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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	January 24, 2024
	9:30 a.m. Docket
Reorganized Debtor.	
	- HIGHLAND'S MOTION FOR BAD FAITH FINDING [3851]
	- HIGHLAND'S MOTION TO STAY CONTESTED MATTER [4013]

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

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DALLAS, TEXAS - JANUARY 24, 2024 - 9:32 A.M.

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

THE COURT: Good morning. Please be seated. All right. We have a video hearing this morning in certain Highland Capital Management matters. We're not going to do an appearance roll call because we've started a new, I think, more efficient system where we just have people log in their appearance when they come onto the video WebEx. And so we're going to rely on that.

All right. So we have two matters. One has been long-scheduled. It's Highland's motion for a bad faith finding and attorneys' fees against NexPoint Real Estate Partners in connection with proof of claim litigation. So we have that set.

And then we had an expedited motion to stay a contested matter set by Highland. Highland is wanting to stay any litigation on a newly-filed motion by Hunter Mountain Investment Trust to sue Mr. Seery in the Delaware Chancery Court or Delaware state court system.

I'm thinking it probably makes sense to consider that expedited motion for a stay first. Does anyone on the line disagree with that sequence?

MR. MORRIS: Your Honor, this is John Morris from

Pachulski for Highland. I don't disagree with it. I was prepared to handle the other matter first, simply because it was filed first, but I defer to the Court if that's the Court's wishes.

THE COURT: Well, I'm just thinking it's probably the shorter matter and there may be folks who will drop off, I don't know, maybe.

MR. MORRIS: Oh. Then that makes sense.

THE COURT: Okay. All right. Well, I'll hear what Highland wants to say first, please.

MR. MORRIS: Okay. Good morning, Your Honor. Before I get to that, just a couple of housekeeping matters. I don't mean to be the policeperson here, but there are, at least showing on my screen, a number of participants just by phone number. There's somebody who's identified as Participant. It may be that the Court has the information as to the identity of these folks, but I thought the purpose was to disclose the identity of anybody who's attending this hearing.

So I see, for example, phone numbers beginning with 202 or 312. There's somebody who's listed, at least on my screen, as "Participant." I don't think that was the intent of the rule. And, again, I don't mean to be the policeperson here. Somebody just joined with a telephone number beginning 469.

If I'm mistaken, you know, please just correct me, but I thought the idea was that there would be transparency as to

who was here.

THE COURT: Okay. The idea is, because of national rules at the Administrative Office of the Courts, post-September 21, 2023, because of so-called anti-broadcasting rules, if you're a participant in the case you may watch by video a court proceeding, but if you're not a participant you can only listen in, audio.

So it may be that those that you're seeing is just, you know, they may have chosen to use the term Participant, but they may be only audio. Of course, it seems less --

MR. MORRIS: Okay.

THE COURT: -- significant when we don't have human beings taking the witness stand in the courtroom.

So, Mike, can you answer, are the anonymous people, are they all audio?

THE CLERK: No. They're not. Not -- excuse me. Let me do this, Judge.

Okay. Anyone with a number, you need to identify yourself for the Court. I see a 202, a 312, and a 469 and 703. If you cannot identify yourself, we will have to expel you from the hearing.

THE COURT: And, again, --

(Inaudible interruption.)

THE COURT: Again, if you aren't identified, you're going to be expelled from the WebEx. You can always call in,

audio, but you -- not my rule. A rule from Washington, DC. So, does anyone at this point want to identify themselves?

(No response.)

THE COURT: Okay. Hearing no identification, they'll be expelled. And then, again, if they want to call in, they can call in, but no video WebEx.

All right. Any other housekeeping matters?

MR. MORRIS: Just one other, Your Honor. It's with some very mixed feelings that I report to the Court that our star paralegal, Aja Cantey, has left us. She has moved on to become the head bankruptcy paralegal at Paul Weiss. You know how much I rely on my paralegals. But my sadness has been assuaged a bit by Andrea Bates, who joined us recently. She is on the line today. She'll be assisting me in today's hearing.

I just wanted to, you know, let the Court knows that there has been a change, that we have supreme confidence in Ms. Bates, who joins us from Skadden Arps.

THE COURT: Okay.

MR. MORRIS: And I just -- I just didn't want there to be any surprises there.

THE COURT: All right. Thank you for announcing that.

MR. SANJANA: Your Honor, I'm sorry to interrupt. Your Honor?

THE COURT: Yes?

MR. SANJANA: I'm sorry to interrupt.

THE COURT: Who is this?

MR. SANJANA: Hi. This is Jason Sanjana at Reorg -- this is Jason Sanjana at Reorg Research. I was the 202 number. And I just wanted to -- I was always on audio, and I'm on audio now.

THE COURT: Okay.

MR. SANJANA: But I was on mute until now. So, --

THE COURT: Okay.

MR. SANJANA: -- I just wanted to let you know that.

THE COURT: Okay.

MR. SANJANA: But it may have been appearing as on WebEx for you, but it isn't.

THE COURT: Okay. All right. I appreciate you clarifying that for us, Jason.

Okay. Anything else?

MR. MORRIS: No, Your Honor.

THE COURT: All right. Well, we had this motion to stay the contested matter of Hunter Mountain wanting relief from the gatekeeper provision to sue Mr. Seery in Delaware. So I'll hear what Highland has to say with regard to its motion for a stay.

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

Management. We're here today on Highland's motion for a very limited stay of Hunter Mountain's motion for leave to sue Mr. Seery.

I have a short deck to use to assist in today's presentation, and I would ask Ms. Bates to put that up on the screen.

While we're waiting for that, just so it's clear, the motion was originally filed at Docket No. 4013.

THE COURT: Okay.

MR. MORRIS: And, you know, as an overarching theme here, the basis for the stay is that the issues in the motion for leave pertaining to whether or not Hunter Mountain is a beneficiary under the Claimant Trust Agreement are the very issues that are going to be -- that have been fully briefed and that are going to be argued just three weeks from now in connection with Highland's motion to dismiss Hunter Mountain's valuation complaint.

And I think that the easiest thing to do here, Your Honor, if we can -- if we could go to the next slide, is just to think about what's -- what the pleadings are. What's the relief that is being requested and what's the basis for the relief?

And so you'll see -- and this is in our motion -- but I find it helpful to actually focus on exactly what the complaint is. The complaint that we're seeking to stay

includes four or five causes of action. You'll find up on the screen Paragraph 35 of the proposed complaint. It follows the heading Roman Numeral V, Causes of Action. And this is the basis for the complaint. It's solely relying on Delaware corporate law, Section 3327 of the Delaware corporate law. And that law allows, you know, certain people the ability to seek the removal of the Trustee.

As set forth in Hunter Mountain's own pleading, under Section 3327, relief can be sought only if it's in accordance with the governing instrument, and Hunter Mountain is not making that claim here, or by a trustor, another officeholder, or a beneficiary. There's no contention that Hunter Mountain is a trustor, there's no contention that it's a court, there's no contention that it's another officeholder.

Therefore, under Hunter Mountain's complaint that they seek to file to remove Mr. Seery, they must be a beneficiary. This Court must determine that Hunter Mountain is a beneficiary. That's what their complaint says, and there really can't be any dispute about that because each of the causes of action uses the very highlighted language that follows from the statute that they're relying upon.

And let's compare that with Hunter Mountain's motion -- complaint for valuation information. So if we can go to the next slide. They have three causes of action in that lawsuit, and every one of those causes of action also requires a

determination that Hunter Mountain is a beneficiary under the Claimant Trust Agreement.

The first cause of action can be found in Paragraphs 82 to 88, and it demands disclosure of trust assets and an accounting. They claim that they need the information, quote, to determine whether their claimant -- contingent Claimant Trust interests may vest into Claimant Trust interests.

You know, for me, Your Honor, that's already a -- shouldn't they know they're not beneficiaries? They have already conceded in Paragraph 83 that they are not holders of Claimant Trust interests but merely have unvested contingent Claimant Trust interests.

But beyond that, as the Court knows from prior litigation, only Claimant Trust beneficiaries have rights to obtain information, and those rights are severely limited.

So you have a concession that Hunter Mountain is not a Claimant Trust beneficiary. You have a document that's been adopted by this Court, approved by this Court, approved by the Fifth Circuit Court of Appeals, that expressly gives only Claimant Trust beneficiaries very limited information rights. And Hunter Mountain here seeks to ignore all of that.

They don't care that they're not a Claimant Trust beneficiary. They don't care that they're seeking more than even Claimant Trust beneficiaries are entitled to. They don't care that they're seeking information that they have no right

to receive.

But the whole premise of Count One is dependent on whether they're a Claimant Trust beneficiary, which is the exact same issue that has to be decided in the motion to remove Mr. Seery.

The second cause of action is for declaratory judgment on the value of the trust assets. That can be found in Paragraphs 89 to 92. And, you know, these are their words. This isn't my -- these aren't my words. This isn't argument. This is just asking the Court to read Hunter Mountain's own pleading. And it depends -- the second cause of action depends on whether the Defendants have been compelled to provide the information about the Claimant Trust assets. The Court can't make a declaratory judgment unless Highland has been compelled to provide the information. But for the reasons I just discussed, Highland can't be compelled to provide any information to Hunter Mountain or Dugaboy because they're not Claimant Trust beneficiaries.

For the same reasons, the third cause of action, which seeks declaratory judgment regarding the nature of the Plaintiffs' interests, you know, there's a whole host of reasons why these causes of action are deficient and why the motion to dismiss ought to be granted, but I'll save that for February 14th. The point now is that, just like the second cause of action, they seek a determination that the Claimant

Trust interests are likely to vest, an advisory opinion if I've ever heard of one. But be that as it may, it -- still, it's an acknowledgement that they're not Claimant Trust beneficiaries.

And so, in both cases, in both lawsuits, the central question is, is Hunter Mountain a Claimant Trust beneficiary?

If we can go to the next slide, let's look at the briefing, because there's really no dispute about this. There's no dispute about it at all. Look at Highland's motion to dismiss the valuation complaint. Right up in Paragraph 2, we say explicitly: Despite holding only unvested contingent trust interests with no rights in the Claimant Trust, Plaintiffs stubbornly seek financial information regarding Claimant Trust assets. This is the basis for the motion to dismiss, that they're not Claimant Trust beneficiaries.

And it's not as if this is the only place in the pleading where this is discussed. If you go to Docket No. 14 in this adversary proceeding, as you can see in the footnote, there's an extensive analysis that explains why Plaintiffs have no rights to financial information, precisely because they're not Claimant Trust beneficiaries.

And it's not as if Hunter Mountain says we're wrong, it's not an issue. They know it's an issue, and they go to great lengths to address it.

If we can go to the next slide. This is from their

opposition to the motion to dismiss. In Paragraph 10, they say the Claimant Trust Agreement evidences an intent that Plaintiffs become Claimant Trust beneficiaries when Claimant Trust assets are sufficient to pay all lower-ranked claims in full, with interest. Again, their pleading, not mine. And it shows that they understand the hurdle they have to come --

Now, there's lots of other stuff in these pleadings regarding other theories for why these claims fail, but all of them fail if they're not a Claimant Trust beneficiary.

And I'd ask the Court to pay particular attention to Paragraphs 40 to 52 in Hunter Mountain's pleading in opposition to the motion to dismiss. As you can see in the footnote, they have an extensive legal argument as to why Plaintiffs are allegedly -- why Plaintiffs allegedly, quote, have a legal right to obtain the information they seek. That's the same issue that's got to be decided in the motion for leave to sue Mr. Seery.

And what's really interesting, Your Honor, is not only do they make the argument in opposition to the motion to dismiss, they basically cut-and-pasted -- I credit Mr. Demo for helping me out; he pointed this out to me this morning, so I want to give credit where credit is due -- they cut-and-pasted the exact same argument in their motion for leave to sue Mr. Seery. So if you just compare Paragraphs 41 to 46 of Hunter Mountain's opposition to Highland's motion to dismiss the

valuation complaint to Paragraphs 31 to 37 of Hunter Mountain's motion for leave to sue Mr. Seery, you'll see they're making the exact same argument as to why they contend they're a Claimant Trust beneficiary.

Again, don't take our word for it. This isn't argument. This is just looking at their own pleading. Right? They're saying in both cases they're Claimant Trust beneficiaries. They're fighting it, right? They know they have to get over that hurdle, because if they don't they can't pursue these claims.

If we can go to the next slide. You've got Highland's reply. Again, extensive discussion. It's the very first point in the very first paragraph, under the Trust Act, whether a party is a beneficiary: Here, a Claimant Trust beneficiary is determined by the plain language of the governing trust -- here, the Claimant Trust Agreement.

And, again, if you take a look at the footnote, our reply in Paragraphs 5 through 9 provides further argument as to why Plaintiffs are not beneficiaries of the Claimant Trust under the plan, the Claimant Trust Agreement, or under applicable law.

So I think it's pretty clear from the pleadings, it's pretty clear from the parties' positions, it's pretty clear from the Delaware law that Hunter Mountain relies upon to move Mr. Seery, Section 3327, that the causes of action in that

proposed complaint and the causes of action in Hunter Mountain's valuation complaint all depend on whether or not Hunter Mountain is a beneficiary under the plan, under the Claimant Trust Agreement, and under Delaware law. And all of those issues are going to be argued in just three weeks. All of those issues are going to be decided by the Court thereafter.

If we can go to, yeah, this next slide. So, yesterday, Hunter Mountain filed its response to the motion for a stay. And I just want to address some of the arguments that were made.

You know, the first argument that they made concerned the legal standard. They said, oh, Highland didn't use the proper legal standard. We disagree. This isn't a motion for injunctive relief. It's not a motion for a stay pending appeal. It's a motion asking the Court to prudently police its own docket.

And here's, here's the irony, Your Honor. Again, don't take my word for it. Take Ms. Deitsch-Perez and her clients' word for it. Because just last year, in connection with their motion for a stay pending the mediation, in a pleading that was filed on 4/20, they said that the Court has the discretion to issue a stay. They relied on *Clinton v. Jones*, exactly as Highland has done to seek a stay in this case. Okay? So the very standard and the case citation that they criticize today

is the very standard and case citation that they relied upon last April.

And here, it gets even better. Because Ms. Deitsch-Perez, on behalf of her client, Hunter Mountain, joined in Dugaboy and Mr. Dondero's motion for a stay. She and her client personally adopted the very standard that they're criticizing today. You can't make this stuff up.

The standard is the right standard. The Court certainly has the discretion to police its own docket.

The second point that they make is that, you know, they'll be really prejudiced without a stay. I say it's the exact opposite. Everybody will be prejudiced without a stay. The Court will be prejudiced. Highland will be prejudiced. Mr. Dondero. Hunter Mountain. All of us will be prejudiced because we will wind up litigating the exact same issue twice. We will expend further resources. And of greatest concern to us is that we might wind up with inconsistent results.

There's no question that -- I shouldn't say there's no question. In all likelihood, a decision will be had on Highland's motion to dismiss the valuation complaint in short order, since argument is scheduled just three weeks from now and the matter is fully briefed. And as Your Honor knows, that -- if we prevail and the Court finds, as it's indicated in prior rulings, that Hunter Mountain is not a Claimant Trust beneficiary and has no rights to this information, and they

appeal that, that'll get assigned to a particular district judge.

If the stay is denied and we proceed with the litigation of the Hunter Mountain complaint that seeks to remove Mr. Seery and we prevail on that one, that'll go to a different judge, in all likelihood, since there's more than, I think, two dozen judges in the District Court. They'll be on completely separate tracks. And you run the -- you run the real risk -- I mean, actually, it's not a real risk, from our point, given the substance -- but you definitely run the risk of inconsistent decisions.

So I know, and I'll close in a moment with some comments about the wisdom of this whole exercise, but I know -- I know how much Mr. Dondero, you know, wants to challenge Mr. Seery. But that doesn't -- that doesn't make it the efficient thing to do. It doesn't make it the fair thing to do, when we're litigating the exact same issues right now.

The third, the third notion, the third argument they make is really they attempt to rewrite their complaint. They try to suggest that the issues are not identical. They suggest that, you know, they've got theories of breach of fiduciary duty and good faith and fair dealing. You know what, Your Honor? You just have to go back to Paragraph 35 of the proposed complaint. That are the legal theories of their case. And to the extent that there's a notion of fiduciary

duty in there, it is predicated on Section 337. In fact, it's predicated -- if you'll give me just one moment -- it's predicated on Section 337 -- 3327(1): The officeholder has committed a breach of trust.

It's not a stand -- there is no standalone breach of fiduciary duty claim, nor could there be. Because as the Court is likely aware, there's a very specific provision in the trust agreement that's been affirmed by this Court, the District Court, the Fifth Circuit, that specifically disclaimed any fiduciary duty to anybody but a Claimant Trust beneficiary. So you couldn't have a standalone breach of fiduciary duty claim. It just doesn't exist.

So they can try if they want to characterize their claims however they want. They should be held to the pleading that they filed. It's the one that we'll be defending if the motion for stay is denied or if the Debtor sees the light of day.

But I do want to close with just some general observations about this. Right? They want to -- they suggest, you know, Highland wants to avoid the suit to remove Mr. Seery. No, we don't. What we want to do is the right thing here. There is no dispute that neither Mr. Dondero, Mr. Patrick, or Hunter Mountain serve on the Claimant Trust Board. They have no personal knowledge of anything concerning the Claimant Oversight Board. And Hunter Mountain's proposed complaint

cites no facts concerning the governance of the Claimant Oversight Board.

Instead, they seek to file another complaint, borne out of grievances, based on rank speculation, untenable inferences, and fabricated tales, lacking in common sense, frankly, that is woefully ignorant of the evidence that has already been admitted against it.

According to Hunter Mountain, the Claimant Trust Board is missing in action. They have abandoned their fiduciary duty. They have ceded control of the Claimant Trust to Mr. Seery to do what he wishes, even if it's acting against Stonehill and Farallon's own interests. Right? The complaint said, oh, Mr. Seery is arbitrarily withholding distributions so he can supposedly enrich himself by getting the same salary that this Court approved it'll be four years ago in July.

You can't make this stuff up, Your Honor. The whole premise doesn't make any sense at all. Why doesn't it make any sense at all? Because Mr. Dondero [sic] is accountable. He is fully accountable. He's accountable for the Claimant Oversight Board and he is accountable to every holder of an actual vested claimant beneficial interest in the trust. He owes them fiduciary duties. Hunter Mountain is not in that group. But Mr. Seery is most definitely accountable to the people who had allowed claims and the people today who are Claimant Trust beneficiaries.

And here's the thing. Hunter Mountain knows that the Claimant Oversight Board is not missing in action. Hunter Mountain knows that Mr. Seery is not acting unilaterally. How does it know that? Because we had a trial last June. And during that trial -- you can find this at Docket No. --

MS. DEITSCH-PEREZ: Your Honor? I -- Your Honor, I regret --

THE COURT: Stop.

MS. DEITSCH-PEREZ: -- interrupting.

THE COURT: Okay. What do you want to say, Ms. Deitsch-Perez?

MS. DEITSCH-PEREZ: I regret interrupting Mr. Morris, but this is not an evidentiary hearing and Mr. Morris is now testifying to things that are not in his pleadings. It's just not a fair way to proceed and the Court should not allow it. Thank you.

THE COURT: Okay.

MR. MORRIS: If I may, Your Honor, just to --

THE COURT: Go ahead.

MR. MORRIS: We received a response -- we received a response yesterday --

THE COURT: Uh-huh.

MR. MORRIS: -- that accused Highland of filing this motion for the stay in order to avoid having this heard. I'd like to -- all I'm doing is responding to the very argument

that they made yesterday.

THE COURT: Okay. You may respond. I overrule that objection.

MR. MORRIS: Thank you. So, and this is all really important, because there's evidence in the record at Exhibits 39, 40, and 41 that were admitted last June that show a very active, responsible Claimant Oversight Board fulfilling their fiduciary duties in negotiating an incentive compensation package for Mr. Seery. And they want to file a complaint that says the Claimant Oversight Board has abandoned its responsibilities, that they're missing in action.

And I want to be really careful here. I want to -- I want to really be transparent here, frankly. Stonehill and Farallon are two of the biggest claimholders. They both hold seats on the board. Does it make any sense at all that they would allow Mr. Seery to do all this at their own expense if they didn't think it was justified?

This is very important, Your Honor. No one who holds a valid, vested claim in the Claimant Trust, who is a Claimant Trust beneficiary, not one of them is complaining about Mr. Seery's management. Not one of them is complaining about his decisions concerning reserves. Not one of them is complaining about whether he has or hasn't made distributions or how much he's distributing. Not one of them has suggested to the Court that Mr. Seery is acting unlawfully. Nobody

holding a claim, a vested claim in the trust is complaining about anything. The only person complaining is Mr. Dondero, the same person who has been the sole source of litigation since the effective date.

He and his counsel should be careful for what they wish for. If Highland's motion for a stay is denied, Highland will respond to the motion and will serve another Rule 11 motion, just as it did when Mr. Dondero filed his ridiculous lawsuit claiming that my firm actually represented him personally back in 2019. Your Honor may have seen how this ended. It ended with the withdrawal of that motion. And this motion will head for the same result.

And I say all of this, Your Honor, because I want to be respectful. I want to make sure everybody's eyes are wide open. I want to ensure everybody understands that we're not seeking a stay here because we're afraid of anything. And I want everybody to know that if the stay is denied or this motion is ever heard, that the first thing that's going to happen is there will be a response and a Rule 11 motion, because it has no basis in law and it has no basis in fact. Highland seeks a stay not to avoid a hearing on the merits but because it makes no sense to keep litigating the same issue over and over again. We are not the same. The stay should be granted.

Thank you, Your Honor.

THE COURT: I have two follow-up questions. First, I think I heard you say February 14th is when the Court --

MR. MORRIS: Yes.

THE COURT: -- is set to have a hearing on the motion to dismiss the complaint seeking valuation. Correct?

MR. MORRIS: Yes.

THE COURT: And --

MR. MORRIS: Yes, Your Honor.

THE COURT: And your motion for a stay here is 'Please stay hearing this latest Hunter Mountain motion to file a complaint until not only this Court has ruled on the February 14th matter but until all levels of appeals have been exhausted on that.' Am I correct about your request?

MR. MORRIS: Yes, Your Honor.

THE COURT: Okay. And my second question: When Ms. Deitsch-Perez started objecting to your argument, I think you were alluding to a trial this Court had on Hunter Mountain's motion to sue Farallon and Stonehill as well as Mr. Seery with regard to what I'll call claims purchasing activity. Is that what you were alluding to?

MR. MORRIS: It was, Your Honor.

THE COURT: Okay.

MR. MORRIS: And I was alluding to it for the very singular purpose of pointing out that there was evidence admitted into the record against Hunter Mountain that shows

the Claimant Oversight Board fulfilling its fiduciary duties and doing exactly what this Court would expect the Claimant Oversight Board would do.

And I point that out only to contrast that evidence, which has already been admitted, with allegations in the proposed complaint that somehow the Claimant Oversight Board has ceded control to Mr. Seery and they're missing in action. It's just -- they know it's not true. They have the evidence.

THE COURT: Okay. And I said two follow-up questions, but I actually have this additional question. This was on my brain, this -- I couldn't remember what month -- the trial, where I ruled on whether Hunter Mountain should be granted leave to sue Farallon and Stonehill and Mr. Seery. This was on my brain because, you know, I've issued a lot of opinions during the Highland case, but I remembered writing extensively on whether Hunter Mountain had standing back in connection with that motion. And in fact, I'm going to hold it up.

MR. MORRIS: Yep.

THE COURT: I wrote a 105-page opinion -- which I don't know if anyone besides my law clerk and I read it, because it's not entertaining -- but I wrote a 105-page opinion denying Hunter Mountain -- different lawyer at the time, not Ms. Deitsch-Perez -- denying Hunter Mountain leave

to sue what I'll call the Claims Purchasers -- Farallon, Stonehill, as well as Mr. Seery. They wanted to sue Mr. Seery for breach of fiduciary duty. And I had multiple reasons for denial, but lack of standing was one of those reasons.

And I went and printed the opinion yesterday to refresh my memory, did I rule on this already? I thought I ruled on this already. And 23 pages of my 105-page opinion deals with the lack of standing of Hunter Mountain. Twenty-three pages, and 85 footnotes, by the way, within that 23 pages, so it's a very dense 23 pages. I went through constitutional standing and I went through prudential standing, and I said Hunter Mountain failed under both tests.

So this is a very longwinded question: What I'm hearing you argue, Mr. Morris, is I'm going to rule one way or another on February 14th, and then there will likely be appeals, so let's don't have to reinvent the wheel. But is there something about my opinion, my 105-page opinion, that isn't -- I mean, have I already addressed this, or is there something I missed in that opinion regarding standing? Has something changed? This was August 2023.

So maybe it's not fair to ask you, because this was more the Claims Purchasers' lawyers' fight, right, and Mr. Seery's, more than --

MR. MORRIS: Right.

THE COURT: -- the Reorganized Debtor? They were the ones who briefed it and argued it. So maybe it's not something that you bothered to read in detail. But I feel like I've ruled on this. And --

MR. MORRIS: So, --

MS. DEITSCH-PEREZ: Your Honor, may --

THE COURT: First Mr. Morris, and then I'll let you, Ms. Deitsch-Perez.

MR. MORRIS: So, a couple of observations, Your Honor.

THE COURT: Uh-huh.

MR. MORRIS: First of all, I read every word that Your Honor wrote, --

THE COURT: I'm sorry.

MR. MORRIS: -- as I do for all judicial.

THE COURT: Okay.

MR. MORRIS: Yeah, right?

Second of all, this issue was addressed by the Court. It was addressed pretty extensively. It was addressed further, frankly, on -- there was a subsequent post-trial motion by Hunter Mountain challenging that very finding --

THE COURT: The motion for reconsideration.

MR. MORRIS: -- and it challenged that very finding.

THE COURT: Uh-huh.

MR. MORRIS: That's right. It challenged that very

finding based on the same *pro forma* balance sheet that's at -- that we're saying kind of moots this whole exercise, at least the valuation proceeding.

But I'm sure Your Honor is not aware of it, but Hunter Mountain has appealed that decision, and they are challenging, you know, every word, I think, in your order. Every word in seven interlocutory orders that preceded it.

And unlike the resolution of the issue that will be had on February 14th, where Hunter Mountain's lack of beneficial ownership in the Claimant Trust is front and center, that issue is one of a very, very long laundry list of issues that are going to the District Court. And we have no reason to believe, we have no -- right? It's one of a million issues, and there's no certainty at all that the District Court is ever going to get to that issue. Right? We don't know how they're going to -- it's just starting now. I don't even think the opening brief -- I think the opening brief might have been filed a day or two ago. I'll start looking at that shortly.

But, so that's why we didn't think that was particularly relevant. We did note that in our footnote. I mean, we did point out that this -- that, you know, there is an appeal of the Hunter Mountain decision of last June. But given the girth of the appeal and the number of matters that are being adjudicated, you know, I wouldn't -- we're not here saying

you should stay the latest Hunter Mountain motion in order to get a result there, because it doesn't seem, you know, maybe they address it, maybe they don't. There's no way to say because it's just not -- it's just buried in there. It's buried in the laundry list.

Another thing I'll say is that you did, you did address it. You did address it pretty comprehensively. But we have new pleadings, you know, with arguably some new shades of argument. But the motion for leave to remove Mr. Seery is based solely on Section 3327 of the Delaware law, which turns right back to the terms of the Claimant Trust.

I'm sure that we're going to wind up at the same spot, whether it's through res judicata, collateral estoppel. I mean, I think we've made a number of these arguments already. But the point here is, why do we have to litigate these issues for a third time?

THE COURT: Okay. Thank you.

All right. Ms. Deitsch-Perez, I'll hear from you.

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

Just to -- and go to Slide 2. But just to jump ahead, the motion for leave is predicated on Delaware Code 3327, and it has in it a number of criteria for why a trustee should be removed. The issues are entirely different than in a valuation proceeding, and a Delaware court may well have a

different view of what a beneficiary is for the purpose of Delaware Code 3327 and the importance of making sure that Delaware trustees are not hostile or unable to act.

I'm also going to jump ahead and answer one of the -- what Mr. Morris added in his last slide, which was new, claiming that, oh, no, it's perfectly clear that the Oversight Board is on the job, so really you, as an equitable matter, you shouldn't worry about this, because Mr. Seery is supervised.

One, that's not in his pleadings. But more importantly, he's mixing apples and oranges, because the evidence in the former trial had to do with approving his compensation. The issue in the motion for leave to bring a suit to remove Mr. Seery is the fact that the Claimant Trust structurally does not -- it gives Mr. Seery complete discretion over the issue of moving money into the indemnity subtrust. It's an entirely different issue than the issue that was raised in the trial in June, and Mr. Morris should and probably does know that, and so has been -- well, his comment was misleading at best.

THE COURT: Okay. Different --

MS. DEITSCH-PEREZ: But let's take a look at --

THE COURT: Different causes of action, different theories, but still it boils down to whether Hunter Mountain is a Claimant Trust beneficiary, right?

MS. DEITSCH-PEREZ: Or whether it will be treated as a Claimant Trust beneficiary, --

THE COURT: Okay.

MS. DEITSCH-PEREZ: -- which is an additional basis.

THE COURT: I don't know what that distinction, where it comes from.

MS. DEITSCH-PEREZ: The distinction is that the parties cannot waive, in Delaware, the duty of good faith and fair dealing. And so if Mr. Seery is taking actions that prevent or attempt to prevent the Class 10 and 11 from becoming beneficiaries, then under Delaware law he would not be able to raise a lack of that status as a defense under 3327.

THE COURT: You're talking about the cause of action --

MS. DEITSCH-PEREZ: And so if --

THE COURT: Stop. You're talking about the cause of action and defenses thereto. We're talking about standing, which, as I mentioned, 23 pages, 85 footnotes, the last time Hunter Mountain wanted to sue Mr. Seery and Farallon and Stonehill. Some of it was constitutional standing, but a few pages was standing under Delaware law, and I said not a Claimant Trust beneficiary. Okay?

Regardless of what the causes of action and theories are, Hunter Mountain has to be a Claimant Trust beneficiary.

MS. DEITSCH-PEREZ: Or --

THE COURT: I've written on that extensively already,

and it sounds like I'm going to have to write on it one way or another extensively after February 14th.

Why should we not stay this new motion to file a new lawsuit, rather than reinvent the wheel again? Maybe it's going to be different --

MS. DEITSCH-PEREZ: Your Honor, --

THE COURT: -- with the valuation motion versus what I wrote in Summer 2023. I don't know. I haven't started looking at the pleadings in depth. But what is illogical --

MS. DEITSCH-PEREZ: Your Honor?

THE COURT: -- about this? I mean, this is, again, it's about judicial resources, efficiency, parties' resources. Why on earth would --

MS. DEITSCH-PEREZ: No, Your Honor, what it --

THE COURT: Go ahead.

MS. DEITSCH-PEREZ: The reason is there's a reason that the Supreme Court has a very high standard to stay other judicial proceedings. So not only must the applicant make a showing of likelihood of success, but the issue is whether they will be irreparably harmed by not having a stay and whether another party would be harmed by having a stay.

And here, because Highland seeks to stay this matter for years, if it turns out in the end that Your Honor's decision is overturned and Hunter Mountain is found to have standing, it will be too late to do anything about it if the cases are

not allowed to proceed in tandem.

Parties have a right to have their cases heard. The fact that there are similar issues means at some point there may be res judicata or collateral estoppel that deals with it. But there's not a rule that only one case can go forward.

Under Highland's theory, virtually Hunter Mountain could not bring any claims, anymore, ever. And that's not the law. Hunter Mountain is entitled to have this decided.

It may well be that Your Honor thinks there's no difference because of 3327 and is going to rule the same way. We don't think that that's correct. We think we will convince you that because Hunter Mountain is moving under 3327, there is a difference in standing. And in any event, that it should go to a Delaware court for that determination to be made. But if Your Honor stays this proceeding, --

THE COURT: And by the way, by the way, what does the Trust Agreement say about where things get litigated?

MS. DEITSCH-PEREZ: Delaware law says that you -- that --

THE COURT: I asked what the Trust Agreement said.

MS. DEITSCH-PEREZ: Delaware law --

THE COURT: I asked what the trust agreement said, because it would trump, right? A contractual agreement would --

MS. DEITSCH-PEREZ: No. That's the -- exactly. It

doesn't trump. Under Delaware law, and we cite a case for this, it's in the brief, a venue provision in an agreement does not override having matters of Delaware internal affairs decided in Delaware. So, no, the Trust Agreement does not automatically override Delaware law.

And so this goes back to the *Landis* -- the standard for stay under *Landis*. Who's harmed? Which harm is irreparable? Because Highland seeks to stay this matter for years. And Your Honor knows how long the Fifth -- the District Court and the Fifth Circuit have been taking to get to rulings. It could be one, two, two and a half, three, if it goes up to the Supreme Court. It could be years. And by that time, Mr. Seery will have continued doing the very things that the complaint seeks to challenge. That's not fair.

I understand there may be a tiny amount of additional work. Mr. Morris says this is all the same. Well, if it's all the same, then he's already done the work. And if Your Honor is convinced it's all the same, well, then you cut-and-paste the old opinion and put it down and the parties could go forward with their appeals.

The prior standing decision is up on appeal. The parties are entitled to go forward and have -- and have their judicial process. There is -- the amount of money Highland spends on these matters, such as bringing -- bringing the sanctions claim against Mr. Ellington and then suddenly dropping it in

the middle, it defies belief that their -- the real interest here isn't conserving resources. If in fact these are duplicative matters, then it will be easy enough to write them up.

And because Highland waited two weeks after the motion to leave was filed and only a week before its response was due, is it really credible that it hasn't already largely written its response? Was it so sure that this Court would do as it asked that it didn't bother to respond, that it set a hearing for a date after its response was due? That seems improbable, Your Honor. I certainly hope that they've gotten this largely written.

But in any event, we've given them -- they asked for and we've given them an additional week to write up its response to the motion to leave. I'd ask that the Court allow this to proceed, because Highland simply doesn't meet the standard, the very, very high standard for a motion to stay here.

THE COURT: All right.

MR. MORRIS: If I may, just a few comments, Your Honor?

THE COURT: Very briefly. Two minutes. Because I thought this was going to be a short matter, and we've been going --

MR. MORRIS: Yeah.

THE COURT: -- fifty minutes. Five-oh minutes. So,

go ahead.

MR. MORRIS: Yeah. Okay. Just, it's not the exact same thing. It has the exact same legal gating issue: Are they a beneficiary?

If the Court denies the stay -- and I assure the Court, I haven't written one word of this thing yet -- but if the Court denies the stay, we are going to be in major litigation. We reserve the right to take discovery. There will be an evidentiary hearing, of that I'm absolutely certain, when we get to that point, as appropriate under the gatekeeping order that's been adopted by this Court. So it will be expensive, it will be time-consuming, and it will ultimately yield absolutely nothing for the Movants here.

You know, we didn't set the date for today. Ms. Deitsch-Perez is exactly wrong about that. The Court set the date for today. We filed an emergency motion a week ahead of time. It's not like we waited until the last second. Right?

So I just, I take offense with all of that. I take offense to the reference to the Ellington sanctions motion. That got resolved because Mr. Ellington finally said he wasn't going to sue Mr. Seery. Had he done that when we asked him a hundred times before that, we never would have filed the motion. He refused to do it. That's why the motion was filed. And it was resolved -- not withdrawn, but resolved -- only after Mr. Ellington and his lawyer finally said they

weren't going to sue Mr. Seery.

So, you know, facts matter, Your Honor. Facts are very important to me. And I want to make sure that the factual record is a hundred percent accurate.

The fact of the matter is, at the end of the day, the Court should grant the stay. You know, if Hunter Mountain really wanted Mr. Dondero [sic] out, they should have included it in their complaint last summer and they shouldn't be allowed to come up with new claims that aren't even in the proposed complaint that's on file right now. There is no claim for breach of the duty of good faith and fair dealing. There isn't. And so they don't get to come here and argue against the stay based on a pleading that has yet to be filed.

The Court should grant the stay.

THE COURT: All right.

MS. DEITSCH-PEREZ: Your Honor?

THE COURT: No. I'm done. I've heard enough.

I am going to grant a stay. It's going to be slightly different from what is requested here. I'm going to grant a -- well, I'm going to grant a stay on this newest HMIT motion to sue Mr. Seery until at least the time I rule on the valuation motion, the motion to dismiss the valuation complaint. Okay? So it's argued February 14th. We know how this case works. I get voluminous submissions. I try to carefully go through them and make a careful ruling. And so

will I get a ruling out in April? That's just a wild guess, okay, but it's probably a reasonable guess.

So what I envision doing is having something like a status conference/scheduling conference shortly after I rule on the motion to dismiss the valuation complaint and decide, are we going to continue the stay to let maybe any appeals -- in fact, I'll probably set a status/scheduling conference shortly after the deadline for a notice of appeal. And we'll see, is there an appeal pending, what's going on big-picture, should I continue the stay? Okay? So I'm not saying it's going to be a two- or three-year stay, but I'm saying it's going to be at least an until-later-this-year stay, and we'll see where things stand in this case.

Now, let me give you a couple of reasons. I don't think the four-prong TRO standard test applies here: Irreparable harm; likelihood of success on the merits; balancing the parties' interests; the public interest. I don't feel the need to make that evaluation here because I do think this is just policing the Court's own docket, which of course any court has the discretion to police its own docket, in the interest of judicial economy and reducing expense. And so I am going to elaborate on that and why I'm exercising my discretion as such.

As I've alluded to a couple of times, August 25, 2023, Docket Entry No. 3903, this Court issued a 105-page opinion in

what I would call a very similar context, if not squarely down the middle of the fairway the same context. And the context, for the record, was Hunter Mountain, through a different attorney -- not Ms. Deitsch-Perez, a different attorney -- filed a motion for leave to sue Mr. Seery and Farallon and Stonehill, Claims Purchasers, for different causes of action. One of them was breach of fiduciary duty by Mr. Seery, I note, but there were different causes of action.

As I've noted here, and I'm saying this for the record in case there's an appeal of this order granting stay today, in the 105-page opinion that I issued denying Hunter Mountain leave to file the lawsuit against Mr. Seery and the Claims Purchasers, I did spend 23 pages, dense pages with 85 footnotes, explaining why I thought in that context Hunter Mountain has no constitutional standing as well as no prudential standing to sue Mr. Seery and the Claims Purchasers.

I note that the prior lawyer for Hunter Mountain, not Ms. Deitsch-Perez, gave very little oral argument or written argument on that. In fact, as I remember, he said, The person aggrieved standard is what applies and we're a person aggrieved.

And the Fifth Circuit as well as the U.S. Supreme Court seem to love the topic of standing. Okay? And I thought we needed a very thorough discussion of standing, okay, because I

thought, more likely than not, that's going to be the first issue -- of course, because it could be bear on subject matter jurisdiction -- that's going to be the first issue that a District Court, the Fifth Circuit, even the U.S. Supreme Court is going to focus on. So, 23 pages, 85 footnotes.

Now, there may be more or different things to say when we have the motion to dismiss on the valuation complaint. Okay?

(Echoing.)

THE COURT: Please turn off your speakers, whoever that is.

I will note that Delaware law, that would be the narrower question of prudential standing, right? And in my 23 pages, I actually spent more time on constitutional standing than prudential standing. And as Mr. Morris notes, the 105-page opinion is chock-full of other stuff besides standing. Okay? Colorability of the claim that Hunter Mountain wanted to bring and what is the standard the Court should apply under the gatekeeping provision. Okay? So, lots of other things.

Yes, it may be years before a higher court rules or different courts rule. And it may be slightly nuanced and different for the valuation thing. But I don't know why anyone would reasonably think I would go down this trail a third time for the same party. Okay? I went down it *ad nauseam* August 25, 2023. It sounds like I'm going to go down it *ad nauseam* again February 14th and thereafter, as I decide

what to do.

As far as abuse of discretion, I think my bosses -- the District Court, the Fifth Circuit, the Supreme Court -- would want to slap my hand if I didn't grant the stay. It's not just judicial economy to me, it's not just efficiency of the parties, but it's my bosses. It's the District Court, the Fifth Circuit. Why are you going to make us look at this yet again? Okay?

Maybe I'll have something different to say. Maybe I'll have something more to say in connection with the valuation motion. I don't know. And that's why I'm leaving open the possibility that we're going to have a status conference after I've ruled, after notices of appeal may have been filed, and we'll figure out, do I go forward with this motion for leave? I'll have a better idea, is there something new and different at this point?

But there is no way any responsible court would go forward a third time considering Hunter Mountain's standing under Delaware law, under constitutional law, as a Claimant Trust beneficiary. Okay? There's no way any reasonable court would do that, with it twice having been teed up. Okay?

So that is the ruling of the Court. We will put it on our tickler system to set a status conference on whether to continue a stay in place after I've ruled on the valuation motion to dismiss.

All right. Please upload an order, Mr. Morris, that reflects that.

MR. MORRIS: Okay. And just so there's no ambiguity, any further briefing on the motion for leave is also suspended? Is that right?

THE COURT: Correct. Yes. Correct. And, again, --

MR. MORRIS: All right.

THE COURT: -- I just want to say one more thing, actually, for the record. Not whining to anyone, but it's going to sound like whining. I checked yesterday, and I'm not even sure my numbers are perfectly accurate, it may be more than this, but I counted in the Highland case I have issued 13 -- well, there are 13 published opinions from this Court. And then if you go back to *Acis*, which was, one might say, a precursor to Highland, there were five more published opinions. And that's not even counting Reports and Recommendations to the District Court, of which there are many more, probably close to a dozen. And then I've heard -- I've heard; I've never checked it -- that there were something like 55 appeals. And that was I think about a year ago someone announced that in court.

So, again, I mean, this is not just about the parties, although I care about the parties and the lawyers. This is about judicial efficiency. This is overwhelming to the system, so to speak. Okay? And so, again, I think it would

be an abuse of discretion for sure if I didn't grant the motion to stay.

All right. I've said enough. And with that, we'll go on to Highland's motion for a bad faith finding and attorneys' fees against I call it HCRE, but I guess it's changed its name a long time ago to NexPoint Real Estate Partners, LLC. All right. Mr. Morris, are you presenting that?

MR. MORRIS: I am, Your Honor. Thank you very much. John Morris, Pachulski Stang, for Highland.

We're here on this hearing, Your Honor, to argue Highland's motion for a bad faith finding for an award of attorneys' fees in connection with the proof of claim and the prosecution of the proof of claim by HCRE.

The motion was originally filed at Docket 3851, and if Ms. Bates can put up the next deck, I'll walk the Court through this. This is pretty straightforward.

The starting point, the starting point here, Your Honor, as it ought to be, is HCRE's claim. And if we could just, yeah, go to this page. What I've put up on the screen here, or what Ms. Bates has put up on the screen, is a slide that shows two pieces of evidence, two documents that were admitted into evidence in this matter. The first is HCRE's proof of claim, and the second is HCRE's response to Highland's objection to that proof of claim. And these documents are critical (chiming) because it sets forth the entire basis for,

you know, for this litigation.

In the proof of claim, HCRE said, among other things, that it contends that all or a portion (chiming) of Highland's interest in an entity called SE Multifamily, quote, does not belong to the Debtor. Or may be property of (garbled).

So this is the proof of claim. They're saying all or a portion of Highland's interest in SE Multifamily isn't Highland's. Right? But Your Honor knows that that's just a statement without regard to how they get there. A proof of claim -- and this is really simple, and it's why this motion, I think, is pretty simple -- a proof of claim has to have some basis in the law. Somebody could have a breach of contract. Somebody could have a slip and fall. There could be a personal injury case against the Debtor. There could be a claim for breach of fiduciary duty or other tortious conduct. But there's got to be a legal theory on which a claimant is seeking to recover against the Debtor.

And the claimant here, HCRE, set forth those legal theories in their response. And that's the box that's below it. And it's based on the very agreement that's at issue, the Amended and Restated (garbled) LLC Agreement for SE Multifamily. It says, After reviewing the documentation, HCRE, quote, believes the organizational documents relating to SE Multifamily Holdings, LLC improperly allocates the ownership percentages -- so that's the issue -- of the members

thereto due to mutual mistake, lack of consideration, and failure of consideration. And these are the legal theories. They claim to reform, rescind, or modify the agreement.

Again, not argument, don't accept anything I say, just accept what HCRE says. These are their pleadings. They told the Court that they believed that Highland didn't have a right to its interest in SE Multifamily. They told the Court that they believed the document improperly allocated the percentages. They told the Court that Highland provided no consideration. They told the Court that they had claims for reformation, to rescind the agreement, or to modify the agreement. That's the whole basis for this litigation.

If we could go to the next slide. Because let's just look at some very simple terms of the agreement. This is unambiguous. Right? And this is an agreement that's drafted by Highland, by HCRE, all under Mr. Dondero's control. Everybody's rowing in the same direction. The testimony here was consistent, not only among Highland and HCRE witnesses but also, and very, very importantly, BH Equities. Right? We haven't spent a lot of time talking about BH Equities, but that evidence is in the record. BH Equities testified up, down, and sideways that the agreement was consistent with its intent, that it was fully aware that Highland had only put in $49,000, that Highland was getting a 46.0 percent interest. Right?

But in addition to BH Equities, Mr. Dondero, and we'll talk about this more in a moment, and Mr. McGraner testified to the same thing. And how could they not? Just look at these provisions. The first box is Schedule A to the agreement. It says, right, in contrast to the $291 million that was credited to HCRE Partners -- they actually didn't put in any of that; that's what the testimony showed -- Highland actually put in $49,000. But these are the percentages that they wrote.

And Your Honor will recall that in the 48 hours before the document was signed -- this is evidence in the record; I'm sorry I don't have citations to the specific exhibits -- but there's a back-and-forth in emails between Freddy Chang, I believe it was, and BH Equities about Schedule A and about the contributions.

And so none of this is an accident. And it's not just stated in Section -- ii Schedule A. It's set forth -- Highland's interest was set forth in Section 1.7, in Section 6.1A, in Section 9.3E, which is the liquidation provision. Right? This was the waterfall in the event of a liquidation. So these are the plain, unambiguous, uncontested terms of the agreement that everybody agreed to when the document was signed.

We can go to the next slide.

Despite that, Mr. Dondero swore under the penalty of

perjury that the proof of claim was true and correct. Remember, the proof of claim said that this really wasn't Highland's interest in SE Multifamily. I don't understand how he could do that, given the plain terms of the agreement. But his testimony was short and precise and unambiguous. It can be found at Pages 55 to 59. It's quoted there -- it's cited there in the footnote. If you just read those four pages, Your Honor.

And Your Honor cited to this pretty extensively on Pages 4 and 5 of the Court's decision in this matter. I've summarized just some of the Court's findings. It's not the Court's findings; it's Mr. Dondero's admissions. He didn't -- he didn't personally do any due diligence of any kind to make sure that Exhibit A was truthful and accurate before he authorized it to be filed. He filed it.

He didn't review or provide comments to the proof of claim or Exhibit A before it was filed. He didn't review the applicable agreements or any documents before signing the proof of claim. He had no idea whose -- where the genesis of the proof of claim was, who at HCRE worked with or who provided information to Bonds Ellis to allow Bonds Ellis to prepare the proof of claim. He had no information about what information was given to Bonds Ellis to formulate the proof of claim. He didn't know whether Bonds Ellis ever communicated with anybody the real estate group regarding the

proof of claim.

He also testified that he never specifically asked anybody in the real estate group if the proof of claim was truthful and accurate before he authorized it to be filed. He didn't check with any member of the real estate group to see whether or not they believed the proof of claim was truthful and accurate. He failed to -- he admitted he failed to do anything to make sure the proof of claim was truthful and accurate before he authorized his electronic signature to be affixed and have it filed on behalf of HCRE.

That's bad faith, Your Honor. You can't rely on some vague process or say 'I'm just relying on others,' because if that's the case, that's what I -- that's we said in our reply, that's the very important person defense, right? He's too busy, he just relies on others, he just signs stuff, and he's got no obligation to do anything. How do you sign something under the penalty of perjury in that milieu?

If the Court doesn't grant our motion here, it will be sending a signal that people can sign proofs of claim with no knowledge of the substance of the claim, with no knowledge of whether the claim is valid, with no knowledge as to whether or not the Court should take the time to adjudicate a disputed claim.

That's what will happen. Right? That will be the signal, that very important people are absolved of the

responsibility of doing basic due diligence before signing a proof of claim.

I think the signing of the proof of claim, the filing of the proof of claim, given what we know now, in particular what we know now, is bad faith.

And I know that HCRE in their opposition said, oh, well, you know, Mr. McGraner did stuff. I would urge the Court to look at Pages 109 to 112 of the transcript, because Mr. McGraner kind of distanced himself from the proof of claim. He said he didn't authorize it, he didn't approve the filing. He said he never gave any documents to Mr. Sauter. He never discussed the proof of claim with Mr. Dondero or anybody at Bonds Ellis. He didn't provide any comments to the proof of claim. He deferred to counsel. He didn't know if Mr. Sauter gave any documents to Bonds Ellis. He never gave the information to Bonds Ellis. He never discussed it with anybody but D.C. Sauter. Right?

So the two people, the only two people who are authorized to act on behalf of HCRE did absolutely nothing to make sure that there was at least a modicum of credibility, at least some basic level of diligence, at least some good-faith basis to assert that this interest that Highland has in SE Multifamily could be subject to challenge. Right? They did nothing.

If we can go to the next slide.

And then, as Your Honor will recall, they tried to withdraw the proof of claim. Right? That in and of itself we contend was an act of bad faith, and it was an act of bad faith for multiple reasons. There's no dispute that they tried to -- they filed their motion to withdraw the proof of claim immediately after taking Highland's depositions but immediately before I was about to depose their witness. It's a naked attempt to try to procure a patently unfair litigation advantage, particularly in light of the fact that HCRE was simultaneously trying to preserve its claims for another day.

If they had just -- and Your Honor made this point at the hearing, right? Just say unequivocally you're done with this. They couldn't do it. They tried to save it for another day.

And so the withdrawal of -- a motion to withdraw the proof of claim we're not saying is always bad faith. Look at what I say in the title of this slide. Under these circumstances, when you file it after taking discovery but before subjecting your people to discovery, and when you try to preserve your claims for another day, the Court properly denied that motion for leave to withdraw the proof of claim. And it stunk. And Your Honor I think rightly questioned whether or not this was, you know, a threat to the integrity of the bankruptcy system and the claims process, whether or

not this amounted to gamesmanship.

But it didn't end there. In closing argument, HCRE persisted with its attempt to try to preserve their claim. This is bad faith. They continued down the exact same path. They told the Court in closing argument at Pages 180 to 181 of the transcript, quote, They want you to make findings that we can't raise any of these other issues, decisions, et cetera, going forward. That's not proper on proofs of claim. Going forward. They wanted to preserve this issue for the future.

But this issue is their proof of claim. This issue is based on the legal theory set forth in Paragraph 5 of HCRE's response to the objection, the response that says they have claims for rescission, to rescind, to modify the agreement. Right? That's the whole legal theory of it. But they wanted Your Honor to simply say the proof of claim is gone but you all can go pursue another day the legal theories that underlied the entire process.

That's (garbled), Your Honor. That's what this is all about, the claims process. You have a claim. You have legal theories on which the claim is based. If your claim is denied or if the objection to the claim is sustained, done. They wouldn't have it. It's why the proof of -- it's why the motion withdraw was denied and why the Court should find that their attempt to preserve these claims for the future is bad

faith.

And the interesting thing, Your Honor, is this is (chiming) one of the very few rulings in the case that Mr. Dondero didn't appeal. I think even he acknowledges, like, like, this is just not -- that he didn't -- he didn't want this seeing the light of day in the District Court.

If we can go to the next slide. And this really amplifies the bad faith in filing the proof of claim. It's the testimony about the nature of the claim. And again, I -- we talk about this exhaustively in our papers, and so I haven't cited to everything, but this is just some of the nuggets from, you know, the testimony that's out there. Right?

Consideration. Mr. McGraner testified that Highland bankrolled HCRE's business. Your Honor can take judicial notice that Highland loaned millions of dollars to HCRE. Right? Those are part of the Notes Litigation that HCRE is now strenuously trying to avoid repaying in its appeal. Right? They're appealing that to the Fifth Circuit and they're trying -- right? We bankrolled the business, we shouldn't have our interest, and they don't want to pay the money back. It really -- this is *chutzpa*, where I'm from. Right?

Going on to the question of consideration -- because, again, this is in Paragraph 5 of the pleading -- there's the

admission that HCRE didn't have the financial wherewithal to close on the Key Bank loan by itself and it needed Highland to provide capital -- flexibility by co-signing on the loan. Right? Couldn't have done the deal without Highland, but they want to take the interest away from us. Bankrolled the whole project, but they want to take the deal away from us.

They include Highland in order to provide tax benefits, but they want to take the deal away from us. Both Mr. Dondero and Mr. McGraner were very clear that tax benefits was one of the reasons Highland was in this. And if Your Honor will recall, in the closing argument, I pointed Your Honor to just one of the tax returns that showed something like $30-plus million in income was allocated to Highland in order to shelter it from taxes. Right? I don't know that there's anything illegal about it. I take no opinion about it. Right? I have no view on it. But *The Little Engine That Could* that put in the $49,000 was suddenly stuck with $31 million of income. I'll wait to hear an explanation as to why Highland was included in the deal and whether taxes were a part of it.

Mr. McGraner also testified just --

(Audio cuts out.)

THE COURT: Okay. What happened?

MR. MORRIS: (begins speaking)

THE COURT: Okay. Mr. Morris, we lost your sound

for about 20 seconds, so if you could kind of repeat the last 20 seconds.

MR. MORRIS: Sure. So I'll try and summarize. On the consideration piece, they know there was consideration. They pursued a claim based on lack of consideration, but in the first point there's an admission about Highland having both bankrolled the whole operation, and in the second point there's the admission from Mr. McGraner that the deal would never have gotten done without Highland's financial wherewithal. And Mr. Dondero and Mr. McGraner admitted that there were tax benefits. And Your Honor saw those tax benefits, right? In my closing argument, I pointed to just one of the tax returns showing that Highland -- I called it *The Little Engine That Could*, who put in the $49,000, somehow got -- somehow got $31 million of income assigned to it. Right?

This was not an accident. Highland was there for tax reasons. Again, I take no view as to the propriety of that at this time, but the notion that there was no consideration is just -- it was ridiculous then, and their admissions show that it was ridiculous.

The next bullet point shows Mr. McGraner's admissions that on March 15, 2019, the deadline was approaching to amend the original LLC agreement to admit BH Equities and to have it retroactive to the prior August. He admitted that he

reviewed the draft Schedule A, which is what we looked at, right? It showed $49,000 and a 46.06 percent interest for Highland. He saw that it unambiguously showed Highland making a $49,000 contribution, getting the 46.06 percent interest. He believed Schedule A reflected his understanding of the terms between Highland and HCRE, and he knew of no obligation that Highland had to make any future capital contributions. I've cited to all of the testimony very specifically.

Mr. McGraner admitted that the allocation of the interest in Schedule A was consistent with the parties' negotiation of the waterfall and other provisions in the amended LLC agreement, that HCRE understood it accurately reflected the parties' intent.

How do you (garbled) proof of claim saying you have to reform, rescind, modify the agreement, when all of this is in your head? How do you do that in good faith? They both admitted that Schedule A reflected the parties' intent at the time it was signed.

It's the last bullet point that's really the head scratcher. What happened is Mr. Dondero, who also caused Highland to file for bankruptcy, didn't like the consequences of his decision. Nothing happened here, as I said in my closing argument, that doesn't happen in every bankruptcy case. The assets of the Debtor are marshaled for distribution

to the creditors. Highland's interest in HCRE is an asset of the estate. HCRE challenged Highland's title to that asset. That's what this litigation is about. And the only reason they challenged the title is because they didn't like the consequences of Mr. Dondero's decision to file Highland for bankruptcy.

That's not good faith. If that were good faith, every equity owner of every business would be able to claw back everything they'd given to a company, every loan that they'd given to a company, every -- like, they can't do that. That's not what the law -- there's no basis for that theory.

Finally, just deal with the attorneys' fees issues quickly. You know, the challenges to our fees are both petty and baseless, frankly. They said we should have avoided discovery. I don't know how you say that. We shouldn't have taken depositions. They took depositions, and we shouldn't have done that? We should have gone to trial where they had discovery and we didn't? That doesn't make a lot of sense to me, and I can't imagine it would make sense to any objective participant.

They claim our legal fees are *per se* excessive. The total legal fee is less than five percent of the value of Highland's interest in SE Multifamily, not according to us but according to Mr. Dondero's family trust, Dugaboy. They told this Court in -- on June 30, 2022, I think, in the very first motion for

information, that Highland's interest in SE Multifamily was $20 million. So we spent less than five percent of the value of that to get good, clean title. I don't think that's excessive by any means, particularly with the amount of hoops we were required to jump through.

Unidentified timekeepers. They say three people were not identified. It was a *de minimis* amount of money. We've addressed that in the brief.

Travel time. You know, again, an even more *de minimis* -- I think that's right -- a more *de minimis* amount of money, less than $10,000 for me and Ms. Winograd to go to Dallas. We billed out at half-time. They admit it. And ironically, you know, our compensation for nonworking travel time was part of the agreement that was authorized when Mr. Dondero was still the head of Highland. I don't know how you criticize that today when it's part of Mr. Dondero's own agreement.

Finally, they take issue with Mr. Adler's relatively modest invoice. I think he charged $700 an hour. He (garbled) 30 hours or something in August 2022 as we were preparing for depositions. Mr. Dondero and Mr. McGraner have admitted that tax issues were a driving force in including Highland in this. And if you look at the Amended and Restated LLC Agreement in the section that comes after Section A, there is a multipage tax analysis that I can't possibly get my head around. I'm not a tax lawyer. And we needed some help to

understand kind of what the tax implications were.

I think, under the circumstances, the need for the tax services was completely warranted, and the amounts here are relatively modest to the whole. You know, it's 30-some-odd hours in connection with depositions at a $700 hourly rate, when my firm doesn't provide tax advice.

So, you know, Your Honor, I think I'm done. I think there's multiple reasons for finding the bad faith here. This proof of claim should never have been filed. You know, if they wanted to withdraw it, they shouldn't have taken our depositions and they should have given us a clean bill of health without trying to reserve some right to bring future challenges to our title to the asset.

And once we got to the trial, it became clear that there's absolutely no basis for the claim, that through the admissions there is no question that the document reflected the intent of parties. Highland provided more than adequate consideration for its interest. It continues to hold its interest today. It continues, you know, to receive its allocation of income. And there's a reason for all of that.

And for those reasons, Your Honor, I think the time has come to start holding people to account here. You know, we did it, as I mentioned, with the Rule 11 on the motion for leave to sue us. We were able to get rid of that. I think the Court really needs to try to bring some discipline to this

process instead of allowing people -- instead of allowing Mr. Dondero and those working at his direction to just file things irresponsibly, without basis of fact, you know, just -- just because.

It's not a thing. You know, that's not what this Court ought to be doing. It's not what I ought to be doing. It's not what I want to be doing, I'll tell you that right now. And so I think there's a real need for a bad faith finding in this particular case. I think there's a real need for there to be consequences of putting the Court and the Reorganized Debtor through this process. Because this -- if Mr. Dondero had only searched his own memory, if he had only asked Mr. McGraner, hey, did the agreement actually reflect the intent of the parties, how could this ever have gotten filed? That's all he had to do, was ask himself the question. All he had to do was ask Mr. McGraner. Right? We wouldn't be here, Your Honor.

And for those reasons, we ask the Court to find that this whole filing and prosecution of this claim was in bad faith (chiming), that we should get an award of attorneys' fees.

THE COURT: All right.

MR. MORRIS: Thank you.

THE COURT: A couple of follow-up questions. Thank you. I think you just answered this question with your closing comment, that you think there was bad faith in both

the filing and the prosecution.

So, as I understand it, the filing of the proof of claim itself you say is bad faith because you say it was a baseless proof of claim, and it was signed without any due diligence on the part of the person who signed it, Mr. Dondero? And then we obviously had months of prosecution, if you will, litigation, after Highland's objection. And then the timing of the withdrawal I would say is kind of a third thing I hear being argued, correct?

MR. MORRIS: Yeah. I would just summarize it this way. The filing of the proof of claim itself was bad faith for all of the reasons that I've stated. The motion to withdraw under these circumstances was also bad faith because they did it after taking discovery and tried to protect their own witnesses from discovery while trying to preserve the claims. They wanted to assert them at another day. Counsel said it in his closing. You know, going forward. That's what he said. And then the third thing is the substance. There is no basis to reform the contract. There's, like, there's no factual basis for the claim itself.

THE COURT: Okay. And my last question -- famous last words, my last question -- if I were to award attorneys' fees here, I'm looking at sort of a summary page for Pachulski's fees. I'm looking at Docket 2852-6. I think this was an Exhibit F to that motion.

So, I always use timelines in my life. While HCRE filed its proof of claim on April 8, 2020, and then Highland objected to it in an omnibus pleading on July 30, 2020, Pachulski has started the clock running, so to speak, August 21st. So, to the extent there were fees incurred, looking at this, after the proof of claim was filed, 2020, thereafter I note HCRE filed a response to the objection October 19, 2020, then the move to disqualify Wick Phillips, dah, dah, dah, dah, dah, April 14, 2021.

I had understood you weren't billing time for the disqualification motion, but in fact it looks like you're only asking for time starting August 2021, correct?

MR. MORRIS: That's right. My intent -- and I think we started the clock then because that's -- you know, we may have filed an omnibus objection, I think we did file, and we're not including time for that. So that's when -- that's when the fees started to become incurred.

THE COURT: Okay.

MR. MORRIS: And if I made a mistake anywhere, I apologize, Your Honor, but the intent was certainly to include, consistent with Your Honor's prior order, every minute of time that was expended in connection with the disqualification motion.

THE COURT: Okay. I just --

MR. MORRIS: Okay. I'm reminded, actually, I'm

actually reminded that August 7th was also the effective date, so that's probably why we used that date.

THE COURT: Okay. Understood. Understood.

All right. I think those are all my questions, so I will hear from HCRE, or NexPoint Real Estate, I think they may prefer to be called. Who is making the argument there?

THE CLERK: He's on mute, Judge.

THE COURT: Okay. You're on mute. Is it Mr. Gameros?

THE CLERK: Yes.

THE COURT: Okay. Mr. Gameros, you're on mute.

MR. GAMEROS: No, I'm not. There we go.

THE COURT: Okay. Here we go.

MR. GAMEROS: Sorry. Good morning, Your Honor.

THE COURT: Good morning.

MR. GAMEROS: Bill Gameros for NexPoint Real Estate. I'm going to hopefully show a PowerPoint. Let's see. I just want to make sure that this is showing. Can everyone see it?

THE COURT: Not yet.

MR. GAMEROS: All right. Nope. How about that? No.

THE COURT: We're not here on our court equipment. Do others -- Mr. Morris, do you see it?

MR. MORRIS: I do not, Your Honor.

THE COURT: Okay.

MR. GAMEROS: Let me try it this way. I'm sorry.

THE COURT: We do not -- oops, now something is starting to happen. Or was. For a --

MR. GAMEROS: How about now?

THE COURT: Here we go. Oh.

MR. GAMEROS: Is it showing now?

THE COURT: Oh, here we go. We have it now, yes.

MR. GAMEROS: All right. I'm sorry about that, Your Honor.

THE COURT: Okay.

MR. GAMEROS: Hate to waste the Court's time.

THE COURT: No problem.

MR. GAMEROS: All right. We're here in response to HCMLP's motion for a bad faith finding and attorneys' fees. First, what are they asking for? Over $800,000 in fees to defend a singular proof of claim that had for it as actions six short depositions, not lengthy, limited written discovery, and a single-day evidentiary hearing.

NREP only has one matter before this Court, the proof of claim. It has discrete ownership. You've already seen that from Mr. Morris's slides. BH Equities. Mr. McGraner actually has a remote interest in it. There are a bunch of folks that have interests in it, so it's a discrete ownership structure.

And it's not a vexatious litigant. It didn't appeal when the Court denied and overruled the proof of claim. It hasn't done anything else.

It didn't file its claim in bad faith. We're going to go through that with some detail. It's never conducted itself in bad faith in front of this Court in any step in the process.

But most importantly today, Your Honor, two things. First, there's not a single case cited in Mr. Morris's slide deck, and it's -- there's none cited for a very simple reason. There is no authority regarding fees for an alleged bad faith proof of claim under 105. We couldn't find it. We looked for it. It hasn't happened. There's no authority for it. He hasn't showed you any, and the authorities that he had showed, there's none in his slide, but we're going to go through them in detail, Your Honor, there's no basis to award attorneys' fees.

I think intellectually the Court should look at this as a two-step process. First, is the proof of claim and its prosecution done in bad faith? I think the answer is going to be a resounding no. But if the Court thinks there is a bad faith -- is bad faith activity, the second step is what fees are possibly awardable.

First, it's styled as a bad faith finding. You look at when the proof of claim was filed and the process that got there. Your Honor, in our response brief, we provide detailed citations to the trial transcript that says a variety of things, including Bonds Ellis never talked to Mr. Dondero, but, contrary to what Mr. Morris told you this morning, Mr.

McGraner did. So there are folks at NREP that were working with Bonds Ellis when they filed the proof of claim.

But he did so, candidly, with one of the best bankruptcy -- that NREP filed its proof of claim with one of the best bankruptcy shops in the Metroplex is telling. They wanted to do it, and they wanted to do it right, and they hired very competent counsel to do that.

These two cases I think are important. It's not just if there's a mistake in the proof of claim, you don't sanction them. And just beating the proof of claim. Is not enough if they lose. Undenied authority. And I think it's telling here.

This Court has seen a lot of litigation on proofs of claim. Objections to all of them, with a host of settlements. That just didn't happen here, but that doesn't make those prior proofs of claim in bad faith, even though they would like you to think that that's true. It's not true and it's not fair. It's also not right.

How did they do it? First, they hired Bonds Ellis. And part of that process was Bonds Ellis did the drafting. Mr. Dondero testified as to how he signed it and the basis on which he signed it. Because despite all the derision from HCMLP about the process and not believing in it, the reality is the process exists, it's what happened, it's what was done, and they coordinated with counsel in its filing.

Just because it's not enforceable, for whatever reason, doesn't make it sanctionable.

What were they trying to accomplish? They did try to reallocate. They wanted a reallocation because HCMLP only put in a tiny amount of capital and it wasn't providing any services.

I don't think it's in dispute that the bankruptcy case has been adversarial. I sat through the prior hour this morning. Mr. Morris made reference to it during this particular motion as well. But it also made the amendment impractical. Not in dispute.

Importantly, Your Honor, in your opinion disallowing the claim and sustaining HCMLP's objection, you didn't find that it was done in bad faith, and Mr. Morris asked you to do it several times at trial. Quite frankly, Your Honor, this ground has been plowed. We don't need to plow it again. The chance for the bad faith finding was last year. He didn't get what he wanted, so now he's taking a second swing at this particular piñata, and it's not right.

But look what happened in the reply brief. These are what are items of bad faith. Bad motive, animus, ill will. That's *Yorkshire*. That's the surreptitious bankruptcy filing. *Brown*. First, not bad faith. What happens in *Brown*, of course, it's a home case, a loan servicer looking to foreclose. And the sanction itself was tiny. Not $800,000.

It was a small sanction. And this Court, you, Your Honor, specifically looked at that case in the past.

Page (phonetic) (garbled). Intentional, deceitful, bad faith, theft. That is not what happened here. Not even close.

Lopez. They don't discuss *Lopez* again. They never mention it. Why? Because *Lopez* has the 'but for' test in it for fees. But this case, unlike *Lopez*, which had multiple motions to compel, had none.

Your Honor, this case had one hearing before the evidentiary trial. A scheduling conference. I'm sorry, it had two. The motion to withdraw, which we believe should have been granted. Your Honor didn't grant it. I understand the Court's ruling. We didn't appeal it. I'm not appealing it right now. But we did try to withdraw the proof of claim. But *Lopez* finds bad faith under 105 for discovery abuse. It doesn't even apply to these facts.

So, looking at the Court's inherent powers, it's not a standard fee application under the Code, that matters, but most importantly, they've got to provide a causal link for 'but for.' *Lopez* tells you that. *Hagar* in the Supreme Court tells you that.

What happens instead at the motion to withdraw, Mr. Morris tells you he wants to win on the merits. The difference in a withdrawn proof of claim and a disallowed proof of claim is

zero. There would have been no difference at all. Nothing has changed. Except for the 'but for' causation analysis on fees. They spent over $375,000 to get there.

I mentioned it in the reply brief. It's on the slide. The *Johnson* factors. Completely absent from their reply brief. They genuflect at it in the initial motion. But me telling you the *Johnson* factors, Your Honor, is like telling you the standard for summary judgment. You don't want to hear it.

However, eight out of twelve *Johnson* factors do not favor this particular fee app. Time and labor required for everything after the withdrawal. Not required.

Novelty and difficulty. It's a proof of claim. It's neither novel nor difficult.

Preclusion of other employment. There's no evidence of that.

The customary fee for work in the community. Candidly, it's against it. Eight hundred grand for fighting a proof of claim is pretty stout.

Time limitations. There were none.

The amount involved and the results obtained. Candidly, Your Honor, almost twice the fees for the same outcome.

Undesirability of the case. No evidence of that.

And awards in similar cases. Here, Your Honor, the absence of 105 cases for proofs of claim, there are no

comparable awards. And I think that's important.

What is the standard you should be using in assessing whether to use your 105 powers? Clear and convincing, Your Honor. Your Honor needs to have a firm belief or conviction that this was done with malice, ill intent, bad faith, et cetera. That's not here.

Why do you know that? Mr. McGraner had his deposition taken. He showed up at trial. Mr. Dondero had his deposition. Showed up at trial. At no instance were they running away from testifying. Quite the contrary. They came to court, they answered Mr. Morris's questions, they answered my questions. If Your Honor had questions, they would have answered them, too.

They took this very seriously. This wasn't some slapdash proof of claim. They were really trying to get something accomplished.

Fees. Your Honor, this is the fee table. I turned it sideways. It's in our response to the motion. I think it's absolutely shocking. The number of hours that were expended and the fees that were expended, the cumulative total -- this is just for selected timekeepers, not everybody -- but I'd point Your Honor to the very bottom, post-motion to withdraw. If they had just said yes, we'll take the win, they wouldn't have had to spend $350,000 for these selected timekeepers, over $375,000 with the rest. That is a clear failure of the

'but for' test in *Lopez* and the cases that it cites.

So, our conclusion, Your Honor. First, the reply doesn't change anything. They don't give you any new authority or any basis to award sanctions or bad faith analysis, if for no other reason than the record is already closed. You've seen this all before. And when asked repeatedly for a bad faith finding, you didn't give it to them. No bad faith in the filing of the claim.

The requested fees are reasonable and necessary. Your Honor, so they flunk the *Johnson* factors. They fail the 'but for' test.

Respectfully, Your Honor, their motion should be denied. If it's not going to be denied, we would like an opportunity to file supplemental briefing addressing the new authorities in the reply brief. Your Honor, I don't think we need to go there. I think you should deny it outright.

Subject to questions from the Court, that concludes my presentation.

THE COURT: All right. A few follow-up questions. In arguing about the size of the potential fees if I get to bad faith, you've had a little bit of a theme of: It was just a proof of claim, it was not difficult, and this was not some "slapdash proof of claim." So you emphasize not reasonable fees for addressing the proof of claim, and you also stress can't find any authority where attorneys' fees have been

allowed for having to defend against a proof of claim.

Here's what I want you to address. Here is what is going through my brain here. This wasn't a proof of claim where, oops, they actually paid our invoice, we're not really owed this amount, sorry, mistake. It's not a situation where you filed a $105,000 proof of claim and in fact only $97,000 was due and owing. And I just use those as very common examples we see in the Bankruptcy Court.

This was, while not a liquidated amount, while not an amount used in the proof of claim, it was basically a multimillion-dollar issue, right? And I don't know if it was a tens-of-millions-of-dollar issue or more than that, but it was a multimillion-dollar issue, right?

MR. GAMEROS: Yes, Your Honor, I understand that.

THE COURT: I mean, that's stating the obvious, right, because you're saying that Highland wasn't really entitled to a 46-percent-whatever ownership interest in Multifamily, it would be something much, much lower than that. Okay. So I think we had in the record Mr. Dondero says the equity interest is worth $20 million. And we know there was a Key Bank loan of up to $500 million-plus. I mean, the proof of claim seeking reformation was ultimately a many-multimillion-dollar claim, if the theory prevailed, right?

MR. GAMEROS: That's right, Your Honor. It could have been.

THE COURT: Okay. So, again, assuming I get to the bad faith finding, I mean, shouldn't I look at these fees in that context? I mean, it wasn't just a proof of claim; it was a potentially multimillion dollar hit to the estate, a bundle of value that wouldn't be there for the creditors. Is that fair, or no?

MR. GAMEROS: Your Honor, I think it's blending some issues in a way that I don't think are appropriate. I think for analyzing whether or not it's a bad faith filing or bad faith prosecution, you have to look to see ill motive, animus, et cetera, and that's not present here. Instead, --

THE COURT: Yes. I'm just saying --

MR. GAMEROS: -- you've got Mr. Dondero --

THE COURT: I'm just saying assuming I get there. And I totally recognize I've got to look at the overall facts of the filing of the claim, of the prosecution, of the withdrawal. I have to look at all that to see do we have bad faith.

But assuming I get there, you've challenged the reasonableness. And it wasn't just some proof of claim. It's a complicated proof of claim, right? It's potentially a multi --

MR. GAMEROS: Your Honor, I understand that.

THE COURT: Okay, go ahead.

MR. GAMEROS: I'm sorry for interrupting, Your Honor.

Go ahead.

THE COURT: Oh, I'm just saying it was pretty darn complicated, the proof of claim. It wasn't quantified. And even though it wasn't quantified, it was clearly a multimillion dollar claim being asserted at the end of the day, the ownership interest that HCRE was trying to challenge.

MR. GAMEROS: That's the position, Your Honor. And they looked at that particular position at the time of filing and said the capital wasn't right, and their response to the objection lays out the different legal arguments. That's exactly what happened.

THE COURT: Okay. My next question is I think you're arguing that because I did not specifically find bad faith in my opinion -- I'm in the mood to talk about lengthy opinions today; it was a 39-page opinion, with 127 footnotes, disallowing the proof of claim -- because I did not make a finding of bad faith there, I'm somehow precluded at this juncture. Am I hearing your argument correctly?

MR. GAMEROS: Your Honor, I didn't say precluded. I just said we don't need to plow that ground again.

THE COURT: Well, --

MR. GAMEROS: I think you left the door open for this particular motion.

THE COURT: Uh-huh.

MR. GAMEROS: And that's what you did in your

opinion. And I just think you were asked repeatedly to make a bad faith finding, and at the time when you ruled disallowing the proof of claim, you didn't do it. You didn't say bad faith.

THE COURT: Okay.

MR. GAMEROS: That's all.

THE COURT: Okay. And then I guess my last question is you said if they, Highland, if they had just said yes, take the win, we wouldn't have all these fees. But I really want to drill down. Would that really have been a win, or would it have been a temporary stand-down? I mean, I begged you all to wrap it all up with language in connection with the withdrawal of the proof of claim. You know, agreed you weren't going to raise this issue again. And your client wouldn't let you do that.

So is it really fair to say, if they had just said yes and taken the win, we wouldn't have had these fees, when it appeared very likely that it was going to be new litigation in a different forum? What is your response to that?

MR. GAMEROS: Your Honor, we're looking back at what happened with hindsight, and I think if we're going to see the maybe-bad we should also see the maybe-good.

What's happened, in hindsight? Zero. Nothing. NREP hasn't done anything. Its proof of claim was disallowed last year, and nothing else has happened.

I think what really happened at the hearing and the motion to withdraw and what we were hearing from Highland, candidly, is they wanted to put a pin in that's our number forever, can't talk about it, don't want to do that. And the agreement allows for amendment.

And that was what we were hung up on. What if we need to amend this thing in the future? We don't want to be stuck with a 46 percent number that we can never get away from. And that was the problem. That was it.

THE COURT: All right. Thank you, Mr. Gameros.

Any rebuttal, Mr. Morris?

MR. GAMEROS: Thank you, Your Honor.

MR. MORRIS: I do. I'll be brief. It's exactly a $20 million issue. It's not millions of dollars. It's exactly $20 million. As I like to say, don't take my word for it, take Mr. Dondero's word for it.

In Dugaboy's pleading that was filed under seal on June 30, 2022, he included his analysis of the value of Highland's assets. I don't want to go through them all, but I'm happy to report that he valued Highland's interest in SE Multifamily in that document that he represented to the Court was worth $20 million. So, from our perspective, we were fighting to get good, clean title to a $20 million asset. That's Point #1.

Point #2, of course, the Court has inherent power under 105 to enter orders of this type. I -- honestly, you know,

the cases are what the cases are. So there's never been a case exactly like this. You know what? I've been doing this for a while. I've never seen a proof of claim as baseless as this one.

So the whole concept of the 'but for' thing, I'll talk about in a minute, but there's no question that the Court has the power to enter orders of this type, and I don't even think counsel disputes that.

I do want to address the notion that we asked the Court repeatedly for a bad faith finding and the Court declined to do it. That's because this Court does its job and does its job well. And I understood Your Honor when you denied it without prejudice. It was telling. And apparently counsel got the signal, too, that you want to make sure that, before you enter an order of that type, that HCRE has due process. And that's why it's denied without prejudice. Because I was raising the issue for the first time at the podium, and you reluctantly, properly, prudently decided that probably isn't fair. And so you wanted to make sure that this thing was fully briefed. And it's been briefed, and that's why we're here today, not because you made a decision back in November of 2022 that there was no bad faith, but simply that you wanted to make sure that HCRE had a full opportunity to address the charge.

Getting to the 'but for' issue. But for the filing of,

frankly, a fraudulent, baseless proof of claim, Highland would have more than $800,000 in its pocket today.

But for the filing of a motion to withdraw that sought an unfair litigation advantage while trying to preserve for the future more challenges to Highland's clear and good title to this asset, Highland would have more money in its pocket.

But for the conduct of a trial, the taking of depositions, and all of the rest of it, we wouldn't be here today. Highland would have more than $800,000 in its pocket.

The notion that we should have taken the win, frankly, is offensive. That we should have just allowed them. He wants the benefit of the $300,000 on the theory that we should have allowed him to take our depositions, not take their depositions, and fight another day. I just -- I'm speechless. I'll just leave it at that. The argument speaks for itself.

No motive? They had no motive here? They don't have ill will? They showed up at the hearing? Goodness, I hope that doesn't absolve them from filing a proof of claim with no basis in fact or law. Of course they showed up at the hearing. They would have been in contempt of court at that point had they not.

The only reason, apparently, they filed the proof of claim is because they didn't like the unintended consequences of the Highland bankruptcy that Mr. Dondero filed. In what world, in what courtroom, under what law, is that a good faith basis for

pursuing a proof of claim, because you don't like the unintended consequences of your own decisions? That's bad motive right there. To try to deny a debtor a $20 million asset because you didn't like the way it turned out.

Mr. Dondero, Mr. McGraner, HCRE were perfectly happy for Highland to have a 46.06 percent interest in exchange for a $49,000 contribution right up until the day they filed that proof of claim. Maybe until the day they filed for bankruptcy. I didn't ask that particular question.

It's not good faith to come to this Court, to file a proof of claim, to go through all of this, because you don't like the consequences of your own decision.

The Court really needs to ask itself whether or not it wants to sanction this. Whether it wants to allow litigants, claimants, to file proofs of claim with no due diligence, no basis in fact, no basis in law. I don't think the Court should do that. I think the bad faith finding is easy, frankly.

And with respect to our legal fees, they are what they are. The notion that this was overstaffed is kind of crazy. It was me, Ms. Winograd, and Ms. Cantey. We billed, the three of us, more than 82 percent of the total fee. And if you take out Mr. Adler, it's probably close to if not in excess of 90 percent of it. It is what it is.

My rates are higher than some of the attorneys Mr. Dondero

hires. It is what it is. He knew about that when he hired us. They're market rates. Clients from east coast to west coast, from north to south, pay those rates every day, with bankruptcy court approval. I'm sorry if he doesn't like to pay those kinds of rates at this point in time, but they are what they are and my client is entitled to get reimbursed for this bad faith conduct.

I have nothing further, Your Honor.

THE COURT: Okay. Thank you.

Well, no surprise, we'll take this under advisement and issue a written opinion and order.

No surprise, I'm going to say like I always say, we'll get to this as soon as our calendar will allow, but I'm not going to promise a date on that.

Obviously, I'm going to be refreshing my memory, going back and studying the memorandum opinion and order I issued sustaining Highland's objection to this proof of claim and going back and looking at the transcript from that hearing that was submitted.

And I say this a lot, that timelines matter a heck of a lot to me and they reveal a heck of a lot. And I will be studying the timeline here and considering its significance.

Some of the important facts that will matter here are that the HCRE proof of claim, again, was filed timely in this case. April 8, 2020. It was signed by Mr. Dondero as the

representative of HCRE.

The evidence I do remember is that Mr. Dondero was president and sole manager of HCRE and he had signed the limited liability agreement for SE Multifamily Holdings, I think is the name of the entity. He had signed the agreement for both Highland and HCRE. There was an original LLC agreement and there was also an amended LLC agreement.

And again, I always think timelines -- again, I've said it a million times -- are very revealing. This was not a very ancient transaction, a very old transaction, in the Highland universe. The evidence I saw -- and again, I always create a timeline -- was that it was actually August 23, 2018 that this SE Multifamily entity was created, and then it was sometime early first quarter of 2019 where there was an amendment of the LLC agreement that brought in the BH entity and its six percent interest. And then, of course, it was October 2019 when the bankruptcy was filed.

Again, why am I mentioning this? I'm mentioning it because this was fairly recent in Highland history that this whole SE Multifamily transaction, Project Unicorn, was done. And that matters to me because I would think memories should have been fresh relative to a lot of other things we've looked at during this case. And so that really is weighing on my brain here with regard to the bad faith possibility on the filing of the proof of claim and the prosecution. It, in my

view, could have been a quick process, doing the due diligence and assembling, you know, is there a good faith basis for this proof of claim or not. And that concerns me. That concerns me.

It, as I recall hearing the evidence, looked like, oh my goodness, look at the consequences now of this bankruptcy, and Highland falling out of the status of being a friendly partner with HCRE. We don't like this. We don't like this and we want to change this.

So, again, I'm sort of thinking out loud here. I'm sort of revealing where I'm leaning right now. It seems like this was a recent-enough transaction where someone could have assembled information pretty quickly and figured out if there was any basis to argue reformation.

And I never did have a clear idea why they would pack up their marbles and want to go home if there was some evidence. And again, the Bankruptcy Rules require the Court to enter an order whether withdrawal should be permitted or not. I very much wanted this to go away, and then there wasn't -- wordsmithing could not come up with a sentence everyone would agree on to make it go away.

So I will, again, be drilling down on the evidence here as to whether we have bad faith, but that's some of the timeline and evidence I'm going to be drilling down on here.

I think *The Little Engine That Could* was the phrase Mr.

Morris argued. I remember very well the evidence was that Highland put in $49,000 to get its membership interest in SE Multifamily Holdings, but I already heard that it was required ultimately to be a cosigner on a $500 million loan from Key Bank. It provided resources, at least until some point during the bankruptcy, to SE Multifamily. And again, the tax benefit of absorbing the income from the entity, which, again, it's nothing to sneeze at here.

All of that I think was addressed pretty thoroughly in my earlier opinion, but again, I'm going to go back and look at it and the evidence and give you a thorough ruling one way or another on the indicia of bad faith as well as the reasonableness of fee-shifting.

All right. It sounds like I'm going to see you on February 14th, or some of you, and so I shall see you then. We're adjourned.

THE CLERK: All rise.

MR. GAMEROS: Your Honor?

THE COURT: I'm sorry?

MR. GAMEROS: Your Honor?

THE COURT: Yes.

MR. GAMEROS: Yeah, I'm sorry. I did ask, if you weren't going to deny it outright, if I could file a brief surreply. Is that allowed?

THE COURT: No. I've got enough on briefing on this.

Thank you.

MR. GAMEROS: All right. Thank you.

(Proceedings concluded at 11:41 a.m.)

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CERTIFICATE

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

/s/ Kathy Rehling **01/24/2024**

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Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

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