time of the allegedly contemptuous conduct, (2) the injunction neither vaguely nor ambiguously required the party to perform or abstain from certain conduct, and (3) the party failed to comply with the injunction's requirements." *Test Masters Educ. Servs., Inc. v. Robin Singh Educ. Servs., Inc.*, 799 F.3d 437, 454 (5th Cir. 2015)*, on reh'g*, No. 13-20250, 2015 WL 13768849 (5th Cir. Oct. 22, 2015) (citing *Oaks of Mid City Resident Council v. Sebelius*, 723 F.3d 581, 585 (5th Cir. 2013)). But Highland failed to satisfy these standards for each of the grounds for contempt found by the Bankruptcy Court and affirmed by the District Court.

A. Dondero's routine communications with Highland employees did not violate Section 2(c) of the TRO.

Highland's attempt to demonstrate that Dondero's routine communications with its employees violated Section 2(c) of the TRO fails the second and third of the

requirements for civil contempt, because Dondero endeavored to *comply* with that provision with his communications, and Highland cannot establish that the TRO clearly and unambiguously prohibited him from engaging in them. Dondero explained that he endeavored to comply with Section 2(c) because he restricted his communications with Highland employees to those allowed under the "shared services" exception. (ROA.10034-36) The language of that exception was not negotiated between the parties but was unilaterally imposed by Highland in its proposed TRO and adopted by the Bankruptcy Court without explanation. (ROA.7522, 9284-85) Accordingly, the only way Dondero could make sense of the exception was to assume that it permitted communications related to the services that Highland provided to the Advisors under the Shared Services Agreements. So he restricted all his communications with Highland employees to those services covered by these agreements—legal services (*see* ROA.7600, 7602, 7605, 7607, 7609, 7617, 7623, 8523, 8525, 8527, 8531, 8536), accounting services (ROA.7605, 7607, 9987, 10001, 10008, 10017), and telecom services (ROA.272-73, 7542). Highland did not prove by "clear and convincing evidence" that the TRO "neither vaguely nor ambiguously" required Dondero to "abstain" from any of these communications, or that Dondero's conduct fell outside Section 2(c)'s exception. *Test Masters,* 799 F.3d at 454.

1. The "shared services" exception in Section 2(c) of the TRO is too vague and ambiguous to serve as a basis for a contempt sanction.

"To support a contempt finding in the context of a TRO," the order must comply with Federal Rule of Civil Procedure 65(d)'s requirements that injunctions and restraining orders "delineate definite and specific mandates," *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 573, 578 (5th Cir. 2000) (internal quotation omitted), stating their terms "'specifically' and 'describ[ing] in reasonable detail' the "conduct restrained or required." *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016) (quoting FED. R. CIV. P. 65(d)(1)). "The drafting standard has been described as 'that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed.'" *Id.* (quoting *U.S. Steel Corp. v. United Mine Workers of Am.*, 519 F.2d 1236, 1246 n.20 (5th Cir. 1975)). This "ordinary person" standard "embodies the elementary due process requirement of notice." *Id.* at 212 (quoting *U.S. Steel*, 519 F.2d at 1246). And compliance with the standard must be determined from the "four corners" of the TRO itself. *Seattle-First Nat'l Bank v. Manges*, 900 F.2d 785, 800 (5th Cir. 1990) (internal quotation omitted).

Section 2(c)'s "shared services" exception fails this basic notice requirement. The concept of "shared services" is not defined in the TRO, and an ordinary person reading the TRO could not know, without reference to some source outside the TRO,

specifically what "services" the exception referred to, who "shared" them, or what information could or could not be shared. The words make no sense on their own, therefore providing no notice to Dondero "of what conduct will risk contempt." Wright & Miller § 2955 n.25. Nor do they provide any standard for determining whether he engaged in prohibited, contemptuous conduct.

The "shared services" exception is therefore just as facially indeterminate as the injunction this Court invalidated in *Scott v. Schedler*, which required the Louisiana Secretary of State to "maintain in force" its "policies, procedures, and directives" related to coordination and enforcement of the National Voter Registration Act. 826 F.3d at 209. The Court concluded that this provision was impermissibly vague because it "refers generally to the defendant's policies without defining what those policies are." *Id.* at 212.

The same type of indeterminacy also makes the "shared services" exception similar to other injunctions that courts around the country have determined to be impermissibly vague. *See Thomas v. County of Los Angeles*, 978 F.2d 504 (9th Cir. 1992), *as amended* (Feb 12, 1993) (invalidating injunction requiring the Los Angeles Sheriff's Department to "[f]ollow the Department's own stated policies and guidelines regarding the use of force and procedures for conducting searches" because the injunction did not define those policies); *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 543 (7th Cir. 1998) (invalidating injunction that

prohibited insurance company from engaging in "unlawful insurance practices."). Like Section 2(c) with its "shared services" exception, the critical language in these injunctions dictating what the enjoined party could or could not do was not defined in the injunctions themselves. The only way to make sense of the injunctive language would be to reference some standard outside the order that would not be available to the ordinary reader.[1]

Indeed, that is what Dondero did. He interpreted the TRO to provide him a safe harbor under Section 2(c) as long as his communications with Highland employees were tied to the services covered by the Shared Services Agreements. That interpretation was a function of practical necessity—because Dondero needed to interpret the TRO in order to avoid violating it. And the Bankruptcy Court appears to have adopted this same interpretation, because it evaluated whether Dondero's contacts with Highland employees fit within the "shared services" exception by determining whether they were covered under a "shared services agreement." (ROA.308 [concluding that Dondero's communications with Highland accountants regarding the turnover of documents about the Dugaboy Trust did not fall within the

[1] Although *Scott*, *Thomas*, and *IDS Life* all involved appeals from the injunctions themselves, the same requirements of clarity, definiteness, and self-completeness apply with equal force to contempt orders based on such injunctions. *See Am. Airlines*, 228 F.3d at 578.

"shared services" exception because there was "no shared services agreement between the Dugaboy Trust and Highland."]).

But that interpretation, however reasonable, did not serve to give the TRO a definite meaning. As this Court has held, a TRO remains vague when it "substitutes nebulous contract terms for [the] specific acts" that a TRO is required to delineate. *U.S. Steel Corp.*, 519 F.2d at 1246 n.19. "Broad, non-specific language that merely enjoins a party" to "comply with an agreement" does not provide that party with "fair notice of what conduct will risk contempt." *Epstein Family P'ship*, 13 F.3d at 771. That is because a contract often "is anything but a precise document; the parties themselves are often unsure what it means in particular circumstances"—which is why they frequently must ask courts to interpret their own contracts. *U.S. Steel Corp.*, 519 F.2d at 1246. And indeed, Highland's new CEO, James Seery, admitted that the Shared Services Agreements themselves, whether "intended to be broad or not," were "certainly ambiguous in places," because they only state in the barest terms what services are covered—"legal" services, "accounting" services, "telecom" services—without specifying what precise services were to be shared or the terms under which the Advisors or their employees would be able to access them. (ROA.10157)

Neither Highland nor the Bankruptcy Court made any effort to address the vagueness and ambiguity in the "shared services" exception or the Shared Services

Agreements. And the District Court's attempt to do so created more problems than it solved. In an effort to avoid reading the "shared services" exception as referencing the Shared Services Agreements—because referencing such an outside document would run afoul of Rule 65(d)(1)(A)—the District Court interpreted the exception to incorporate Highland's "operational reality," providing a safe harbor for the "services currently provided" to the Advisors "as of the time the TRO took effect," whether covered under the Shared Services Agreements or not. (ROA.11642) It is debatable whether this interpretation of the TRO allowed the District Court to escape the requirements of Rule 65(d)(1)(A). But there can be no debate that the District Court's interpretation only exacerbated the vagueness and ambiguity of the "shared services" exception. The phrase remains impermissibly vague and ambiguous, no more definite than the injunction prohibiting transfers of funds "other than in the normal course of business" that the Eleventh Circuit determined to be "invalid" and an improper "basis for a compensatory civil contempt action" in *Reliance Insurance Co. v. Mast. Const. Co.*, 84 F.3d 372, 374, 376 (11th Cir. 1996). Injunctions referencing normal or customary conduct or "operational realit[ies]" are not self-defining and cannot be understood by an ordinary person. And if Section 2(c)'s "shared services" exception can bear both Dondero's and the District Court's interpretations of the phrase, that only adds another layer of ambiguity. Accordingly,

the TRO resists the District Court's effort to interpret it—meaning that it is incapable of giving Dondero proper notice of exactly what he could or could not do.

The District Court also assumed that this problem of fair notice could be overcome by the fact that Dondero would have some subjective knowledge of this "operational reality" as the "former lead executive at Highland" overseeing its operations. (ROA.11642) Although the District Court correctly recognized that the "principle of fair notice" requires that a "TRO's prescriptive language 'should be framed so that those enjoined will know what conduct the court has prohibited" (ROA.11643, quoting *Am. Airlines*, 228 F.3d at 578), the court erroneously assumed that the standard of notice is subjective, measured exclusively by the information that the restrained person might possess about the proscribed conduct. But the test is objective, focusing on whether "an ordinary person reading the court's orders"—unfamiliar with the background information that someone like Dondero might have—would be able to understand from the order itself exactly what conduct is prohibited or permitted. That is why this Court in *Scott v. Schedler* invalidated the injunction requiring the Louisiana Secretary of State to "maintain" its "policies, procedures, and directives" on voting, even if "the policies are [the Secretary's] own," and the Secretary presumably understood them. 826 F.3d at 212. And that is also why an injunction preventing transfers outside the "normal course of business"

was too vague to support a contempt finding—even though the persons restrained likely knew how asset transfers ordinarily are made. *Reliance Ins.*, 84 F.3d at 374.

The reasons for this objective standard are simple: The terms of a TRO, and Rule 65(d)'s requirement of definiteness, do not exist merely to instruct the restrained person how to obey them. They exist to "protect those who are enjoined" from arbitrary punishment for conduct that was never intended to be unlawful. *Hughey v. JMS Dev't Corp.*, 78 F.3d 1523, 1531 (11th Cir. 1996). They exist to prevent opponents from seeking an unfair tactical advantage by "hold[ing] the club of contempt forever over the other's head." *Epstein Family P'ship*, 13 F.3d at 771. And they allow the "appellate tribunal" reviewing an injunction or a contempt sanction "to know precisely what it is reviewing." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). These functions require a *standard* that *anyone* can recognize and apply to determine whether it has been violated. And a standard that exists only in Dondero's head, solely by virtue of running a vast business operation, is no standard at all. It is simply too vague to serve as a basis for contempt.

Accordingly, it ultimately does not matter whether this Court adopts the definition that Dondero and the Bankruptcy Court appeared to ascribe to the "shared services" exception, or the version the District Court adopted. Both are too vague and ambiguous to serve as the basis of a contempt sanction. And both the Bankruptcy

Court and the District Court therefore erred in imposing a sanction based upon Section 2(c) of the TRO.

2. Highland failed to show by clear and convincing evidence that Dondero violated Section 2(c), regardless of the meaning ascribed to its "shared services" exception.

There is another reason why the Bankruptcy Court erred in concluding that Dondero violated Section 2(c) of the TRO: Highland offered no clear and convincing evidence to show that Dondero's communications with Highland employees ever went beyond the "shared services" that were protected under Section 2(c)'s exception, regardless of which among the exception's dueling interpretations is ultimately correct.

If, for example, the "shared services" exception means what Dondero and the Bankruptcy Court apparently believed it to mean—to refer to services covered under the Shared Services Agreements—then Dondero did not violate Section 2(c) at all, because he deliberately restricted his communications with Highland employees to matters that concerned the contractual shared services. For example, Dondero permissibly communicated with Highland's lawyers on a number of litigation-support matters related to the Highland bankruptcy. These included answering discovery, pursuing joint defense agreements (ROA.7617), identifying potential witnesses (ROA.7600, 8523, 8525), and objecting to claims (ROA.288, 293-94). They also included Dondero's communications with Scott Ellington, Highland's

General Counsel, about serving as "settlement counsel" in negotiating with Highland on Dondero's preferred "pot plan" for Highland's reorganization. (ROA.293)

Seery objected to these communications, insisting that Highland never "appointed" Ellington to serve in the role of settlement counsel. (ROA.293) But it is ultimately immaterial under the "shared services" exception whether *Highland* ever authorized Ellington to serve as settlement counsel—because Ellington did not perform services for just Highland. He also performed them for the Advisors. And if the "shared services" allowed under Section 2(c) equate to services that Highland agreed to provide to the Advisors under the Shared Services Agreements, then the only relevant question is whether those agreements permitted *Dondero* to ask Ellington to serve in that role. The answer is plainly "Yes," because those are the sort of "legal services" that Dondero and the Advisors were entitled to obtain from Highland. Highland never demonstrated that Dondero lacked the right to access those services in his role as president of the Advisors.

It is likewise immaterial—under a reading of Section 2(c) that equates the "shared services" referenced in the exception with the services provided under the Shared Services Agreements—whether Dondero's communications with the attorneys seemed to be advancing "Dondero's interest" and "Dondero's own personal litigation strategies" in a manner that may have been "adverse to the Debtor's interest." (ROA.286, 293-94) The Shared Services Agreements broadly

gave the Advisors a right to receive "legal services" from Highland, regardless of the *purpose* for which those legal services were sought. Accordingly, Dondero's communications with Highland lawyers fell within the "shared services" exception, even if they did concern matters that arguably advanced Dondero's interests over Highland's.

In addition, if "shared services" equates to services under the Shared Services Agreements, the Bankruptcy Court was also off-base in concluding that Dondero's communications with Highland's accountants regarding the production of documents about the Dugaboy Trust did not fall within the "shared services" exception simply because there was "no shared services agreement between the Dugaboy Trust and Highland." (ROA.300) The only relevant questions were whether the Shared Services Agreements between Highland and *the Advisors* covered those services, regardless of the reason they were sought, and whether Dondero had the right to access those services. The answers again are "Yes." The same problem invalidates the Bankruptcy Court's conclusion that Dondero's communications with Jason Rothstein about Dondero's cell phone fell outside the "shared services" exception. Because the Shared Services Agreements promised that Highland would provide "telecom" and "cell phone" services to the Advisors, Dondero indisputably had the right to communicate with Highland employees concerning those services. (ROA.7703-04, 7865)

The answer is even simpler if, as the District Court assumed, the "shared services" exception merely reflected the "operational reality" of "how services were shared" between Highland and the Advisors "as of the time the TRO took effect." (ROA.11642-43) Each of Dondero's communications with Highland employees involved a continuation of the type of "services" that Highland had been providing to the Advisors and Dondero for years before the TRO was entered. (ROA.8632-34, 8644, 10054-58) Dondero had also been advocating for his "pot plan," and permissibly communicating with Highland lawyers about it, before entry of the TRO in December 2020. (ROA.9323-24) And Highland had quite clearly been providing accounting services related to the Dugaboy Trust, and telecom services related to Dondero's cell phone, well before entry of the TRO. Indeed, Highland provided Dondero with a cell phone, which is why he dealt with Highland personnel to dispose of his old phone and obtain a new one. Highland also housed and maintained the accounting records related to the Dugaboy Trust, which is why Dondero had to confer with Highland employees about whether those accounting records should be turned over. Each of these contacts originated before the TRO, and were therefore protected under the "shared services" exception. And that means none of them could have been a violation of Section 2(c) under the clear-and-convincing-evidence standard for imposing civil contempt.

B. Dondero did not violate Section 2(d) of the TRO because he did not interfere with any post-TRO securities trades.

The Bankruptcy Court also erred in concluding that Dondero violated Section 2(d) of the TRO by purportedly "interfering" with post-TRO stock trades, because Highlands evidence on this issue failed to satisfy this Court's rigorous standards for a finding of civil contempt. Here, the problem arises from the *first* and *third* of those standards, because Highland could not establish that "the injunction was in effect at the time of the allegedly contemptuous conduct," and therefore could not demonstrate that Dondero "failed to comply with the injunction's requirements." *Test Masters*, 799 F.3d at 454. These standards must be satisfied by "clear and convincing evidence," *id.*—"that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Moawad v. Childes*, 253 F.3d 700, 700 (5th Cir. 2001) (per curiam) (quoting *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995)). The evidence must be "so clear, direct, weighty, and convincing as to enable a fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case." *Id*. But the evidence Highland offered about the securities trades did not come close to meeting this stringent standard.

Highland alleged that "on December 22, 2020"—less than two weeks after the Bankruptcy Court entered the TRO—Dondero "personally intervened to prevent the Debtor from executing certain securities transactions authorized by Mr. [Seery]" in

SKY and AVYA. (ROA.7203) But Dondero explained at the contempt hearing that this interference actually occurred "[t]he week before Thanksgiving"—at least two weeks *before* entry of the TRO on December 10. (ROA.9979) And Dondero unequivocally denied any suggestion that he interfered with any trades after entry of the TRO—or "on December 22." (*Id.*) Accordingly, in his testimony at the contempt hearing, Dondero admitted to the interfering conduct that *led up* to the TRO but denied any interference *after* the TRO. Dondero therefore did not violate Section 2(d) of the TRO, because the only conduct he allegedly committed that *would* have violated that provision occurred before the TRO was ever in effect.

The Bankruptcy Court nonetheless rejected Dondero's unequivocal testimony, concluding that it was inconsistent with his previous deposition and hearing testimony—despite the fact that Dondero explained more than "half a dozen times" that his previous testimony was simply mistaken. (ROA.9979) Yet the Bankruptcy Court never dealt with the contradiction between Dondero's recanted testimony, which suggested that he had "instruct[ed] the employees of the Advisors not to execute" trades that Seery had authorized on December 22 (ROA.7709, 8044, 9979), and Seery's own testimony, which acknowledged that all the December trades he authorized in fact were executed as scheduled (ROA.10149, 10154). Instead, the Bankruptcy Court made the conclusory determination that it was

Dondero's contempt-hearing testimony *denying* any post-TRO interference that was inconsistent with "[t]he evidence." (ROA.282)

But the "evidence" the Bankruptcy Court relied on to suggest that Dondero interfered with "the Debtor's attempted sales in *late* December 2020—*after* entry of the TRO" (ROA.281, emphasis added)—indisputably concerned events that occurred in November and early December *before* entry of the TRO on December 10. These events included Dondero's pre-Thanksgiving, pre-TRO interference with Highland's trades in AVYA and SKY. (ROA.281) Indeed, in erroneously concluding that such interference occurred "in late December 2020," the Bankruptcy Court relied on deposition testimony about a series of conversations between Dondero and Highland employees Matt Pearson, Hunter Corvitz, and Thomas Surgent that occurred in emails dated before "November 27" (ROA.281-82, citing ROA. 7029-30, 7696-97, 7701-02; *see also* ROA.264-65)—two weeks *before* the entry of the TRO, and nearly a month *before* the date the Bankruptcy Court believed those conversations occurred.

Notably, Highland emphasized this same episode, concerning the same people, the same stocks, and the same emails—including the one containing Dondero's warning that "There is potential liability. Don't do it again" (ROA.281)—as a basis to *obtain* the TRO (*see, e.g.*, ROA.6807, 6832, 6862). But none of these late November communications could amount to a *violation* of the later TRO. In

fact, Seery himself acknowledged that all of the December trades went through as scheduled (ROA.10149, 10154), contradicting Highland's own allegation that Dondero interfered with any stock trades on December 22.

Nor could the Bankruptcy Court devise any "late December 2020" interference from Dondero's text to Seery stating "Be careful what you do, last warning," which supposedly led up to Dondero's eviction from Highland's offices on "December 31, 2020." (ROA.260, 266, citing ROA.7354, 7519, 7533) As Highland itself admitted in a complaint filed before the entry of the TRO, Dondero sent this text message "[o]n December 3, 2020" (ROA.6809)—before the TRO. And this message had nothing to do with Seery's trades at all, but rather concerned Dondero's reaction to Highland's attempt to call certain notes that Dondero and his affiliate entities owed to Highland. (*Id.*) This too was one of the events that precipitated Highland's pursuit of the TRO. But it too cannot be considered a violation of the TRO, because the TRO was not in effect at that time.

In fact, the only event that Highland actually demonstrated to have occurred on December 22, 2020 is a letter that the Advisors' outside lawyers sent Highland to "*request*" that "no further CLO transactions occur at least until … the confirmation hearing" of the Debtor's plan of reorganization. (ROA.7648-50 [RE 6]) This "request" is the only documentary evidence that Highland has ever presented to support its accusation that "Mr. Dondero personally intervened to

prevent the Debtor from executing certain securities transactions" on December 22. (ROA.7203) And the letter plainly shows nothing of the kind. Indeed, the Bankruptcy Court correctly held that the letter did not "cross[] the line into contemptuous behavior." (ROA.299) That, however, has not stopped Highland from repeatedly misrepresenting—in its bankruptcy lawyer's letter dated December 23, 2020 (ROA.7627), in its motion for contempt (ROA.7203, citing ROA.7648-50), and in its appellate brief in the District Court (ROA.11557)—that the lawyers' December 22 letter somehow represented a "notif[ication]" that the Advisors "would not settle the CLOs' sale of the AVYA and SKY securities." That is a complete fabrication. And there is nothing else to support the allegation that Dondero tried to block any trades after the TRO—no texts, no emails, no letters, and no testimony from any securities traders or Highland employees.

The Bankruptcy Court's confusion about the correct sequence of events is perhaps attributable to the voluminous evidence in the record, the allegations of conduct occurring at different times within a single period, and Highland's effort to conflate the pre-TRO acts of Dondero with the very different post-TRO request of the Advisors' outside lawyers. Indeed, Dondero himself was initially confused about these details. But his initial confusion is not a basis to uphold the Bankruptcy Court's conclusion that Dondero violated Section 2(d) of the TRO. The Bankruptcy Court's "credibility" determinations about Dondero's testimony, including its

decision to credit his inaccurate, unsupported, and recanted deposition testimony over his accurate, supported, and consistent contempt-hearing testimony, rested on a fundamental misinterpretation of the evidence. That was clear error. *Olson v. Schweiker*, 663 F.2d 593, 596 (5th Cir. 1981) ("[A] credibility choice based on misinterpretation" of the evidence is "clearly erroneous"); *see also Arete Partners, L.P. v. Gunnerman*, 594 F.3d 390, 394 (5th Cir. 2010) ("[C]lear error" occurs when "the court misinterpret[s] the effect of the evidence."). That means there is "not clear and convincing evidence upon which to find" that Dondero violated Section 2(d) of the TRO in connection with the securities trades. *Test Masters*, 799 F.3d at 457. And that means the Bankruptcy Court "abused its discretion" by finding Dondero in civil contempt on this basis. *Id*.

III. The amount of the sanction—$450,000—is excessive and impermissible.

Beyond the lack of evidentiary support for the Bankruptcy Court's contempt finding, the amount of the sanction is also demonstrably excessive, violating basic legal standards for permissible compensatory fee awards in numerous respects. For one thing, it is axiomatic that in issuing a compensatory fee award as a sanction for misconduct, "the court can shift only those attorney's fees incurred because of the misconduct at issue." *Goodyear Tire & Rubber Co. v. Haege*r, 137 S. Ct. 1178, 1186 (2017). This standard requires a "causal connection" between the misconduct and the fee award, meaning that the wronged party "may recover 'only the portion of his

fees that he would not have paid but for the misconduct.'" *Id.* at 1187 (quoting *Fox v. Vice*, 563 U.S. 826, 836 (2011)). But the Bankruptcy Court's fee award failed to heed that command, going far beyond the fees Highland could have sustained because of any contemptuous conduct Dondero might have committed. Not only does the award include fees incurred *before* the TRO was entered, which cannot be considered compensation for losses related to *violations* of the TRO, it also awards Highland *all* the fees it incurred pursuing the motion for contempt, although Highland prevailed on only two of the six grounds on which it sought contempt. That gave Highland a double windfall.

The District Court's attempts to excuse these windfalls are unavailing. The District Court maintained that it was permissible for the Bankruptcy Court to award "fees predating the contemptuous conduct" and the entry of the TRO. (ROA.11647) According to the District Court, because *Goodyear Tire* permits fees to be awarded by "'category,'" the Bankruptcy Court might have permissibly viewed Dondero's behavior in the periods leading up to and following the TRO as a single "pattern of conduct"—one "'phase'" of the litigation—"that would not have occurred absent the misconduct" and therefore justifying fees for the entire phase. (ROA.11646-47, quoting 137 S. Ct. at 1187) But the discretion *Goodyear Tire* permits courts to exercise in framing the scope of compensatory legal fee awards only goes so far. As *Goodyear Tire* itself explains, a remedial fee award "extends" too far if it covers

"fees that would have been incurred without the misconduct." 137 S. Ct. at 1186. The fees leading up to the TRO fail that basic "but-for test," because even if Dondero had refrained from all the post-TRO conduct that Highland claimed was a violation of the TRO, Highland's pre-TRO fees "would have been incurred" anyway. Accordingly, the pre-TRO fees fail *Goodyear Tire*'s requirement that a "causal link" must exist "between the litigant's misbehavior and legal fees paid by the opposing party." *Id.* And that means they cannot be awarded.

Highland's fees related to its four of six unsuccessful contempt challenges also fail this basic but-for test, but the District Court cited a different ground to justify the Bankruptcy Court's refusal to discount the award to account for them. The District Court deemed this challenge to the fee award excessively "nit-picky" and "unworkable" because "no attorneys segregate their billing based on the factual allegation they are currently working in support of," making it impossible to perform a perfect segregation of these unrecoverable fees. (ROA.11647) Instead, according to the District Court, courts may do "rough justice" and "use estimates in calculating and allotting an attorney's time." (*Id.*, quoting *Fox*, 563 U.S. at 838) But the availability of estimating does not excuse the Bankruptcy Court's failure to segregate—it *required* the Bankruptcy Court to segregate. If Highland's fee statements were not particularized enough to itemize fees incurred by factual allegation, and if precise segregation between successful and unsuccessful grounds

was impossible, the Bankruptcy Court still could have done a rough division of the fees to prevent Highland from recovering a windfall. Estimates would have worked, but the Bankruptcy Court could not simply refuse to give Highland's legal fees close scrutiny, or refuse to trim its bills of excess, merely because the trimming might prove imperfect.

Indeed, the sheer size of the fee award made it all the more imperative for the Bankruptcy Court to do that trimming. This Court has held that "[i]f the sanctions imposed are substantial in amount, type, or effect, appellate review of such awards will be inherently more rigorous; such sanctions must be quantifiable with some precision." *Topalian v. Ehrman*, 3 F.3d 931, 936-37 (5th Cir. 1993). The Court noted that the $300,000 attorney's fee sanction in that case "clearly belongs near the upper end" of the spectrum. *Id.* The award here—which is $150,000 more than the award in *Topalian*—is undoubtedly at the outer edge of what is permissible and must be subjected to exacting scrutiny. Accordingly, the Bankruptcy Court's failure to ensure that its compensatory award did no more than compensate requires that the award be reversed.

The Bankruptcy Court's compensatory award also violated another axiomatic principle governing fee awards based on billable hours: Parties "seeking attorney's fees have the burden of showing the reasonableness of the hours billed and that the attorneys exercised billing judgment." *Black v. SettlePou, P.C.*, 732 F.3d 492, 502

(5th Cir. 2013). Attorneys seeking reimbursement for their fees must therefore do more than merely prove the total amount of fees they billed. They must also submit some evidence of the *reasonableness* of those fees, to enable "a meaningful review of whether the hours claimed" were "reasonably expended." *Wegner v. Standard Insurance*, 129 F.3d 814, 823 (5th Cir. 1997) (affirming award where attorney submitted "an affidavit from legal counsel reflecting her credentials and her view that the attorney's fees on the printout were reasonable and necessary in the prosecution of the case"); *see also Payne v. Univ. of S. Miss*, 681 F. App'x 384, 390 (5th Cir. 2017) (affirming fee award where party offered "multiple affidavits and a declaration" establishing "the time spent on the case" and the "reasonableness" of the fee).

None of the attorneys working for or with Highland complied with this evidentiary requirement. Highland's bankruptcy counsel provided nothing more than "invoices of the fees incurred . . . relating to the TRO and Contempt Motion," offering no affidavit, no testimony, and no other evidence indicating that the billed fees were reasonable. (ROA.301) Even then, Highland's bankruptcy counsel did more than the UCC's counsel and Highland's local counsel, who did not even provide invoices. (*Id.*) Yet the Bankruptcy Court awarded their fees anyway, and the District Court overlooked this evidentiary gap, concluding that the Bankruptcy Court "adequately established the reasonableness and necessity" of the fees awarded based

on the "documentation before it" and its "experience with Highland's counsel." (ROA.11646) But the Bankruptcy Court made no finding that the fees billed by Highland, the UCC, or local counsel were reasonable or necessary. Nor could the Bankruptcy Court make such a finding based on its general experience with the lawyers, because that experience had nothing to do with the work at issue. Accordingly, the Bankruptcy Court's findings did not, and could not, fill the gap in Highland's proof. And that is another reason the fee award must be reversed.

CONCLUSION

For the reasons stated above, the Bankruptcy Court's order of contempt and sanction of $450,000, and the District Court's affirmation of that order and award, should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 19, 2022, the foregoing Appellant's Brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the Appellate CM-ECF System. Participants in this case who are registered CM-ECF users will be served electronically by the Appellate CM-ECF System. Other participants will be served by e-mail.

/s/ Jeffrey S. Levinger

Jeffrey S. Levinger

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