Case No. 24-10287

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE HIGHLAND CAPITAL MANAGEMENT, L.P.

JAMES DONDERO; HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; the DUGABOY INVESTMENT TRUST; GET GOOD TRUST; and NEXPOINT REAL ESTATE PARTNERS, LLC,

Appellants

v.

JUDGE STACEY G. JERNIGAN,

Appellee

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division
No. 3:23-CV-0726-S
Hon. Karen Gren Scholer, District Judge

MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE

CRAWFORD WISHNEW & LANG, PLLC
Michael J. Lang
1700 Pacific Ave., Suite 2390
Dallas, Texas 75201
Tel.: (214) 817-4500

Attorneys for Appellants James Dondero, Highland Capital Management Fund Advisors, L.P., The Dugaboy Investment Trust, Get Good Trust, and NexPoint Real Estate Partners, LLC

1934054240618000000000002

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. R. 27.4, counsel for Appellants certifies that the following persons and entities have an interest in the outcome of this case.

Appellants
James D. Dondero
Get Good Trust
Highland Capital Management Fund Advisors, L.P.
NexPoint Real Estate Partners, L.L.C.
The Dugaboy Investment Trust

Counsel:
CRAWFORD WISHNEW LANG PLLC
Michael Lang

Appellee
The Honorable Stacey G. Jernigan,
United States Bankruptcy Court for the Northern District of Texas

The Debtor
Highland Capital Management, L.P.

Counsel:
PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz
John A. Morris

HAYWARD PLLC
Melissa S. Hayward
Zachary Z. Annabel

Dated June 17, 2024

/s/Michael J. Lang (with permission)
Michael J. Lang
Attorney for Appellants

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 27 and Federal Rule of Evidence 201(b)(2), Appellants James D. Dondero, Get Good Trust, Highland Capital Management Fund Advisors, L.P., NexPoint Real Estate Partners, L.L.C., and The Dugaboy Investment Trust (the "Dondero Parties") respectfully move this Court to take judicial notice of (1) certain pleadings in and orders of the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") issued in the Chapter 11 bankruptcy of Highland Capital Management, L.P. ("Highland") and (2) the contents of certain transcripts of proceedings before the Bankruptcy Court. The pleadings, orders, and transcripts that are the subject of this Motion were either issued and created after the Bankruptcy Court issued its order denying the motion to recuse at issue in this appeal and therefore could not have been considered by the Bankruptcy Court, or are relevant to the issues in the appeal. All are relevant for the purpose of explaining the circumstances leading to this appeal and demonstrating that the Bankruptcy Court continues to act in a manner that is objectively biased or, at the very least, reasonably calls into question the Court's impartiality, requiring recusal.

RELEVANT BACKGROUND

This appeal arises from a multi-year effort by the Dondero Parties to seek the recusal of Judge Stacey G. Jernigan, the presiding judge in the Highland bankruptcy. The Dondero Parties initially sought to recuse the bankruptcy judge on March 18, 2021, after a series of statements and decisions by the judge manifested an abiding animosity against the Dondero Parties that should have mandated her recusal pursuant to the federal recusal statute, 28 U.S.C. § 455. Despite multiple efforts by the Dondero Parties, the bankruptcy judge has persistently refused to recuse herself, concluding in part that the Dondero Parties' efforts are untimely because they waited until seventeen months after the Highland bankruptcy was transferred to the Judge's court to seek recusal. ROA. 52–53. Highland likewise has argued that recusal is inappropriate given the passage of time in the Highland bankruptcy. *See* ROA.3167–170.

Putting aside that the recusal statute is silent regarding the timing of a motion to recuse, the Highland bankruptcy has now been pending for 56 months—meaning that the Dondero Parties have been seeking recusal for well more than three-fourths of the case's pendency. In light of that timing, and the fact that the Dondero Parties sought recusal as soon as

the judge's bias clearly manifested itself, there should be no argument that the movants' efforts were untimely. In any event, as the orders and transcripts filed with this Motion demonstrate, the bankruptcy judge's bias continues to permeate the Highland bankruptcy proceedings, and her statements and rulings continue to "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Andrade v. Chojnacki*, 338 F.3d 448, 455 (5th Cir. 2003). At the very least, a reasonable observer could and should question the judge's impartiality. As a result, the need for recusal remains pressing.

ARGUMENT

This Court has authority to take judicial notice of orders and proceedings before the Bankruptcy Court pursuant to Federal Rule of Evidence 201(b)(2). That Rule provides that the courts "may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b)(2). Under the Rule, this Court has recognized its authority to take judicial notice of "official, public record[s]" when those records are placed "on file with this Court." *United States v. Hawkins*, 566 F.2d 1006, 1008 n.2 (5th Cir. 1978)

(citing *Mass. v. Westcott*, 431 U.S. 322, 323 n.2 (1977); *see also NCBN Tex. Nat'l Bank v. Johnson*, 11 F.3d 1260, 1263 n.2 (5th Cir. 1994) ("We take judicial notice of . . . official records on file with this circuit.").

The Court may take judicial notice of pleadings filed, orders issued by the Bankruptcy Court, and statements made by the Court in official proceedings because those records are judicial acts not subject to reasonable dispute. *In re Halo Wireless, Inc.*, 684 F.3d 581, 596–97 (5th Cir. 2012) (taking judicial notice of "federal court and state commission proceedings and orders that ha[d] been referenced and/or discussed in the parties' briefing" on appeal); *Colonial Oaks Assisted Living Lafayette, L.L.C. v. Hannie Development, Inc.*, 972 F.3d 684, 688 n. 9 (5th Cir. 2020) (taking judicial notice of an interim arbitration order and explaining that the Court "may take judicial notice of matters of public record"); *United States v. Hernandez-Adame*, 2023 WL 2706828, at *1 (5th Cir. Mar. 29, 2023) (granting government's motion to take judicial notice of court records).

Further, the Court may take judicial notice of official court records even though the records are not part of the record on appeal. *See Gibson v. Blackburn*, 744 F.2d 403, 405 n.3 (5th Cir. 1984) ("Although a court of

appeals will not ordinarily enlarge the record to include material not before the district court, it is clear that the authority to do so exists.") (citing *United States v. Page*, 661 F.2d 1080, 1082 (5th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1992)); *accord In re Halo Wireless, Inc.*, 684 F.3d at 596–97 (taking judicial notice of publicly available orders and proceedings even though the materials were not considered by the bankruptcy court and were not part of the record on appeal); *Tejas Motel, L.L.C. v. City of Mesquite*, 63 F.4th 323, 328–29 & n.10 (5th Cir. 2023) (taking judicial notice of "activity back in state court" during the pendency of appellant's federal appeal even though proceedings were "not part of the record on appeal") (citing *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 481 n.1 (5th Cir. 2003)).

The Dondero Parties respectfully request that the Court take judicial notice of the following orders and transcripts, which are attached for reference:

- Highland bankruptcy docket entries 617, 771, 827, 832, 1121, 3519, 3541, 3542, 4038, 4039, 4040, 4041, and 4069.
- Motion to recuse from *Kirschner v. Dondero, et al.*, Case No. 3:21-03076-sgj (Bankr. N.D. Tex.), Dkt. Nos. 309, 310.

See Exhibits 1 through 16 (attached).

Judicial notice of the attached pleadings, orders, and transcripts is appropriate for several reasons. First, the court records are "official, public record[s]" recording judicial acts that are not subject to reasonable dispute. *Hawkins*, 566 F.2d at 1008 n.2. Second, the records are now on file with this Court, as required. *Id.*, 566 F.2d at 1008. Finally, judicial notice of the contents of the pleadings, orders, and transcripts is important to appellate review in this case because those records illustrate why the Dondero Parties' recusal efforts were timely and help put the presiding bankruptcy judge's comments and actions into context.

CONCLUSION

For the foregoing reasons, the Dondero Parties respectfully request that the Court take judicial notice of the pleadings, orders, transcripts from the Highland bankruptcy filed simultaneously with this Motion.

Respectfully Submitted,

REICHMAN JORGENSEN LEHMAN & FELDBERG LLP

/s/Michael J. Lang
(with permission)
CRAWFORD WISHNEW & LANG, PLLC
Michael J. Lang
Texas Bar No. 24036944
mlang@cwl.law

1700 Pacific Ave., Suite 2390
Dallas, Texas 75201
Tel.: (214) 817-4500

Attorneys for James Dondero, Highland Capital Management Fund Advisors, L.P., The Dugaboy Investment Trust, Get Good Trust, and NexPoint Real Estate Partners, LLC

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this brief contains 1,160 words.

2. This brief has been prepared in a proportionally spaced typeface using 14 point Century Schoolbook font.

Dated June 17, 2024

/s/Michael J. Lang (with permission)
Michael J. Lang
Attorney for Appellants

CERTIFICATE OF CONFERENCE

In accordance with 5th Cir. R. 27.4, the undersigned certifies that counsel for the Dondero Parties conferred with counsel for Appellees concerning the content of this motion. Counsel for Highland stated that they are opposed.

Dated June 17, 2024

/s/Michael J. Lang (with permission)
Michael J. Lang
Attorney for Appellants

CERTIFICATE OF SERVICE

This is to certify that this brief was served this day on all parties who receive notification through the Court's electronic filing systems.

Dated June 17, 2024

/s/Michael J. Lang (with permission)
Michael J. Lang
Attorney for Appellants

LIST OF EXHIBITS

No.	Short Description
1	Highland bankruptcy docket entry 617
2	Highland bankruptcy docket entry 771
3	Highland bankruptcy docket entry 827
4	Highland bankruptcy docket entry 832
5	Highland bankruptcy docket entry 1121
6	Highland bankruptcy docket entry 3519
7	Highland bankruptcy docket entry 3541
8	Highland bankruptcy docket entry 3542
9	Highland bankruptcy docket entry 4038
10	Highland bankruptcy docket entry 4039
11	Highland bankruptcy docket entry 4040
12	Highland bankruptcy docket entry 4041
13	Highland bankruptcy docket entry 4069
14	*Kirschner v. Dondero, et al.*, Case No. 3:21-03076-sgj (Bankr. N.D. Tex.), Dkt. No. 309
15	*Kirschner v. Dondero, et al.*, Case No. 3:21-03076-sgj (Bankr. N.D. Tex.), Dkt. No. 310

EXHIBIT 1

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
Bryan C. Assink
State Bar I.D. No. 24089009
BONDS ELLIS EPPICH SCHAFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900 telephone
(817) 405-6902 facsimile

Attorneys for James Dondero

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

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**Case No. 19-34054**
	§	
	§	
Debtor.	§	**Chapter 11**
	§	

JAMES DONDERO'S LIMITED RESPONSE TO ACIS CAPITAL MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO ALLOW PURSUIT OF MOTION FOR ORDER TO SHOW CAUSE FOR VIOLATIONS OF THE ACIS PLAN INJUNCTION

COMES NOW, James Dondero ("Dondero") and files this, his Limited Response to Acis Capital Management, L.P. and Acis Capital Management GP, LLC's (collectively, the "Movants") Motion for Relief from the Automatic Stay to Allow Pursuit of Motion for Order to Show Cause for [claimed] Violations of the Acis Plan Injunction [Docket No. 593] ("Motion"), and Dondero would respectfully show as follows:

1. Dondero denies each and every allegation or insinuation in paragraphs 1 through 21 of the Motion that he has engaged in or committed any wrongdoing, bad act, or improper act. Dondero also denies each and every allegation or insinuation in paragraphs 1 through 21 of the

Motion that he has acted, or caused actions or conduct in violation of the Court's orders in the Acis Capital Management, L.P. *et al* bankruptcy cases.

2. Attached as Exhibit 1 to the Motion is an alleged draft Show Cause Motion, which the Movants incorporate in to the Motion. Dondero denies each and every allegation or insinuation in the draft Show Cause Motion that he has engaged in or committed any wrongdoing, bad act, or improper action or conduct. Dondero also denies each and every allegation or insinuation in the draft Show Cause Motion that he has acted, or caused, actions or conduct in violation of the Court's orders in the Acis Capital Management, L.P. *et al* bankruptcy cases.

3. Dondero states that the automatic stay in the above captioned chapter 11 case is not applicable to Dondero in his individual capacity, but to the extent the automatic stay is applicable, Dondero does not oppose relief from stay being granted.

4. Movants' claims and allegations in the Show Cause Motion are without merit. However, the merits of those claims and allegations, including any and all preliminary findings necessary to reach the merits of a show cause or contempt claim, should not be discussed, litigated, debated, ruled upon, or determined by this Court during or through a lift stay proceeding. Such matters should be heard, if at all, via a separate proceeding after all targeted parties are afforded sufficient due process.

WHEREFORE, PREMISES CONSIDERED James Dondero respectfully prays that the merits of any claims or allegations asserted in the Motion or Show Cause Motion regarding any alleged wrongdoing, bad act, or improper action or conduct of Dondero not be discussed, litigated, debated, ruled upon, or determined by this Court during or through a lift stay proceeding, including any and all preliminary findings necessary to reach the merits of a show cause or contempt claim; and for any further relief that James Dondero is entitled.

Dated: May 1, 2020

Respectfully submitted,

/s/ D. Michael Lynn

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
Bryan C. Assink
State Bar I.D. No. 24089009
BONDS ELLIS EPPICH SCHAFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900 telephone
(817) 405-6902 facsimile
Email: michael.lynn@bondsellis.com
Email: john@bondsellis.com
Email: bryan.assink@bondsellis.com

Attorneys for James Dondero

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on May 1, 2020, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for Movants and on all other parties requesting such service in this case.

/s/ Bryan C. Assink
Bryan C. Assink

EXHIBIT 2

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No.143717) (*admitted pro hac vice*)
Ira D. Kharasch (CA Bar No. 109084) (*admitted pro hac vice*)
Gregory V. Demo (NY Bar 5371992) (*admitted pro hac vice*)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760

HAYWARD & ASSOCIATES PLLC
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachary Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Attorneys for the Debtor and Debtor in Possession

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

In re:	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	§	Case No. 19-34054-sgj11
Debtor.	§	

Response Deadline: July 23, 2020 at 4:00 p.m. (ET)
Hearing Date: August 6, 2020 at 9:30 a.m.

OBJECTION TO PROOF OF CLAIM OF ACIS CAPITAL MANAGEMENT L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC

Pursuant to sections 502(b)-(d) and 558 of Title 11 of the United States Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

1934054200623000000000002

"Bankruptcy Rules"), debtor and debtor in possession Highland Capital Management, L.P. (the "Debtor") hereby objects to Proof of Claim No. 3 (the "Acis Claim") filed by claimants Acis Capital Management L.P. and Acis Capital Management GP, LLC (together, "Acis").

The Debtor respectfully submits that there are numerous bases for the summary disposition of all claims for relief asserted in the Acis Claim, and represents as follows:

Preliminary Statement

1. The Acis Claim incorporates the complaint from litigation commenced by the trustee of the former estate in the Acis bankruptcy case (the "Acis Case") at a time when Acis had unpaid creditors (the "Acis Complaint").[2] The trustee sought to avoid and recover certain transfers by Acis that were allegedly intended to prevent its largest creditor, Josh Terry, from collecting his $8.168 million arbitration award (the "Arbitration Award"). The transfers, allegedly orchestrated by James Dondero using his common control and ownership interests in Acis, the Debtor and the other Highland entities, were purportedly intended to "denude" Acis by transferring certain of its management contracts and interests in the managed assets to its affiliates, including the Debtor. Finding a likelihood of success that certain transfers were avoidable, the Court issued a preliminary injunction, which was carried over into a "Temporary Plan Injunction" that allowed Acis to manage those assets to pay creditors. Consistent with that substantive basis, the injunction expires once those creditors are paid in full. That is the operating principle of the Acis Plan: creditors are paid using assets temporarily diverted from the putative transferees that are named as defendants in the Acis Complaint.

[2] Specifically, the Acis Claim incorporates the *Second Amended Complaint (Including Claim Objections and Objections to Administrative Expense Claims)* filed in Adversary No. 18-03078 in the Acis Case.

2. The Acis Plan has worked as intended. The income diverted by the temporary injunction will soon have paid Mr. Terry and Acis's other creditors 102% of their claims, *plus* all of the administrative expenses incurred to achieve that result. There will no longer be an estate or estate claims to administer. Having served its purpose, the injunction dissolves and the creditor remedies asserted in the Acis Complaint become moot. But Acis is doing the opposite. It filed the Acis Claim in the amount of "at least $75 million" and has initiated new lawsuits in federal and state court against employees, advisors and professionals for allegedly breaching duties owed not to creditors but ***purportedly owed to Acis***. The sole beneficiary of these far-flung litigations would be Mr. Terry, whose claim is paid in full under the Acis Plan, except for $1 million with which he chose to purchase Acis's equity.[3] Now Mr. Terry seeks a $75 million windfall, which would come not at Dondero's expense but from the pockets of the Debtor's innocent creditors (including unsecured trade creditors, the Redeemer Committee of the Highland Crusader Fund ("Redeemer"), with an arbitration award of $190,824,557, and UBS Securities LLC ("UBS").

3. Attempted windfalls usually have a fallacious premise, and this one is a $75 million whopper. The fallacy is that Reorganized Acis has greater rights than "old Acis," which at the time of the transfers was a member of the Highland related entities that Acis itself alleges were controlled and primarily owned by Dondero. Acis alleges that each was an alter ego of the others, which means that *Acis is just as culpable, and just as much an alter ego, as*

[3] Inasmuch as claims against Acis are worth 102%, Terry's $1 million reduction of his claim was the substantive equivalent of paying $1 million, not a typical debt for equity exchange.

any of the others. Coupled with the fact that Acis's creditors are being paid in full, several things follow that are instantly fatal to the Acis Claim. None are subject to any factual dispute.

a. First, it is undisputed that at the time of the transfers, James Dondero and Mark Okada were Acis's sole owners, and it is hornbook law that sole owners do not owe fiduciary duties ***to their company***. Subject of course to the rights of creditors to claw back transfers that leave a company unable to pay its debts, Dondero and Okada as Acis's sole owners were free to transfer its assets to other entities, and third parties had no duty or right to stop them. "Delaware law is clear that a company's sole owner cannot breach fiduciary duties 'owed to the companies he wholly owned.' … [Plaintiff] has not cited legal support for the proposition that a nonowner can be liable for conspiring with the sole owner of a partnership for breaching duties that the owner owes himself." *Tow v. Amegy Bank N.A.*, 976 F. Supp. 2d 889, 906-07 (S.D. Tex. 2013) (internal citation omitted). Whatever their motive, if Acis's owners wanted to shut it down, they were free to do so, subject to the rights of creditors, who are being paid in full without any further recovery.[4] Nor can Acis base its claims on the rights of Acis's former creditors. For one thing, they've been paid, and for another, Delaware law does not permit creditors of a limited partnership to sue third parties for breach of fiduciary duty, *nor does*

[4] Acis relies heavily on the Arbitration Award, but the panel found no violation of any duty ***to the partnership***. The only duty that the panel found was breached was between partners: it was the duty of the majority partners not to exceed the ratio of expenses to revenue while Terry was a 25% limited partner. Even that duty expired with Terry's partnership interest when his employment was terminated. About that there is no dispute: the cash-out of his partnership interest was the primary component of the Arbitration Award. The panel found that Terry was not wrongfully terminated because his employment was "at-will," but that he was entitled to payment for his partnership interest because the termination was not for cause. Most of the rest of his award was his pro rata partnership share of the alleged Overpayments (which he now seeks to recover *twice* by claiming them through Acis).

it permit a trustee to sue on their behalf.[5] These claims are not and cannot as a matter of law be brought for the benefit of Acis's former creditors.

b. Second, even if fiduciary duties had been owed, Acis's duty-based claims against the Debtor and other third parties are barred by the *in pari delicto* defense. It is a paradigmatic application of the doctrine: Acis cannot sue others for participating in a scheme in which it, as one of the entities it alleges was commonly owned and controlled, was equally culpable. This fundamental defect is obscured by the subsequent appointment of a trustee and change of ownership. But while the Fifth Circuit has not decided the issue, it has affirmed that Bankruptcy Code § 541 subjects trustees and successors to whatever defenses existed against the debtor, and most courts of appeal hold that, as a result, the appointment of a trustee does not "cleanse" the *in pari delicto* defense (much less, as here, where the claims purportedly revested in the reorganized debtor). Even if the equities are applied, as this Court once held they may, there is no equity in permitting a new owner to sue persons for conspiring with the old owner, in order to parlay a $1 million investment into $75 million, *at the expense of this Debtor's creditors*. These facts are not in dispute, and the issue can and should be decided on the record before the Court.

c. Third, the fraudulent transfer claims fail, and may be summarily resolved, because the Debtor did not receive the benefit of the alleged fraudulent transfers since (with one exception) it was not the transferee of the transferred rights. Bankruptcy Code §

[5] *Beskrone v. OpenGate Capital Grp. (In re Pennysaver USA Publ'g, LLC)*, 587 B.R. 445, 467 (Bankr. D. Del. 2018); *Gavin/Solmonese LLC v. Citadel Energy Partners, LLC (In re Citadel Watford City Disposal Partners, L.P.),* 603 B.R. 897, 905 (Bankr. D. Del. 2019).

550(a) is not satisfied as to those transfers for which the Debtor was not the initial transferee: it is insufficient as a matter of law simply to allege an amorphous benefit from being part of the same corporate group. This is all that the Acis Claim alleges – the Debtor benefited solely because it was a Highland related entity. Furthermore, if the Debtor did not receive the benefit from a transfer, there are no damages in the first place. That is shown *conclusively* by the fact that the earnings derived by Acis from the enjoined transfer of the ALF PMA have already paid Acis's creditors and administrative expenses. That is presumably why the Acis Claim lacks any damage allegations – there are none.

d. Fourth, the fraudulent transfer claims also fail, along with preference claims as well, for another reason that may also be summarily resolved: a debtor cannot recover avoidance claims for its own benefit under section 550(a) of the Bankruptcy Code. There must be a benefit to the debtor's estate. Here, there is nothing left of the former Acis estate: creditors were paid, old equity was canceled, and the new equity is held by a purchaser who paid $1 million, no different than if he had done so in an auction. There is no estate to benefit. Authority before and after *Mirant* holds that avoidance recoveries should be limited based on equitable considerations, which in this case are conclusively in favor of limiting any recovery to the amount required to satisfy creditors' claims. Unlike *Mirant* and this Court's *Texas Rangers* decision, this is not a case in which a recovery will enable a debtor to satisfy outstanding plan obligations, or one in which creditors were forced to take equity instead of cash

and are depending on its value for a recovery on their claims.[6] There is no estate and no equities to support Mr. Terry's windfall.

e. Fifth, Acis may not assert for its own benefit any claims against prior equity holders or third parties that were not pending when Mr. Terry purchased the company. The *Bangor Punta* doctrine holds that a purchaser of controlling equity in a company may not then use the control over the corporate machinery to turn around and assert claims against the prior owners if the claims arose prior to the date when the purchaser took control.[7] The reasons are self-evident and squarely applicable here: the purchaser paid what it considered fair value and has suffered no damage, and to permit such claims would promote the kind of litigation free-for-all in which Mr. Terry is presently engaged. This bars standing as to all claims except those the trustee had already asserted prior to Mr. Terry's purchase (relating to the ALF share transfer, ALF PMA transfer and the note transfer described herein), all of which claims fail for multiple other independent reasons.

f. Sixth, Acis's four claims seeking $7 million in so-called "Overpayments" have no legal basis and should be summarily disallowed. These are payments for services that exceeded, in gross, the expense ratio that was permitted under Acis's limited partnership agreement (the "Acis LPA") without partner consent. The only alleged substantive basis for recovery is the claim that the Overpayments were *ultra vires* acts, which would be flatly wrong even if it applied in concept (which it does not): (i) Acis was indisputably *authorized* to

[6] Significantly, any recovery on preference or constructive fraudulent transfer claims would be offset by the Debtor's resulting claims under Bankruptcy Code § 502(h), which would be entitled to full payment under the Acis Plan.

[7] *Bangor Punta Operations, Inc. v. Bangor & A. R. Co*., 417 U.S. 703, 710, 94 S. Ct. 2578 (1974); *Midland Food Servs., LLC v. Castle Hill Holdings V, LLC*, 792 A.2d 920, 929 (Del. Ch. 1999).

pay for services, which is all that matters legally; any excess was not *ultra vires* but an inter-partner issue already addressed by the Arbitration Award (through which Mr. Terry already recovered his share); (ii) turnover under Bankruptcy Code § 542(a) does not apply to disputed debts as a matter of law; and (iii) and the "money had and received" and conversion claims are equally inapplicable as a matter of law. In any event, most of the time period during which the alleged Overpayments were made is beyond the two year statute of limitations under Texas law.

g. Seventh, Acis's civil conspiracy claim also fails as a matter of law because the claim is not recognized: section 550 provides the statutory remedies for any fraudulent transfer liabilities, and it may not be circumvented by a conspiracy claim.

h. Eighth, Acis's tortious interference claim fails as a matter of law because it does not apply to at-will contracts, and the Debtor had the right to compete for the business.

i. Ninth, Acis's breach of contract claim, like its claim for breach of fiduciary duty, rests on the fallacy that Acis had legal interests that were distinct from those of its sole owners, duties that parties contracting with Acis had a duty to identify and protect even though Acis's sole owners instructed otherwise. That is not the law.

j. Tenth, alter ego liability is inadequately pled; it is a remedy and not a claim and, moreover, is unavailable on the alleged grounds. What Acis alleges is "single enterprise" liability based on common control by Mr. Dondero, a theory never adopted under Delaware law (which controls) and also rejected by the Texas Supreme Court.

k. Numerous other of the Debtor's defenses are meritorious but cannot be decided summarily, including defenses such as solvency (Acis was manifestly solvent without recovering *all* of the alleged fraudulent or preferential transfers), preference defenses and punitive damages (to the extent any tort claim is not dismissed; notably, such damages would be subordinated at best).

4. The rights of creditors to be paid were the legal basis of the Acis Plan injunction, which is why the injunction terminates once those creditors are paid in full. Mr. Terry elected to acquire new equity for $1 million; he is not entitled to receive another $75 million by claiming that *Acis* was damaged by those transfers, much less from the pockets of the Debtor's unpaid creditors. To impose on the former partners and third parties such as the Debtor a duty to "restore" $75 million to the former business, not to pay its creditors but for the sole benefit of a successor owner who bought the diminished entity for $1 million, would be a legally groundbreaking windfall, to say the least. The Acis Claim can and should summarily be disallowed in its entirety on the record before the Court.

Jurisdiction

5. The Court has jurisdiction over this matter under the Bankruptcy Code and pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. §§ 157(b)(2)(A), (B) and (L). Venue is proper in this District under 28 U.S.C. §§ 1408 and 1409.

6. The statutory predicates for the relief requested herein are 11 U.S.C. § 502(b)-(d), 11 U.S.C. § 558 and Fed. R. Bankr. P. 3007.

Factual Background

7. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Delaware Court").

8. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in the Delaware Court.

9. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's Bankruptcy Case to this Court [Docket No. 186].[8]

10. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the "Settlement Order").

11. The Settlement Order approved, among other things, certain operating and reporting protocols [Docket Nos. 354, 466].

12. In connection with the Settlement Order, an independent board of directors was appointed on January 9, 2020, at the Debtor's general partner, Strand Advisors, Inc. (the "Independent Board")

13. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections

[8] All docket numbers refer to the docket maintained by this Court.

1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

Objection

A. Legal Standard

14. The Bankruptcy Code establishes a burden-shifting framework for proving the amount and validity of a claim. "A claim . . . , proof of which is filed under section 501 [of the Bankruptcy Code], is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). "A proof of claim executed and filed in accordance with the [Bankruptcy Rules] shall constitute *prima facie* evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f); *see also In re Armstrong*, 347 B.R. 581, 583 (Bankr. N.D. Tex. 2006). However, the ultimate burden of proof for a claim always lies with the claimant. *Armstrong*, 347 B.R. at 583 (citing *Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15 (2000)).

15. The Acis Claim incorporates and is expressly based upon the claims and causes of action asserted in the Acis Complaint filed in the Acis Case. It purports to assert thirty-four claims for relief, which are described and addressed *seriatim* below.

B. Claims 1-4 to Recover the Alleged Overpayments Must be Disallowed

16. The first four claims are based on service and expense payments by Acis to the Debtor that allegedly exceeded 20% of revenues, without Mr. Terry's consent, in violation of section 3.10(a) of the Acis LPA, which provides that "the aggregate annual expenses of the Partnership … may not exceed 20% of Revenues without the consent of all of the members of

the Founding Partner Group." The arbitration panel found that Mr. Terry (still a partner at that time) had not consented to these so-called "Overpayments," which totaled $7,021,924.

17. Acis asserts four claims: (1) the alleged Overpayments were void or voidable *ultra vires* acts because all of the partners had not consented; (2) the Overpayments are Acis's estate property subject to turnover under Bankruptcy Code § 542(a); (3) the Debtor is liable to return the Overpayments as "money had and received"; and (4) the Debtor is liable for conversion of the alleged Overpayments.[9]

18. Each of the four claims is frivolous, and all should be summarily disallowed: (1) the Alleged Overpayments were not *ultra vires*; (2) the turnover statute does not apply when the right to the property is disputed; (3) "money had and received" does not apply as a matter of law; and (4) neither does conversion. (As discussed below, even if these claims were not frivolous, because they are brought for the benefit of Acis's equity acquirer and not for the benefit of creditors, they are also barred by the *Bangor Punta* doctrine.)

1. The Alleged Overpayments Were Not Void or Voidable as Ultra Vires

19. Acis obviously had the *power* to make payments for services. That is all that would matter even if Delaware had not essentially abolished the *ultra vires* doctrine.[10] If Acis paid more for services than the Acis LPA permitted without the partners' consent, that is a

[9] Acis appears to base its claims solely on allegations that the alleged Overpayment are void, not on the alleged excessive contract rates. As set forth herein, the Debtor believes all four claims may be summarily disallowed as a matter of law on undisputed facts. Nonetheless, the Debtor reserves the right to bring defenses with respect to whether the rates were reasonable or any other applicable defenses.

[10] *See* discussion *infra*; *Carsanaro v. Bloodhound Techs., Inc*., 65 A.3d 618, 648 (Del. Ch. 2013) (*ultra vires* applied under former law when "the corporation acted outside the scope of . . . its authorized powers.").

matter *between partners*, not an *ultra vires* act. That is how the arbitration panel treated it for purposes of valuing Mr. Terry's partnership interest: it calculated how much Mr. Terry would have received as a 25% partner had expenses not exceeded the limit, and included it in the Arbitration Award. By necessary extension, the rest of any recovered money should be distributed to the *other* partners; instead, Mr. Terry seeks to recover it a second time.

20. Regardless, *ultra vires* is inapplicable. It formerly applied under Delaware law only when "the corporation acted outside the scope of … its authorized powers" (which was not the case here) but the superseding statute essentially eliminated any utility the *ultra vires* doctrine had. *See* Delaware General Corporation Law, § 124 ("No act of a corporation and no conveyance of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer. . . "); *see also Carsanaro v. Bloodhound Techs., Inc*., 65 A.3d 618, 648 (Del. Ch. 2013).

21. Furthermore, contrary to Acis's suggestion, even if Delaware had not statutorily eliminated *ultra vires* as a valid concept in corporate law, the concept of *ultra vires* acts never applied to partnerships. The Acis Claim blatantly misstates the law and the cited decision in stating that corporate law on *ultra vires* applies by analogy. *In re Mesa Ltd. P'ship Preferred Unitholders Litig*., Civil Action No. 12,243, 1991 Del. Ch. LEXIS 214, at *20 (Dec. 10, 1991) did not apply *ultra vires* to a partnership, by analogy or otherwise. In fact, it had nothing whatsoever to do with *ultra vires*. It was an unpublished decision involving a ratification issue in a breach of fiduciary duty case. *Ultra vires* was mentioned as one of several

things that can be cured by ratification, after which the court began the next paragraph with: "Case rulings construing statutory corporation law are not necessarily binding precedents as to issues arising under contractual partnership agreements but they may often be helpful by analogy." The Eleventh Circuit Court of Appeal has suggested that *ultra vires* does not apply to partnerships even in concept.[11]

22. Acis does not claim that the alleged Overpayments are void or voidable on any substantive basis other than *ultra vires*, and thus has no colorable claim under state law to recover its own payments. Accordingly, claims 1-4 must be disallowed under Bankruptcy Code § 502(b)(1). A claimant may not simply venture forth recovering payments a debtor has made without some substantive basis; whether Mr. Terry was deemed to consent to them under the Acis LPA is completely irrelevant.

2. Turnover Under Bankruptcy Code § 542(a) is Inapplicable

23. It is axiomatic that turnover under Bankruptcy Code § 542(a) applies only to obtain possession of property that is indisputably property of the estate. *See, e.g., United States v. Inslaw, Inc.*, 932 F.2d 1467, 1472 (D.C. Cir. 1991) ("It is settled law that the debtor cannot use the turnover provisions to liquidate contract disputes or otherwise demand assets whose title is in dispute."); *In re Amcast Indus. Corp.*, 365 B.R. 91, 122 (Bankr. S.D. Ohio 2007) ("Recovery under 11 U.S.C. § 542 is limited to assets that are undisputedly property of the

[11] *In re Sec. Grp.*, 926 F.2d 1051, 1054 n.5 (11th Cir. 1991) ("The appellants consistently cast their argument as one alleging the guaranties were ultra vires with respect to the partnerships. Ultra vires is a uniquely corporate concept, arising out of an historical fear and distrust of the corporate form. [citation omitted] Indeed, almost all of the cases cited by the appellants involve corporations, not partnerships. We do not believe that this uniquely corporate concept controls this case.").

estate.") (citation omitted). Here, Acis's purported right to the property at issue is clearly in dispute, and section 542(a) is therefore inapplicable.

3. "Money Had and Received" is Also Inapplicable

24. "The quasi-contractual action for money had and received is a cause of action for a debt not evidenced by a written contract between the parties" (*MGA Ins. Co. v. Chesnutt*, 358 S.W.3d 808, 815 (Tex. App. 2012)). Here, the alleged Overpayments were made pursuant to valid contracts. Once again, therefore, Acis's theory of relief is conceptually inapplicable.

25. Even if there were a claim for "money had and received," a substantial portion of such a claim would be time-barred. The Arbitration Award found that the alleged Overpayments were made from 2014 to May 2016. Texas applies a two-year statute of limitations to claims for money had and received. *Merry Homes. Inc. v. Luc Dao*, 359 S.W.3d 881, 884 (Tex. App. 2012) (citing "clear precedent"). Accordingly, Acis cannot recover any alleged Overpayments that were made prior to January 31, 2016 (two years prior to the Acis petition date).

4. Conversion is Also Inapplicable

26. Conversion is another inapplicable claim. The Debtor has no identifiable, segregated money subject to recovery through a conversion cause of action, and Acis has not even attempted to identify any such money or property. *See, e.g., Lawyers Title Co. v. J.G.*

Cooper Dev., Inc., 424 S.W.3d 713, 718 (Tex. App. 2014) ("an action for conversion of money arises only where the money can be identified as a specific chattel, meaning it is (1) defined for safe keeping; (2) intended to be kept segregated; (3) substantially in the form in which it is received or an intact fund; and (4) not the subject of a title claim by the keeper"). As noted above, conversion and similar claims are subject to a two-year statute of limitations (Tex. Civ. Prac. & Rem. Code 16.003(a)). Acis cannot meet its burden of proving these requirements.

C. Claims 5-25: All Avoidance Claims Should be Disallowed Because They Seek Recovery Under Section 550(a) of Amounts in Excess of Acis's Plan Obligations

27. Reorganized Acis will no doubt contend that it may prosecute avoidance claims and recover damages without regard to whether creditors are paid in full, because the company itself was damaged by the transfers. The argument is invalid and is based on a gross oversimplification of the law. Reorganized Acis stands in the shoes of old Acis, and debtors cannot recover transfers for their own benefit, except to the extent the recovery is effectively in payment of a claim. Acis has paid its creditors; in fact, it did so with money effectively recovered from the Debtor on one of the very claims it asserts here, by virtue of the Temporary Plan Injunction! Bankruptcy Code § 550 does not permit a debtor or anyone standing in the shoes of the debtor to recover another $75 million for the benefit of the debtor. ***This is a summary basis for disallowance of all avoidance claims alleged in Claims 5-25***.

28. "Courts have consistently held that an avoidance action can only be pursued if there is some benefit to creditors and may not be pursued if it would only benefit the debtor." *Balaber-Strauss v. Harrison (In re Murphy)*, 331 B.R. 107, 122 (Bankr. S.D.N.Y.

2005) (citing *Wellman v. Wellman*, 933 F.2d 215, 218 (4th Cir. 1991) (denying recovery "when the result is to benefit only the debtor rather than the estate")). Consistent with that principle, the Acis Plan provides that "the Reorganized Debtor shall have exclusive standing . . . to prosecute . . . Estate Claims *for the benefit of the Estate* . . . ." Acis Plan, § 7.03 (emphasis added). But a recovery of "at least $75 million" in damages demanded by Reorganized Acis will benefit only one person or entity, namely Mr. Terry, who bought the equity interests in the new Acis. Acis's creditors will have been paid in full; none are depending for their recovery on anything more than has already been recovered by means of the Temporary Plan Injunction. Mr. Terry is among those Acis creditors who will have been paid in full. He may claim that he acquired his equity interest in the new Acis in a debt for equity exchange, *i.e.*, by shaving $1 million off his $8.168 million claim, but that is not a recovery on behalf of his claim, but on behalf of the new equity that he bought. There is no substantive difference between discounting a hundred cent claim and a cash purchase. Even if there was, it would not justify such a windfall, much less at the expense of *the Debtor's creditors*. These include unsecured trade creditors, Redeemer, which has filed a proof of claim in respect of its arbitration award of $190,824,557 in damages as of the petition date, and UBS.

29. Restoring the pre-transfer equity value of the old Acis, after its creditors have been paid in full, and the equity to be "restored" is newly issued and purchased equity, is not the kind of "benefit to the estate" contemplated by *MC Asset Recovery LLC v. Commerzbank A.G. (In re Mirant Corp.)*, 675 F.3d 530, 534 (5th Cir. 2012), as discussed below. There is no post-confirmation "estate" to benefit within the meaning of section 550(a). Unlike any decision

in which a recovery was found to at least indirectly benefit an estate, where, e.g., plan obligations were unfulfilled, or even simply to boost equity value where creditors had received new equity interests on account of their claims (as opposed to purchasing the new equity, as Mr. Terry effectively did), there is no benefit to the estate here. Creditors were paid and Acis's equityholders' interests were canceled under the Acis Plan, and with it their partnership, a relationship that dissolved by operation of law upon the bankruptcy of their general partner, Acis LLC.[12] There is only a new owner, Mr. Terry, who purchased the new equity under the Acis Plan exactly as if it were sold at auction. There is no legal basis for Mr. Terry's attempt to stand in the shoes of the preconfirmation partnership in order to recover more assets than necessary to satisfy its liabilities.

30. In fact, there is a triple irony to Reorganized Acis's demand: (i) first, Mr. Terry is already the only person who was paid for his former equity interest in Acis (the value of which was the main component of the Arbitration Award, for which he has been paid in full in cash); (ii) second, the petition-date Acis equity holders (the persons who might have benefited from Acis recovering its prepetition transfers if their interests had not been canceled) will not

[12] As a Delaware entity, Acis LP was governed by the Delaware Revised Uniform Limited Partnership Act ("DRULPA"). DRULPA specifies six different events that trigger the dissolution of a Delaware limited partnership. Pertinent here, these include a withdrawal of the general partner "upon the happening of events specified in a partnership agreement…." Article 5 of the Acis LP Agreement,, captioned "Dissolution and Winding Up," provides that Acis LP "shall be dissolved" upon any of four events, which include the bankruptcy of the general partner (Sec. 5.01(a)). Here, the general partner was co-debtor Acis LLC. State law dissolution may be prevented by an election by the partners to continue the partnership, made within 90 days of the general partner's bankruptcy filing, but that did not occur. "Because these dissolution provisions have been adopted into the partnership law of almost every state, federal bankruptcy courts have generally enforced the UPA and RULPA dissolution provisions as incorporated in state law, and have held partnerships to be dissolved upon the filing of a bankruptcy petition by a general partner." Lawrence J. La Sala, *Partner Bankruptcy and Partnership Dissolution: Protecting the Terms of the Contract and Ensuring Predictability*, 59 Fordham L. Rev. 619, 621(1991) (citing cases) (available at: https://ir.lawnet.fordham.edu/flr/vol59/iss4/5).

only see none of any recovery, they or their affiliates are actually the ones being asked to pay it; *and* (iii) third, the only recipient of the $75 million would be Mr. Terry himself! Presumably, Mr. Terry purchased Reorganized Acis in anticipation of earning money managing assets while it paid Acis creditors; if he anticipated a $75 million return on his $1 million investment at the expense of the Debtor's creditors, it was a gross miscalculation, inconsistent with the law.

31. *Mirant* is entirely consistent with the Debtor's position, and is not in derogation of the substantial body of authority holding that section 550 is subject to equitable limitations. In *Mirant*, the debtor had sued its lenders to avoid a guaranty and recover payments thereunder. Its plan of reorganization provided for the creation of a special litigation entity ("MCAR"). Unsecured creditors received Reorganized Mirant stock and an interest in MCAR's recoveries. The lender moved for summary judgment in part on the basis that creditors would be paid in full and so MCAR lacked standing. The district court found that MCAR had standing (while granting summary judgment on other grounds), ruling in part:

> Finally, and ***most importantly, the fact that the creditors were paid in New Mirant stock confers standing on MCAR to pursue the avoidance action based on the indirect benefit to the creditors from a more financially sound estate***…. [S]ee also Acequia, 34 F.3d at 811-12 (discussing broad interpretations of 'benefit the estate' in context of avoidance actions and fact that equity stake to creditors results in benefit to estate)… ***In the instant case, the creditors were paid in stock; thus, the prospect of a more financially sound estate would provide MCAR with standing***.

Mirant, 441 B.R. 791, 803 (N.D. Tex. 2010) (emphases added).

32. The Fifth Circuit agreed with the district court's ruling on standing (while vacating on other grounds):

> A bankruptcy trustee may still have standing to avoid a fraudulent transfer after the unsecured creditors are satisfied in full. The fraudulent transfer injured the estate and § 550 ensures that the injury is redressed because a trustee may only avoid a transfer to the extent it benefits the estate. ***Therefore, to the extent that MCAR's successful avoidance of fraudulent transfers will benefit the bankruptcy estate, MCAR has Article III standing to avoid transfers that injured the estate***.

Mirant, 675 F.3d at 534 (emphasis added).

33. This Court followed *Mirant* in the *Texas Rangers* case. The former debtor, Texas Rangers Baseball Partners ("TRBP") had sued its former ultimate parent, HSG Sports Group ("HSG"), to avoid obligations under an aircraft sharing contract signed on the eve of bankruptcy. TRBP had paid its creditors in full under a confirmed plan. HSG argued that TRBP therefore lacked standing as there would be no benefit to the estate from avoiding the contract. This Court observed *Mirant's* broad interpretation of "benefit to the estate," while noting two facts critical here: (1) the case at hand was for avoidance only, and not for recovery under section 550(a), and (2) TRBP still had obligations to lenders that had *not* been paid their entire prepetition indebtedness under the plan. On these facts, the Court found that TRBP had Constitutional standing to assert the fraudulent transfer claim because it would produce a plausible "benefit to the estate."

> *Mirant* makes clear that "benefit to the estate" does not hinge on whether a Chapter 5 action will result in a pool of assets being garnered for the benefit of unsecured creditors. Here, it is a matter of public record that the equity holders of TRBP have obligations to certain lenders that TRBP was also liable to. . . .
>
> Thus, to the extent the equities matter here, it would seem that such equities weigh in favor of finding there to be a plausible "benefit to

> the estate" argument articulated by TRBP. Accordingly, the court finds that here, TRBP does have Constitutional standing to assert a fraudulent transfer claim under section 548(a)(1)(A) of the Bankruptcy Code, even though unsecured creditors were paid in full under the Plan, and that the Avoidance Complaint should not be dismissed.

Paradigm Air Carriers, Inc. v. Tex. Rangers Baseball Partners (In re Tex. Rangers Baseball Partners), 498 B.R. 679, 709 (Bankr. N.D. Tex. 2013).

34. The great weight of authority, both pre- and post-*Mirant*, holds that recovery under section 550(a) is subject to a case-by-case analysis of the facts of the case and the equities. Section 550(a) provides that "the trustee may recover, ***for the benefit of the estate***, the property transferred, or, if the court so orders, the value of such property[.]" 11 U.S.C. § 550(a) (emphasis added).

> Under §550, courts have limited the recovery of pre-petition transfers on equitable principles in a manner consistent with the purposes of the Bankruptcy Code and §550, in particular. *See, e.g.*, *In re Sawran*, 359 B.R. 348, 353 (Bankr. S.D. Fla. 2007) (citing cases). For a concise discussion of the rationales for limiting recovery under 11 U.S.C. §550 based on equitable principles, see Robert B. Bruner and Gerard G. Pecht, The Unexplored Limits of Moore v. Bay: Statutory and Equitable Basis for Limiting Money Damage Awards on Fraudulent Transfer Claims, 26 J. Bankr. L. & Prac. NL Art. 2 (June 2017).

Holber v. Nikparvar (In re Incare, LLC), Nos. 13-14926 ELF, 14-0248, 2018 Bankr. LEXIS 1339, at *35-36 (Bankr. E.D. Pa. May 7, 2018) (citing, among others, *Crescent Res. Litig. Tr. ex rel. Bensimon v. Duke Energy Corp*., 500 B.R. 464, 481-82 (W.D. Tex. 2013)).

35. *Duke Energy* is an instructive, post-*Mirant* decision from the district court in the Western District of Texas, noting that the power to avoid a transfer is not the same as the

power to recover under section 550(a) and holding that while the full amount of the fraudulent transfer was legally avoidable, as per *Mirant*, the court could nonetheless consider "the equitable impact of the Trust's potential recovery" and limit the recovery under section 550. *Id*. at 481-83.

36. In *Duke Energy*, the Crescent Resources post-confirmation Trust sued to avoid a 2006 spinoff transaction that allegedly rendered Crescent Resources insolvent while Duke received $1.6 billion. The plan gave the original lenders all of the equity and allowed unsecured claims for the $961 million difference between those claims and the value of their new equity interests. The Plan also formed the Trust and authorized it to pursue claims against third parties. The Trust had two classes of beneficiaries: Class A comprised creditors with $279 million in unrelated claims and Class B included the lenders with their $961 million in allowed claims.

37. Duke Energy defended in part on the basis that the original lenders entered into the 2006 transaction knowing how the loan proceeds would be distributed, and should not benefit from its avoidance. *Id*. at 478. The district court agreed, referring to *Mirant* and offering the following section 550(a) analysis:

> There is precious little guidance from the Fifth Circuit on the scope of Section 550(a)'s "for the benefit of the estate" language. Other courts generally interpret the language broadly. *See In re Acequia, Inc.*, 34 F.3d 800, 811 (9th Cir. 1994); *In re Tronox Inc*., 464 B.R. 606, 617 (Bankr. S.D.N.Y. 2012) (citing *Acequia*, 34 F.3d at 811). Still, there are numerous examples of cases where courts have denied or limited recovery based on the equitable principles underlying the Bankruptcy Code and Section 550(a) in particular. *See, e.g., Wellman v. Wellman*, 933 F.2d 215, 218 (4th Cir. 1991) (affirming district court's order holding debtor's avoidance action was not "for the benefit of" the estate); *In re Yellowstone Mountain Club, LLC*, 436 B.R. 598, 678 (Bankr. D. Mont. 2010) (refusing to

> award any recovery to the original lender who was complicit in the fraudulent transfer, as well as syndicate lenders "who have speculated on a monumental award against" the plaintiff); *In re Jackson*, 318 B.R. 5, 27-28 (Bankr. D.N.H. 2004), *aff'd*, 459 F.3d 117 (1st Cir. 2006) (because "equity guards against windfalls in general," amount of recovery through Section 550(a) on a Section 544(b) claim may be equitably adjusted); *but see Tronox*, 464 B.R. at 614 (collecting cases interpreting Section 550(a) as setting "a minimum floor for recovery in an avoidance action," but not "any ceiling on the maximum benefits that can be obtained once that floor has been met").
>
> The one consistent vein traveling through all of these cases is the fact-specific nature of the inquiry. *See, e.g., Wellman*, 933 F.2d at 218 ("benefit of the estate" question requires "a case-by-case, fact-specific analysis"); *In re Murphy*, 331 B.R. 107, 121 (Bankr. S.D.N.Y. 2005) (limiting recovery under Section 550 based on the "extremely unusual" facts of the case). It is therefore instructive to consider the factual circumstances of this case, and the equitable impact of the Trust's potential recovery.
>
> * * *
>
> If the Trust is allowed to recover the $961 million of the term loan proceed transfer destined for the Class B creditors—a group of creditors who all derive their interest in the estate from the original lenders—the banks' high risk investment will pay off in the form of a massive windfall.

Duke Energy, 500 B.R. at 481-82. The district court concluded that there was "no equitable basis" for allowing a recovery to Class B creditors, and granted summary judgment in favor of Duke Energy.

38. Where this Court found the facts and equities in *Texas Rangers* to favor finding a "benefit to the estate," the facts and equities here point decisively to the opposite conclusion. By comparison, here: (1) Reorganized Acis is seeking not just to avoid obligations but to recover $75 million under section 550(a), (2) Acis's creditors will already have been paid in full at 102% (once Mr. Terry actually elects to pay creditors with the cash at Acis), (3) there

are ***no*** creditors relying on Reorganized Acis's equity or financial condition to recover on their claims, (4) any recovery would come at the expense of the Debtor's unsecured creditors, and (5) the person to receive the asserted $75 million windfall (*i.e.*, Mr. Terry) paid only $1 million to purchase Acis's interests to take a flyer on this and related litigation. As the court stated in *Blixseth v. Kirschner (In re Yellowstone Mt. Club, LLC)*, *supra*, 436 B.R. at 678 "the Court will not at this time enter an order that would in any way benefit Credit Suisse, the Prepetition Lenders or other parties who have speculated on a monumental award against Blixseth." *See also Wellman, supra,* 933 F.2d at 219 (Fourth Circuit denied recovery where the plaintiff/debtor "executed the non-recourse promissory notes to the creditors in an attempt to create a claim in the estate so that he could obtain a "massive surplus recovery" for himself in addition to the surplus distributed to him.").

39. The facts here are firmly aligned with cases dealing with recoveries under section 550(a) such as *Adelphia Recovery Trust v. Bank of America, N.A.,* 390 B.R. 80, 97 (S.D.N.Y. 2008), where the court found no benefit to the estate where all creditors were "paid in full with interest under the Plans and no creditors have been issued shares" in the Adelphia Recovery Trust. As noted, Mr. Terry did not receive the ownership interests in Acis in payment of his claim against the Acis estate (for which claim he received or will receive 102% of his claim amount); he purchased the debtor – Acis – for $1 million, and it is only Mr. Terry who would benefit, not Acis's creditors, employees (there are none) or prior equity holders. "Courts have consistently held that an avoidance action can only be pursued if there is some benefit to creditors and may not be pursued if it would only benefit the debtor." *Balaber-Strauss v.*

Harrison (In re Murphy), 331 B.R. at 122 (citing *Wellman*, *supra*, 933 F.2d at 218 (no recovery "when the result is to benefit only the debtor rather than the estate")).

40. Thus, under sections 548 and 550, "only net amounts diverted from, that is damages consequently suffered by the creditor body of, a debtor may be recovered via a fraudulent conveyance action." *In re Foxmeyer Corp*., 296 B.R. 327, 342 (Bankr. D. Del. 2003). To do otherwise is solely to benefit the debtor (or, as here, the debtor's purchaser). That is inappropriate under either federal or state fraudulent transfer laws, as discussed at length in *Murphy*, 331 B.R. at 124-25. As a Minnesota bankruptcy court explained:

> Whether there is a benefit to the estate depends on a case-by-case, fact-specific analysis. [ ] This is not the usual case in which an increase in dollars to the estate results in a patent benefit to the estate. In this case, the increase in dollars to the estate which would result from the requested relief would not provide a benefit to the estate. In this case, the trustee has advised that the amount on hand for distribution from the estate already exceeds the total amount of estimated administrative expenses and all claims. Thus, in this case, the only party to benefit from avoiding and recovering the Transfer would be the debtor.
>
> Such a benefit to the debtor would be inappropriate. The provisions of MUFTA "protect creditors rather than transferors of debt." *See Bartholomew v. Avalon Capital Group, Inc*., 828 F.Supp.2d 1019, 1025 (D. Minn. 2009). "Only creditors are entitled to remedies under the UFTA." *Id*., *citing* Minn. Stat. §§ 513.47, 513.48(b).

Running v. Dolan (In re Goodspeed), 535 B.R. 302, 315-16 (Bankr. D. Minn. 2015). Noting that trustees are the exception since they sue on behalf of creditors, the court observed that nonetheless there must be a benefit to creditors, citing and extensively quoting *Murphy* and *Wellman*, *supra*.

41. To permit any recovery under section 550(a) beyond the amount needed to pay creditors would create a new duty under state law. Acis's former equity holders, as its sole owners, had no duty under applicable state law *to Acis*, or anyone else other than creditors, to refrain from making the transfers at issue, nor did the Debtor or any of the other related entities or professionals who are now litigation targets have any right or obligation to stop them. Thus in a trustee's lawsuit against former partners of a debtor partnership, in which the trustee alleged in part that the partners had conspired to "set into motion a series of transactions that crippled [the debtor partnership]," the district court for the Southern District of Texas explained and held in part:

> Delaware law is clear that a company's sole owner cannot breach fiduciary duties "owed to the companies he wholly owned." *See Midland Food Services, LLC v. Castle Hill Holdings V, LLC*, 792 A.2d 920, n. 14 (Del. Ch. 1999) (citing *Goodman v. Futrovsky*, 42 Del. Ch. 468, 213 A.2d 899, 902 (1965) (the defendants could not defraud company since they "were the sole owners . . . and could do with it as they wished"), cert denied, 383 U.S. 946, 86 S. Ct. 1197, 16 L. Ed. 2d 209 (1966). ***Tow has not cited legal support for the proposition that a nonowner can be liable for conspiring with the sole owner of a partnership for breaching duties that the owner owes himself***.

Tow v. Amegy Bank N.A., 976 F. Supp. 2d 889, 906-07 (S.D. Tex. 2013) (emphasis added). *See also Newman v. Toy*, 926 S.W.2d 629, 631 (Tex. App.-Austin 1996, writ denied) ("A sole shareholder or all shareholders acting in agreement, being all the beneficial owners of corporate property, may themselves deal with such property so long as the rights of creditors are not prejudiced ...").

42. Accordingly, any recoveries of the transfers sought to be avoided in the Acis Claim should be limited to any amount needed to satisfy obligations under the Acis Plan, that is to say, to pay creditors and administrative claimants in full. No creditors have a stake in restoring Acis to the financial condition it occupied prior to any of the transfers that are the subject matter of the Acis Claim, at least not on account of any unpaid claims. Upon payment of creditors in full under the Acis Plan, therefore, all avoidance claims should be dismissed as moot, and the only thing stopping the avoidance claims from actually being moot is Mr. Terry's unwillingness to pay Acis's creditors with the cash at Acis.

D. Acis is Barred Under the *Bangor Punta* Doctrine From Asserting For Its Own Benefit All Claims Not Asserted Pre-Acquisition – Claims 1-8 and 21-34 – Excepting Only Claims Related to the ALF PMA Transfer (Claims 9-12), the ALF Share Transfer (Claims 13-16), and the Note Transfer (Claims 17-20)

43. In *Bangor Punta Operations, Inc. v. Bangor & A. R. Co*., 417 U.S. 703, 94 S. Ct. 2578, 2584-85 (1974); the Supreme Court held that a stockholder who has purchased all or substantially all of the shares of a corporation from a vendor at a fair price may not seek to have the acquired corporation recover against the vendor for prior corporate mismanagement and waste of corporate assets that may have occurred during the prior vendor's ownership. *Bangor Punta*, 417 U.S. at 710. "What the *Bangor Punta* Doctrine does prohibit is purchasers . . . from accepting their end of the bargain - - ownership and control of the corporation - - and attempting to sweeten their end of the deal by suing the seller to recover damages to the corporation allegedly caused by the seller before the sale. The *Bangor Punta* Doctrine properly prohibits as

inequitable such attempts at re-trading commercial transactions through litigation. *Midland Food Servs., LLC v. Castle Hill Holdings V, L.L.C.*, 792 A.2d 920, 933-34 (Del. Ch. 1999). The nature of the claim does not matter. *Id*. at 930.

44. The doctrine does not apply to claims brought for the benefit of creditors. *Bangor Punta*, 417 U.S. at 715 (rejecting argument that plaintiff-corporation should be entitled to recovery since any recovery would benefit the public where the plaintiff-corporation "would be entitled to distribute the recovery in any lawful manner it may choose"); *Wieboldt Stores, Inc. v. Schottenstein*, 94 B.R. 488, 508 (N.D. Ill. 1988) (permitting debtor in possession to assert breach of fiduciary claim but only to extent of creditor injury – "The creditors cannot receive a "windfall" recovery, but may recover only to the extent of their claims."). *Cf. Meyers v. Moody*, 693 F.2d 1196, 1207 (5th Cir. 1982) (*Bangor Punta* doctrine inapplicable to suit brought by receiver for benefit of creditors); *Think3 Litig. Tr. v. Zuccarello (In re Think3, Inc.)*, 529 B.R. 147, 185 (Bankr. W.D. Tex. 2015) (doctrine inapplicable where "Plaintiff Trust was created by a confirmed plan of reorganization in the Think3 bankruptcy case for the purpose of bringing suits for the benefit of creditors of insolvent Think3.").

45. The doctrine also does not apply to claims that were pending when the acquisition occurred. *Meyers v. Moody*, 693 F.2d at 1208 ("Moody is thus urging us to extinguish a cause of action that both existed and was pursued long before the transfer of Empire's assets took place. Neither law nor equity permits us to do so."); *TNS Media Research, LLC v. TiVo Research & Analytics, Inc*., 193 F. Supp. 3d 307, 312 (S.D.N.Y. 2016) ("Once

brought, a claim is not released merely and necessarily based on a change in corporate ownership.").

46. Mr. Terry agreed to purchase Acis's equity on July 5, 2018 and the Acis Plan was confirmed on January 1, 2019. The only claims pending at either time were those asserted by the Acis trustee in his counterclaim filed on July 2, 2018 (Acis Adversary No. 18-03078, at Docket No. 23). That counterclaim asserted only fraudulent transfer claims for (1) the ALF Share Transfer, (2) the ALF PMA Transfer, and (3) the Note Transfer (all as described below). Acis's amended complaint, asserting for the first time *all other claims* asserted in the Acis Claim, all of which relate to other transactions, was filed on ***June 20, 2019***. The *Bangor Punta* doctrine, therefore, bars all claims other than Claims 9-20.

E. Claims 5-8: Fraudulent Transfer Claims - Sub-Advisory Agreement Modifications

47. Claims 5 through 8 are claims to avoid as fraudulent transfers and recover unspecified damages based on modifications to the Sub-Advisory Agreement by and between Acis LP and the Debtor dated January 1, 2011. The modifications were made on July 29, 2016, and raised the Debtor's rates from 5 to 20 basis points. Those claims are: (5) for actual fraudulent transfer under section 548; (6) for actual fraudulent transfer under section 544(b) and Texas law; (7) for constructive fraudulent transfer under section 548; and (8) for constructive fraudulent transfer under section 544(b) and Texas law.

48. There are numerous bases on which Claims 5-8 can and should be disallowed entirely, some on a summary basis and others for which further factual development would be required, as follows:

a. As set forth above, Acis is not entitled to any recovery beyond that required to satisfy obligations under the Acis Plan. The Debtor believes this issue can be summarily adjudicated at this time.

b. The claims are barred by the *Bangor Punta* doctrine, which can be summarily adjudicated at this time.

c. In addition, the Debtor objects to these claims on the following grounds, which are not subject to summary adjudication at this time:

(1) Acis cannot meet its burden of proving insolvency at the time of the modifications. In fact, Acis clearly was solvent at that time. Expert testimony will be required on this issue.

(2) Acis received reasonably equivalent value for the modifications, in that the rates had been maintained at artificially low levels during Mr. Terry's tenure, and as modified represented reasonably equivalent value for the services rendered thereunder. In fact, the revised rates are similar to what Brigade is currently charging Acis.

(3) The modifications, which were made prior to the commencement of litigation and which had a legitimate purpose and justification, were not undertaken to hinder or defraud creditors.

(4) Acis has not alleged damages. The modifications gave rise to, at most, an avoidable *obligation*, not a *transfer*, and the obligation potentially subject to avoidance was rejected by

the Acis trustee and approved by an order of the Court. To the extent that Acis alleges that payments made at the modified rates were fraudulent transfers, the Debtor maintains, as alleged above, that the rates as modified constituted reasonably equivalent value for the services rendered.

(5) The Debtor will have a claim in the Acis Case under Bankruptcy Code § 502(h) with respect to any property recovered on account of this claim.

F. Claims 9-24: Acis Has Not Alleged Facts Sufficient to Show That the Debtor is the Entity for Whose Benefit the Transfers Were Made

49. Acis claims that with respect to each alleged avoidable transfer, the Debtor was either the initial transferee or the entity for whose benefit it was made, from which the property transferred or its value may be recovered under federal or state law.[13]

50. Acis concedes, as it must, that ***the Debtor was not the initial transferee of the transfers alleged in Claims 9 through 24***. As to those claims, Acis has failed to allege facts sufficient to establish, if proven, that the Debtor was "the entity for whose benefit such transfer was made." This defense can be summarily adjudicated at this time.

[13] Section 550(a) provides that with respect to a transfer that is avoided under sections 544, 545, 547, 548, 549, 553(b), or 724(a), "the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—(1) ***the initial transferee of such transfer or the entity for whose benefit such transfer was made***[.]" 11 U.S.C. § 550(a)(1). Texas law is similar. *See Citizens Nat'l Bank of Tex. v. NXS Constr., Inc.*, 387 S.W.2d 74, 79-80 (Tex. App. 2012) ("the creditor may obtain a monetary judgment against the transferee of the asset, the person for whose benefit the transfer was made, or subsequent transferees." (citing Tex. Bus. & Com. Code § 24.009(b)). Other than with respect to the sub-advisory agreement modifications, the Debtor is not alleged to have been either an immediate or subsequent transferee of any of the allegedly improper transfers, for purposes of Bankruptcy Code § 550(a) and Tex. Bus. & Com. Code § 24.009(b) (referencing the "first transferee" and "any subsequent transferee").

51. Specifically, Acis has not identified any specific, direct benefit to the Debtor from the fraudulent transfers alleged in Claims 9-24. It only alleges an indirect benefit to the Debtor from being part of the Highland corporate group. But any transaction by a corporate group member commonly has indirect benefits for other group members, which is why as a matter of law it is insufficient simply to allege an amorphous benefit for the Debtor to be deemed a beneficiary of the putative fraudulent transfers under § 550. *See, e.g., Faulkner v. Kornman (In re Heritage Org., LLC)*, 413 B.R. 438, 495-96 (Bankr. N.D. Tex. 2009) (Judge Houser) ("an unquantifiable advantage" is not a "benefit" for purposes of § 550(a); liability will not be imposed upon a party that allegedly benefitted from the fraudulent transfer just because defendant had controlled debtor-transferor and directed the transfer; "There is simply no showing that Kornman [who allegedly benefitted] received any benefit at all from the initial transfers."); *Peterson v. Hofmann (In re Delta Phones, Inc.)*, 2005 Bankr. LEXIS 2550, *16-*17 (Bankr. N.D. Ill. Dec. 23, 2005) ("That a shareholder holds some ownership interest in a corporation does not somehow mean that all transfers made to the corporation or by it are automatically made for the 'benefit' of the shareholder under § 550(a)(1). The 'entity' under § 550(a)(1) must benefit from the transfer 'directly,' not indirectly…. Taken to its logical conclusion, Peterson's position would put average investors on the hook for all kinds of corporate transactions any time a public company sought bankruptcy protection."); *see also In re Peregrine Fin. Group, Inc*., 589 B.R. 360 (Bankr. N.D. Ill. 2018) ("the [defendant] cannot be the transfer beneficiary if it will get the benefit of the funds sometime later"; "[T]he [defendant] received no direct benefit at the

time the transfer was made. It had only the right to benefit from the funds in the future after [certain fees were deducted, other requirements were met, and funds were still available].").

52. Accordingly, Reorganized Acis has not alleged facts sufficient to establish, even if proven, that the Debtor was "the entity for whose benefit such transfer was made" with respect to the transfers alleged in Claims 9-24.

G. Claims 9-12: Fraudulent Transfer Claims - ALF PMA Transfer

53. Acis alleges that its rights to direct and effectuate an optional redemption and otherwise control the assets of Acis Loan Funding Ltd. ("ALF"), pursuant to a Portfolio Services Agreement dated August 10, 2015, and a Portfolio Management Agreement dated December 22, 2016, by and between Acis and ALF (together, the "ALF PMA"), had value and were transferred for no value to Highland HCF Advisor in October 2017. The corresponding claims for relief are: (9) actual fraudulent transfer under section 548; (10) actual fraudulent transfer under section 544(b) and Texas law; (11) constructive fraudulent transfer under section 548; and (12) constructive fraudulent transfer under section 544(b) and Texas law. Acis seeks to avoid the transfer and recover unspecified damages.

54. ***Acis fails to address the fact that it has been exercising the rights that it alleges were transferred and has been deriving earnings under the ALF PMA since the preliminary and plan injunctions were issued in the Acis Case, in an amount sufficient to satisfy all claims against it***. That is, the alleged transfers had no economic effect as Acis retained all rights under the contracts. Accordingly, the Debtor objects on the following bases to Claims 9-12:

a. As set forth above, Acis is not entitled to any recovery beyond that required to satisfy obligations under the Acis Plan. The Debtor believes this issue can be summarily adjudicated at this time.

b. As set forth above, the Debtor was not the transferee of the ALF PMA Transfer and an insufficient factual basis is alleged to conclude that it was the entity for whose benefit the transfer was made. The Debtor believes this issue can be summarily adjudicated at this time.

c. In addition, the Debtor objects to these claims on the following grounds, which are not subject to summary adjudication at this time:

(1) Acis cannot meet its burden of proving insolvency at the time of the transfer. Expert testimony will be required on this issue.

(2) Acis received reasonably equivalent value for the transfer.

(3) The transfer had a legitimate purpose and justification, and was not undertaken to hinder or defraud creditors.

(4) Acis has not alleged damages. In fact, Acis has continued to exercise rights and derive earnings under the ALF PMA pursuant to injunctive relief granted in the Acis Case.

(5) The Debtor will have a claim in the Acis Case under Bankruptcy Code § 502(h) with respect to any property recovered on account of this claim.

H. Claims 13-16: Fraudulent Transfer Claims - ALF Share Transfer

55. Acis alleges that on October 24, 2017, Acis and CLO Holdco Ltd. entered into a resolution whereby Acis sold its equity interest in ALF (the "ALF Share Transfer") to Highland Funding for $991,000. The 13th through 16th claims for relief are: (13) actual fraudulent transfer under section 548; (14) actual fraudulent transfer under section 544(b) and Texas law; (15) constructive fraudulent transfer under section 548; and (16) constructive fraudulent transfer under section 544(b) and Texas law. Acis seeks to avoid the ALF Share Transfer and recover unspecified damages.

56. The Debtor submits that there are numerous bases for disallowance of Claims 13-16 in the entirety:

a. As set forth above, Acis is not entitled to any recovery beyond that required to satisfy obligations under the Acis Plan. The Debtor believes this issue can be summarily adjudicated at this time.

b. As set forth above, the Debtor was not the transferee and an insufficient factual basis is alleged to conclude that it was the entity for whose benefit the transfer was made. The Debtor believes this issue can be summarily adjudicated at this time.

c. In addition, the Debtor objects to these claims on the following grounds, which are not subject to summary adjudication at this time:

(1) Acis cannot meet its burden of proving insolvency at the time of the transfer. Expert testimony will be required on this issue.

(2) Acis received reasonably equivalent value for the transfer, as the repurchase price was at their net asset value.

(3) The transfer had a legitimate purpose and justification, and was not undertaken to hinder or defraud creditors.

(4) Acis has not alleged damages. In fact, Acis has continued to control and derive earnings from these assets by means of the ALF PMA pursuant to injunctive relief granted in the Acis Case.

(5) The Debtor will have a claim in the Acis Case under Bankruptcy Code § 502(h) with respect to any property recovered on account of this claim.

I. Claims 17-20: Fraudulent Transfer Claims – Note Transfer

57. Acis alleges that on November 3, 2017, Acis LP, the Debtor, and Highland Management (a Debtor affiliate) entered into an *Agreement for Assignment and Transfer of Promissory Note* (the "Note Transfer Agreement"), by which Acis transferred a $9.5 million promissory note owed by the Debtor to Acis (the "Note") to Highland CLO Management for no material value. Based thereon it pleads the 17th through 20th claims for relief: (17) actual fraudulent transfer under section 548; (18) actual fraudulent transfer under section 544(b) and Texas law; (19) constructive fraudulent transfer under section 548; and (20) constructive fraudulent transfer under section 544(b) and Texas law. Acis seeks to avoid the transfer and recover unspecified damages.

58. Not only did the Debtor not receive the Note, it remains liable! For this and other reasons, the Debtor objects to Claims 17-20 on the following bases:

a. Since the Debtor did not receive the Note, and indeed remains liable on the Note, it is certainly not the entity for whose benefit it was made. This issue can be summarily adjudicated at this time.

b. As set forth above, Acis is not entitled to any recovery beyond that required to satisfy obligations under the Acis Plan. This issue can be summarily adjudicated at this time.

c. In addition, the Debtor objects to these claims on the following grounds, which are not subject to summary adjudication at this time:

(1) Acis cannot meet its burden of proving insolvency at the time of the transfer. Expert testimony will be required on this issue.

(2) Acis received reasonably equivalent value for the transfer.

(3) The transfer had a legitimate purpose and justification, and was not undertaken to hinder or defraud creditors.

(4) Acis has not alleged damages.

(5) The Debtor will have a claim in the Acis Case under Bankruptcy Code § 502(h) with respect to any property recovered on account of this claim.

J. Claims 21-24: Fraudulent Transfer Claims – Acis CLO 2017-7 Agreement

59. Acis alleges that on December 19, 2017, it entered into an *Agreement for Assignment and Transfer* (the "CLO 2017-7 Agreement") by which it transferred its interests in sub-advisory and services agreements relating to Acis CLO 2017-7, by which it derived fees, to

Highland CLO Holdings (a Debtor affiliate) for no consideration, and also its indirect equity interests in the underlying CLO (the "2017-7 Equity") in exchange for the forgiveness of $2.8 million payable owed by Acis to the Debtor. Based thereon Acis pleads the 21st through 24th claims for relief: (21) actual fraudulent transfer under section 548; (22) actual fraudulent transfer under section 544(b) and Texas law; (23) constructive fraudulent transfer under section 548; and (24) constructive fraudulent transfer under section 544(b) and Texas law. Acis seeks to avoid the transfer and recover unspecified damages.

60. The Debtor submits that Claims 21-24 can and should be disallowed on the following bases:

a. As set forth above, Acis is not entitled to any recovery beyond that required to satisfy obligations under the Acis Plan. This issue can be summarily adjudicated at this time.

b. As set forth above, the Debtor was not the transferee and an insufficient factual basis is alleged for a conclusion that it was the entity for whose benefit the transfer was made. This issue can be summarily adjudicated at this time.

c. The claims are barred by the *Bangor Punta* doctrine, which can be summarily adjudicated at this time.

d. In addition, the Debtor objects to these claims on the following grounds, which are not subject to summary adjudication at this time:

(1) Acis cannot meet its burden of proving insolvency at the time of the transfer. Expert testimony will be required on this issue.

(2) The Debtor did not receive any benefit from the transfer and so is not the entity for whose benefit the transfer was made.

(3) Acis received reasonably equivalent value for the transfer.

(4) The transfer had a legitimate purpose and justification, and was not undertaken to hinder or defraud creditors.

(5) Acis has not alleged damages.

(6) The Debtor will have a claim in the Acis Case under Bankruptcy Code § 502(h) with respect to any property recovered on account of this claim.

K. Claim 25: Preferences

61. Acis alleges that within one year of the Petition Date, the Debtor received payments of totaling $16,113,790.14 from Acis on account of purported debt claims owed by Acis, comprised of approximately $7.3 million pursuant to the Shared Services Agreement and Sub-Advisory Agreement (the "Service Payments"), over $5 million pursuant to an October 2016 Participation Purchase Agreement (the "Participation Payments"), approximately $3.3 million in promissory note repayments (the "Note Payments"), and approximately $118,000 for miscellaneous expense reimbursements ("Expenses").

62. Acis's 25th claim for relief alleges that if such transfers are not otherwise recoverable, they may be avoided and recovered as preferences under Bankruptcy Code § 547 and Texas Business and Commerce Code §§ 24.006(b) and recovered under Bankruptcy Code § 550. Acis also alleges that the 2017-7 Equity Transfer and the Note Transfer, to the extent they satisfied legitimate obligations, are avoidable as preferences.

63. Setting aside the many statutory defenses to these claims set forth below, the fact that Acis creditors are being paid in full is fatal to the preference claim. Acis tries to sidestep one consequence by asserting that whether a creditor would receive more in liquidation is measured as of the petition date. But there are at least two other consequences. One, as discussed, is that Acis cannot recover damages for its own benefit, once creditors are paid. The other is that the Debtor would receive on account of any preference recovery a general unsecured claim under the Acis Plan under Bankruptcy Code § 502(h), which would offset any liability ***in full***. The Debtor objects to Claim 25 on those bases and others, as follows:

a. As set forth above, Acis is not entitled to any recovery under section 550(a) on the alleged preferences beyond that required to satisfy obligations under the Acis Plan. This issue can be summarily adjudicated at this time.

b. The claims are barred by the *Bangor Punta* doctrine, which can be summarily adjudicated at this time.

c. Acis has not alleged a factual basis for its allegation that it was insolvent at the time of the transfers. This is a pleading requirement.

d. Acis has not alleged the existence of antecedent debts, also a pleading requirement.

e. In addition, the Debtor objects to this claim on the following grounds, which are not subject to summary adjudication at this time:

(1) Acis cannot meet its burden of proving insolvency at the time of the transfers. Expert testimony will be required on this issue.

(2) Acis cannot meet its burden of proving that each transfer enabled the Debtor to receive more than it would have received in a hypothetical chapter 7 liquidation.

(3) The Debtor will have a claim in the Acis Case under Bankruptcy Code § 502(h) with respect to any property recovered on account of this claim.

(4) Within the meaning of section 547(c)(1), each alleged transfer was intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and was in fact a substantially contemporaneous exchange, including without limitation all Service Payments and Expenses.

(5) Within the meaning of section 547(c)(2), each alleged transfer was made in the ordinary course of business or financial affairs of the debtor and the transferee; or made according to ordinary business terms, including without

limitation all Service Payments, all payments under Participation Payments, all Note Payments, and all Expenses.

(6) Within the meaning of section 547(c)(4), each alleged transfer was made to or for the benefit of a creditor, to the extent that, after each such transfer, such creditor gave new value to or for the benefit of the debtor—(A) not secured by an otherwise unavoidable security interest; and (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor, including without limitation all Service Payments, Participation Payments, and Expenses.

(7) Participation Payments were received as a mere conduit.

(8) Any recovery on account of the alleged preferences would be offset by a corresponding general unsecured claim under the Acis Plan under Bankruptcy Code § 502(h).

L. Claim 26: Liability Under Section 550(a)

64. Acis alleges that the Debtor is the initial transferee within the meaning of Bankruptcy Code § 550(a) of all transfers sought to be avoided in Counts 5 – 8 and 25, and that it is the entity for whose benefit the transfers were made with respect to the transfers sought to be avoided in Counts 9-24.

a. Claim 26 can and should be disallowed in its entirety, on a summary basis. First, by operation of the statute, there is no liability under section 550 if no

transfers are avoided. Second, as discussed in Section E above, Acis concedes the Debtor was not the initial transferee of the transfers alleged in Claims 9 through 24, and it has not alleged facts sufficient to establish, if proven, that the Debtor was "the entity for whose benefit such transfer was made." Specifically, it has not identified any specific, direct benefit to the Debtor from the fraudulent transfers alleged in Claims 9-24. It only posits an indirect benefit from being part of the Highland corporate group, which is inadequate to establish that an entity is the entity for whose benefit a transfer was made. Finally, all claims other than Claims 9-20 are barred by the *Bangor Punta* doctrine.

M. Claim 27: Civil Conspiracy to Commit Fraud, Including Fraudulent Transfers

65. Acis alleges that the Debtor, Highland Advisor, Highland Management, and Highland Holdings formed a conspiracy to "engage in a series of fraudulent transfers and other fraudulent schemes, including the ALF PMA Transfer, the ALF Share Transfer, the Note Transfer, the 2017-7 Equity transfer, the 2017-7 Agreements transfer and the thwarted Universal/BVK Agreement transfer in order to denude Acis's assets and take over Acis LP's valuable business." Acis Claim, ¶ 246.

66. This claim fails as a matter of law, and can be adjudicated at this time. It is an impermissible end-around section 550's remedial provisions, and the inconvenient fact that the Debtor did not receive a cognizable benefit thereunder with respect to most of the fraudulent transfer claims. Section 550 provides the exclusive remedy for fraudulent transfers. Partly for that reason, there is simply no substantive legal basis for the sinister allegations of "unlawful, overt acts" to "take over Acis LP's valuable business" upon which the "conspiracy" is

predicated. As discussed above, the law is crystal clear that Acis's equity holders had no duty to Acis ***not*** to 'take over its valuable business' and nobody had a duty to stop them from doing so, as the Southern District of Texas court discussed thoroughly in *Tow v. Amegy Bank N.A.*, *supra*, 976 F. Supp. 2d at 906-07. They owned all of it! The only thing they could not do is transfer assets without adequate consideration if Acis were insolvent. For that, there are statutory remedies prescribed by sections 548 and 550.

67. That is why no claim for conspiracy to commit an actual or constructive fraudulent transfer (or for "aiding and abetting") exists under Texas or federal law. *Tow v. Bulmahn*, No. 15-3141, 2016 U.S. Dist. LEXIS 57396, at *91 (E.D. La. Apr. 29, 2016). *See Mack v. Newton*, 737 F.2d 1343, 1357 (5th Cir. 1984) ("[T]he general rule under the Bankruptcy Act is that one who did not actually receive any of the property fraudulently transferred (or any part of a 'preference') will not be liable for its value, even though he may have participated or conspired in the making of the fraudulent transfer (or preference)."); *Schlossberg v. Abell (In re Abell)*, 549 B.R. 631, 667 (Bankr. D. Md. 2016). A party may not be liable for more than it actually received. *D.A.N. Joint Venture III, L.P. v. Touris*, No. 18-cv-349, 2020 U.S. Dist. LEXIS 51407, at *25-26 (N.D. Ill. Mar. 25, 2020) ("Numerous courts have held that the bankruptcy court cannot invoke state law remedies to circumvent or undermine the remedy legislated by Congress for the avoidance of a fraudulent transfer . . . . [T]he trustee's remedy for an avoided transfer [is] provided for in § 550, and that provision only allows a trustee to recover up to the amount of the transfer.") (citations omitted). Allowing a trustee to recover more than the amount of the transfer would "lead to a result that expands the remedies [for a fraudulent

transfer] beyond §550." *Sherman v. FSC Realty LLC (In re Brentwood-Lexford Partners, LLC*), 292 B.R. 255, 275 (Bankr. N.D. Tex. 2003).

68. This Court recognized but distinguished *Mack* in *Milbank v. Holmes (In re TOCFHBI, Inc.)*, 413 B.R. 523, 535 (Bankr. N.D. Tex. 2009):

> [W]hile it is perfectly true that "the general rule under [the Bankruptcy Code or the old Act] is that one who did not actually receive any of the property fraudulently transferred (or any part of a 'preference') will not be liable for its value, even though he may have participated or conspired in the making of the fraudulent transfer (or preference)," (*Mack v. Newton,* 737 F.2d at 1357), the Chapter 7 Trustee, in this case, is not moving under the fraudulent transfer statute and arguing something amazingly similar such as "conversion" and "conspiracy" regarding the same acts--and, in the process, joining Defendants who would not normally have liability under the relevant fraudulent transfer statutes.

Id. at 535-36. "). The Court recognized that "liability [under most states' uniform fraudulent transfer acts] cannot be imposed on non-transferees under aiding and abetting or conspiracy theories[.]" *Id*. (citation omitted). Accordingly, the claim should be disallowed.

69. Further, this claim is barred by the *in pari delicto* defense, as discussed below in the discussion of the Thirtieth Claim for Breach of Fiduciary Duty. Acis was by its own allegations an instrumentality of Dondero, who allegedly used it to perpetrate the "scheme" characterized in the Acis Complaint. The trustee was, and Reorganized Acis is, subject to all defenses that existed against Acis. Any claim by Acis against its alleged co-conspirators would be barred by *in pari delicto*, as Acis was at least equally culpable in all of the conduct it alleges.

70. Finally, the claim is barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry, the acts occurred prior to Mr. Terry's acquisition of

the company, and this claim was not asserted in the Acis trustee's counterclaim that was pending when Mr. Terry acquired the company.

N. Claim 28: Tortious Interference with the Universal/BVK Agreement

71. Acis alleges that the Debtor tortiously interfered with its rights by seeking to replace it as manager under the Agreement for the Outsourcing of Asset Management between Acis LP and Universal-Investment-Luxembourg S.A. by which Acis provided sub-advisory services for a German fund (the "Universal/BVK agreement"), before and after the Debtor's sub-advisory services were terminated on August 1, 2018.

72. Claim 28 can and should be summarily disallowed, as there is no factual dispute on several critical issues: (1) this was an at-will contract; (2) the Debtor had no duty not to compete; and (3) no damages were sustained, as the contract was not terminated and all attorneys' fees have been paid, in fact, with money diverted from the Debtor.

73. Under Texas law, a claim for tortious interference with contract has four elements: (1) a contract subject to the alleged interference exists; (2) the alleged act of interference was willful and intentional; (3) the willful and intentional act proximately caused damage; and (4) actual damage or loss occurred. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 939 (Tex.1991). Those requirements are not met on the undisputed facts.

74. The Universal/BVK agreement was an at-will contract. "Ordinarily, merely inducing a contract obligor to do what it has a right to do is not actionable interference." *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997). A defendant cannot tortiously interfere with a contract that permits the non-plaintiff contracting party to terminate

the agreement, where the defendant's actions constitute justifiable competition. *See, e.g., C.E. Servs. Inc. v. Control Data Corp*., 759 F.2d 1241, 1248 (5th Cir. 1985); *West Tex. Gas v. 297 Gas Co*., 864 S.W.2d 681, 686 (Tex. App. 1993) (competitor had legal right to persuade company to exercise its right to terminate at-will natural gas sale/purchase agreement with plaintiff). "[A] legal justification or excuse, which is treated as a type of privilege, is an affirmative defense to a claim of tortious interference…. Interference with a contractual relationship is privileged where it results from the bona fide exercise of a party's own rights."; "North Texas had the legal right to persuade or attempt to persuade 297 to exercise its right to terminate the 1988 agreement and to contract with it." *Id*.

75. Once again, until displaced, Acis's owners had every right to do as they wished with the Universal/BVK Agreement, subject to creditor rights but not subject to any duty *to Acis* to refrain from doing so, and the Debtor had no duty to say otherwise. After the Debtor was terminated, it had a right as a competitor to attempt to win back its business. The contention that it should have stopped after the Acis bankruptcy petition is the subject of a different claim. Further, "[t]he alleged interference generally must have induced a breach of the contract to be actionable." *Official Brands, Inc. v. Roc Nation Sports, LLC*, 2015 U.S. Dist. LEXIS 167320, at *7 (N.D. Tex. Dec. 15, 2015). Here, that is not even alleged to have occurred.

76. Further, no damages were sustained. The contract was not terminated, and to the extent the alleged damages are administrative expenses incurred in the Acis case, not only have they been paid, they have been paid by the Debtor by virtue of the earnings derived from the enjoined putative transfer of the ALF PMA.

77. Finally, the claim is barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry and all acts occurred prior to Mr. Terry's acquisition of the company.

78. Accordingly, no claim for tortious interference has been stated, and the claim is barred in any event, and so it should be disallowed.

O. Claim 29: Breach of the Sub-Advisory Agreement and Shared Services Agreement

79. Acis claims that the Debtor breached these agreements by failing to purchase and attempting only to sell loans for the CLOs, in order to liquidate Acis for the benefit of the Debtor and the detriment of Acis. This claim should be dismissed.

80. The Debtor met its standard of care but, moreover, there is a more fundamental fallacy that is instantly fatal to this claim. As discussed, here and throughout the Acis Claim, Acis sets up a fictional jurisprudential world in which it, by virtue of its existence as a legal entity, had interests that contracting parties or managers or professionals were required to identify and protect, rather than acting as instructed by Acis's owners. It did not and they did not. The Debtor was entitled to take directions from Acis's owners. Put differently, there is no allegation whatsoever that Acis did not want the Debtor to do exactly what it did. *Ipso facto*, the Debtor did not breach the contract. The claim must be dismissed.

81. Finally, the claim is barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry and all acts occurred prior to Mr. Terry's acquisition of the company.

P. Claim 30: Breach of Fiduciary Duty

82. Acis claims that the Debtor owed it a fiduciary duty pursuant to the Sub-Advisory Agreement as its investment adviser, and that it breached that fiduciary duty by acting in a manner detrimental to Acis by increasing its fees under the Sub-Advisory Agreement, charging over-market rates in excess of the compensation limits of the Acis LPA, and being the "ringleader" and ultimate beneficiary of schemes to render Acis judgment-proof by transferring the ALF PMA, the ALF Shares, the Note, the 2017-7 Equity and the 2017-7 Agreements. Acis makes no damage allegations but seeks punitive damages.

83. This claim can and should be summarily disallowed. ***First, the duty to Acis was contractual, not fiduciary***. The Debtor as portfolio manager had fiduciary duties ***to investors*** in the CLOs, but its duties to Acis were governed by the Shared Services Agreement which, construed with the Sub-Advisory Agreement, provides that the Debtor was an independent contractor with only a contractual obligation to act with reasonable care and no other obligations or duties.

84. ***Second, regardless***, even if the Debtor had a fiduciary duty to Acis, it could not and did not violate that fiduciary duty by following directions from Acis's sole owners. As discussed in the authorities and analysis above, such a claim is a legal impossibility. At all relevant times, Acis was by its allegations controlled and principally owned by Dondero and Okada, along with all of the other Highland related entities. It is hornbook law that sole owners do not have a fiduciary duty to their company; they could transfer away its assets without violating any duty to their company. How, then, would advisors and employees and

professionals go about protecting the interests of an entity such as Acis against the "ravages" of an owner such as Dondero, who had no such duty? The owners had a right, subject to fraudulent transfer laws, to direct Acis and transfer assets as desired. Acis did not, simply by virtue of its existence alone, have interests distinct from its owners' interests that its fiduciaries were obligated to somehow identify and protect against the designs of its sole owners. No duty *to Acis* could be or was breached by following its owners' directions.

85. ***Third, any fiduciary duty claim is barred by the in pari delicto defense***:

> The equitable defense of *in pari delicto*, which means 'in equal fault,' is based on the common law notion that a plaintiff's recovery may be barred by his own wrongful conduct." *Howard v. Fidelity and Deposit Co. of Maryland, (In re Royale Airlines, Inc.)*, 98 F.3d 852, 855 (5th Cir. 1996). "Two fundamental premises underlie this defense: (1) that courts should not lend their good offices to mediating disputes among wrongdoers; and (2) that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." *Murray v. Royal Alliance Assocs*., 375 B.R. 208, 213 (M.D. La. 2007).

Milbank v. Holmes (In re TOCFHBI, Inc.), 413 B.R. 523, 536-37 (Bankr. N.D. Tex. 2009). While this Court denied summary judgment on the defense in *Milbank* (*id.* at 537), the defense can be applied on the face of the pleadings when it is apparent that it applies. *Brickley v. ScanTech Identification Beams Sys., LLC*, 566 B.R. 815, 842-43 (W.D. Tex. 2017) ("In sum, because applicability of the *in pari delicto* defense to parts of the trustee's breach of fiduciary duty claim is apparent on the face of the Complaint, the Court will dismiss … the claims that the Stolzar defendants breached their fiduciary duties by assisting Barra and Vitale in their efforts to fraudulently obtain shareholder capital and debt financing, by counseling and providing legal

services assisting Barra, Vitale, and Shaw in the usurpation of corporate assets and corporate opportunities, and by aiding in the execution of the fraudulent loan agreement.").

86. Here, it is apparent from the face of the Acis Claim that to the extent that the "scheme" of which Acis complains was orchestrated by Dondero in violation of fiduciary duties, Acis had every bit as much culpability as the Debtor or any of the other commonly controlled entities; after all, according to Acis, the same person was making the decisions for all of them. Acis is simply assuming the Court will not hold the *delicto* of "old Acis" against Reorganized Acis.

87. While the assertion of *in pari delicto* against a trustee or reorganized debtor is not a settled issue in the Fifth Circuit, it is in most others. In *Milbank*, in 2009, this Court stated: "Some courts have found that the defense may be asserted against a bankruptcy trustee, as he stands in the shoes of a debtor who may have, through its officers and directors, perpetrated bad acts. The Fifth Circuit has not addressed this issue." The Court determined that it should "consider how the facts and equities of the individual case interact with the policy in pari delicto was designed to serve," which it found presented factual issues that could not be resolved on summary judgment. *Milbank*, 413 B.R. at 537 (internal citations omitted).

88. Subsequently, however, in 2012, in refusing to apply *in pari delicto* to a receiver, the Fifth Circuit specified that cases under the Bankruptcy Code were distinguishable because of federal law (Bankruptcy Code § 541) subjecting a trustee to whatever defenses existed against the debtor as of the petition date.

> These cases, however, are plainly distinguishable because they rely upon Section 541(a) of the Bankruptcy Code, which limits the debtor estate to interests of the debtor "as of the commencement of the case." 11 U.S.C. § 541(a)(1); *see, e.g., Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1150 (11th Cir. 2006) ("If a claim of [debtor] would have been subject to the defense of in pari delicto at the commencement of the bankruptcy, then the same claim, when asserted by the trustee, is subject to the same affirmative defense.") (internal quotation marks and citations omitted); *Official Comm. of Unsecured Creditors of R.F. Lafferty & Co., v. R.F. Lafferty & Co., Inc*., 267 F.3d 340, 356 (3d Cir. 2001) ("[T]he application of the in pari delicto doctrine is affected by the rules governing bankruptcies. . . . [T]he explicit language of section 541 directs courts to evaluate defenses as they existed at the commencement of the bankruptcy."); *Matter of Pernie Bailey Drilling Co., Inc*., 993 F.2d 67, 70 (5th Cir. 1993) (noting that bankruptcy trustee stood in pari delicto); *see also In re Hedged-Invs. Assocs., Inc*., 84 F.3d 1281, 1285 (10th Cir. 1996) ("Though the Seventh Circuit's reasoning in Scholes enjoys a certain appeal, both from doctrinal and public policy perspectives, we cannot adopt it in this case. Put most simply, Mr. Sender is a bankruptcy trustee acting under 11 U.S.C. § 541, and bankruptcy law, apparently unlike the law of receivership, expressly prohibits [application of Scholes]."). We therefore are not persuaded by Wells Fargo's analogy to bankruptcy trustees.

Jones v. Wells Fargo Bank, N.A., 666 F.3d 955, 967-68 (5th Cir. 2012).

89. So although the Fifth Circuit has not addressed the issue directly, courts have predicted it will follow the majority rule, and ruled accordingly, as in this 2019 Western District of Texas decision:

> It is an open question in the Fifth Circuit whether *in pari delicto* can be asserted as a defense to claims made by a trustee in a bankruptcy case. *In re Today's Destiny, Inc*., 888 B.R. 737, 747 (Bankr. S.D. Tex. 2008). The majority of sister Circuits do apply the *in pari delicto defense* to claims made by trustees, however, and this Court has no reason to believe that the Fifth Circuit would depart from that majority. *See, e.g., Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1151 (11th Cir. 2006) ("If a claim . . . would have been subject to the defense of in pari delicto at the commencement of the bankruptcy, then the same

> claim, when asserted by the trustee, is subject to the same affirmative defense.") (*citing Grassmueck v. Am. Shorthorn Ass'n*., 402 F.3d 833, 837 (8th Cir. 2005); *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co*., 267 F.3d 340, 356-57 (3rd Cir. 2001); *Terlecky v. Hurd (In re Dublin Sec. Inc.*), 133 F.3d 377, 381 (6th Cir. 1997); *Sender v. Buchanan (In re Hedged— [*17] Inv. Assocs*.), 84 F.3d 1281, 1285 (10th Cir. 1996); *Official Comm. of Unsecured Creditors of Color Tile v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158-66 (2nd Cir. 2003)). Accordingly, the Court will consider the in pari delicto defense raised by Broadway.

Osherow v. York, No. 5:17-CV-483-DAE, 2019 U.S. Dist. LEXIS 200382, at *16-17 (W.D. Tex. Aug. 5, 2019).

90. Even if, as in *Milbank*, the Court were to consider the particular facts and equities of this case, as in *Milbank*, *supra*, there should be only one possible conclusion on the facts of this case, and there are no additional facts that could change it: the equities favor the Debtor's creditors over a windfall to Mr. Terry, who paid $1 million presumably on the basis of expected earnings and not tens of millions of dollars of litigation recoveries (or even if the latter, Acis (Mr. Terry) is still not entitled to a speculator's ransom at the expense of innocent creditors). No amount of factual development can or will change that conclusion.

91. Finally, no duty can be bootstrapped from the rights of Acis's (former) creditors, who will not only be paid in full but who had no such right: ***under Delaware law, creditors of a limited partnership cannot sue third parties for breach of fiduciary duty, even derivatively, nor can a trustee sue for them***. "The claim for breach of fiduciary duties owed to the creditors fails because the Trustee does not allege that the creditors are assignees or members of the Debtors' LLCs. The creditors of the Debtors' LLC thus lack standing to sue the LLC or its members and directors for breaches of fiduciary duties. ***The Trustee does not have standing to***

sue on behalf of the creditors who themselves have no standing." *Beskrone v. OpenGate Capital Grp. (In re Pennysaver USA Publ'g, LLC)*, 587 B.R. 445, 467 (Bankr. D. Del. 2018) (emphasis added). The analysis and result is the same for limited partnerships. *Gavin/Solmonese LLC v. Citadel Energy Partners, LLC (In re Citadel Watford City Disposal Partners, L.P.),* 603 B.R. 897, 905 (Bankr. D. Del. 2019) ("Given the similarity of the relevant statutory language of the Delaware Limited Liability Company Act to that of the Delaware LP Act, the result here should be no different for limited partnerships.").

92. Finally, the claim is barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry and all acts occurred prior to Mr. Terry's acquisition of the company.

Q. Claim 31: Punitive Damages

93. Acis seeks punitive damages to the extent permitted by law. But, to start, there is no right to recover punitive damages under either federal or state fraudulent transfer laws:

> Section 550 does not provide for the recovery of exemplary damages. The trustee has recovered under Texas fraudulent conveyance laws. Under Texas law, exemplary damages are available if the plaintiff has in fact sustained actual loss or injury. *Mack v. Newton,* 737 F.2d 1343, 1367 (5th Cir. 1984). However, as concluded above, the court cannot invoke state law remedies to circumvent or undermine the specific remedy legislated by Congress for the avoidance of a fraudulent transfer.

Sherman v. FSC Realty LLC (In re Brentwood-Lexford Partners, LLC), 292 B.R. 255, 275 (Bankr. N.D. Tex. 2003). *See also Schlossberg v. Abell (In re Abell)*, 549 B.R. 631, 667 (Bankr.

D. Md. 2016); *Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair Inc.*, 419 B.R. 749, 760 (M.D. Tenn. 2009); *In re Lexington Oil and Gas Ltd., Co.*, 423 B.R. 353, 376 (Bankr. E.D. Okla. 2010); *Tronox Inc. v. Anadarko Petroleum Corp. (In re Tronox Inc.)*, 429 B.R. 73, 111 (Bankr. S.D.N.Y. 2010) ("Persuasive authority holds that § 550 bars punitive damages notwithstanding their possible availability under state law.").

94. As set forth herein, Acis's state law claims can and should be summarily disallowed, which ends any issue concerning punitive damages.

95. Texas law permits punitive damages only if the plaintiff has in fact sustained actual loss on its substantive counts. *See, e.g., Sherman*, 292 B.R. at 255 (plaintiff could not recover exemplary damages since he did not recover any judgment for breach of fiduciary duty or other applicable cause of action).[14] The claimant must prove by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud[15]; (2) malice[16]; or (3) gross negligence.[17] Tex. Civ. Prac. & Rem. Code § 41.003(a). Acis cannot sustain this burden, nor would such an award be supported under the relevant factors.[18]

---

[14] Texas law caps punitive damages at the greater of (1) two times economic damages plus an amount equal to noncompensatory damages found by a jury not in excess of $750,000, or (2) $200,000. Tex. Civ. Prac. & Rem. Code § 41.008(b).

[15] Constructive fraud does not count. Tex. Civ. Prac. & Rem. Code § 41.001(6).

[16] "Malice" means "a specific intent by the defendant to cause substantial injury or harm to the claimant." Tex. Civ. Prac. & Rem. Code § 41.001(7).

[17] "Gross negligence" means "an act or omission: (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others." Tex. Civ. Prac. & Rem. Code § 41.001(11).

[18] "The Court weighs the following six factors in determining the reasonableness of an award: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which such conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant." *In re Galaz,* 2015 Bankr. LEXIS 229, at *30 (Bankr. W.D. Tex. Jan. 23, 2015) (citing Tex. Civ. Prac. & Rem. Code § 41.011(a)).

96. Finally, any claim for punitive damages is barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry and was not asserted prior to Mr. Terry's acquisition of the company.

R. Claim 32: Alter Ego Liability

97. Acis does not adequately allege a claim for alter ego, even if it was a "claim," which it is not; it is only a means of imposing liability for an underlying cause of action. *NMRO Holdings, LLC v. Williams*, 2017 Tex. App. LEXIS 9939, *6 (Tex. App. Oct. 24, 2017). Its allegations of common control by Mr. Dondero are insufficient as a matter of pleading and substantively.

98. Acis alleges that the Debtor, Highland Funding, Highland Adviser, Highland Management, and Highland Holdings (the "Alter Egos") are all controlled by Mr. Dondero, and "[e]ach of the Alter Egos should be held liable for any damages awarded under any Count in this Second Amended Complaint, as each is the alter ego of the others." It also requests that the ALF PMA Transfer, the ALF Share Transfer, the Note Transfer, and the transfer of the 2017-7 Equity and the 2017-7 Agreements be "collapsed" and treated as a scheme by which the Debtor would take over Acis's business. Although it is unclear, Acis appears to also assert under this rubric a claim for unjust enrichment, and requests that "[e]ach of the Highlands, and in particular Highland Capital and Highland Funding, benefitted from the ALF PMA Transfer, the ALF Share Transfer, the Note Transfer, and the transfer of the 2017-7 Equity and the 2017-7 Agreements even if they were not the direct transferee. Each of the Highlands should

be held liable for benefits unjustly received and make restitution to the Debtors and their estates for those benefits." Acis Claim ¶ 280.

99. Texas law applies the alter ego rules of the state of incorporation or formation. *See, e.g., In re The Heritage Org., LLC*, 413 B.R. 438, 510 (Bankr. N.D. Tex. 2009); *The Richards Group, Inc. v. Brock*, 2008 U.S. Dist. LEXIS 55139 (N.D. Tex. July 18, 2008). The analyses are often similar. *See, e.g., Sell v. Universal Surveillance Sys., LLC*, 2017 U.S. Dist. LEXIS 219898, at *5 (W.D. Tex. July 6, 2017) (observing that the analyses undertaken by Texas courts, federal courts, and Delaware courts are similar and focus on whether the defendant abused the corporate form).

100. What Acis is essentially alleging is "single enterprise" liability based on common control by Mr. Dondero. Delaware has never recognized the "single business enterprise" theory of alter ego liability, and it was rejected under Texas law by the Texas Supreme Court in *SSP Partners v. Gladstone Invs. Corp.*, 275 S.W.3d 444, 452-54 (Tex. 2008).

101. *SSP Partners* is instructive in rejecting allegations of common control as sufficient to support alter ego liability without the use or abuse of the corporate form to perpetrate a wrong.

> We disregard the corporate fiction, even though corporate formalities have been observed and corporate and individual property have been kept separately, when the corporate form has been used as part of a basically unfair device to achieve an inequitable result. Specifically, we disregard the corporate fiction:
>
> > (1) when the fiction is used as a means of perpetrating fraud;

> (2) where a corporation is organized and operated as a mere tool or business conduit of another corporation;
>
> (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation;
>
> (4) where the corporate fiction is employed to achieve or perpetrate monopoly;
>
> (5) where the corporate fiction is used to circumvent a statute; and
>
> (6) where the corporate fiction is relied upon as a protection of crime or to justify wrong.
>
> Each example involved an element of abuse of the corporate structure. . .
>
> Creation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace. We have never held corporations liable for each other's obligations merely because of centralized control, mutual purposes, and shared finances. There must also be evidence of abuse.

Id. That is not what Acis does or can allege, *i.e*., even if, *arguendo*, it could establish that assets were wrongfully transferred, the "wrong" did not involve any abuse of the *form* of the entities involved. They are simply a family of commonly controlled entities. As the Fifth Circuit explained in *Pan Eastern Exploration Co. v. Hufo Oils*, 855 F.2d 1106 (5th Cir. 1988):

> "The focus of alter ego proper is on the legal adequacy of the corporation's existence, and the relationship between the corporation and its controlling corporation or individual. Many wholly-owned subsidiary and closely-held corporations are not factually distinct from their owners; many are in fact controlled and operated in close concert with the interests of the owners, and do not have a distinct factual existence-- separate employees, separate offices, separate properties, etc. That is perfectly natural and proper. *See, e.g., Edwards Co. v. Monogram Industries*, 730 F.2d 977 (5th Cir. 1984) (en banc) ('shell' subsidiary was formally distinct and creditor was not misled; corporate disregard under Texas law was therefore improper). The problem arises when such

> a corporation is not treated as *legally* distinct, when, in other words, the owners neglect to maintain the *formal* existence of the corporation as required by law."

Id. at 1131.

102. Indeed, the absence of a wrong by this Debtor involving the corporate form led the Southern District of New York district court to reject alter ego liability in *Highland CDO Opportunity Master Fund, L.P. v. Citibank, N.A.*, 270 F. Supp. 3d 716 (S.D.N.Y. 2017). Citibank had identified three acts that it asserted constituted fraudulent or wrongful conduct, for which it contended the Debtor had alter ego liability: (i) the Debtor stripped cash and assets from Highland CDO Opportunity Master Fund, L.P. ("CDO Fund") that would have otherwise been available to satisfy the obligations to Citibank; (ii) the Debtor diverted cash distributions on certain notes (the "HFP Notes") that would otherwise have been available to CDO Fund to meet its obligations to Citibank; and (iii) the Debtor fraudulently misrepresented the value of the HFP Notes that CDO Fund pledged to Citibank as collateral. *Id*. at 729-33. The district court held that the first prong of New York's alter ego test – the Debtor's control and domination of its affiliates – was satisfied, but that Citibank failed to demonstrate the second prong – a "wrong or fraud" for veil piercing purposes – and so dismissed the alter ego claims seeking to hold the Debtor liable for CDO Fund's obligations. *Id*. at 729-33.

103. Here, the allegations are insufficient even as a matter of pleading. *See Capmark Fin. Grp. Inc. v. Goldman Sachs Credit L.P.*, 491 B.R. 335, 349 (S.D.N.Y. 2013). The pleading here is particularly inadequate because, absent "single enterprise" liability (which is unavailable), Acis would actually need to pierce the veil of each entity between the Debtor and

any entity found to bear liability. *Id*. ("[Plaintiff] fails to present facts to adequately allege the "double-pierce" required to lump together two "sister" subsidiaries, the Goldman Lenders and the PIA Funds, even under the liberal notice pleading standard."). *See Outokumpu Eng'g Enters., Inc v. Kvaerner Enviropower, Inc*., 685 A.2d 724, 729 (Del. Super. 1996) (stating that in order to disregard corporate formalities separating "sister" subsidiaries, a plaintiff must first pierce the veil separating one subsidiary from its corporate parent, and then surmount "another barrier" by piercing the veil separating the corporate parent from the second subsidiary).

104. Any claim for punitive damages is also barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry and was not asserted prior to Mr. Terry's acquisition of the company.

105. Finally, to the extent that Acis is alleging in this action that Dondero is liable as an alter ego for any liability of the Debtor herein (as it does explicitly in its other newly commenced lawsuits), Acis is violating the automatic stay in this case, as any such rights is property of the bankruptcy estate.

S. Claim 33: Willful Violation of the Automatic Stay

106. Acis alleges that the Debtor and Highland Funding violated the Acis automatic stay by sending the Acis trustee Optional Redemption Notices requesting that the trustee effectuate optional redemptions, and by "demanding" that the trustee take actions to effectuate the optional redemption by the next day. Acis seeks damages, attorneys' fees and costs, and punitive damages.

107. The claim should be disallowed. The Acis trustee declined to effectuate the redemptions. HCLOF, the equity holder of the CLO entities, took the position that the automatic stay was inapplicable, and the Debtor did not believe that it applied. In addition, the claim is untimely and/or has been waived.

108. The claim is also barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry and the acts occurred prior to Mr. Terry's acquisition of the company.

T. Claim 34: Payment of Attorneys' Fees and Costs, Including all Allowed Professionals' Fees and Expenses in the Bankruptcy Cases

109. Acis requests that the Court award attorneys' fees in the adversary proceeding under Texas Business and Commerce Code § 24.013, Civil Practice and Remedies Code § 38.001, TUFTA, and all fees in the entire Acis Case from the Debtor based on the Debtor's alleged breach of fiduciary duty. There is no basis in fact or law for such an award, and the Debtor reserves all defenses thereto.

110. Furthermore, the Debtor and/or affiliates *already* bore the fees of which "reimbursement" is sought: as they were paid by income derived from transferred assets that as a result of the injunction were utilized for the benefit of Acis rather than by the transferees.

111. Finally, the claim is also barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry and the acts occurred prior to Mr. Terry's acquisition of the company.

U. Reservation of Rights

112. The Debtor reserves its right to supplement or modify this Objection and to assert such further objections, defenses or arguments as may later become available or apparent.

WHEREFORE, the Debtor respectfully requests that the Acis Claim be disallowed in its entirety, and such other and further relief as this Court may deem just and proper.

Dated: June 23, 2020

PACHULSKI STANG ZIEHL & JONES LLP

/s/ Jeffrey N. Pomerantz

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No.143717)
(*admitted pro hac vice*)
Ira D. Kharasch (CA Bar No. 109084)
(*admitted pro hac vice*)
Gregory V. Demo (NY Bar 5371992)
(*admitted pro hac vice*)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
E-mail: jpomerantz@pszjlaw.com
ikharasch@pszjlaw.com
gdemo@pszjlaw.com

-and-

HAYWARD & ASSOCIATES PLLC
Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachary Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231

Tel: (972) 755-7100
Fax: (972) 755-7110

Attorneys for the Debtor and
Debtor in Possession

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been served electronically via the Court' s CM/ECF system upon all parties appearing on the attached service list.

/s/ Jeffrey N. Pomerantz
Jeffrey N. Pomerantz

In re Highland Capital Management, L.P.
Case No. 19-34054-sgj11

ECF Recipients:

- Zachery Z. Annable zannable@haywardfirm.com
- Michael I. Baird baird.michael@pbgc.gov, efile@pbgc.gov
- Sean M. Beach bankfilings@ycst.com, sbeach@ycst.com
- Matthew A. Clemente mclemente@sidley.com, matthew-clemente-8764@ecf.pacerpro.com;efilingnotice@sidley.com
- David Grant Crooks dcrooks@foxrothschild.com, etaylor@foxrothschild.com,jsagui@foxrothschild.com,plabov@foxrothschild.com,jmanfrey@foxrothschild.com;jdistanislao@foxrothschild.com
- Bojan Guzina bguzina@sidley.com
- Melissa S. Hayward MHayward@HaywardFirm.com, mholmes@HaywardFirm.com
- Michael Scott Held mheld@jw.com, lcrumble@jw.com
- Juliana Hoffman jhoffman@sidley.com, txefilingnotice@sidley.com;julianna-hoffman-8287@ecf.pacerpro.com
- John J. Kane jkane@krcl.com, ecf@krcl.com;jkane@ecf.courtdrive.com
- Jeffrey Kurtzman kurtzman@kurtzmansteady.com
- Phillip L. Lamberson plamberson@winstead.com
- Paige Holden Montgomery pmontgomery@sidley.com
- Edmon L. Morton emorton@ycst.com
- Rakhee V. Patel rpatel@winstead.com, lbayliss@winstead.com;achiarello@winstead.com
- Charles Martin Persons cpersons@sidley.com
- Mark A. Platt mplatt@fbtlaw.com, aortiz@fbtlaw.com
- Linda D. Reece lreece@pbfcm.com
- Penny Packard Reid preid@sidley.com, txefilingnotice@sidley.com;penny-reid-4098@ecf.pacerpro.com;ncade@sidley.com
- Brian Patrick Shaw shaw@roggedunngroup.com, cashion@roggedunngroup.com
- Laurie A. Spindler Laurie.Spindler@lgbs.com, Dora.Casiano-Perez@lgbs.com
- United States Trustee ustpregion06.da.ecf@usdoj.gov
- Jaclyn C. Weissgerber bankfilings@ycst.com, jweissgerber@ycst.com
- Elizabeth Weller dallas.bankruptcy@publicans.com, dora.casiano-perez@lgbs.com;Melissa.palo@lgbs.com

EXHIBIT 3

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
Joshua N. Eppich
State Bar I.D. No. 24050567
Bryan C. Assink
State Bar I.D. No. 24089009
BONDS ELLIS EPPICH SCHAFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900 telephone
(817) 405-6902 facsimile

ATTORNEYS FOR JAMES DONDERO

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

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**Case No. 19-34054**
	§	
	§	
Debtor.	§	**Chapter 11**

JAMES DONDERO'S (I) OBJECTION TO PROOF OF CLAIM OF ACIS CAPITAL MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC; AND (II) JOINDER IN SUPPORT OF HIGHLAND CAPITAL MANAGEMENT, L.P.'S OBJECTION TO PROOF OF CLAIM OF ACIS CAPITAL MANAGEMENT L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC
[Relates to Claim No. 3 and Docket No. 771]

James Dondero ("Dondero"), a creditor, indirect equity security holder, and party in interest in the above-captioned bankruptcy case, hereby files this *(I) Objection to Proof of Claim of Acis Capital Management, L.P. and Acis Capital Management GP, LLC; and (II) Joinder in Support of Highland Capital Management, L.P.'s Objection to Proof of Claim of Acis Capital Management, L.P. and Acis Capital Management GP, LLC* and hereby objects to Proof of Claim No. 3 (the "Acis Claim")[1] filed by claimants Acis Capital Management, L.P. and Acis Capital

[1] The Acis Claim was assigned Claim No. 23 by the Debtor's claims' agent.

Management GP, LLC (collectively, "Acis") in the above-captioned chapter 11 case of Highland Capital Management, L.P. (the "Debtor"). In support thereof, Dondero respectfully represents as follows:

I. BACKGROUND

1. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Delaware Court").

2. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in the Delaware Court.

3. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's Bankruptcy Case to this Court [Docket No. 186].

4. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the "Settlement Order").

5. The Settlement Order approved, among other things, certain operating and reporting protocols [Docket Nos. 354, 466].

6. In connection with the Settlement Order, an independent board of directors was appointed on January 9, 2020, at the Debtor's general partner, Strand Advisors, Inc. (the "Independent Board").

7. The Acis Claim incorporates the complaint from litigation commenced by the trustee of the former estate in the Acis bankruptcy case (the "Acis Case") at a time when Acis had

unpaid creditors (the "Acis Complaint")[2].

8. On June 23, 2020, the Debtor filed its *Objection to Proof of Claim of Acis Capital Management L.P. and Acis Capital Management GP, LLC* [Docket No. 771] (the "Highland Objection"). The Highland Objection raises many issues that will potentially be litigated in connection with the Acis Complaint. The Highland Objection is set for hearing on August 6, 2020 at 9:30 a.m.

II. RELIEF REQUESTED

9. For the reasons set forth in the Highland Objection, Dondero believes that the Acis Claim should be disallowed in its entirety and therefore files this objection to the Acis Claim and joinder in support of the Highland Objection.

10. Terry, whose claim has been, or soon will be, satisfied in full under Acis's plan, should not be granted a $75 million (or more) windfall at the expense of this Debtor's creditors and its estate. As detailed at length in the Highland Objection, the Acis Claim attempts to circumvent established legal principles to obtain a recovery—exponentially larger than Acis's debt—not for the Acis estate (it no longer exists), not for Acis's creditors (they have all been paid or will be soon satisfied), but for Terry himself. Each of Acis's causes of action fails for a variety of independent reasons, many of which stem from the fact that Terry is ultimately seeking a personal recovery. The Court should see the Acis Claim for what it is—a vexatious attempt to obtain an undue personal windfall at the expense of the Debtor, its estate, and its creditors and equity owners. The Court should disallow the Acis Claim in full.

[2] Specifically, the Acis Claim incorporates the *Second Amended Complaint (Including Claim Objections and Objections to Administrative Expense Claims)* filed in Adversary No. 18-03078 in the Acis Case.

III. STANDING

11. Dondero, as a creditor, indirect equity security holder, and party in interest, has standing to file this claim objection and joinder pursuant to sections 502(a)-(b) and 1109(b) of the Bankruptcy Code and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

12. Section 502(a) of the Bankruptcy Code provides that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects." 11 U.S.C. § 502(a).

13. In the event an objection is filed by a party in interest, section 502(b) provides that the court, after notice and hearing, shall determine the allowance of such claim. 11 U.S.C. § 502(b).

14. While neither sections 101, 502, 1109 nor any other section in the Bankruptcy Code specifically define the term "party in interest," section 1109(b) provides a non-exclusive list of constituents that fall within the meaning of "party in interest" for the purposes of a chapter 11 proceeding. *See Kipp Flores Architects, L.L.C. v. Mid-Continent Cas. Co.*, 852 F.3d 405, 413 (5th Cir. 2017) ("The Bankruptcy Code does not provide an exclusive definition of a party in interest, but the Code broadly includes debtors, creditors, trustees, indenture trustees, and equity security holders among the parties entitled, *e.g.*, to notice of proceedings in the case.").

15. Specifically, section 1109(b) provides that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee may raise and may appear and be heard on any issue in a case under [Chapter 11]." 11 U.S.C. § 1109(b). This section "has been construed to create a broad right of participation in Chapter 11 cases." *In re Global Industrial Technologies,*

Inc., 645 F.3d 201, 210 (3d Cir. 2011) (quoting *In re Combustion Engineering, Inc.*, 391 F.3d 190, 214 n.21 (3d Cir. 2004)).

16. Parties in interest for the purpose of claims objections "include not only the debtor, but anyone who has a legally protected interest that could be affected by a bankruptcy proceeding." *Adair v. Sherman*, 230 F.3d 890, 894 n. 3 (7th Cir. 2000). "Any 'party in interest' may object to a proof of claim and request the court to determine its correct amount." *Kipp Flores Architects, L.L.C. v. Mid-Continent Cas. Co.*, 852 F.3d 405, 413 (5th Cir. 2017). *See also* 4 COLLIER ON BANKRUPTCY P 502.02 (16th ed. 2020) ("In the context of a chapter 11 case in particular, the term 'party in interest' expressly includes the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee.").

17. Here, Dondero has standing to be heard on any issue in this Chapter 11 case, including this claim objection proceeding, because he is (i) a creditor; (ii) an equity security holder; and (iii) a party in interest as those terms are interpreted under the Bankruptcy Code.

18. Dondero is a creditor of the Debtor because he has prepetition claims against the Debtor and its estate, including, without limitation, those asserted through proofs of claim numbers 141, 142, and 145 filed by Dondero on April 8, 2020.

19. Dondero is also an equity security holder through his role as the President and sole shareholder of Debtor's General Partner, Strand Advisors, Inc. ("Strand"). As the Debtor's General Partner, Strand maintains a 0.2508% partnership interest in the Debtor.

20. Accordingly, as both a creditor and equity security holder, Dondero qualifies as a "party in interest" under the Bankruptcy Code and has the right to file this claim objection and be heard on any other issue in this Chapter 11 case.

IV. LEGAL STANDARD

21. Section 502 of the Bankruptcy Code provides, in pertinent part, as follows: "[a] claim or interest, proof of which is filed under section 501 of [the Bankruptcy Code], is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502.

22. The Bankruptcy Code establishes a burden-shifting framework for proving the validity and amount of a claim. "A proof of claim executed and filed in accordance with the [Bankruptcy Rules] shall constitute *prima facie* evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f); *see also In re Armstrong*, 347 B.R. 581, 583 (Bankr. N.D. Tex. 2006). A proof of claim loses the presumption of *prima facie* validity under Bankruptcy Rule 3001(f) if an objecting party produces evidence sufficient to rebut at least one of the allegations that is essential to the claim's legal sufficiency. *See In re Fidelity Holding Co.*, Ltd., 837 F.2d 696, 698 (5th Cir. 1988); *McGee v. O'Connor (In re O'Connor)*, 153 F.3d 258, 260 (5th Cir. 1998). Once such allegations are rebutted, the burden shifts back to the claimant to prove its claim by a preponderance of the evidence. *In re Armstrong*, 347 B.R. 581, 583 (Bankr. N.D. Tex. 2006). Despite this shifting burden, "the ultimate burden of proof always lies with the claimant." *Id.* (citing *Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15 (2000)).

V. OBJECTION AND JOINDER

23. For the reasons set forth in the Highland Objection, Dondero hereby objects to the Acis Claim and asserts it should be disallowed as articulated in the Highland Objection.

24. Dondero hereby joins in and adopts in full, and hereby incorporates by reference, the Highland Objection and the objections and supporting legal arguments asserted therein. Without limiting the generality of the foregoing, Dondero specifically objects to the Acis Claim on the following grounds:

a. The Acis Claim for breach of fiduciary duty should be disallowed because sole owners do not owe fiduciary duties to their company.

b. Even if fiduciary duties had been owed, this part of the Acis Claim should be disallowed because Acis cannot sue others for participating in a scheme in which it, as one of the entities it alleges was commonly owned and controlled, was equally culpable.

c. The fraudulent transfer claims should be disallowed because a debtor cannot recover avoidance claims for its own benefit under section 550(a) of the Bankruptcy Code.

d. All claims asserted by Acis on its own behalf against prior equity holders or third parties that were not pending when Mr. Terry purchased the company should be disallowed under the *Bangor Punta* doctrine.

VI. RESERVATION OF RIGHTS

25. Dondero reserves the right to amend and/or supplement this objection and joinder, including to assert additional claim objections and legal arguments. Dondero further reserves the right to participate in discovery respecting and the hearing on the Highland Objection, including to make argument, present evidence, and examine witnesses.

CONCLUSION

Dondero respectfully requests that the Court enter an order disallowing the Acis Claim and granting him and the Debtor such other and further relief to which they may be justly entitled.

Dated: July 13, 2020

Respectfully submitted,

/s/ D. Michael Lynn

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
Joshua N. Eppich
State Bar I.D. No. 24050567
Bryan C. Assink
State Bar I.D. No. 24089009
BONDS ELLIS EPPICH SCHAFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900 telephone
(817) 405-6902 facsimile
Email: michael.lynn@bondsellis.com
Email: john@bondsellis.com
Email: joshua@bondsellis.com
Email: bryan.assink@bondsellis.com

ATTORNEYS FOR JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on July 13, 2020, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for Acis Capital Management, L.P. and Acis Capital Management GP, LLC, the Debtor, the Office of the U.S. Trustee, and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink
Bryan C. Assink

EXHIBIT 4

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
Bryan C. Assink
State Bar I.D. No. 24089009
BONDS ELLIS EPPICH SCHAFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900 telephone
(817) 405-6902 facsimile

ATTORNEYS FOR JAMES DONDERO

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

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**Case No. 19-34054**
	§	
	§	
Debtor.	§	**Chapter 11**

RESPONSE OF JAMES DONDERO TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' EMERGENCY MOTION TO COMPEL PRODUCTION BY THE DEBTOR
[Relates to Docket No. 808]

James Dondero ("Dondero"), a party in interest, hereby files this Response to the *Official Committee of Unsecured Creditors' Emergency Motion to Compel Production by the Debtor* [Docket No. 808] (the "Motion"). In support thereof, Dondero respectfully represents as follows:

BACKGROUND

1. Through the Motion, the Committee seeks the production by the Debtor of a wide variety of documents, including emails, to aid in its investigation of potential Estate Claims[1] and other potential causes of action against third parties, which includes "any and all estate claims and causes of action against Dondero, [Mark] Okada, other insiders of the Debtor, and each of the

[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

Related Entities,[2] including promissory notes held by any of the foregoing." In accordance with the Final Term Sheet, the Committee also seeks "any privileged documents or communications that related to the Estate Claims."

2. The Final Term Sheet grants the Committee access to privileged documents and communications in the Debtor's possession, custody, or control specifically related to the investigation and pursuit of the Estate Claims. The term sheet provides that "solely with respect to the investigation and pursuit of Estate Claims, the document production protocol will acknowledge that the Committee will have access to the privileged documents and communications that are within the Debtor's possession, custody, or control ("Shared Privilege")."

3. Accordingly, the Proposed Protocol of the Committee seeks, among other things, documents, emails, and other electronically stored information (ESI) exchanged from or between nine different custodians, who include Dondero.[3] The Committee has requested all ESI for the nine custodians, including without limitation, email, chat, text, Bloomberg messaging, or any other ESI attributable to the custodians.

4. The Debtor's document production to the Committee in this case is subject to the terms and conditions of the Agreed Protective Order [Docket No. 382] entered into between the Committee and the Debtor on January 21, 2020. Under this protective order and the Committee's

[2] As described in the Motion, "[t]he Final Term Sheet defines "Related Entities," as, collectively, "(i) any non-publicly traded third party in which Mr. Dondero, Mr. Okada, or Mr. Grant Scott, or Mr. John Honis . . . has any direct or indirect economic or ownership interest, including as a beneficiary of a trust; (ii) any entity controlled directly or indirectly by Mr. Dondero, Mr. Okada, Mr. Grant Scott, or Mr. John Honis . . . ; (iii) MGM Holdings, Inc.; (iv) any publicly traded company with respect to which the Debtor or any Related Entity has filed a Form 13D or Form 13G; (v) any relative . . . of Mr. Dondero or Mr. Okada each solely to the extent reasonably knowable by the Debtor; (vi) the Hunter Mountain Investment Trust and Dugaboy Investment Trust; (vii) any entity or person that is an insider of the Debtor under Section 101(31) the Bankruptcy Code, . . .; and (viii) to the extent not included in [the above], any entity included in the listing of related entities in **Schedule B** hereto (the "Related Entities Listing")." (Dkt. 354-1, at 52.) The Related Entities Listing lists thousands of entities related to the Debtor. CLO Holdco i[s] a shareholder and limited partner of various entities on the Related Entities Listing."

[3] These nine custodians are Patrick Boyce, Jim Dondero, Scott Ellington, David Klos, Isaac Leventon, Mark Okada, Trey Parker, Tom Surgent ("Surgent"), and Frank Waterhouse.

Proposed Protocol, any document not including one of the agreed-upon set of privilege terms (that is, those likely to identify attorney-client privileged communications or attorney work product, but not those related to the Estate Claims) would be produced to the Committee for review, subject to the Agreed Protective Order's provisions on "No Waiver" and "Claw Back of Inadvertently Produced Protected Materials." Thereafter, after review by Debtor's contract attorneys, the Committee's Proposed Protocol suggests that non-privileged documents and "privileged documents related to the Estate Claims would be produced to the Committee on a rolling basis."

5. While the Agreed Protective Order provides these and other protections to the Debtor related to the production of documents and information in this proceeding, the order provides that it does not apply to any third-party beneficiaries. Specifically, the order states that it "precludes non-Debtor affiliates, and their Representatives, including any entity affiliated with, owned by, or controlled in any way, directly or indirectly, by James Dondero and his affiliates (the "Dondero Parties") from seeking to enforce or rely on this Order in any way, unless any of the Dondero Parties is asked (formally or informally) to produce or receive Discovery Materials thereby becoming a "Party" as defined herein."[4]

6. On July 9, 2020, Highland Capital Management, L.P. (the "Debtor" or "Highland") filed *Debtor's Motion for Entry of (I) A Protective Order, or, in the Alternative, (II) an Order Directing the Debtor to Comply with Certain Discovery Demands Tendered by the Official Committee of Unsecured Creditors, Pursuant to Federal Rules of Bankruptcy Procedure 7026 and 7034* [Docket No. 810].

7. Because the production of certain privileged information is implicated by the Committee's Motion, including as it relates to Dondero, both individually and in connection with

[4] *See* Agreed Protective Order [Docket No. 382], para. 17.

his affiliated entities, Dondero is a Party that may seek relief with this Court in connection with the Agreed Protective Order.

RESPONSE

8. While Dondero takes no position as to the relief requested by the Committee in the Motion, he files this Response to ensure his rights are protected in connection with the production of any confidential or privileged documents and other information sought by the Committee.

9. Under the Final Term Sheet, the Committee is entitled to "privileged documents and communications that are within the Debtor's possession, custody, or control" with respect to its investigation and pursuit of Estate Claims. In turn, members of the Committee will be entitled to access and review such information. Because of the broad scope of access granted to the Committee through the Final Term Sheet and the Shared Privilege, each of the committee members will have access to much more material than in the typical case.

10. One such member, Joshua Terry ("Terry"), along with his wholly-owned or controlled entities, Acis Capital Management GP, LLC, and Acis Capital Management, L.P. (collectively, "Acis"), would enjoy access to this privileged and confidential information. As the Court is aware, Terry and Acis have commenced a number of proceedings against Dondero, Highland, and various related parties, which are not intended to benefit Highland's creditors generally, but are meant to benefit primarily Terry himself. Because of these pending actions, if the Court grants the Motion, the Court should restrict Terry and Acis's access to the information sought by the Committee, especially that which is privileged or confidential.

11. While Dondero has found no case law directly on point, there is an analogous situation. Under Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Court may order the examination of any entity. Fed. R. Bankr. P. 2004. Rule 2004

further provides that the Court may order the examination and the production of documentary evidence concerning any matter that relates "to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or . . . any matter relevant to the case or the formulation of a plan." Fed. R. Bankr. P. 2004(b).

12. The scope of discovery under Rule 2004 is very broad. Courts have likened the examination to be in the nature of a "fishing expedition." *In re Countrywide Home Loans, Inc.*, 384 B.R. 373, 400 (Bankr. W.D. Pa. 2008).

13. Although discovery under Rule 2004 is extremely broad, "once an adversary proceeding or contested matter is commenced, discovery should be pursued under the Federal Rules of Civil Procedure and not by Rule 2004." *In re SunEdison, Inc.*, 572 B.R. 482, 490 (Bankr. S.D.N.Y. 2017); *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002) (citing *Snyder v. Soc'y Bank*, 181 B.R. 40, 42 (S.D. Tex. 1994), aff'd sub nom. *In re Snyder*, 52 F.3d 1067 (5th Cir. 1995)); *In re Bennett Funding Group, Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996) ("The well recognized rule is that once an adversary proceeding or contested matter has been commenced, discovery is made pursuant to the Fed. R. Bankr. P. 7026 *et seq.*, rather than by a [Rule] 2004 examination."). Because Rule 2004 is designed to provide the examining party with "broad power to investigate the estate, it does not provide the procedural safeguards offered by Fed. R. Bankr. P. 7026." *In re Bennett Funding Grp., Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996).

14. In this case, the Committee and the Debtor have, through the Final Term Sheet, agreed to allow the Committee to conduct broad discovery concerning the Debtor's assets and financial affairs (akin to a 2004 examination) to aid in the Committee's investigation and pursuit of potential Estate Claims and other causes of action. Thus, to the extent there are pending

proceedings to which the Committee or any of its members is a party, they may be affected by this discovery.

15. While the Committee itself has not commenced an adversary proceeding or contested matter against the Debtor, Dondero, or any related entities, Terry has done so. Terry, either on behalf of himself or his wholly-owned and controlled entity, Acis, has commenced a number of adversary proceedings and state court lawsuits against the Debtor, Dondero, a number of Debtor's employees, and certain related entities. These proceedings remain pending and discovery may (for the most part) be taken by the parties.

16. Specifically, the pending proceedings commenced by Terry are (i) by Terry, related to his 401(k), in state court against Dondero and Surgent; (ii) by Acis in state court against former Highland attorneys including in-house counsel; (iii) by Acis in this Court against Highland and its related parties (stayed by Highland's chapter 11 filing); (iv) by Acis against Dondero and certain Highland employees, recently commenced in this Court; and (v) the frivolous motion for contempt by Acis against Dondero, Highland, and certain Highland employees and others, if Acis ever gets around to actually filing it (it has been before the Court as an exhibit to the motion for relief from stay filed in connection with it).

17. If the Committee and each of its members is given access to the confidential and privileged information of Dondero and his affiliates related to the Estate Claims, Terry and by extension his wholly owned and controlled entity, Acis, Highland's competitor and litigation adversary, stand to gain an unfair advantage by accessing proprietary, confidential, or privileged information of Dondero and related parties for the purposes of pending litigation. Allowing Terry to participate in such discovery in Highland's bankruptcy case would circumvent the procedural

protections provided by Bankruptcy Rule 7026 and give Terry unprecedented access to sensitive information he may use to gain undue leverage in these various actions.

18. Moreover, with the existence of the multitude of the pending actions commenced by Terry and Acis against Dondero and Highland's employees, there is another significant problem posed by Terry's service on the Committee: now that Terry has sued (sometimes in a different case) not only Dondero but numerous other Highland employees, Terry's access to the Committee's privileged information in the Highland case may create significant problems for Dondero and Highland's employees in fulfilling their duties to Highland.

19. The successful operations of Highland, especially during this critical time, require the close attention and candid disclosures of its employees, including in-house counsel, to the Independent Board and the Committee. Dondero, for example, often exchanges views with the Independent Directors. In doing so he must be cognizant of the possibility that his words may prejudice him in pending litigation.

20. The foregoing concerns were first brought to the Court's attention by Dondero in his filed Comment[5] to the *Motion for Leave to File Redacted Quarterly Operating Reports* [Acis Docket No. 1161] (the "QOR Motion") filed by Acis in the Acis case, pursuant to which Acis seeks to conceal critical portions of its quarterly operating report from all creditors and interested parties in the Acis case while at the same time utilizing this Court's time and resources to pursue litigation against Dondero, Highland, its employees, and certain related parties. The QOR Motion remains pending. As discussed in the Comment to the QOR Motion, the advantages to Terry resulting from the Shared Privilege and access to information provided to the Committee are significant.

[5] *See* Docket No. 1168 filed in the Acis case.

21. The observations and concerns raised by Dondero in that Comment are even more striking and relevant in this contested matter. If Terry and Acis are allowed access to the privileged and confidential information being sought by the Committee, such information will undoubtedly be utilized by Terry and Acis in their pursuit of Dondero and Highland. Terry, either on behalf of himself or Acis, has litigation pending against (i) Highland; (ii) Highland's founder, Mr. Dondero; (iii) various Highland related entities; (iv) Highland's former attorneys; and (v) Highland's own employees. Given the extraordinary breadth of these actions, there is an existential threat of abuse by Terry of his access to the information available to the Committee, including through the Shared Privilege, to the detriment of Dondero, the Debtor-related parties, Debtor's employees, and the Debtor's estate.

CONCLUSION

For the reasons set forth above, in the event the Court grants the Motion, Dondero respectfully requests that the Court bar Terry's access to the information sought by the Committee in the Motion. The information sought may be used by Terry and Acis to circumvent the discovery protections under Bankruptcy Rule 7026 to gain an unfair advantage in the litigation Terry has commenced against Dondero, Highland, Highland's employees, and various related parties.

Dated: July 14, 2020

Respectfully submitted,

/s/ D. Michael Lynn

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
Bryan C. Assink
State Bar I.D. No. 24089009
BONDS ELLIS EPPICH SCHAFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900 telephone
(817) 405-6902 facsimile
Email: michael.lynn@bondsellis.com
Email: john@bondsellis.com
Email: bryan.assink@bondsellis.com

ATTORNEYS FOR JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on July 14, 2020, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for the Committee, the Debtor, and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink

Bryan C. Assink

EXHIBIT 5

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
John T. Wilson, IV
State Bar I.D. No. 24033344
Bryan C. Assink
State Bar I.D. No. 24089009
BONDS ELLIS EPPICH SCHAFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900 telephone
(817) 405-6902 facsimile

ATTORNEYS FOR JAMES DONDERO

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

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**Case No. 19-34054**
	§	
	§	
Debtor.	§	**Chapter 11**

JAMES DONDERO'S RESPONSE TO DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH (A) ACIS CAPITAL MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP LLC (CLAIM NO. 23), (B) JOSHUA N. TERRY AND JENNIFER G. TERRY (CLAIM NO. 156), AND (C) ACIS CAPITAL MANAGEMENT, L.P. (CLAIM NO. 159), AND AUTHORIZING ACTIONS CONSISTENT THEREWITH
[Relates to Docket No. 1087]

James Dondero ("Respondent"), a creditor, indirect equity security holder, and party in interest in the above-captioned bankruptcy case, hereby files this Response to *Debtor's Motion for Entry of an Order Approving Settlement with (A) Acis Capital Management, L.P. and Acis Capital Management GP LLC (Claim No. 23), (B) Joshua N. Terry and Jennifer G. Terry (Claim No. 156), and (C) Acis Capital Management, L.P. (Claim No. 159), and Authorizing Actions Consistent Therewith* [Docket No. 1087] (the "Motion") filed by Highland Capital Management, L.P. (the "Debtor"). Through the Motion, the Debtor seeks approval of its compromise with Acis Capital

Management, L.P. and Acis Capital Management GP LLC (collectively, "Acis") pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of this response, Respondent respectfully represents as follows:

I. INTRODUCTION

1. Under Bankruptcy Rule 9019, the Bankruptcy Court is tasked with making an independent judgment on the merits of a proposed settlement to ensure that the proposed settlement is "fair, equitable, and in the best interest of the estate."[1] While Respondent appreciates the apparent lengths the Debtor went through in coming to terms of a settlement with Acis, Respondent believes it is critical that the Court be as fully informed as possible concerning why and how the settlement was arrived at. Given that just three months ago the Debtor asserted that Acis's claim "should summarily be disallowed in its entirety"[2] as a "$75 million windfall,"[3] it is appropriate for the Court to independently assess the merits of the settlement to understand why the Debtor now believes paying Acis millions of dollars "from the pockets of the Debtor's innocent creditors"[4] to be in the best interest of the estate.

II. BACKGROUND

2. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Delaware Court").

3. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in Delaware.

[1] *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).
[2] *See* Debtor Objection, p. 9.
[3] *Id.* p. 3, para. 2.
[4] *Id.*

4. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's Bankruptcy Case to this Court [Docket No. 186].

5. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the "Settlement Order").

6. In connection with the Settlement Order, an independent board of directors was appointed on January 9, 2020, for the Debtor's general partner, Strand Advisors, Inc. (the "Independent Board"). The members of the Independent Board are James P. Seery, Jr., John S. Dubel, and Russell F. Nelms.

7. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. *See* Docket No. 854.

8. On December 31, 2019, Acis filed its Proof of Claim Number 23 with the Bankruptcy Court (the "Acis Claim").

9. The Acis Claim incorporates the complaint from litigation commenced by the trustee of the former estate in the Acis bankruptcy case (the "Acis Case").

10. In response, on June 23, 2020, the Debtor filed its *Objection to Proof of Claim of Acis Capital Management, L.P. and Acis Capital Management GP, LLC* [Docket No. 771] (the "Debtor Objection").

11. On July 13, 2020, Respondent filed *James Dondero's (i) Objection to Proof of Claim of Acis Capital Management, L.P. and Acis Capital Management GP, LLC; and (ii) Joinder*

in Support of Highland Capital Management, L.P.'s Objection to Proof of Claim of Acis Capital Management, L.P., and Acis Capital Management GP, LLC [Docket No. 827].

12. On July 23, 2020, UBS Securities LLC and UBS AG, London Branch filed *UBS (i) Objection to Proof of Claim of Acis Capital Management L.P. and Acis Capital Management GP, LLC and (ii) Joinder in the Debtor's Objection* [Docket No. 891].

13. On July 31, 2020, Acis responded to each objection in its *Omnibus Response to Objection to Proof of Claim of Acis Capital Management, L.P. and Acis Capital Management GP, LLC* [Docket No. 908].

14. On September 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the Acis Claim under Rule 9019.

III. STANDING

15. Respondent, as a creditor, indirect equity security holder, and party in interest, has standing to file this response and be heard on the Motion pursuant to section 1109(b) of the Bankruptcy Code and Rule 9019 of the Bankruptcy Rules.

16. While neither section 1109 nor any other section in the Bankruptcy Code specifically defines the term "party in interest," section 1109(b) provides a non-exclusive list of entities that fall within the meaning of "party in interest" for the purposes of a chapter 11 proceeding. *See Kipp Flores Architects, L.L.C. v. Mid-Continent Cas. Co.*, 852 F.3d 405, 413 (5th Cir. 2017) ("The Bankruptcy Code does not provide an exclusive definition of a party in interest, but the Code broadly includes debtors, creditors, trustees, indenture trustees, and equity security holders among the parties entitled, *e.g.*, to notice of proceedings in the case.").

17. Specifically, section 1109(b) provides that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an

equity security holder, or any indenture trustee may raise and may appear and be heard on any issue in a case under [Chapter 11].” 11 U.S.C. § 1109(b). This section “has been construed to create a broad right of participation in Chapter 11 cases.” *In re Global Industrial Technologies, Inc.*, 645 F.3d 201, 210 (3d Cir. 2011) (quoting *In re Combustion Engineering, Inc.*, 391 F.3d 190, 214 n.21 (3d Cir. 2004)). Parties in interest “include not only the debtor, but anyone who has a legally protected interest that could be affected by a bankruptcy proceeding.” *Adair v. Sherman*, 230 F.3d 890, 894 n. 3 (7th Cir. 2000). *See also* 4 COLLIER ON BANKRUPTCY P 502.02 (16th ed. 2020) (“In the context of a chapter 11 case in particular, the term ‘party in interest’ expressly includes the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee.”).

18. Further, in the context of a court’s evaluation of a proposed settlement under Rule 9019, the input and interests of creditors are of particular importance. *See In re Foster Mortgage Corp.*, 68 F.3d 914, 917 (5th Cir. 1996).

19. Here, Respondent has standing to be heard on any issue in this Chapter 11 case, including related to the Motion, because he is (i) a creditor; (ii) an indirect equity security holder; and (iii) a party in interest as those terms are interpreted under the Bankruptcy Code.

20. Respondent is a creditor of the Debtor because he has prepetition claims against the Debtor and its estate, including those asserted through proof of claim number 138 filed by Respondent on April 8, 2020. None of those claims has been objected to as of this writing.

21. Respondent is also an indirect equity security holder through his role as the sole shareholder of Debtor’s General Partner, Strand Advisors, Inc. (“Strand”). As the Debtor’s General Partner, Strand maintains a 0.2508% partnership interest in the Debtor.

22. Accordingly, as both a creditor and equity security holder, Respondent qualifies as a "party in interest" under the Bankruptcy Code and has the right to file this response and be heard on Debtor's Motion.

IV. LEGAL STANDARD

23. The merits of a proposed compromise should be judged under the criteria set forth in *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968). *TMT Trailer* requires that a compromise must be "fair and equitable." *TMT Trailer*, 390 U.S. at 424; *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984). The terms "fair and equitable," commonly referred to as the "absolute priority rule," mean that (i) senior interests are entitled to full priority over junior interests; and (ii) the compromise is reasonable in relation to the likely rewards of litigation. *In re Cajun Electric Power Coop.*, 119 F.3d 349, 355 (5th Cir. 1997); *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).

24. In determining whether a proposed compromise is fair and equitable, a Court should consider the following factors:

(i) the probabilities of ultimate success should the claim be litigated;

(ii) the complexity, expense, and likely duration of litigating the claim;

(iii) the difficulties of collecting a judgment rendered from such litigation; and,

(iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

TMT Trailer, 390 U.S. at 424.

25. In considering whether to approve a proposed compromise, the bankruptcy judge "may not simply accept the trustee's word that the settlement is reasonable, nor may he [or she] merely 'rubber stamp' the trustee's proposal." *In re Am. Res. Corp.*, 841 F.2d 159, 162 (7th Cir. 1987). "[T]he bankruptcy judge must apprise himself of all facts necessary to evaluate the

settlement and make an informed and independent judgment about the settlement." *See TMT Trailer*, 390 U.S. at 424, 434.

26. While the trustee's business judgment is entitled to a certain deference, "business judgment is not alone determinative of the issue of court approval." *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 536 (Bankr. D. Nev. 2011). Further, the business judgment rule does not provide a debtor with "unfettered freedom" to do as it wishes. *See In re Pilgrim's Pride Corp.*, 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009) ("[A]s a fiduciary holding its estate in trust and responsible to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight."). The Court must conduct an "intelligent, objective and educated evaluation"[5] of the proposed settlement "to ensure that the settlement is fair, equitable, and in the best interest of the estate and creditors." *See In re Mirant Corp.*, 348 B.R. 725, 739 (Bankr. N.D. Tex. 2006) (quoting *Conn. Gen. Life Ins. Co. v. Foster Mortgage Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995)).

V. ANALYSIS OF PROPOSED COMPROMISE

27. It is Respondent's belief that, in order for the Court to be fully informed regarding the settlement proposed by the Motion, it is critical that the facts be explored through the adversarial process. To that end, Respondent intends to assist the Court by presenting evidence that addresses the advisability of granting or denying the Motion and that, in turn, addresses the merits of the Acis Claim and the merits of the objections to it.

28. First, the Motion appears to rely heavily on the fact that the settlement will resolve complex litigation that has been pending for years. While all parties can appreciate a settlement

[5] *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) ("To assure a proper compromise the bankruptcy judge, must be apprised of all the necessary facts for an intelligent, objective and educated evaluation. He must compare the terms of the compromise with the likely rewards of litigation.").

that resolves a number of long-running disputes, Rule 9019 requires an analysis as to whether the probability of success in litigation is outweighed by the consideration achieved under the settlement. *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (The Court must "compare the terms of the compromise with the likely rewards of litigation."). Here, the Debtor's Motion does not appear to address this factor in any detail. If the Acis Claim is indeed based upon a "fallacious premise"[6] as the Debtor and others have asserted in their objections, then there may be a strong chance that the Debtor ultimately succeeds on the merits of the litigation.

29. Further, while the expeditious administration of a claim is a laudable goal, that, standing alone, may not justify a proposed settlement. *See In re Alfonso*, No. 16-51448-RBK, 2019 Bankr. LEXIS 2816, at *11 (Bankr. W.D. Tex. Sep. 6, 2019) ("to the extent that this settlement does facilitate expeditious administration of the remaining claim, such benefits are outweighed by the large discrepancy between the potential significant recovery if the case were to proceed and the $105,000 Proposed Settlement amount").

30. To be sure, as noted by the Debtor in the Motion, the litigation between Acis and the Debtor is complex. But the Motion does not appear to address the fact that many of the claims may be subject to summary adjudication. The Debtor Objection, for example, asserts that many of the causes of action underlying the Acis Claim (at least twenty-five separate counts) are subject to summary adjudication based on the current record before the Court. If that is true, a resolution of at least some of these issues could reduce the Acis Claim substantially. In fact, the parties themselves apparently contemplated that not only would a number of issues be promptly brought before the Court for summary adjudication,[7] but that there would be an "expeditious trial setting"

[6] *See* Debtor Objection, p. 3, para. 3 ("Attempted windfalls usually have a fallacious premise, and this one is a $75 million whopper.").
[7] *See* HCMLP Hearing Transcript, July 21, 2020, p. 111, lines 6-8, 10-14.

where the remaining issues would be determined by the Court.[8] In late July, the Debtor anticipated that such trial setting could even happen before Plan confirmation.[9] And this Court previously entered a scheduling order directing the parties to file motions for summary judgment by September 17, 2020.

31. Even if not all claims are subject to summary disposition, because of this Court's familiarity with the litigation, an adjudication of the Acis Claim may not be needlessly lengthy. There is no question that this Court already has a unique understanding of the claims and facts underlying the litigation. For example, prior to the Debtor's bankruptcy filing, the Court prepared a lengthy report and recommendations to the District Court as to the pending motions to withdraw the reference.[10] While the Debtor Objection raises new legal theories and defenses to the Acis Claim, the Court should be able to analyze those relatively promptly due to its familiarity with the parties, facts, and causes of action involved.

32. Another factor not directly addressed by the Debtor in the Motion is the expense of litigating the claim. The amount to be paid on account of the Acis Claim—as much as approximately $27 million—is likely exponentially higher than the cost to litigate the claim. If indeed many of the claims can be adjudicated through the summary judgment process, the initial cost to trim down the basis of the Acis Claim should not be substantial relative to the potential benefit.

33. Based on the foregoing issues, Respondent believes it is appropriate for the Court to independently address the merits of the proposed settlement.

[8] *See* HCMLP Hearing Transcript, July 21, 2020, p. 113, lines 19-20.
[9] *Id.* at lines 22-24.
[10] *See* HCMLP Hearing Transcript, July 21, 2020, p. 117, lines 21-24.

CONCLUSION

Respondent respectfully requests that the Court independently assess the merits of the proposed settlement and provide him such other and further relief to which he may be justly entitled.

Dated: October 5, 2020

Respectfully submitted,

/s/ D. Michael Lynn

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
John T. Wilson, IV
State Bar I.D. No. 24033344
Bryan C. Assink
State Bar I.D. No. 24089009
BONDS ELLIS EPPICH SCHAFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900 telephone
(817) 405-6902 facsimile
Email: michael.lynn@bondsellis.com
Email: john@bondsellis.com
Email: john.wilson@bondsellis.com
Email: bryan.assink@bondsellis.com

ATTORNEYS FOR JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on October 5, 2020, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for the Debtor and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink
Bryan C. Assink

EXHIBIT 6

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE:	.	Case No. 19-34054-11(SGJ)
	.	
HIGHLAND CAPITAL	.	Earle Cabell Federal Building
MANAGEMENT, L.P.,	.	1100 Commerce Street
	.	Dallas, TX 75242-1496
	.	
Debtor.	.	Monday, September 12, 2022
. . . . .	.	9:40 a.m.

TRANSCRIPT OF HEARING ON MOTION TO WITHDRAW PROOF OF CLAIM #146 BY HCRE PARTNERS, LLC (3443) AND REORGANIZED DEBTOR'S (A) OBJECTION TO MOTION TO QUASH AND FOR PROTECTION [DOCKET NO. 3464] AND (B) CROSS-MOTION TO ENFORCE SUBPOENAS TO ENFORCE SUBPOENAS AND TO COMPEL A DEPOSITION (3484)

BEFORE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT CHIEF JUDGE

TELEPHONIC APPEARANCES:

For Highland Capital Management, L.P.:	Pachulski Stang Ziehl & Jones LLP BY: JOHN MORRIS, ESQ. 780 3rd Avenue, 34th Floor New York, New York 10017
For NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC:	Hoge & Gameros, L.L.P. BY: CHARLES W. GAMEROS, JR., ESQ. 6116 North Central Expressway Suite 1400 Dallas, Texas 75206
Audio Operator:	Michael F. Edmond

Proceedings recorded by electronic sound recording, transcript produced by a transcript service.

INDEX

INDEX

EXHIBITS

MOTION TO WITHDRAW PROOF OF CLAIM #146 BY HCRE PARTNERS, LLC (3443)

		ID	EVD
FOR THE DEBTOR:			
1 through 16	Docket Number 3488 With Declaration of John Morris	9	9
FOR HCRE:			
(None)			

REORGANIZED DEBTOR'S (A) OBJECTION TO MOTION TO QUASH AND FOR PROTECTION [DOCKET NO. 3464] AND (B) CROSS-MOTION TO ENFORCE SUBPOENAS TO ENFORCE SUBPOENAS AND TO COMPEL A DEPOSITION (3484)

FOR THE DEBTOR:			
1 through 6	Docket Numbers 3485 and 3486 With Declaration of John Morris	7	8
FOR HCRE:			
(None)			

(Proceedings commenced at 9:40 a.m.)

THE COURT: All right. We have a setting this morning in Highland Capital, Case Number 19-34054. We have both a motion to withdraw proof of claim of HCRE Partners, LLC, as well as the reorganized debtor's objection to a motion to quash and cross-motion to enforce subpoenas.

All right. So let's start by getting lawyer appearances, please. For HCRE, who do we have appearing?

Let me get appearances first from the main parties. For the debtor this morning, who is appearing?

MR. GAMEROS: Good morning, Your Honor. Bill Gameros for NexPoint Real Estate Partners f/k/a HCRE.

THE COURT: All right. Thank you.

For Highland, who do we have appearing this morning?

MR. MORRIS: Good morning, Your Honor. John Morris, Pachulski Stang Ziehl & Jones for Highland Capital Management, L.P.

THE COURT: Good morning.

All right. I'm guessing these are our only appearances. These are the only parties involved who filed pleadings. If there is anyone who felt the need to appear, go ahead.

(No audible response)

THE COURT: All right. Well, I don't know if you all have talked about the sequence we are going to take things this

morning. Obviously, the first filed motion is HCRE's motion to withdraw proof of claim. But we have a discovery dispute and I think -- well, we've got Highland objecting to the motion to withdraw the proof of claim, but I think the backup argument is at the very least let us take discovery before you rule on the motion to withdraw proof of claim.

So have you all talked about who's going to go first on this one?

MR. GAMEROS: Your Honor, we haven't spoken about it, but it makes sense to me that if we withdraw the proof of claim, it moots everything else. And I think that's really what we ought to do, take it all at one time.

THE COURT: All right. Mr. Morris, do you agree on that sequence?

MR. MORRIS: I'm happy to cede the podium and let Mr. Gameros go first since he filed the first motion, but I do think that Your Honor had your finger on the pulse that before -- either the motion should be denied for the reasons set forth in our papers or we should be permitted discovery.

THE COURT: All right.

With that, Mr. Gameros, I'll hear your opening statement and hear what your evidence is going to be.

MR. GAMEROS: We didn't file any evidence today. We just simply want to withdraw the proof of claim. I think that we've satisfied the Manchester factors.

Quite frankly, there's only been the filing of the proof of claim and a scheduling order entered. Since I've been involved in it, we've only had the scheduling order entered. Anything else that's happened in this case was a motion to disqualify that precipitated our appearance. We filed the motion to withdraw. There's no summary judgments pending, no dispositive motions pending.

Quite frankly, we've looked at it as the company continued to operate. The things we were worried about happening didn't happen. And as a result, we decided we don't need the proof of claim, we don't want to continue it because I think we satisfy Manchester. If the Court has any concerns at all, A, the debtor's reorganized so proceeding with our proof of claim or withdrawing it doesn't affect it and, B, you can conditionally withdraw with a forecredudous [*sic*] order withdrawing the proof of claim.

But, quite frankly, I don't think we could amend it and we passed the claims bar date. So the Court should simply allow NexPoint Real Estate Partners to discontinue pursuing a proof of claim that they don't want to continue anymore. Everything else falls after that. That's it.

THE COURT: All right. Well, assuming the Manchester factors apply here, you're not going to have any evidence on any of these factors?

MR. GAMEROS: I don't believe that we need to have

evidence on those. The only one that could possibly be at issue is one that the debtor might be able to bring but they haven't, and that's actual legal prejudice.

The withdrawal of the proof of claim here essentially says they win. And they've objected to our proof of claim, and now we're withdrawing it. So the proof of claim is resolved in their favor except we're withdrawing it instead of going through all of the exercise to get to a hearing where we don't want to pursue the proof of claim anymore.

THE COURT: All right. But is it a withdrawal that you seek with prejudice with any bells and whistles about future preclusion of litigation?

MR. GAMEROS: Your Honor, the proof of claim -- I know the Court knows this, it's its own type of proceeding. This isn't a adversary proceeding or a different kind of lawsuit. It's simply a proof of claim, and we know we're not going to be able to amend it, we're not going to be able to re-assert it because it's after the bar date. That's why the Court should allow the withdrawal and, to the extent the Court wishes to condition it, condition it with prejudice. That's it.

THE COURT: Mr. Morris, I'll hear from you.

MR. MORRIS: Thank you, Your Honor.

Before I begin, I'd like to move into evidence Exhibits 1 through 6 that appear at Docket 3485 and 3486.

They're mirror images of each other. They're duplicates of each other, Your Honor.

But because our motion -- our objection to the motion for a protective order and the cross-motion to compel were filed as one document, the Court had us file it basically twice so that one is serving as the objection to the motion for the protective order and the other is serving as the cross-motion to compel. And so you'll see at Dockets 3485 and 3486 duplicate declarations from me with Exhibits 1 through 6.

THE COURT: All right. Any objections?

MR. GAMEROS: Your Honor?

THE COURT: Any objection?

MR. MORRIS: And then -- and then, Your Honor?

THE COURT: I'm sorry, I did not hear what Mr. Gameros said.

MR. GAMEROS: Your Honor, we don't object.

THE COURT: All right.

MR. GAMEROS: We don't necessarily believe it's relevant, but we don't object to its admission.

THE COURT: All right. They'll --

MR. MORRIS: And then, Your Honor, we've got --

THE COURT: Docket -- Exhibits 1 through 6 are admitted.

Go ahead.

(Debtor's Exhibits 1 through 6 admitted into evidence)

MR. MORRIS: And then at Docket 3488 we have another declaration under my signature with Exhibits 1 through 16, which are offered in opposition to HCRE's motion to withdraw their proof of claim.

THE COURT: Any objection?

MR. GAMEROS: No, Your Honor.

THE COURT: Okay. Those exhibits and that declaration are admitted, as well.

(Debtor's Exhibits 1 through 16 admitted into evidence)

MR. MORRIS: So, Your Honor, if I may, please, you know, the lack of evidence and the dismissiveness with which HCRE is approaching this proceeding is alarming.

We have litigated for two years. We were forced to move and litigate vigorously a motion to disqualify our prior counsel even though we put into evidence a document that said Wick Phillips represents Highland Capital Management. We were still forced to do that. We were forced to engage in expert. We were forced to have a hearing on this.

We have gone through discovery not once but twice. We have fulfilled every single obligation that were were required to fulfill under the scheduling orders. We have engaged in two rounds of written discovery. We have offered up every witness that has been noticed. We have produced thousands of pages of documents.

We took discovery from third parties, and this is

really important for a number of reasons, Your Honor. We served subpoenas on BH Equities. BH Equities is not subject to the jurisdiction in Dallas, so we served the subpoena. We took the deposition.

They can't be compelled to testify at a hearing. HCRE chose not to ask any questions. The accounting firm, they chose not to ask any questions. Discovery is over, okay. I hear Counsel talk about the proof of claim. We need -- and this is where the prejudice comes in. We need an order on the merits. We need to know that HCRE is never going to challenge again Highland's 46.06 percent interest in SE Multifamily. That's what we need, because that's what we were about to get and they know that. And that's why they're folding their tent.

We informed them that we were moving for summary judgment. In fact, just seven days before they filed their motion, we negotiated a stipulation in order to extend the expert discovery deadline so that they could file an expert report while preserving Highland's ability to move for summary judgment. HCRE knew this when it filed its motion.

Discovery is now closed. There's only three things left to do. There's four things left to do: take the deposition of Mr. Dondero, Mr. McGraner (phonetic) and HCRE and have a hearing on the merits.

I want to say right now, Your Honor, Highland is willing to forego its right to move for summary judgment. We

don't need to take that step. Let's just proceed. This motion should be denied. They offer no evidence whatsoever. Let's just proceed with the three depositions because discovery is otherwise closed and let's have a one-day trial live in your courtroom, Your Honor. We could have this done in six weeks.

The legal prejudice is enormous. We've set it out in our papers. Our evidence supports it. But I want to just highlight a few things. Again, I hear vagueness here. I hear you can dismiss the proof of claim with prejudice, but somehow I get the feeling from their papers from the cases that they cited to, from the quotations that say just because we get a tactical advantage doesn't mean that the motion should be denied, just because we may choose to file this in a different forum.

And that's the question that I really hope the Court will ask Mr. Gameros. Is HCRE waiving its right to ever challenge this again because if you can't get an unambiguous answer to that question, the motion must be denied because that's the prejudice.

But there's more prejudice, too. They've taken our deposition and based on what Mr. Gameros just told you, based on what's in their papers, they perceive something that happened in that deposition as being advantageous to them. If this Court were to consider dismissing this case with prejudice, it should do so on the condition that that

transcript cannot be used for any purpose at any time anywhere because otherwise it's not fair, otherwise we've been prejudiced by them being permitted to take our deposition but foreclosing us from taking their deposition. Either the playing field needs to be level or that deposition transcript should never see the light of day.

That's condition number two, not just the dismissal with prejudice here, we need an ironclad commitment that HCRE is irrevocably waiving its right to challenge Highland's interest in SE Multifamily because that would be the result if this went to trial. And that transcript of Mr. Seery as Highland's 30(b)(6) witness should never see the light of day because they're playing games. They want to use that for some other purpose. And if they want to do that, that's fine, but I get to take their depositions. The playing field has to be level, Your Honor.

We have spent hundreds of thousands of dollars on this case. The excuse that they're giving, the reason that they're giving for dismissing the case at this time makes no sense whatsoever. There's nothing in the proof of claim, nothing in the pleadings. There will never be any evidence.

There's no affidavit suggesting that Highland was interfering with SE Multifamily, that Highland threatened to interfere with SE Multifamily, that until this motion was filed that HCRE had any concerns whatsoever that Highland would be

engaging in wrongful conduct. There will never be any evidence whatsoever that HCRE ever took any steps to protect itself from this so-called interference that they're now so fearful of.

And I do want to -- I have to ask this question, Your Honor. If HCRE believed that they were at risk on Wednesday, August 10th, so that they had to take Mr. Seery's deposition, what happened after that that caused them 48 hours later to file this motion with no notice whatsoever?

It's not right, Your Honor. So let me get to the substance. This is not a motion under Rule 41. Under Rule 41, plaintiffs sometimes have the right, the unilateral right to withdraw a pleading. HCRE has no right to that today. Rule 3006 is very clear. When there is a proof of claim that is contested, the proof of claim can only be withdrawn with court approval after a hearing and subject to whatever conditions the Court decides are appropriate.

And that's to protect the integrity of the process. And that's what we're asking the Court to do, to protect the integrity of the claims resolution process.

It is a fact-intensive inquiry. In this district, as HCRE has pointed out, there is precedent, the Manchester case, that sets forth a long list of factors that a court could consider in the face of such a motion. As we explain in our opposition, we believe that every single one of those factors weighs in favor of denying the motion.

I'm going to go through just a bit of it, Your Honor, because I think it's very important that everybody see exactly what's happening. In contrast to the lack of evidence by HCRE, we have all of the exhibits that have just been admitted into evidence here. The claims stated, the proof of claims, start with the proof of claim, stated that some or all of Highland's interest in SE Multifamily might be the property of HCRE.

It's a proof of claim that was signed by Jim Dondero. It was signed under the penalty of perjury. There is no good-faith basis for that proof of claim to have been filed, none whatsoever. If you take a look at their response to Highland's initial objection which can be found at Exhibit 7 on the initial docket, we'll put it up on the screen jut -- here's Exhibit 7 from Docket Number 3488.

And this is HCRE's response. And if we can go to Paragraph 5. This is the -- this is really their response here. And it says:

> "After reviewing what documentation is available to HCRE with the debtor, HCRE believes the organizational documents relating to SC Multifamily improperly allocates the ownership percentages of the members thereto due to mutual mistake, lack of consideration, and/or the failure of consideration. As such, HCRE has a claim to reform, rescind, or modify the agreement."

This is their proof of claim, that there was some mistake that happened in the drafting of the SE Multifamily documents. There is no good-faith basis for this proof of claim. There is no good-faith basis for this response that's up on the screen. And let me show you why.

If Your Honor had an opportunity to review BH Equities' deposition transcript, at least the portions that we specifically cited to, BH Equities is a truth third party. They're the only third party that is a member of SE Multifamily. I took their deposition. They retained Dentons. They produced documents. They acted professionally.

And their witness testified up, down, and sideways that from their perspective, it was a bilateral negotiation with them on one side and the grand Highland on the other side and that Highland drafted the ultimate agreement, the amended and restated LLC agreement.

It's an issue that is not in dispute. Highland drafted the document. People working on the Highland platform in the spring of 2019 when Mr. Dondero was in control, solely in control of Highland and HCRE.

So they say in that response and in the proof of claim that the allocation, the allocation is the allocation of the membership interest in SE Multifamily, they say, oh my goodness, that allocation was wrong because Highland only put in $49,000. And Mr. Dondero signed the agreement.

Let's take a look just quickly at Exhibit 5, and let's see how it's possible that Mr. Dondero could swear under oath that he made a mistake. If we can go to Schedule A.

Take a look at this, Your Honor. This is Schedule A. It's about a page or two after Mr. Dondero's signature. It has the percentage interest that he says was a mistake as if he didn't know the capital contribution that Highland put in. And if we got to a trial, Your Honor, we would show that Highland actually reached into its pocket for the $49,000. HCRE, in contrast, borrowed all the money, even though Highland was on the hook for the obligations to Key Bank.

But, nevertheless, here it is. It's in plain, plain, plain terms. The numbers are next to each other. It's not just the percentage interest. It shows the capital contribution. I'd be really interested in asking Mr. Dondero did he review this. I suspect he'll say no because that's what he usually says. But doesn't that scream fraud? How do you say you made a mistake when the numbers are on that page? I don't understand it.

Yet, we've spent two years and hundreds of thousands of dollars litigating this case. But here's the thing, Your Honor, it's not just in Schedule A. If we could go to Section 1.7 earlier in the agreement.

And remember, this is a document that BH Equities says was drafted by Highland. Look at 7; 7 is company

ownership. That's the name of the section. Again, HCMLP has 46.06 percent. Is that a mistake? How did this -- somebody should explain how this mistake happened.

Let's go to Section 6.1. Section 6.1 is critical, and we'll see this in a moment. This is what's known as the waterfall. It shows how the distributions of cash from SE Multifamily are going to be made to its members. And you'll see in Section 6.1A that after certain things occur, cash is going to be distributed 46.06 percent to Highland. Another mistake, I guess, without explanation.

Section 9.3. Section 9 deals with liquidation and termination, and 9.3 is effectively the waterfall that's supposed to be in place upon a liquidation. And at the bottom of the waterfall in 9.3(e), not surprisingly, you see the exact same allocation.

So the allocation that Mr. Dondero swore under oath was the result of a mutual mistake was an allocation that appears in four separate places in a document that was drafted by people under his authority. Think about that. It's extraordinary. We spent two years litigating this case, and now they just want to go home.

But wait, there's so much more, Your Honor. I'm not going to go through all of it, but I want to just show you two other documents because these numbers are not in this document by accident. They're there on purpose.

If we could go to Exhibit Number 11.

So if you've seen from our papers and at all, Your Honor, Highland presented an initial draft of the amended and restated agreement to BH Equities on March 14th. It had to be completed by March 15th in order t make it retroactive to the prior August because that's for tax reasons. And you'll see up on the screen there's an email exchange from Mr. Broaddus at Highland to a fellow named Dusty Thomas at BH Management.

And it's two emails. The first one is sent on the afternoon of March 15th. And the important point is a little bit down where he says: "The contributions schedule in the attached needs to be updated with the actual contribution numbers."

So this is Highland telling BH Equities that the contribution schedule, which is Schedule A, needs to be updated so that the actual contribution numbers are in it. This is the mistake. This is the mistake, right. And notice that Mr. McGraner, I'm told is one of the Apex employees, he's got notice of this. He know exactly what's happening, right.

And Mr. Broaddus follows up. He follows up the next day and says the contribution schedule is attached. Well, let's take a look at what the contribution schedule is, if we can go to the next page. Look at that.

It's the same contribution schedule that appears in the final agreement. And this is just critical, Your Honor,

because this shows that Highland, people working at the direction of Highland are preparing this document and it's a stand-alone document. So it's not as if somebody can say, gee, you know, it got lost in the sauce, it was deep in the details, deep in the weeds and I just missed it.

The very purpose of the sending of this document was to show the other counterparty, BH Equities, exactly what the capital contribution and percentage interest were going to be, not just the percentage interest but the capital contributions.

Later on that day, if we can go the next document, Exhibit 13. BH Equities was very concerned about the waterfall. They wanted to make sure that they were going to get back their capital before other distributions were made. And you can see here this is an email from Mr. Thomas back to Mr. Broaddus where he raises this issue, and I'll just kind of cut to the chase. Attached to Mr. Thomas' email was a proposal that BH Equities had made the prior fall with respect to the waterfall.

There's no dispute that Mr. Broaddus on behalf of Highland, the big Highland, rejected BH Equities' proposal. And if we can go the prior page and see exactly what they did in response. Instead, you can see Mr. Chang, Freddie Chang, another member of the Highland complex, with a very private email to Mr. Broaddus, right, BH Equities isn't even copied on it. And he comes up, it's labeled 6.1, but this is what

becomes -- it's labeled 1.1, but this is what becomes 6.1 in the actual agreement. This is the waterfall. This is Mr. Chang and Mr. Broaddus exchanging an email with a new version of the waterfall that they wanted. And the new version that they wanted shows in Section 1.1(a) here that Highland was going to get 46.06 percent of the distributable cash as set forth therein.

A mistake? A mutual mistake when people working under Mr. Dondero's direction drafted these documents in specific -- as part of a negotiation? This is about the only thing that was the subject of a negotiation.

And, of course, there's more because if you take a look at the deposition transcript that we cited from BH Equities from BH Equities' perspective, Section 1.7, 6.1, and 9.3 and Schedule A all reflects the parties' intent. And that deposition is closed, right. I mean they chose not to ask any questions. They didn't challenge that. There is no good-faith basis for this proof of claim to have ever been filed. And that, Your Honor, is the definition of vexatiousness, and that is one of the Manchester factors.

Another one of the factors is the extent to which the suit has progressed. Other than the depositions that they unilaterally shut down, the only thing left was either a summary judgment motion or a trial. Again, discovery is over. Highland has fulfilled its obligations. There is nothing left

to do here except to take three depositions and have a trial on the merits. So the suit has progressed far.

Duplicate of expense of re-litigation, are we really going to do this again? Are they really going to get the benefit of new discovery in a new lawsuit somewhere else that's not a proof of claim but that somehow tries to recraft it because we've seen stuff like this before from Mr. Dondero. He's going to say, oh, that was just a proof of claim, that's a different standard that somehow, you know, I can bring a different claim in a different court at a different time. We're going to do this again? I hope not.

How about the adequacy of the explanation? They concluded that Highland wasn't interfering. Where was the evidence that Highland ever interfered? Where was the evidence that Highland ever threatened to interfere? Where was the evidence that HCRE ever expressed a concern that Highland would interfere? Where's their application to the Court for some kind of protective order or some type of protection, some type of injunction relief to prevent us from interfering? There's nothing.

HCRE filed this -- and I'll have to speculate here because they're not -- I don't thing they're being candid with the Court. They filed it because they hoped to do this trial in a different forum at a different time elsewhere.

They're shutting it down because they know that their

witnesses are going to be asked questions that are going to further buttress Highland's claims to breach of contract, going to get into some serious tax questions where even BH Equities wouldn't even rely on the K-1s that HCRE caused to be prepared. Really tough questions.

I know they want to get out now, but they never should have filed the proof of claim. And forcing Highland to go down this path to incur this expense, to take our deposition and then try to shut the door, can't think of a better fact scenario for the denial of a 3006 motion than we have here.

Look at just what happened in the seven days before they filed their motion because it is extraordinary, and I didn't even put everything in the papers because one of the things I forgot to put in is Mr. Gameros sent to me seven days before the motion the 30(b)(6) notice for Highland. So that's sent on August 5th.

On August 5th, we finish negotiating and sign a stipulation that extends the expert discovery deadline to allow them to call an expert which we think had no merit which is why we reserve the right on the motion to strike because we don't think -- as described to us at the time, but nevertheless, we reserved our right to either make a motion to strike or to proceed right to summary judgment. It's all in the stipulation that we negotiated, that we signed on behalf of the clients, and that Your Honor's approved just two days before this is

filed.

I think Mr. Seery's deposition was the 10th. At 4:00 on the 9th, HCRE produced over 4,000 pages of documents like six weeks after the deadline, right. And Counsel and I spent the next 24 hours -- you know, I was pretty upset, I'll admit it, but you've got -- you know, it's in the record, you know, what my written responses were. And I tried very hard to avoid motion practice, and I tried very hard as I always do to try to come to a reasonable resolution. And we actually got to that point just moments before Mr. Seery's deposition. And then they take Mr. Seery's deposition.

So think about it. They serve a 30(b)(6) notice, they take a deposition, they produce 4,000 pages of documents, they negotiate and sign a stipulation to extend the discovery deadline, the Court takes the time to review the stipulation, orders it. All of this happens within seven days of their motion, two days after they take Mr. Seery's deposition and just two days before I'm scheduled to take their client's depositions.

Based on the complete lack of evidence on HCRE's part and the evidence that I've just shown the Court, we believe the Court should simply deny the -- deny all three motions, you know what I mean? Let's just cut to the chase, let's take three substantive depositions, and let's set a trial date. That, I believe, is the most appropriate result here.

If the Court is not inclined to rule on the motion to withdraw, the Court should then deny the motion for a protective order and grant our cross-motion to compel the depositions on this motion. I assure the Court that if the Court decides to follow that path, my questioning will be limited to the Manchester factors. And I won't get into the substance because that wouldn't be ripe.

The first question is whether or not they have a right to -- whether the Court should grant their motion to withdraw, and I will limit my questioning if we go down, you know, option B to those questions, to the Manchester questions, right. There's no question that we have the right to discovery. They filed a motion. We filed an objection. We now have a contested matter under the bankruptcy rules. We're entitled to discovery.

I want to address, I guess, on this topic some of the issues that were raised in the motion for the protective order. They say, oh, we didn't serve the witnesses. That's easily -- well, first, I would point out that if you looked at Exhibit 1, you know, Counsel previously accepted service of subpoenas on Mr. Dondero and Mr. McGraner's behalf. Maybe he's got an explanation why he did it before but he won't do that now. But if that's the way HCRE wants to do it, we'll hire professional process servers that can -- that give us a couple of weeks and we'll find them. We'll find them. And if not, we'll get the

adverse inference.

They said we didn't give enough time, that we didn't take into account their scheduling. Just look at Exhibit 4, Your Honor. I specifically wrote to Counsel, it's there in writing. You know, it's there in writing. If you need an accommodation, let me know. Let me know if the dates and times work. I have flexibility. I told him that in writing. And yet, the reason the Court should enter a protective order is because we didn't give them sufficient time or we wouldn't take into account their schedules.

We've got all the time now, Your Honor. I'm actually not available next week, but after that, I can take these depositions any time the last week of September, the first week of October, whatever is convenient for them. That is no reason to grant a protective order.

And then, finally, this notion that, you know, Mr. McGraner and Mr. Dondero are some Apex employees, Your Honor, HCRE has no employees. None. Mr. Dondero signed the original LLC agreement. He signed the amended LLC agreement. He signed the proof of claim. Who else should I be deposing? Mr. McGraner owns a substantial interest of HCRE. He's on the emails that show he had contemporaneous knowledge that people working in the Highland complex were drafting Schedule A in a manner that was ultimately accepted not just by Highland and HCRE but by a third party, BH Equities.

There's nobody to depose other than Mr. McGraner and Mr. Dondero. I mean I guess Mr. Ellington, I haven't thought about that. He is a five percent owner. But for a company with no employees, who else am I supposed to depose?

Finally, Your Honor, I've taken probably enough time here. But option C, right, I think this just be denied outright. If not, we should at least be permitted to get some discovery before the Court rules on the motion. Option C, if the Court really wants to dismiss this -- grant the motion in any respect, there ought to be severe conditions on it.

It has to be a dismissal on the merits. It has to be a dismissal that pays Highland its reasonable legal fees incurred for this waste of time. And it has to be conditioned on the fact that Mr. Seery's deposition transcript will be barred from use in any proceeding going forward or they have got to show up for the depositions to level the playing field.

So that's where we are, Your Honor. Three choices. You know, they're in the order that we think are most appropriate. But I've got nothing further at this point, Your Honor.

THE COURT: All right. A couple of questions for you.

You've represented as an officer of the Court that your client, the estate, has incurred hundreds of thousands of dollars of attorneys' fees and costs relating to this proof of

claim. Is that correct?

MR. MORRIS: Yes, Your Honor.

THE COURT: Okay. And I'm just curious, did this claimant, HCRE, file other pleadings during the Highland case, like objections to the plan or -- I remember discovery disputes when Wick Phillips was involved in the main case. But I'm just curious, did you look at other times they may have participated as a party, a creditor?

MR. MORRIS: In all candor, Your Honor, I haven't --

THE COURT: Okay.

MR. MORRIS: -- looked at that. My memory, which could be wrong, my memory is that they did file other things, although it's possible I'm just confusing it with Wick Phillips representing different entities of Mr. Dondero. But I believe that Wick Phillips was involved in other matters. I think HCRE filed other things, but I don't know off the top of my head.

THE COURT: Okay. So the representation that hundreds of thousands of dollars were spent on this proof of claim dispute, I mean you're zeroing in on this proof of claim dispute. Is that correct?

MR. MORRIS: One hundred percent limited to this proof of claim.

I mean think about what we did here, Your Honor. We had a whole litigation over Wick Phillips. Both sides retained experts. We took fact discovery. We participated in written

discovery, something that never ever should have happened. But we were forced to do that, and I do include that as part of this.

What else have we done? Because I think it's -- I think Your Honor's asking a fair question, like how do you get to that number. Before the Wick Phillips' disqualification motion and the reason that we got to that point is we had engaged in written discovery. And this is back in the spring of 2021. We served, you know, document requests, we served requests to admit, we served interrogatories. All of that was answered.

We produced thousands of pages of documents at that time. And it was in preparing for the depositions that were then scheduled that we saw in the documents the conflict that Wick Phillips had. So we went though that whole process throughout the rest of 2021, completely unnecessary. Just completely unnecessary, but nevertheless, we did. We prevailed.

New counsel came in in January and did nothing, right. It took us six months to get to a scheduling order. It took me almost three months to get them to respond at all. But we did the whole thing again, and we went through more written discovery and more interrogatories and more requests to admit and more document requests. And we produced more documents.

We served subpoenas on Mark Patrick, on BH Equities,

on Baker Vigotto, the accounting firm that prepares the tax returns at the direction of HCRE on behalf of SE Multifamily. There's lots of negotiations in there. There's -- I mean Your Honor can see just how many times depositions were scheduled and rescheduled and rescheduled again to accommodate everybody's summer and business, right.

So we took the deposition of Mr. Patrick. We took the deposition of Barker Vigotto. We took the deposition of BH Equities. We defended Mr. Seery and his deposition. We took the time to prepare for that. We were reviewing the 4,000 documents that they produced belatedly, right. We're marshaling our evidence, getting ready for our summary judgment motion. We're negotiating amendments to scheduling orders at HCRE's request.

Yeah, we spent several hundred thousand dollars, Your Honor, for sure.

THE COURT: Okay.

All right, Mr. Gameros, do you have cross-examination of Mr. Morris?

MR. GAMEROS: I don't have cross-examination of Mr. Morris. I'd just like to respond to a few points if I could.

Is that permitted, Your Honor?

THE COURT: Oh, yes. I mean this was your chance to cross-examine Mr. Morris since he submitted a declaration with exhibits. But if you decline to do that, I think Mr. Morris --

MR. GAMEROS: Cross-examine Mr. Morris, Your Honor?

THE COURT: Just -- Mr. Morris, the reorganized debtor rests, right? I got the impression you were resting?

MR. MORRIS: Yes, Your Honor.

THE COURT: All right.

MR. MORRIS: Yes.

THE COURT: Mr. Gameros, now your chance for rebuttal.

MR. GAMEROS: All right.

First, in terms of hundreds of thousands of dollars of fees and the activity level since my firm appeared in January of 2022, I think we need to look back at the disqualification proceeding and remember that the estate was denied its request for attorneys' fees on the disqualification and that's in this Court's order.

If we proceed to trial, they won't be entitled to attorneys' fees for winning, if they do. There's no claim here that entitles the estate to shift its attorneys' fees to NexPoint. None.

And I think that's important. The relief that he's asking for, Your Honor, if you listen to what the estate's requesting, it wants to limit the use of Mr. Seery's deposition. It wants to have a trial. Now apparently they may not move for summary judgment. Okay. Things that they would like, but all they get is a ruling on a proof of claim. And

we've already said the Court should allow us to withdraw the proof of claim and condition it with prejudice.

There is no other lawsuit out there. There is no other position being taken anywhere. Frankly, Your Honor, the reason why I said admit the exhibits and I question their relevance is because none of them go to actual legal prejudice. Can't show it, hasn't shown it, hasn't demonstrated it. It says they did a lot of work, gave you the greatest hits of some email, but quite frankly, Your Honor, that goes to merit, not legal prejudice. That goes to, I believe, part of their story as to what happened.

The story that matters to me is we think things were going to happen during the estate, he's right. We didn't move for them. We looked back at it and said we don't need the proof of claim anymore, we should withdraw it. That's the only thing that's happened, and that's why we're here. We don't think he's entitled to discovery as to why we withdrew the proof of claim.

It's his burden to show legal prejudice. He can show it or he can't. He hasn't.

THE COURT: Okay.

MR. GAMEROS: The estate hasn't.

THE COURT: Mr. Gameros?

MR. GAMEROS: (Indiscernible) Mr. Dondero.

THE COURT: I have a question. I mean I'm looking at

your pleading, your motion to withdraw the proof of claim, and I'm looking at this wonderful chart you have on Page 7 saying here are the standards under Bankruptcy Rule 3006, you, Court, should consider. They were articulated in the Manchester case.

And it's not merely about is there any prejudice to the estate. I mean you set forth five factors. One is "reason for dismissal." One is diligence in bringing the motion to withdraw. One is undue vexatiousness. One is the matter's progression including trial preparation. One is duplication of expense of relitigation.

This is your own authority, which I believe actually is correctly articulating the standards. It's not just about prejudice. Yes, I agree that some of the case law has zeroed in on that one in particular. But I mean you say yourself reason for dismissal is a factor the Court must consider.

MR. GAMEROS: That's correct, Your Honor. Those are the factors, and I think our analysis on them is correct.

If we go all the way to trial and the result is that our proof of claim is denied, we're in the same position we are right now. So why should the parties, the estate, and the Court go through that exercise?

THE COURT: Okay. Well, that's another issue, I think, other than the reason for dismissal. But a follow-up question to what you just said is this.

Would you agree to a condition on the withdrawal of

your proof of claim that your client agrees that Highland has a 46-point whatever it was percent interest in SE Multifamily Holdings and your client waives any right in the future to challenge that interest?

MR. GAMEROS: Your Honor, if that's what the Court wants to put in an order and I have a chance to confer with my client on it, I'm pretty sure that would be agreeable.

THE COURT: Today's the day. I'm not going to continue. I've got, you know, the whole day booked if I needed it because I wasn't sure what you all were going to want to put on.

MR. GAMEROS: Your Honor, we'd agree with that.

MR. MORRIS: Your Honor, I'm sorry to interrupt, but a waiver of any appeal, too. I just hard that if that's what you want to put in the order, that's okay. But this case has to end, and that's what we're looking for.

We're a post-confirmation estate that will not go forward with the possibility hanging over its head that it may be divested of this asset. That is what this proof of claim and this dispute is about.

And what the debtor needs in order to avoid legal prejudice is the complete elimination of any uncertainty that it owns 46.06 percent of SE Multifamily. And if HCRE is not willing to give that comfort today, we again renew our request for a direction that the three HCRE witnesses appear for

substantive depositions and we get this on the trial calendar.

MR. GAMEROS: Your Honor, we'll agree to it.

THE COURT: Well, you know what, this is such a big deal I really need a client representative to say that. It would be that --

MR. GAMEROS: I don't have one here today, but I can get you one.

THE COURT: How soon --

MR. GAMEROS: Do you want me to file a stipulation or an affidavit?

THE COURT: Pardon?

MR. GAMEROS: Do you want me to file an affidavit?

THE COURT: Well, let's be a hundred percent clear. Your client would state that with the granting of the motion to withdraw proof of claim number 146, HCRE is irrevocably waiving the right to ever challenge Highland Capital Management's 46 percent interest -- and I know it's 46-point something -- 46 percent interest in SE Multifamily Holdings, LLC and is, likewise, waiving the right to appeal or challenge the order to this effect.

MR. MORRIS: Your Honor, if I may, perhaps we can take a ten-minute recess and allow him to consult with his client and perhaps get a client representative on the phone who can make that representation?

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

can get a client rep on the WebEx?

MR. GAMEROS: I'm pretty sure I can, Your Honor.

THE COURT: All right. Well, how about we take a 15-minute recess. Does that sound a reasonable amount of time? We've got, you know, two dozen people --

MR. GAMEROS: It does, Your Honor.

THE COURT: Two dozen people on the WebEx. I don't know if maybe one is a client representative, but we'll take a 15-minute break and I'll come back. Okay.

THE CLERK: All rise.

(Recess at 10:33 a.m./Reconvened at 10:50 a.m.)

THE CLERK: All rise.

THE COURT: Please be seated.

We're back on the record in Highland.

Mr. Gameros, how did you want to proceed now?

MR. GAMEROS: Your Honor wanted me to get a representative of NexPoint Real Estate Partners to state that they agree that the estate has its 46 percent interest in the company agreement subject to the company agreement. And I've got Mr. Sauter here who has authority to speak on behalf of NexPoint Real Estate Partners.

THE COURT: All right. Well, so what is his position with HCRE?

MR. SAUTER: Your Honor, I don't have -- this is DC Sauter. I don't have an official position with HCRE, but I

have spoken with Mr. Dondero and he has authorized me to appear here today and agree to the conditions that Mr. Gameros just outlined.

THE COURT: All right. Well, it sounds like hearsay to me. I don't know -- Counsel, let me have you both respond. You know, I worry about this will fall apart the minute Mr. Dondero is instructing a lawyer, I never agreed to that. I mean I just don't know. This is highly unusual.

First --

MR. GAMEROS: Your Honor, if I might?

THE COURT: Please.

MR. GAMEROS: Mr. Sauter is an officer of the Court. He works, you know, with Mr. Dondero at his business at NexPoint; certainly an authorized agent on behalf of NexPoint Real Estate Partners to make this agreement on behalf of NexPoint Real Estate Partners.

To the extent that the condition that you originally described as a conclusory matter, in other words, how to end the withdrawal, we already agreed to that, that we also can agree on the record to waive any appeal. Mr. Sauter is authorized to agree to that, as well.

So I think as an agent and a lawyer on behalf of NexPoint Real Estate Partners, he's fully able to do that.

THE COURT: How do I know he's able to do that?

And, by the way, if Mr. Dondero is in I guess the

last 15 minutes given him authority to testify before the Court, why couldn't Dondero just get on the WebEx himself?

MR. SAUTER: Your Honor, I think he felt more comfortable with me being a lawyer agreeing to those terms so that he wouldn't misstate something. He has been listening. I believe he's still on, although I'm not certain.

THE COURT: Mr. Morris, do you want to respond? I mean I'm not sure, frankly, I care what you say, no offense. I don't think I have a person with clear authority here.

MR. MORRIS: I'll just be quick and say I agree.

THE COURT: Okay. Mr. Gameros --

MR. GAMEROS: As an attorney for NexPoint Real Estate Partners, I have the authority to make that agreement on the record and it be binding. Mr. Sauter is confirming that authority having spoken with Mr. Dondero about it.

I think that the Court is fully --

THE COURT: Mr. Gameros --

MR. GAMEROS: -- capable of doing that --

THE COURT: Mr. Gameros, come on. You know this is the client's decision to make. Okay. I don't have a client representative. I don't have an officer or controlling equityholder as evidence here of --

MR. MORRIS: Mr. Dondero --

THE COURT: -- the willingness to make the agreement. Pardon?

MR. MORRIS: Can Mr. Dondero make the representation on the record to the Court that he is authorizing Mr. Sauter to waive any claim that HCRE has to Highland's 46.06 percent interest in SE Multifamily along with any appeal? This is just step one. But if Mr. Dondero was on the phone, let him speak up and make it crystal clear that he is delegating the full authority to Mr. Sauter to negotiate and enter into this consensual order on behalf of HCRE.

THE COURT: All right. Mr. Gameros, do you want to give your client authority to speak up? Your client representative, someone who's actually an officer or a controller or equity owner?

MR. GAMEROS: Your Honor, if Mr. Dondero can do that, that would be great. I don't know if he's in a place where he can do that.

THE COURT: All right. Mr. Dondero, if you can hear us, are you willing to give some quick testimony in that regard?

(No audible response)

MR. DONDERO: I can't see the box --

UNIDENTIFIED SPEAKER: Surprising that -- surprising he was on the phone before, but now he's not after delegating. Just I'm not --

MR. SAUTER: Your Honor, he's on the phone. I'm just -- if you will give me a minute, I got to run around the corner

and try to make sure he knows how to unmute himself.

THE COURT: Star 6. If he's on a phone, star 6 is the way to unmute himself. But I want to see video, too.

THE OPERATOR: There we go. Try again.

MR. DONDERO: Hello?

THE COURT: All right.

MR. DONDERO: Hello?

THE COURT: Mr. Dondero, is that you?

MR. DONDERO: It's me. I've been on the entire time.

THE COURT: All right. Can you turn your video on, please?

MR. DONDERO: I am on my cell phone.

THE COURT: Okay. Well, so I guess you just called in on your cell phone, you don't have a WebEx connection on your cell phone?

MR. DONDERO: I don't have a WebEx.

THE COURT: Okay. Well -- yeah, it sounded like you were in the same office as Mr. Sauter. Is that -- did I misunderstand?

MR. DONDERO: We work in the same office. I'm in my car. I just stepped out of my car.

THE COURT: All right. Well, this is not ideal, you know, without us seeing you. But I'll go ahead and swear you in. All right. Can you hear me okay? I need to swear you in.

MR. DONDERO: Yes.

THE COURT: All right.

JAMES DONDERO, HCRE'S WITNESS, SWORN

THE COURT: All right.

Mr. Gameros, do you want to ask him the questions we need to hear answers on, please?

MR. GAMEROS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. GAMEROS:

Q Mr. Dondero, on behalf of HCRE, do you agree as a condition for withdrawing the proof of claim that HCRE will not challenge the estate's ownership or equity interest in SE Multifamily subject to the company agreement?

A Yes.

Q Do you agree that you will not appeal and that, therefore, HCRE is waiving any appeal right to that determination as a condition of withdrawing the proof of claim?

A Yes.

MR. GAMEROS: Those are the questions for Mr. Dondero.

MR. MORRIS: Your Honor, if I may?

THE COURT: Mr. Morris, you may.

MR. MORRIS: I'm very uncomfortable. I'm very uncomfortable with the inclusion of the language subject to the company agreement. It sounds like a very conditional waiver. We need an irrevocable unconditional admission by HCRE that

Highland owns 46.06 percent of SE Multifamily, period, full stop. If they want to keep conditions in there and make it conditional and make it subject to other things, let's please deny the motion and proceed to trial.

THE COURT: All right. Well, Mr. --

MR. GAMEROS: The equity that they own is part of the company agreement. It's not modifying the company agreement by saying.

THE COURT: Well --

MR. MORRIS: Our ownership is not subject to the agreement. We either have an ownership interest or we don't. Our rights and obligations as a member of SE Multifamily are subject to the agreement, but our ownership interest is not. And that's the ambiguity that we need to remove.

THE COURT: Okay. Well, Mr. Gameros, do you want to rephrase the question or are you not willing to make the agreement as specific as Mr. Morris says he needs it?

MR. GAMEROS: That's what I'm -- I guess I don't understand what his complaint is. If the estate owns 46 percent of the equity of SE Multifamily, it owns that subject to the company agreement. It's not a separate ownership interest. So I don't know what the problem is.

THE COURT: Okay. Let me try to phrase it as I understand it.

What I understand has been asserted in the proof of

claim is that what was set forth in the agreement was a mistake, okay. A mistake. And it sounds like you're using language that says we'll agree the agreement, you know, they have a 46 percent interest pursuant to the agreement. But that doesn't change -- that does not really zero in on the argument made in the proof of claim that there was a mistake in the agreement, right?

So you'd have to go broader to completely resolve the issues raised in your proof of claim and say we agree, Highland has a 46.06 interest in SE Multifamily and we agree that is correct and we waive any right to challenge it in the future and we waive any right to appeal this order.

MR. GAMEROS: And, Your Honor, if that's the condition, I guess my concern is that the 46 percent is still part of the company agreement. We agree not to challenge it on the basis of anything asserted in the proof of claim, that being mistake, lack of consideration, or failure of consideration. Their 46 percent is their ownership interest in SE Multifamily and HCRE won't challenge that.

Is that sufficient?

THE COURT: Well, I need to hear from your client. I mean he needs to be asked every which way from Sunday whether he is waiving the right to challenge Highland's 46.06 interest from now until eternity, okay. That's basically, you know, we either have that agreement or we'll just have a trial.

CONTINUED DIRECT EXAMINATION

BY MR. GAMEROS:

Q Mr. Dondero, do you agree that NexPoint Real Estate Partners will not challenge in any way the estate's interest in SE Multifamily, its 46-point whatever percent interest that is?

A I think the nuance is that agreement is okay in current as of today. But it's part of an operating agreement, and that percentage ownership can change due to capital calls and other things. And it could change over time. It's never in a partnership agreement fixed into perpetuity. And so no businessman can agree to that.

If the Court wants it fixed into perpetuity, that would be very odd.

MR. MORRIS: Can we go to trial, Your Honor? Can we just deny the motion and go to trial? Let me have my depositions and go to trial. This is -- if Mr. Dondero wants to take that position, he's welcome to do that. But I'm entitled to finality, and I'd like to get there.

THE COURT: All right. Well, Mr. Gameros, anything else you want to ask your client that you think might be helpful?

BY MR. GAMEROS:

Q Mr. Dondero, you desire to withdraw the proof of claim. Correct?

A Yes.

Q And you agree to an order denying the proof of claim with prejudice. Correct?

A Yes.

Q And can you agree that HCRE will not challenge the equity ownership of its member in SE Multifamily of the estate?

A Yes.

MR. GAMEROS: Your Honor, I think there it is.

THE COURT: Mr. Morris, do you have any --

MR. GAMEROS: He agrees.

THE COURT: -- do you have any follow-up questions --

MR. MORRIS: The waiver of the right to --

THE COURT: -- Mr. Dondero?

MR. MORRIS: The waiver of the right to any appeal whatsoever. And I do have -- you know, there are the other conditions that we mentioned earlier, right? Either they have to also agree that Mr. Seery's deposition transcript shall never be used for any purpose at any time or they need to level the playing field and submit their witnesses to examination.

The playing field needs to be level here. Either if they want to use that deposition transcript for some purpose, I have no problem with that. Just let me take my depositions. If they don't want to submit their witnesses to depositions, then they also have to agree that that transcript will never be used for any other purpose. It's as if this proof of claim has never been filed, right, for that purpose, right. Because

that's just not fair. That's the legal prejudice.

How do you take my client's deposition on Wednesday and file this motion on Friday knowing your client's supposed to be deposed on Tuesday? Level the playing field. That's conditional number two.

And condition number three, frankly, Your Honor, this proof of claim was fraudulent. I mean my client has been damaged. My client has spent an enormous amount of money on this, and I'd like them to agree to if not make us whole, you know, do something because it's wrong. It's just wrong that Mr. Dondero files proofs of claim under penalty of perjury that have absolutely no basis in fact.

It's distressing. I'd like those two last issues addressed, as well.

MR. GAMEROS: Your Honor, in terms of the Court's questions in terms of finality with respect to the membership interest in SE Multifamily, Mr. Dondero agrees with the Court. He's already said that he won't waive -- that he waives, rather -- I'm sorry, let me start again.

He has said very clearly that he has waived appeal of this order allowing the withdrawal of the proof of claim with the conditions that you asked for. I think you should grant the motion to withdraw and we can put an end to all of this.

THE COURT: Okay.

MR. MORRIS: Here's the thing, Your Honor. We know

there's going to be more litigation with HCRE. We know they've breached the contract. We know because the evidence is in the record. We know that Highland demanded access to books and records as is its contractual right back in June. We know that that notice was sent to all of Mr. Dondero's lawyers and HCRE's lawyers. And we know that that request has been absolutely categorically ignored. Okay?

We are going to --

MR. GAMEROS: This has nothing to do with the proof of claim.

MR. MORRIS: We are going to get -- well, no.

To be clear, Your Honor, that is what's driving this concern is because we know that there's going to be additional litigation. We know the tax forms are not accurate. We know there's already an existing breach of contract.

And what we're trying to make sure is that HCRE is not able to resurrect this concept that we don't have an ownership interest, that it's not 46.06 percent, that Mr. Seery made some admission that they're going to use in some future litigation. That's the prejudice, okay.

So I think step one is (indiscernible), but then we need either an agreement that the transcript isn't going to be used elsewhere or that I get the deposition of the HCRE witnesses because it's unfair prejudice to use this process to take that deposition on Wednesday, August 10th and to file this

motion on Friday, August 12th. That is unfair prejudice for them to have taken my client's sworn testimony and then shut it down before I could take theirs.

So either eliminate it all or let it all in, right? It can't be. They can't possibly benefit from this.

THE COURT: Let me understand something, Mr. Morris, you just said. We know we're going to have future litigation. I mean I'm not asking for revelation of attorney-client privilege, but -- communications, but you kind of dangled it out there.

You're saying that the reorganized debtor intends to file litigation against HCRE because of what you think are breaches by it as manager of SE Multifamily of the existing agreement.

MR. MORRIS: The evidence is already in the record, Your Honor. We have -- Highland as a member of SE Multifamily has the contractual right to obtain access to inspect and copy -- those are the words, inspect and copy SEC *[sic]* Multifamily's books and records.

We made that request at the end of June. It's one of the exhibits that's attached that's in the record now. I made probably three different follow-up emails, and it's been completely ignored, okay.

HCRE is the manager of SE Multifamily, right. They're in control. They're the ones who dictate how the

accounting is done. They're the ones who dictate how distributions are made. They're the ones who dictate how tax forms are prepared. They have an obligation under the amended and restated agreement to cause SE Multifamily to prepare the tax returns. They're the ones who are in direct contact with Barker Vigotto.

There's a whole host of issues we're going to examine, but the one thing that I do know for certain, Your Honor, is that they are in breach of the agreement today because they have refused for three months now to give us what we're entitled to. And that is access to inspect and copy SE Multifamily's books and records.

So unless they agree to do that, and I mean pretty soon, we're not going to have any alternative. If you recall, Your Honor, Mr. Dondero's trust, the Dugaboy Trust, filed this valuation motion which we'll address in due course. I don't know where they got the number, but according to Mr. Dondero's trust, Highland's interest in SE Multifamily is worth $20 million. This is not a small asset. This is not harassment.

But they're not complying with their contractual obligation to give us access to inspect and copy SE Multifamily's books and records. For a $20-million asset where it's -- I mean they're conceding now that we're the owner of those membership interest. How can they deny us access?

And if they don't give us that access so that we can

verify the value of this asset, so that we can verify whether or not we've gotten the distributions that we're entitled to, so that we can verify that the profits and losses that have been allocated to Highland were actually proper and consistent with the agreement, I'm afraid that there will be further litigation, and that's why we need to -- we need to nail this down right now because I don't want to get a counterclaim that says we left the deal open to challenging Highland's interest in SE Multifamily. That door needs to close today.

THE COURT: Okay. All right. Well, I'm going to start out by saying we're in a very unusual procedural posture.

Before I forget, Mr. Gameros, I meant to mention this at the very beginning. The motion to withdraw the proof of claim of your client, you had an odd way of signing it. I wonder if this was a mistake or you always sign this way. You signed the pleading signature Charles W. Gameros, Jr., PC.

Is that -- was that inadvertent or do you always sign that way? I mean a lawyer's supposed to personally sign under Rule 11 a pleading. Was that just inadvertent or do you think that's fine?

MR. GAMEROS: I've used that signature block for over 20 years, and I've never -- no one has ever asked. I thought it was fine.

THE COURT: Okay. Well, no one's ever asked and you think it's fine. I think you need to go back and do some

research on that, okay. I'm not sure it's fine. I'm not sure it's fine.

I mean you would agree that you're personally bound under Rule 11 when you file a pleading, right?

MR. GAMEROS: Yes, Your Honor.

THE COURT: I mean I know it feels a little different if you're -- well, I don't know. You're not a -- you have a firm, Hoge & Gameros, L.L.P. I mean it wouldn't be appropriate for Mr. Morris to sign a pleading Pachulski Stang, right? He has to sign his name personally on a pleading, right?

MR. GAMEROS: Your Honor, I'll make that change.

THE COURT: Okay.

Well, so we're in an unusual procedural context. We I think all agree that Bankruptcy Rule 3006 is the applicable authority, and it provides that, you know, a creditor can't just withdraw a claim when there's been an objection filed to it. There has to be notice and an order from the Court.

And so we don't run into this situation very often, but I have seen it before. And as someone or both correctly noted, it is a rule that sort of goes to the integrity of the system. Filing a proof of claim is obviously a very significant act in the context of a bankruptcy case.

You file a proof of claim under penalty of perjury so it's a big deal from, you know, a criminal exposure standpoint

but it's also a big deal because we want to make sure only parties with legitimate claims are given a seat at the table, so to speak, in bankruptcy as far as, you know, their right to a distribution, their right to be heard in a case.

So, you know, that's the reason for the rule. We don't see it come into play very often, but it's there because we want to make sure that we protect the integrity of the bankruptcy process. And if someone files a proof of claim and it's pending and, you know, activity happens in the bankruptcy case as a result of it, that we don't just let a party say never mind.

So the Manchester case, which you both cited in your pleadings, has set forth fact-intensive factors -- fact-intensive inquiry. And, again, I'm just looking at HCRE's motion, Page 7. There was a chart and it sets forth the Manchester factors. Factor number one, diligence in bringing the motion to withdraw the proof of claim.

In Mr. Gameros' chart, his response to that factor is that HCRE brought its motion to withdraw immediately after conferring with debtor's counsel. I don't even know what that means, okay. But what I do know is in looking at diligence of bringing the motion, the proof of claim was filed April 8th, 2020. It was objected to, the proof of claim, July 30th, 2020. And then on August 12th, 2022, this motion to withdraw the proof of claim was filed.

So two years and one month after the objection was filed to the proof of claim HCRE withdraws it. So that doesn't seem very diligent. It's not diligent at all, to be honest.

Your second factor, you cited, Mr. Gameros, undue vexatiousness, and you say HCRE has not been vexatious in pursuing its proof of claim. And outside the motion to disqualify previous counsel, which is not substantive, everything in the matter has proceeded by agreement and there have been no hearings set or held.

Okay. Well, debtor has represented in its pleadings and today through counsel on the record that it has spent hundreds of thousands of dollars litigating this. It has mentioned that four depositions have been taken. It was Mr. Mark Patrick. It was the tax accounting firm. We had the B -- the entity -- BH Equities, LLC, their representative. And then Mr. Seery. So four depositions, and I'm told a lot of written discovery.

And on the day before the -- well, the day after, day or two after the Seery deposition, the motion to withdraw the proof of claim was filed after 5:00 in the evening on a Friday, August 12th, and I guess a couple of business days before the depositions were to occur of Mr. Dondero and the fellow, Mr. McGraner, and I feel like there was one other deposition. I'm losing track of those.

But --

THE CLERK: The 30(b)(6).

THE COURT: Oh, the 30(b)(6). The 30(b)(6) representative.

So on top of all of that, you know, Highland argues there was just simply no good-faith basis for the proof of claim. Proof of claim asserted the membership interest, Highland's 46.06 interest, set forth in the Multifamily LLC agreement were the result of mistake.

Mr. Dondero signed the agreement for both parties, HCRE and Highland. And then now the motion to withdraw says something to the effect of the anticipated issues have not materialized. So anyway, the undue vexatiousness factor I think weighs -- because of these factors I've mentioned, weighs in favor of there has been undue vexatiousness.

Factor number three, according to HCRE's motion to withdraw the proof of claim, is matter's progression including trial preparation. Again, four depositions, thousands of pages of written discovery. We were days away from the last depositions occurring, those of HCRE's potential witnesses and we have trials set. We have a trial set in November. So that factor, again, seems to weigh heavily in favor of Highland's objection here.

Duplication of expense of relitigation, here's why we got Mr. Dondero on the phone or wanted to have a witness with authority. Highland is saying we are concerned about

relitigation of this ownership interest issue. And as part of its argument, Highland has said we've got claims, we've got our own claims for breach of agreement and different things that are going to cause us to have to drill down on terms of the LLC agreement.

And we can't -- we don't want to face exposure on this issue of, well, you don't have the ownership interest or the rights you say you do, Highland. So, you know, if we could get ironclad language here of, you know, we waive the right, we agree that Highland has the 46.06 interest and we waive the right to challenge that, then I don't think we'd have to worry about relitigation of the issues in the proof of claim. But it feels like we had a little bit of reluctance to say it as forcefully as we would need to have it said to avoid relitigation.

Reason for dismissal, I don't know. I don't know what the reason for dismissal. Again, to quote HCRE's pleading on Page 7, the reason for dismissal is, "The operation of the company" -- I think that means SE Multifamily -- "during the case and the anticipated issues therewith have not materialized and NREP no longer desires to proceed in the matters raised in the proof of claim."

I mean that's just not in sync with the theory espoused in the proof of claim that we think there was a mistake made in the LLC agreement. So, again, looking at these

legal factors, I do not think that the correct result is to grant the motion to withdraw the proof of claim under Rule 3006 under the Manchester factors. I will throw in that I think there is potential for prejudice here of the debtor.

I mean not even considering that hundreds of thousands of dollars have been spent over two-plus years on this issue, you know, I remember very well the disqualifying motion. And I said Wick Phillips should be disqualified. I didn't shift fees because I just wasn't sure at the time that, frankly, HCRE should be imposed with the fees attributable to its lawyers, not recognizing the conflict of interest when they saw one. It was just a little fuzzy in my mind.

But I'm just letting you know that now that we are here many years later, many months later and we have all the sudden, okay, never mind, this is just a situation where I have some regrets I didn't shift fees, to be honest. But -- so the motion is denied. The depositions shall go forward. I'm not sure, you know, if the dates that have been proposed are still workable, but if someone wants to speak up now about those deposition dates to avoid an emergency hearing, I'm willing to hear that.

I think what I heard was, well, I don't know what -- have you talked about dates at all? Probably not, Mr. Morris, in light of this hearing today.

MR. MORRIS: We have not, Your Honor. But I do think

that Counsel and I can work that out. I'm not available until the week of the 26th. So it won't be early that week but sometime between let's say the 28th of September and the 7th of October, I'll be prepared to take these depositions. And I would respectfully request, and we can work with Ms. Ellison to try to find a trial date sometime the last week of October, first week of November so we can get this finished.

THE COURT: Okay. Did I dream up that there was a trial set already in November?

MR. MORRIS: You know what?

You know what, let's just keep that date, Your Honor. Let's just keep that date.

THE COURT: All right. Traci, are you still on the line? Can you confirm my memory? I thought we had a two-day trial set aside for this in November.

MS. ELLISON: Is this on the merits of HCRE's claims, Judge Jernigan? I have a note holding November 1 and 2.

THE COURT: Okay.

MR. MORRIS: Yeah.

THE COURT: So we'll go ahead and mark that down.

Now the last -- so you'll work on an a mutually agreeable date for these three remaining depositions sometime, you know, late September, early October. And I trust you will --

MR. MORRIS: Yeah. I would respectfully request that

Counsel just propose dates for the depositions. I'll wait to hear from him. But I think -- I'm representing to the Court that any time between September 28th and let's just give it two full weeks, October 12th. That's plenty of time in advance of the trial.

THE COURT: All right. Mr. Gameros, anything you want to add on that?

MR. GAMEROS: No, Your Honor. I'm sure we can work with Mr. Morris to get those scheduled.

THE COURT: All right. And here's actually the last thing I wanted to say.

You know, I had thought about, you know, waiting 24 hours to give you a ruling on this motion to withdraw the proof of claim and directing you all to kind of talk and see if maybe you could work out language, you know, without the pressure of the Court hovering over you that could make both of your clients satisfied.

I still encourage you to do that, but I'm going to pick on our U.S. Trustee. I see she's observing today, and I'm not going to ask you to say anything, Ms. Lambert. But if you all do agree, if you all in the next, you know, 24 hours come to some sort of agreement, I don't mean to be alarming, but I want it run by the U.S. Trustee because, you know, I've heard some things that have troubled me about the, you know, lack of good faith with regard to the proof of claim and, you know,

alleged gamesmanship.

And, you know, I talked earlier about this goes to the integrity of the system, you know, filing a proof of claim under penalty of perjury. Anyway, I'm feeling a little bit uncomfortable about signing off on an agreed order where there may be quid pro quos that went back and forth in connection with withdrawing a proof of claim. I mean at some point -- well, that's why we have scrutiny of these things under Rule 3006, right?

Again, there are integrity issues. And so I just -- you know, if you were to work out language, I want you to run it by Ms. Lambert and I want to hear that either she was okay with it or she wasn't okay with it or maybe she declines to comment. You know, I'm not going to tell her how to do her job, but I feel like that needs to happen, okay?

It's just something uncomfortable going on in my brain about, you know, again a proof of claim being on file two, almost two and a half years and then, you know, okay, never mind, okay, I agree to never mind as long as you agree to XYZ.

And I have no idea what's in the Seery transcript. I don't have it before me. But, you know, I don't even know what that's all about. I don't even know if I care what that's all about. I just know if there are quid pro quos I feel like, you know, maybe I need to have the U.S. Trustee, you know, not per

se signing off on any agreed order but at least kind of looking at it and telling me either U.S. Trustee's fine with it, U.S. Trustee is not fine with it, or U.S. Trustee declines to comment. Just I know that I've gone through the drill, okay?

So just letting you know I am still, you know, all open to an agreed resolution of this, okay. But we're going forward as if you can't get there, okay?

All right. I'll look for -- what am I going to look for? I'm going to look for an order denying the motion to withdraw proof of claim. I'm going to look for an order granting the -- well, an order resolving the objection to motion to quash and cross-motion for subpoenas saying that these three witnesses are going to appear at a mutually agreeable time either late September or early October.

All right. We're adjourned.

THE CLERK: All rise.

MR. MORRIS: Thank you, Your Honor.

(Proceedings concluded at 11:35 a.m.)

* * * * *

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

I, DIPTI PATEL, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Dipti Patel

DIPTI PATEL, CET-997

LIBERTY TRANSCRIPTS DATE: September 13, 2022

EXHIBIT 7

CRAWFORD, WISHNEW & LANG PLLC
Michael J. Lang
Texas State Bar No. 24036944
mlang@cwl.law
1700 Pacific Ave, Suite 2390
Dallas, Texas 75201
Telephone: (214) 817-4500

Counsel for Movants

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

In re:	)	Case No. 19-34054-sgj-11
	)	
Highland Capital Management, L.P.,	)	Chapter 11
	)	
Debtor.	)	
	)	

RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware limited liability company (collectively, "Movants") file this Renewed Motion to Recuse (the "Motion") Pursuant to 28 U.S.C. § 455[1] and would, in support thereof, respectfully show the Court as follows:

1. This Motion is necessary because the Court denied a prior motion by Movants to supplement the record in support of their original motion to recuse, making it impossible for Movants to have all evidence of the Court's bias considered on appeal.

2. As previously asserted, the Court has essentially acknowledged that it has formed negative opinions of Mr. Dondero in a prior bankruptcy; those opinions have carried into *this* bankruptcy; and, despite best efforts, the Court has been unable to extricate those opinions from its mind.

[1] 28 U.S.C. § 455 has been made applicable to bankruptcy judges under FED. R. BANKR. P. 5004.

1934054220927000000000031

Moreover, the record in this bankruptcy reflects that the Court's negative opinions of Mr. Dondero have resulted in, if not actual bias against Movants, the undeniable perception of bias against them that impair the ability of Movants to preserve their legal rights. And while the Court previously suggested that Movants sought recusal too late, that suggestion is misguided, because the Court continues to preside over several proceedings involving Movants, and because the Court's bias continues to pervade all proceedings before it. For the reasons set forth above and in the Movants' Memorandum of Law in Support of Renewed Motion to Recuse, which is incorporated by reference as if fully set forth herein, Movants respectfully request that their Motion be granted. In the alternative, Movants hereby request that the Court make clear that any order denying recusal is final, so that Movants may appeal the Court's order to the Northern District of Texas.

Dated: September 27, 2022

Respectfully submitted,

CRAWFORD, WISHNEW & LANG PLLC

By: */s/ Michael J. Lang*
Michael J. Lang
Texas State Bar No. 24036944
mlang@cwl.law
1700 Pacific Ave, Suite 2390
Dallas, Texas 75201
Telephone: (214) 817-4500

Counsel for Movants

CERTIFICATE OF SERVICE

The undersigned certifies that on September 27, 2022, a true and correct copy of the above and foregoing document was served on all parties and counsel set to receive notice by the Court's ECF system.

/s/ Michael J. Lang
Michael J. Lang

EXHIBIT 8

Docket #3542 Date Filed: 9/27/2022

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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.	Case No. 19-34054 (SGJ)
Debtor.	JAMES DONDERO, HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., NEXPOINT ADVISORS, L.P., THE DUGABOY INVESTMENT TRUST, THE GET GOOD TRUST, and NEXPOINT REAL ESTATE PARTNERS, LLC, F/K/A HCRE PARTNERS, LLC, A DELAWARE LIMITED LIABILITY COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

MOVANTS' MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

1934054220927000000000034

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

This Renewed Motion to Recuse is necessary because the Court denied a prior motion by James Dondero, Highland Capital Management Fund Advisors, L.P., The Dugaboy Investment Trust, Get Good Trust, and NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC (collectively, "Movants") to supplement the record in support of their original motion to recuse, making it impossible for Movants to have all evidence of the Court's bias considered on appeal. As set forth herein, the Court's animus toward Movants is so evident, persistent, and severe that Movants cannot receive fair treatment or justice in this Court. And while the Court previously suggested that Movants sought recusal too late, that suggestion rings hollow, because the Court continues to preside over several proceedings involving Movants, and because the Court's bias continues to pervade all proceedings before it. This Motion should be granted.

II. PROCEDURAL HISTORY

The Movants filed their original motion to recuse ("Original Recusal Motion") on March 18, 2021.[1] The Court denied the Motion less than a week later.[2] In doing so, the Court acknowledged "that the applicable statute and rule do not expressly address timeliness" but nonetheless concluded that the motion was untimely.[3] Moreover, despite recognizing that an objective standard should be applied to a recusal determination, the Court instead applied a subjective standard, based entirely on a self-assessment: "The Presiding Judge does not believe she harbors, or has shown, any personal bias or prejudice against the Movants."[4]

The Movants appealed the Bankruptcy Court's order denying their Original Recusal

[1] *In re: Highland Capital Management, L.P.*, Case No. 19-34054-sgj11, Bankr. Dkt. No. 2061.
[2] Bankr. Dkt. No. 2083.
[3] *Id.* at 5.
[4] *Id.* at 10.

Motion to the United States District Court for the Northern District of Texas on April 6, 2021.[5] On February 9, 2022, the District Court denied the appeal for lack of jurisdiction.[6]

Thereafter, this Court continued to preside over the bankruptcy proceedings as well as at least nine adversary proceedings involving the Movants. Further, the Court has since held additional hearings and made additional rulings and other statements that demonstrate clearly the Court's ongoing animus toward Movants. As a result, on August 26, 2022, Movants filed an Amended Motion for Final Appealable Order and Supplement to Motion to Recuse Pursuant to 28 U.S.C. § 455 ("Motion to Supplement"), in which Movants sought: (1) to remove the "reservation language" in the Original Recusal Order; (2) an order stating that Original Recusal Order is final; and (3) to supplement the record on the Original Recusal Motion.[7] The Court held a hearing on the Motion to Supplement on August 31, 2022. At that hearing, the Movants informed the Court that Highland was *unopposed* to the relief requested in the Motion to Supplement. Nevertheless, the Court accused Mr. Dondero and his counsel of "carpet-bombing us with paper and causing us to expend resources," chastised Mr. Dondero's counsel at length for the size of the record submitted in support of the Motion, and asked counsel to "help me to understand why this is not wasting resources in your view and why this isn't just some strategy."[8]

Following the hearing, the Court issued an order denying the Motion to Supplement as procedurally improper.[9] In its order, the Court invited Movants to do one of two things: (1) file a "simple motion" (without attaching additional evidence) seeking the removal of the language

---

[5] *See Dondero v. Hon. Stacey G. C. Jernigan*, Civ. Action No. 3-21-CV-0879-K.

[6] *Id.*, Dkt. No. 39 at 1-2 (noting that the Bankruptcy Court "reserve[d] the right to amend or supplement" its ruling).

[7] Bankr. Dkt. No. 3470.

[8] Ex. U, August 31, 2022 Hr'g Tr. at 20:13-25. Based on the Court's comments, Movants have attached only relevant excerpts of transcripts to this Motion to minimize the volume of exhibits in the record. However, Movants can file an appendix attaching full transcripts at the Court's request.

[9] Bankr. Dkt. No. 3479 at 3.

in the Court's original order denying recusal that hindered immediate appeal, or (2) file a new motion to recuse based on "any alleged new evidence or grounds for recusal."[10] By invoking the first option, Movants would be free to seek mandamus of the Court's denial of the Original Recusal Motion, but would not have the benefit of a full and complete record. Consequently, Movants have elected to file a new Motion containing all evidence of record that supports recusal.

III. RELEVANT BACKGROUND AND EVIDENCE OF BIAS[11]

Many disparaging remarks have been made about Mr. Dondero, his employees, and his businesses during the course of these bankruptcy proceedings, few of which are tethered to facts or evidence adduced in this case. Among other things, Mr. Dondero has repeatedly been labeled "vexatious," "litigious," and a bad actor. HCMLP has, in turn, been described as a "Byzantine empire" and "ruinous web."[12] These accusations—which, to be clear, is all they are—have no basis in the realities of HCMLP's business or Mr. Dondero's management of it.

A. Mr. Dondero Ran A Successful And Profitable Business For More Than Two Decades Prior to Bankruptcy

HCMLP is an SEC-registered investment advisor founded in 1993 by Mr. Dondero and Mark A. Okada.[13] Although this Court has adopted various advocates' description of HCMLP and its affiliates as a complex "web" of entities operated at the whim and for the sole benefit of Mr. Dondero, for 26 years prior to filing a chapter 11 petition, HCMLP operated as a legitimate (and heavily regulated) investment advisor for the benefit of its managed funds and investors. As of the Petition Date, HCMLP continued to employ 76 employees, including executive-level

---

[10] *Id.*

[11] Movants have truncated the discussion of the relevant background that previously was discussed in Movants' Original Recusal Motion. Movants hereby incorporate the Original Recusal Motion by reference and, where appropriate, Movants specifically reference sections of that Motion to support their renewed arguments here.

[12] Ex. D, June 30, 2020 Hr'g Tr. at 22:18, 68:24.

[13] Order (I) Confirming Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief ("Confirmation Order"), Bankr. Dkt. No. 1943, ¶ 4.

managers.[14] Thus, while the Court has described Mr. Dondero as HCMLP's solitary decision-maker on all matters concerning the company's operation and management, that description makes no sense. At its high-water mark, HCMLP had assets under management exceeding $40 billion.

Following the financial crisis in 2008, HCMLP and some of its managed funds and affiliates, like many other financial institutions and advisors across the globe, faced several lawsuits. Notably, although the Court has repeatedly characterized Mr. Dondero as "litigious" and "vexatious," in virtually all of the lawsuits involving HCMLP before its bankruptcy filing, HCMLP was *the defendant*.[15] What is more, between 2008 and HCMLP's bankruptcy filing in 2019, virtually none of the lawsuits filed against HCMLP resulted in any sizeable liability *against HCMLP*, and certainly none that would render HCMLP insolvent.[16] Indeed, the only significant award issued against HCMLP at any time between 2008 and 2019 is an arbitration award in favor of the Redeemer Committee. It also bears mentioning that at no time prior to HCMLP's bankruptcy filing had Mr. Dondero ever personally been held liable for *any* misconduct in relation to his management of HCMLP's business.

B. The Court Formed An Animus Against Mr. Dondero During The Acis Bankruptcy Case That Infected This Bankruptcy Case From The Outset

The Court's animus toward Movants stems from its earlier involvement in the bankruptcy case of Acis Capital Management, L.P., a Delaware limited partnership formed in 2010. In January 2018, Joshua Terry, filed an involuntary petition in bankruptcy against Acis and its general partner,

---

[14] *Id.*, ¶ 5.

[15] *See, e.g.*, *UBS Securities, LLC v. Highland Capital Mgmt., L.P., et al.*, Index No. 650097/2009 (N.Y. Sup. Ct.); *Citibank, N.A. v. Highland CDO Opportunity Master Fund, L.P., et al.*, Case No. 1:12-cv-02827-NRB (S.D.N.Y.); *HYMF, Inc. v. Highland Capital Mgmt., L.P., et al.*, Index No. 601027/2009 (N.Y. Sup. Ct.); *Daugherty v. Highland Capital Mgmt., et al.*, Case No. 2017-0488-SG (Del. Ch. Ct.).

[16] Although this Court has suggested that HCMLP owes "$1 billion" to UBS, the UBS judgment was not against HCMLP but two of its managed funds. *See* Bankr. Dkt. 177-4. The Debtor itself objected to UBS's $1 billion proof of claim on this basis. *See* Bankr. Dkt. No. 906.

Acis Capital Management GP, L.L.C. (collectively, "Acis").[17] This Court presided over the Acis Bankruptcy. Prior to its bankruptcy, Acis served as portfolio manager for "hundreds of millions of dollars' worth" of collateralized loan obligations ("CLOs").[18] Mr. Dondero served as Acis's Chief Executive Officer, and HCMLP provided certain services to Acis pursuant to shared services agreements. The Court's Bench Ruling confirming Acis's Chapter 11 plan makes abundantly clear that the Court formed negative opinions of Mr. Dondero during that bankruptcy case. The ruling is replete with negative remarks about Mr. Dondero, his management decisions, and the structure of his businesses.

HCMLP, a separately owned entity, filed its Chapter 11 petition in bankruptcy for entirely different reasons in Delaware on October 16, 2019.[19] At the time, Debtor's counsel—Pachulski, Stang, Ziehl & Jones, LLP ("Pachulski")—explained that it filed the bankruptcy in Delaware to give HCMLP and its then-existing management (including Mr. Dondero), a "fresh start."[20] The Official Committee of Unsecured Creditors (the "UCC") moved to transfer the proceedings to this Court, arguing that transfer was appropriate because the Court had the benefit of a "learning curve" because of the Acis Bankruptcy.[21] At the time, Pachulski resisted the transfer, arguing that the UCC only wanted to take advantage of the Court's preexisting negative views of HCMLP's management.[22] Thus, it was Pachulski that initially questioned the Court's impartiality. The

[17] *In re Acis Capital Mgmt., L.P.*, Case No. 3:18-bk-30264 (N.D. Tex.) ("Acis Bankruptcy"), Dkt. No. 1; *see also* Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee's Third Amended Joint Plan ("Bench Ruling), Acis Bankr. Dkt. No. 287 at 10-11.

[18] Bench Ruling, Acis Bankr. Dkt. No. 827 at 4.

[19] Bankr. Dkt. No. 3.

[20] Ex. A, December 3, 2019 Hr'g Tr. at 78:21-23.

[21] *Id.*

[22] *Id.* at 78:3-8; *see also id.* at 79:14-20 (referring to the opinions the Court formed in the Acis bankruptcy as "baggage").

Delaware Bankruptcy nonetheless granted the UCC's motion to transfer.[23]

Following transfer, this Court foreshadowed that it would rely on the negative opinions it formed during the Acis Bankruptcy in dealing with Mr. Dondero, his former employees, and his affiliated entities.[24] Indeed, *at the very first hearing* before this Court on January 9, 2020, the Court reiterated its many negative opinions.[25] And the Court pointed to actions purportedly taken by Mr. Dondero in the Acis Bankruptcy as "evidence" of a presumed propensity of Mr. Dondero to engage in similar actions in the HCMLP bankruptcy. For that reason, the Court insisted on including language in its order allowing it to hold Mr. Dondero (but no other party) in contempt of court.[26] Notably, at the time of this first hearing, *Mr. Dondero had not filed a single motion or objection to any motion*. Consequently, there was nothing in the record before the Court to justify its specific rulings and comments relating to Mr. Dondero.

C. The Court's Animus Continued To Infect It Decision-Making And Treatment Of Movants[27]

1. The February 19, 2020 Motion to Retain Hearing

Just over a month after the Court's initial hearing in the bankruptcy case, on February 19, 2020, the Court held a hearing on HCMLP's application to retain the law firm Foley Gardere to pursue appeals relating to the Acis Bankruptcy on behalf of Neutra Ltd., a company owned by Mr. Dondero that succeeded to the ownership of Acis. Importantly, during the hearing, former Bankruptcy Judge Russell Nelms—one of the three independent directors appointed to Debtor's

---

[23] *Id.* at 90:15-24.

[24] Shortly after the case was transferred, the United States Trustee likewise relied on the Court's comments and conclusions in the Acis Bankruptcy as the basis for its motion to appoint a Chapter 11 trustee. *See* Bankr. Dkt. No. 271. None of the evidence cited in the Trustee's motion had yet been adduced in HCMLP's bankruptcy proceeding.

[25] Ex. B, January 9, 2020 Hr'g Tr. at 78:23-79:16 (stating, "I can't extract what I learned during the Acis case, it's in my brain," and explaining its opinion that Mr. Dondero acted in a "bad way" in the Acis case).

[26] *Id.* at 80:3-6; *see also id.* at 52:10-25.

[27] For completeness and to give a full picture of the extent of the Court's bias, Movants have attached as Appendix A a chart listing many other, similar examples.

Independent Board—testified that, in the Board's business judgment, employment of Foley Gardere and payment of its legal fees was in the Debtor's best interest.[28] Despite that testimony, the Court *sua sponte* expressed a belief (untethered to evidence) that Mr. Dondero may have somehow used his "powers of persuasion" to unduly influence the Independent Board's business judgment.[29] The Court did not stop there. It went on to comment: "Highland is in bankruptcy because of litigation, litigation, litigation. The past officers and directors and controls' propensity to fight about everything . . . It's about years of litigation coming home to roost. And this appears to be more of the same, potentially."[30] That unsolicited commentary is surprising for two reasons. *First*, again, Mr. Dondero had not yet "fought" anything in the context of the HCMLP proceedings (and indeed, was not even present at the hearing on the Debtor's motion to retain Foley Gardere). *Second*, HCMLP was the *defendant* in the various lawsuits spawning "years of litigation," which the Court nonetheless blamed on "past officers and directors" of HCMLP.[31] Where, as here, the Court has manifested an early distrust of one party and made unsolicited negative comments about the party's practices and intent, federal appellate courts have required recusal.[32]

---

[28] Ex. C, February 19, 2020 Hr'g Tr. at 62:6-17.

[29] *Id.* at 177:7-178:3 (emphasizing the Court's "long history" with Mr. Dondero—a history that came entirely from the Acis Bankruptcy). In the same hearing, the Court also suggested that Mr. Dondero could not be "trusted" to "keep his word." *Id.* at 174:11-175:13. When applying the reasonable business judgment standard to Mr. Seery and Debtor management, by contrast, the Court has said it is a very low standard requiring judicial deference. *See* Ex. W, August 4, 2021 Hr'g. Tr. at 77:4-78:20.

[30] Ex. C, Feb. 19, 2020 Hr'g Tr. at 178:4-12.

[31] *See id.* at 177:7-178:17. Again, the *only* pre-petition lawsuit that ended in any sizeable judgment *against HCMLP* was the arbitration award issued against HCMLP in favor of the Redeemer Committee. Further, the Debtor *objected* to proofs of claim filed by the parties litigating or attempting to litigate against HCMLP—including those filed by Acis, UBS, Pat Daugherty, and HarbourVest—arguing that their proofs of claim were unmeritorious. *See* Bankr. Dkt. Nos. 771 (Acis and Terry), 1008 (Daugherty), 906 (HarbourVest), 928 (UBS).

[32] *See Sentis Group, Inc. v. Coral Group, Inc.*, 559 F.3d 888, 904-05 (8th Cir. 2009) (judge's "apparent distrust of Plaintiffs as manifested early in the litigation" were among the reasons that reassignment on remand was appropriate); *U.S. v. Microsoft Corp.*, 56 F.3d 1448, 1464-65 (D.C. Cir. 1995) (district judge made "several comments during proceedings which evidenced his distrust of Microsoft's lawyers and his generally poor view of Microsoft's practices" arising out of "other alleged misdeeds," none of which were at issue in the actual case before it).

From that point on, unsurprisingly, HCMLP and its counsel began to leverage the Court's predisposition against Mr. Dondero (*i.e.*, what the Debtor had previously described as the Court's "baggage") for the Debtor's own benefit.[33]

2. The June 30, 2020 CLO Fund Release Hearing

The Court's animus against Movants persisted, and if anything, got worse, from there. In April 2020, CLO Holdco—a non-debtor wholly-owned subsidiary of a charitable Donor-Advised Fund (the "DAF") established by Mr. Dondero, moved to have $2.5 million in funds that indisputably belonged to CLO Holdco released from the registry of the Court.[34] The UCC objected. At a June 2020 hearing, CLO Holdco introduced 16 exhibits supporting its claim to the funds, and the Court admitted that CLO Holdco's lawyer made "perfect arguments" regarding the potential legal ramifications of refusing to release the funds, including that "holding the money in the registry of the Court that a non-debtor asserts is its property" is "tantamount to a prejudgment remedy."[35] Nonetheless, based entirely on arguments made by counsel for the UCC, the Court again concluded that Mr. Dondero was behind the CLO Holdco filing and, therefore, questioned whether it was filed in "good faith," despite the absence of evidence in the record supporting this belief.[36] The Court therefore denied the motion. To date, the UCC has not pursued injunctive (or any other) relief with respect to the funds, but the Court has not released them to CLO Holdco.[37]

---

[33] This is similar in kind to what happened in *Sentis Group, Inc.*, in which the U.S. Court of Appeals for the Eighth Circuit reversed and remanded for reconsideration by a different judge a district court's order dismissing the case as a sanction for perceived discovery misconduct by the plaintiffs. In a case marred by contentious discovery disputes, the Eight Circuit first noted that "defense counsel's goal shifted from conducting effective discovery to fanning the flames of the court's frustration and building a case for sanctions." *Id.* at 891. Ultimately, the Eighth Circuit reversed the sanctions order and held that the district court's statements, in combination with its misconstruction of a prior order and "its apparent distrust of Plaintiffs as manifested early in the litigation" showed a "sufficiently high degree of antagonism to require reassignment of the case on remand." *Id.* at 904-05.

[34] Bankr. Dkt. No. 590.

[35] *See* Ex. D, June 30, 2020 Hr'g Tr. at 85:17-22.

[36] *Id.* at 82:3-11, 85:4-16.

[37] Needless to say, Movants and every entity that the Court has surmised has any affiliation with Mr. Dondero are gun-shy about filing any motion out of fear they will be slapped with sanctions or deemed to have acted in "bad faith."

3. The July 8, 2020 Exclusivity Hearing

Just over one week later, at a hearing on HCMLP's motion to extend the exclusivity period, the Court, acting *sua sponte*, directed HCMLP's counsel to investigate Mr. Dondero and certain "Highland affiliates" after allegedly seeing a news article (that was not part of the record) that referenced "Mr. Dondero or Highland affiliates" receiving PPP loans.[38] Notably, neither Mr. Dondero nor the "Highland affiliates" referred to in the article were the property of or controlled by HCMLP. In fact, as HCMLP would later confirm, the PPP loans at issue had nothing whatsoever to do with the HCMLP.[39]

4. The December 16, 2020 And January 26, 2021 CLO Hearings

In keeping with its habit of accusing entities that the Court perceives to be affiliated with Mr. Dondero of acting "bad faith," the Court did so again in December 2020.[40] On December 16, 2020, the Court held a hearing on a motion by various third-party financial advisors and retail funds to prevent HCMLP's liquidation of certain CLO assets (the "Restriction Motion").[41] During the hearing, the Court chastised counsel for the advisors and retail funds for filing the Restriction Motion (*i.e.*, for advocating a good faith position on behalf of their clients), stating that it was "dumbfounded" by the motion, and opining that Mr. Dondero was behind it, notwithstanding that it was filed by separate and distinct legal entities represented by independent counsel.[42] The Court

---

Conversely, the UCC, which has not alleged any legitimate basis for the Court's continued retention of the funds belonging to CLO Holdco, has not been chastised or threatened with sanctions.

[38] *See* Ex. E, July 8, 2020 Hr'g Tr. at 42:10-24.

[39] Ex. F, July 14, 2020 Hr'g Tr. at 53:17-59:3.

[40] The federal courts have repeatedly required recusal or reassignment to a different judge where the sitting judge questions the integrity of one party or their counsel or suggests that their actions constitute "bad faith." *See, e.g.*, *Johnson v. Sawyer*, 120 F.3d 1307, 1334-37 (5th Cir. 1997); *In re U.S.*, 572 F.3d 301, 311-12 (7th Cir. 1999); *U.S. v. Kennedy*, 682 F.2d 244, 258-60 (3d Cir. 2012).

[41] Bankr. Dkt. No. 1522. The basis and context for the motion is described in detail in Movants' Original Recusal Motion, Bankr. Dkt. No. 2061, at pp. 8-16. Notably, the retail funds are registered investment advisors that owe independent fiduciary duties to their investors pursuant to the Investment Advisors Act of 1940.

[42] Ex. J, December 16, 2020 Hr'g Tr. at 63:14-25.

concluded, without any evidentiary basis, that the Restriction Motion was brought for an improper purpose.[43] The Court further declared the Restriction Motion frivolous, "almost Rule 11 frivolous," notwithstanding that the motion was filed in good faith.[44] The Court then used the hearing to condemn Mr. Dondero on the record.

Yet another display of the Court's bias toward Movants came in the context of this same dispute, several weeks later. On January 26, 2021, the Court held a preliminary injunction hearing in which it considered whether the advisors and retail funds had tortiously interfered with agreements relating to management of the CLOs.[45] It was abundantly clear at the hearing that HCMLP could not make the requisite showing to justify injunctive relief.[46] And the evidence was undisputed that Mr. Dondero did not influence or cause the advisors or retail funds to take any action. Nevertheless, the Court once again turned its focus to Mr. Dondero, warning him that the Court had prohibited him from taking action to interfere with the CLOs. Incredibly, the Court then made the implied finding that Mr. Dondero had caused counsel for the retail funds to take certain actions.[47] The Court further stated that it was "leaning" toward finding Mr. Dondero in contempt of court and threatening to shift the "whole bundle of attorney's fees" to Mr. Dondero in connection with a motion for injunctive relief filed by HCMLP that had nothing to do with him.[48]

---

[43] *Id.*

[44] *See id.* at 64:1-7. The statutory basis for the requested relief was section 363(c)(1) or section 1108 of the Bankruptcy Code, which provide that the debtor-in-possession may engage in ordinary course business "unless the court orders otherwise." That was all that the Advisors and Retail Funds asked the Court to do.

[45] *See* Adv. Proc. No. 21-03000-sgj, Dkt. 1; Ex. L, January 26, 2021 Hr'g Tr.

[46] HCMLP's failures in this regard are detailed in Movants' Original Recusal Motion, Bankr. Dkt. No. 2016, at pp. 13-16.

[47] This finding was in direct contravention of the Court's statements just one week earlier, where it implied that Mr. Dondero lacked such control and prohibited Mr. Dondero from testifying that he exercised no control of the advisors, the retail funds, or their counsel. Ex. K, January 8, 2021 Hr'g Tr. at 119:6-122:25.

[48] Ex. L, Jan. 26, 2021 Hr'g Tr. at 251:24-252:5.

5. The Court's Ruling On Movants' Motion For An Examiner

Another concerning thing that has happened at the hands of this Court is the repeated disenfranchisement of Movants from judicial process. For example, the Court has repeatedly wielded its scheduling powers as a sword against Movants, often preventing any real consideration of legitimate motions filed by Movants by ensuring that hearings on those motions happen too late. In one such instance, on January 14, 2021, Dugaboy and Get Good (the "Trusts") requested the Court direct the appointment of a neutral third-party examiner pursuant to 11 U.S.C. § 1104(c) as a less costly means to resolve various issues that had arisen in the HCMLP bankruptcy (the "Examiner Motion").[49] The Trusts sought the appointment of an examiner to address, among other things (i) the issues raised by the advisors and the retail funds in the Restriction Motion, (ii) various objections to the proposed plan of reorganization raised by the advisors, the retail funds, and the United States Trustee (discussed below), and (iii) concerns expressed by the Court about costs and expenses incurred in the context of the bankruptcy proceedings.[50]

Given the timing of the Examiner Motion relative to the expected date of the hearing on Debtor's Fifth Amended Plan of Reorganization (as Modified) (the "Plan"), the Trusts asked the Court to consider the Motion on an "emergency" basis to avoid interference with the Plan.[51] Despite this request (and despite the Court's willingness to hear motions filed by HCMLP on an emergency basis), the Court set the hearing on a date long after the expected hearing on Plan confirmation, thereby ensuring that the Motion would be rendered moot.

[49] Bankr. Dkt. No. 1752.

[50] *Id.*

[51] *Id.*

D. The Court Confirms A "Monetization Plan" Over Movants' Objections

The Court's biased decision-making tethered to its preexisting negative views of Mr. Dondero persisted through Plan confirmation.

On February 8, 2021, the Court announced its oral ruling regarding the Plan, in which the Court referred inexplicably and extensively to proceedings in the Acis Bankruptcy.[52] In its ruling, the Court summarily rejected all of the Plan objections lodged by Movants, decreeing them as filed in bad faith.[53] Next, even though it had "not been asked to declare Mr. Dondero and his affiliated entities as vexatious litigants per se," the Court deemed Mr. Dondero and other Movants "vexatious litigants."[54] The Court's ruling failed to comport with its own iteration of the prerequisites to declaring a litigant vexatious.[55] Indeed, the Fifth Circuit recently explained that the Bankruptcy Court failed to follow proper procedures to designate Mr. Dondero vexatious.[56]

On February 22, 2021, the Court issued its Confirmation Order. Against the backdrop discussed herein, it is perhaps not surprising that the Court again took the opportunity to criticize and accuse Mr. Dondero and Movants:

- "Naturally, [the independent board members] were worried about getting sued no matter how defensible their efforts—given the litigation culture that enveloped Highland historically. Based on the record of this case and the proceedings in the Acis chapter 11 case, it seemed as though everything always ended in litigation at Highland."[57]

- "The Debtor's Chief Executive Officer, James P. Seery, credibly testified at the Confirmation Hearing that the Debtor was 'run at a deficit for a long time and then would sell assets or defer employee compensation to cover its deficits.' The Bankruptcy Court cannot help but wonder if that was necessitated because of

[52] Ex. M, February 8, 2021 Hr'g Tr. at 15:15-16:5.

[53] *Id.* at 20:17-20.

[54] *Id.* at 46:20-25, 45:12-14.

[55] *See id.* at 46:6-15 (describing factors to be considered prior to deeming a litigant vexatious).

[56] *See In the Matter of Highland Capital Mgmt., L.P.*, 48 F.4th 419 n.19 (5th Cir. 2022) (citing *In re Carroll*, 850 F.3d 811, 815 (5th Cir. 2017) (per curiam)). The problems with the Court's ruling regarding vexatiousness are further described in detail in Movants' Original Recusal Motion, Bankr. Dkt. No. 2061 at pp. 21-27.

[57] Confirmation Order, Bankr. Dkt. No. 1943, ¶ 14.

enormous litigation fees and expenses incurred by the Debtor due to its culture of litigation . . . ."[58]

- "[T]he Bankruptcy Court questions the good faith of Mr. Dondero's and the Dondero Related Parties' objections. In fact, the Bankruptcy Court has good reason to believe that these parties are not objecting to protect economic interests they have in the Debtor but to be disruptors."[59]

- "Mr. Post testified on behalf of the Highland Advisors and Funds that the Funds have independent board members that run the Funds, but the Bankruptcy Court was not convinced of their independence from Mr. Dondero because none of the so-called independent board members have ever testified before the Bankruptcy Court and all have been engaged with the Highland complex for many years. Notably, the Court questions Mr. Post's credibility because, after more than 12 years of service, he abruptly resigned from the Debtor in October 2020 at the exact same time that Mr. Dondero resigned at the Board of Directors' request, and he is currently employed by Mr. Dondero."[60]

- In discrediting the objections of various NexBank entities, the Court likewise surmised that "Mr. Dondero appears to be in control of these entities as well."[61]

- "[T]he Bankruptcy Court has allowed . . . these objectors to fully present arguments and evidence in opposition to confirmation, even though . . . the Bankruptcy Court questions their good faith. Specifically, the Bankruptcy Court considers them all to be marching pursuant to the orders of Mr. Dondero."[62]

Again, the Bankruptcy Court offered up no specific evidence of any bad faith on behalf of Mr. Dondero or the other "objectors." Nor did the Court offer any evidence (or explanation) of why it had "good reason to believe" that Mr. Dondero and the other objectors were seeking to do anything other than protect their legitimate economic interests.[63] In short, an objective observer reading the

---

[58] *Id.*, ¶ 7.

[59] *Id.*, ¶ 17.

[60] *Id.*, ¶ 18. Notably, at the time of these comments, there was no evidence of record even suggesting that the Funds were managed by anything other than independent boards, and there was no evidence—other than the Court's own conjecture—that Mr. Post's resignation from his position at HCMLP had anything to do with Mr. Dondero. Nor is it clear how Mr. Post's mere association with Mr. Dondero could possibly impact his competency or credibility to testify about the management of various Funds that he personally came into contact with during "12 years of service" for the Debtor.

[61] *Id.*

[62] *Id.*, ¶ 19.

[63] Notably, the Fifth Circuit previously has admonished this Court for making findings and decisions based on mere "suspicion" and "indirect inference" rather than evidence. In *The Cadle Co. v. Moore*, the Fifth Circuit reversed an order of dismissal issued by this court as a sanction for "abuse of judicial process," finding that the "bankruptcy court's

language of the Confirmation Order would have reason to question this Court's impartiality.

E. The Court's Post-Confirmation Decisions Have Continued To Give The Appearance Of Bias

Since confirmation, the Court has continued to act in a biased manner.

1. The Court's August 2021 Sanctions Order

Perhaps one of the most telling orders issued by the Court since the Original Recusal Motion was filed is the Court's order sanctioning various entities and individuals because two entities—the DAF and CLO Holdco—in consultation with legal counsel, decided to file a lawsuit against HCMLP in the Northern District of Texas. Specifically, on April 12, 2021, a complaint was filed against HCMLP and two HCMLP-controlled entities (Highland HCF Advisor, Ltd. ("HCFA") and Highland CLO Funding, Ltd. ("HCLOF")) alleging, *inter alia*, impropriety by the Debtor, HCFA, and HCLOF in brokering the sale of CLO interests held by HarbourVest[64] to the Debtor, without prior notice to other CLO investors and without respecting those investors' right of first refusal.[65] Shortly after filing the complaint, the DAF and CLO Holdco filed a motion for leave to amend the complaint to add Mr. Seery as a defendant, based on his role brokering the HarbourVest transaction.[66] Within days of these filings, HCMLP filed a motion seeking an order holding the DAF, CLO Holdco, and "the persons who authorized the DAF and CLO Holdco . . . to file the Seery motion," including their attorneys, Sbaiti & Company, PLLC, in civil contempt.[67]

---

mere suspicions do not add up to clear and convincing evidence." 739 F.3d 724, 731 (5th Cir. 2014). In addition, the Fifth Circuit emphasized that it was "troubled by the bankruptcy court's use of indirect inferences" to support its decision. *Id.* at 731 n.11.

[64] "HarbourVest" refers to HarbourVest Dover Street IX Investment, L.P., HarbourVest 2017 Global AIF, L.P., HarbourVest 2017 Global Fund, L.P., HV International VIII Secondary, L.P., and HarbourVest Skew Base AIF, L.P.

[65] *Charitable DAF Fund, L.P. v. Highland Capital Management, L.P.*, Case No. 21-cv-00842 (N.D. Tex.) ("DAF Action").

[66] DAF Action, Dkt. No. 6.

[67] Bankr. Dkt. No. 2247. Specifically, HCMLP argued that the lawsuit and the motion seeking to add Mr. Seery as a defendant violated the Court's Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course [Dkt. 339] and as well as its Order Approving Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of

The Court held an evidentiary hearing on HCLMP's sanctions motion on June 8, 2021. At that hearing, Mark Patrick, who was then serving as the DAF's general manager, testified that he hired Sbaiti & Co. and that he authorized the DAF to file the lawsuit and the motion to add Mr. Seery as a defendant.[68] Mr. Dondero testified that, while he provided certain information to the DAF and Sbaiti & Co. in relation to the lawsuit, he was not involved at all in authorizing or preparing the motion to add Mr. Seery (the main reason for the motion for civil contempt).[69]

Despite this testimony and the absence of any contravening testimony, the Court concluded that "Mr. Dondero sparked this fire" and that the evidence "was clear and convincing that Mr. Dondero encouraged Mr. Patrick to do something wrong, and Mr. Patrick basically abdicated responsibility to Mr. Dondero."[70] The Court then concluded that the lawsuit filed by the DAF and CLO Holdco was, "***from this Court's estimation, wholly frivolous.***"[71] In fashioning its sanctions award, the Court took into consideration the invoices submitted by HCMLP's counsel reflecting what the firm actually incurred in connection with the civil contempt motion ($38,796.50), and then compounded the sanction by nearly *seven times* that amount. In the end, the Court ordered the DAF, CLO Holdco, Sbaiti & Co. (including Mazin Sbaiti and Jonathan Bridges individually), Mark Patrick, and Mr. Dondero to pay $239,655 in sanctions to HCMLP.[72] Worse still, the Court tacked on a monetary sanction of $100,000 to be paid by anyone that filed any appeal.[73]

In short, the Court ignored the undisputed testimony of record to find "clear and convincing

---

James P. Seery, Jr. as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020 [Dkt. 854]. *Id.* at 2.

[68] Bankr. Dkt. No. 2660 at 19.

[69] *Id.* at 21.

[70] *Id.*

[71] *Id.* at 26 (emphasis added).

[72] *See id.* at 28-30.

[73] *Id.* at 30. The District Court subsequently confirmed the sanctions award. Mr. Dondero intends to appeal.

evidence" of Mr. Dondero's responsibility for the motion to name Mr. Seery as a defendant, concocted a way to saddle Mr. Dondero and others with a multi-hundred thousand dollar liability, and prophylactically sanctioned any effort to invoke a legal appellate process.[74]

2. The Court's Order To Appear

The Court has further targeted Mr. Dondero (as well as his sister Nancy Dondero) by requiring their presence at all hearings, regardless of whether their presence is needed. In ordering Mr. Dondero's presence, the Court explained that Mr. Dondero's participation in the bankruptcy and related proceedings was "taking up time."[75] By the Court's own admission, this is a departure from its usual approach, where a party would be expected to attend hearings only if they are "taking a position" on the issue at hand.[76]

At the same hearing (which was to decide a motion to compel the Debtor's deposition testimony), the Court openly speculated that there was an ulterior motive of "antagonism" behind Mr. Dondero's good-faith litigation conduct.[77] The Court's statements indicate that, when Mr. Dondero engages in routine litigation steps, like making discovery motions, the Court will treat such actions as nefarious "antagonistic move[s]" rather than ordinary invocation of legal process.

3. The Court's September 12, 2022 Withdrawal of Claim Hearing

And in the most recent example of the Court's biased decision-making, on September 12, 2022, the Court held a hearing on several motions, including a motion by Movant NexPoint Real

---

[74] The District Court recently found that the claims against the Debtor with respect to the Debtor's dealings with HarbourVest *had merit*—despite the Bankruptcy Court's lengthy and opinionated vocalizations to the contrary. *Compare The Charitable DAF Fund, L.P. v. Highland Capital Mgmt., L.P.*, Adv. Proc. No. 3:21-cv-3129-B, Dkt. No. 28, *with* Bankr. Dkt. 2247. Judge Boyle reversed the Bankruptcy Court's dismissal of the claims against the Debtor on the basis of collateral estoppel, noting that the Bankruptcy Court had raised collateral estoppel *sua sponte*—neither party had raised collateral estoppel below, nor even briefed the issue—and holding that the elements of collateral estoppel *could not be met* under the circumstances. *See* Adv. Proc. No. 3:21-cv-3129-B, Dkt. 28 at 7-13.

[75] Ex. P, May 20, 2021 Hr'g Tr. at 20:19-21:14.

[76] *Id.*; *see also id.* at 21:1-8.

[77] *Id.* at 34:3-9 (criticizing Mr. Dondero for engaging in "a fight with Mr. Seery" and commenting that "the motion to compel names him by name. It just — it feels like another antagonistic move").

Estate Partners LLC f/k/a HCRE Partners LLC ("HCRE") to withdraw its proof of claim.[78] In that hearing, HCRE sought the Court's approval to withdraw a disputed proof of claim relating to HCRE's asserted interest in a fund called SE Multifamily Holdings.[79] Counsel for HCMLP objected to HCRE's withdrawal in the absence of certain concessions by HCRE, including a stipulation that HCRE would not contest HCMLP's 46.6% interest in SE Multifamily Holdings and that HCRE would waive any right to appeal a final order on its withdrawn proof of claim.[80] In what can only be described as an incredible exchange, the Court first asked HCRE's counsel, Bill Gameros ("Mr. Gameros"), if HCRE would consent to those conditions. Mr. Gameros agreed to both.[81] But that did not satisfy the Court. The Court instead demanded that a "client representative" of HCRE appear and testify that the conditions were acceptable. At that point, DC Sauter, in-house counsel for Mr. Dondero, appeared and confirmed that HCRE would agree to the conditions for withdrawal of its proof of claim.[82] Still, the Court was not satisfied:

> THE COURT: All right. Well, it sounds like hearsay to me. I don't know – Counsel, let me have you both respond. You know, *I worry about this will fall apart the minute Mr. Dondero is instructing a lawyer*, I never agreed to that. I mean I just don't know. This is highly unusual.[83]

When Mr. Sauter explained that Mr. Dondero felt more comfortable having a lawyer make legal representations on the record, the Court responded: "I mean I'm not sure I care what you say, no offense. I don't think I have a person with clear authority here."[84] The Court then rebuffed Mr. Gameros's suggestion he could make binding representations on behalf of his client: "Mr.

---

[78] Ex. V, Sept. 12, 2022 Hr'g Tr.

[79] Bankr. Dkt. No. 3443 at 3.

[80] Ex. V, Sept. 12, 2022 Hr'g Tr. at 32:22-34:2.

[81] *Id.*

[82] *Id.* at 34:3-20, 35:36.

[83] *Id.* at 36:4-8 (emphasis added).

[84] *Id.* at 36:12-37:9.

Gameros, come on. You know this is the client's decision to make. Okay. I don't have a client representative."[85]

At that point, Mr. Gameros offered to get Mr. Dondero on the phone to give the exact same representation that Mr. Gameros and Mr. Sauter had already given. Before taking Mr. Dondero's sworn testimony, the Court rebuffed him for failing to have access to video, even though he no previous notice he would have to give testimony at the hearing.[86] Mr. Dondero testified that HCRE would agree to all of the Debtor's conditions to withdrawal of the proof of claim.[87] Even then, the Court told Mr. Gameros: "*I mean he needs to be asked every which way from Sunday whether he's waiving the right* to challenge Highland's 46.06 interest *from now until eternity, okay*. That's basically, you know, we either have that agreement or we'll just have a trial.[88] Mr. Dondero then again agreed to the entry of an order denying HCRE's proof of claim with prejudice and agreed not to challenge HCMLP's equity ownership in SE Multifamily Holdings.[89]

After all of that, the Court stated: "[I]t feels like we had a little bit of reluctance to say it as forcefully as we would need to have it said to avoid relitigation" and then denied HCRE's motion to withdraw its proof of claim.[90] In doing so, the Court found that HCRE had acted with "undue vexatiousness" in pursuing the proof of claim merely because HCMLP opposed the claim and had spent "hundreds of thousands of dollars" doing so.[91] The Court therefore ordered additional depositions to take place and the parties to attend trial. And as a parting shot, the Court asked the U.S. Trustee to investigate HCRE and Mr. Dondero (who signed the proof of claim):

---

[85] *Id.* at 37:7-22.
[86] *Id.* at 38:24-39:3, 39:8-24.
[87] *Id.* at 40:9-17, 41:10-22, 42:13-25.
[88] *Id.* at 42:21-25 (emphasis added).
[89] *Id.* at 43:23-44:6.
[90] *Id.* at 54:6-15.
[91] *Id.* at 52:4-53:14.

> I don't mean to be alarming, but I want it run by the U.S. Trustee because, you know, I've heard some things that have troubled me about the, you know, lack of good faith with regard to the proof of claim and, you know alleged gamesmanship. And, you know, I talked earlier about this goes to the integrity of the system, you know, filing a proof of claim under penalty of perjury. . . . It's just something uncomfortable going on in my brain about, you know, again a proof of claim being on file two, almost two and a half years and then, you know, okay, never mind, okay, I agree to never mind as long as you agree to XYZ. . . . I just know if there are quid pro quos I feel like, you know, maybe I need to have the U.S. Trustee, not per se signing off on any agreed order but at least kind of looking at it . . . .[92]

The suggestion that the U.S. Trustee investigate supposed "gamesmanship" by HCRE and Mr. Dondero and whether *they* had given quid pro quos is particularly concerning, where the entire record of the hearing makes clear that it was *HCMLP and its counsel* asking for quid pro quos in return for agreeing to the withdrawal of HCRE's proof of claim.

IV. THE COURT SHOULD IMMEDIATELY RECUSE ITSELF

Application of the appropriate standard for recusal leaves little doubt that recusal is required in this case. Under Section 28 U.S.C. § 455, a judge "*shall* disqualify [her]self in any proceeding in which h[er] impartiality may reasonably be questioned."[93] A judge "*shall* also disqualify [her]self" if one of several enumerated circumstances exist, including if the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."[94] The provisions of section 455 are mandatory and afford separate, though overlapping, grounds for recusal.[95]

Under section 455(a), recusal is required whenever a judge's partiality might reasonably be questioned, even if the judge does not have actual personal bias or prejudice.[96] The test is not

---

[92] *Id.* at 57:18-59:4.

[93] 28 U.S.C. § 455(a) (emphasis added).

[94] 28 U.S.C. § 455(b)(1) (emphasis added).

[95] *Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003).

[96] *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850 (2001); *Andrade*, 338 F.3d at 454.

whether the judge believes he or she is capable of impartiality and not whether the judge possesses actual bias.[97] Instead, the test is whether the "'average person on the street who knows all the relevant facts of a case'" might reasonably question the judge's impartiality.[98] As Congress explained when enacting section 455, litigants "ought not have to face a judge where there is a reasonable question of impartiality."[99] Thus, this statutory provision was "designed to promote public confidence in the impartiality of the judicial process."[100] Accordingly, recusal is warranted where a judge's comments during proceedings would "cause a reasonable observer to question whether [the judge] 'would have difficulty putting h[er] previous views and findings aside.'"[101]

With respect to 28 U.S.C. § 455(b), although "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion," the Supreme Court has recognized that predispositions developed during the course of a trial can suffice to demonstrate the requisite bias or prejudice.[102] In this regard, the words "bias" and "prejudice" mean a disposition or opinion that is somehow wrongful or inappropriate, either because: (a) it is undeserved; (b) it rests upon knowledge that the holder of the opinion ought not to possess; or (c) it is excessive in degree.[103] Notably, a court's consideration of an extrajudicial source of information is a factor in favor of finding either an appearance of partiality under section 455(a) or bias or prejudice under section 455(b)(1).[104] Moreover, "opinions formed by the judge on the basis of facts introduced or events occurring in

---

[97] *See Burke v. Regolado*, 935 F.3d 960, 1054 (10th Cir. 2019) (citations omitted); *Liljeberg*, 486 U.S. at 805.

[98] *In re Kansas Pub. Employees Retirement Sys.*, 85 F.3d 1353, 1358 (8th Cir. 1996).

[99] H. Rep. No. 1453, 93rd Cong., 2d Sess. 1 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6355.

[100] *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988) (quoting H.R. Rep. No. 1453); *Liljeberg*, 486 U.S. at 859-60.

[101] *Microsoft Corp.*, 56 F.3d at 1465 (quoting *United States v. Torkington,* 874 F.2d 1441, 1447 (11th Cir.1989)).

[102] *Liteky v. U.S.*, 510 U.S. 540, 555 (1994).

[103] *Id.* at 554.

[104] *Bell v. Johnson*, 404 F.3d 997, 1004 (6th Cir. 2005) (citations omitted). Importantly, consideration of an extrajudicial source is not necessary to a finding of bias or prejudice. *Liteky*, 510 U.S. at 551, 554-55.

the course of the current proceedings, or of prior proceedings," may evidence bias if the opinions reveal that they "derive from an extrajudicial source; and ***they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible***."[105]

In short, the Movants, like all other litigants, are entitled to a full and fair opportunity to make their case in an impartial forum—regardless of their history with that forum.[106] Indeed, "fundamental to the judiciary is the public's confidence in the impartiality of [its] judges and the proceedings over which they preside."[107] Thus, "justice must satisfy the appearance of justice."[108] For this reason, the Fifth Circuit has held that "[i]f the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal."[109]

In this case, the balance can tip only in one direction because recusal is appropriate under both prongs of 28 U.S.C. § 455. At a minimum, the Court's statements and actions in this case would cause any objective observer to question the Court's impartiality, which mandates recusal.[110] As set forth above, the Court has made antagonistic statements to and about Movants and has manifested an "apparent distrust" of Movants since "early in the litigation."[111] Indeed, the Court deemed Mr. Dondero a bad actor at the very first hearing it held in the case, based entirely on opinions formed during the Acis Bankruptcy.[112] At that first hearing, the Court singled Mr. Dondero out for potential future sanctions before he had taken any action in this case. Just one

---

[105] *Liteky*, 510 U.S. at 555(citation omitted) (emphasis added).

[106] *Miller v. Sam Houston State Univ.*, 986 F.3d 880, 893 (5th Cir. 2021) (citing *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995)).

[107] *Id.*

[108] *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

[109] *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997).

[110] *Liljeberg*, 486 U.S. at 850; *Andrade*, 338 F.3d at 454.

[111] *Sentis Group, Inc.*, 559 F.3d at 904-05 (reassigning case to a new judge on remand for engaging in similar behavior).

[112] *See* Section III.B, *supra* at pp. 6-7; *see also* Original Recusal Motion, Bankr. Dkt. No. 2061 at pp. 5-6.

month later, the Court accused Mr. Dondero of misconduct at a hearing that he did not attend in connection with a motion that he did not file.[113] The Court's subsequently repeatedly accused Movants and their counsel of acting in "bad faith," repeatedly called Mr. Dondero "vexatious" or "litigious" when he acted in a legally justifiable manner, and generally manifested a distrust of Movants and their counsel. Courts repeatedly have found recusal appropriate in circumstances that mirror these.[114]

But in addition to *appearing* biased, which itself would mandate recusal, the Court in this case has *acted* in a manner that demonstrates such a "high degree of favoritism or antagonism as to make fair judgment impossible."[115] Although the record is replete with examples, by way of summary, the Court has (1) admitted that the negative opinions about Mr. Dondero formed during the Acis Bankruptcy cannot be excised from the Court's mind;[116] (2) made repeated negative statements about Mr. Dondero and entities that the Court perceives be affiliated with him in connection with the Court's rulings;[117] (3) repeatedly targeted Mr. Dondero with threats of

---

[113] *See* Section III.C.1, *supra* at pp. 7-8.

[114] *See, e.g.*, *In re U.S.*, 572 F.3d at 311-12 (reversing district judge's order denying motion to recuse and ordering that "all orders entered by the Judge after the motion for recusal was filed . . . be vacated" where judge questioned one party's decision to pursue a course of action and made comments that were critical of the party's position); *Kennedy*, 682 F.2d at 258-60 (ordering reassignment of the case to a different judge on remand where judge openly questioned the integrity of one party's counsel, suggested he was proceeding in "bad faith," and called certain decisions made by him "suspicious"); *Johnson*, 120 F.3d at 1334-37 (ordering reassignment of the case to a different judge on remand where judge questioned in open court "the conduct of the lawyers" for one party, and the judge questioned one party's "good faith"); *Microsoft Corp.*, 56 F.3d at 1465 (where judge's comments "evidenced his distrust of [one party's] lawyers and his generally poor view of [one party's] practices," a reasonable observer could question whether judge "would have difficulty putting his previous views and findings aside," requiring recusal on remand).

[115] *Liteky*, 510 U.S. at 555.

[116] *See* Section III.C., *supra* at pp. 6-7 & n.25.

[117] *See* Sections III.B, *supra* at pp. 6-8; Section III.C.4, *supra* at p. 11; Section III.E.1, *supra* at pp. 16-17; Section III.E.2, *supra* at pp. 17-18; Section III.E.3, *supra* at pp. 19-20. In addition, the Court has repeatedly described Mr. Dondero as "vexatious" and "litigious" as a justification for its actions. *See* Ex. G, Sept. 23, 2020 Hr'g Tr. at 51:14; Ex. M, Feb. 8, 2021 Hr'g Tr. at 17:15, 37:18, 40:21, 45:13, 46:21; Ex. N, Feb. 23, 2021 Hr'g Tr. at 232:18; Ex. S, June 25, 2021 Hr'g Tr. at 109:21. The Court also has repeatedly surmised that the actions of Mr. Dondero, Movants, and their attorneys are in "bad faith" or "frivolous." *See* Ex. J, Dec. 16, 2020 Hr'g Tr. at 64:1-5; Ex. L, Jan. 26, 2021 Hr'g Tr. at 254:4; Ex. N, Feb. 23, 2021 Hr'g Tr. at 233:18; Ex. O, May 10, 2021 Hr'g Tr. at 43:3; Ex. R, June 10, 2021 Hr'g Tr. at 87:6. And the Court has repeatedly referred to Mr. Dondero and his companies, including Movants, in a pejorative manner, as a "Byzantine complex," "Byzantine empire" and "web." *See* Confirmation Order, ¶ 6; Ex.

contempt or sanctions, singled Mr. Dondero out for disparate treatment, and and questioned the good faith of Movants and their counsel for defending lawsuits and motions and/or asserting valid legal positions;[118] (5) sanctioned Mr. Dondero in connection with a motion that he and others testified he had no role in filing or responsibility for authorizing;[119] (6) prophylactically sanctioned Mr. Dondero for asserting his lawful appellate rights;[120] (7) concluded, without supporting evidence, that any entity the Court deems connected to Mr. Dondero is essentially no more than a tool of Mr. Dondero;[121] (8) disregarded the testimony of any witness with a connection to Mr. Dondero as per se less credible, which includes attorneys and persons who owe fiduciary duties and ethical obligations;[122] and (9) ruled against Mr. Dondero and the Movants at every possible opportunity, regardless of the evidence and the testimony before the Court. Each of these examples alone would mandate recusal, but cumulatively they leave no doubt that the Court's antagonism for Movants goes far beyond is acceptable and makes fair judgment impossible.

Moreover, contrary to the Court's prior suggestion that any motion to recuse filed by Movants is untimely, there is a very real and present reason to seek recusal even now.[123] As explained above, the Court continues to preside over the bankruptcy proceedings, acted in a

---

D, June 30, 2020 Hr'g Tr. at 80:17-18, 86:19, 87:5-8; Ex. E, July 8, 2020 Hr'g Tr. at 46:11; Ex. M, Feb. 8, 2021 Hr'g Tr. at 7:15; Ex. Q, June 8, 2021 Hr'g Tr. at 294:3. And the Court has singled out Mr. Dondero, his affiliates (including Movants), and his attorneys for disparate treatment at every possible opportunity. *See* Ex. H, Oct. 21, 2020 Hr'g Tr. at 10:21-24, 34:1-5, 36:1-14; Ex. I, Dec. 10, 2020 Hr'g Tr. at 24:19-25; Ex. N, Feb. 23, 2021 Hr'g Tr. at 232:7-234:19; Ex. T, Mar. 1, 2022 Hr'g Tr. at 83:12-23.

[118] *See, e.g.*, Section III.C.2, *supra* at p. 9; Section III.C.4, *supra* at pp. 10-11; Section III.D., *supra* at p. 14 & nn.59, 62; Section III.E.2, *supra* at pp. 17-18.

[119] *See* Section III.E.1, *supra* at pp. 15-17.

[120] *See id.*

[121] *See* Section III.C.4, *supra* at pp. 10-11.

[122] *See, e.g.*, Section III.D, *supra* at pp. 13-14; Section III.E.3 at pp. 19-20.

[123] The sole case cited by the Court for this proposition—*Davies v. C.I.R.*, 68 F.3d 1129 (9th Cir. 1995)—is inapposite because the basis for the recusal motion was *one* event —a pretrial disclosure by the judge—which occurred eight months prior to the petitioners' motion to recuse. In stark contrast, the Court's bias in this case has been pervasive and consistent throughout the ongoing proceedings and continues to this day.

manner that was very clearly partial less than two weeks ago, and continues to preside over no less than nine adversary proceedings. Where, as here, the Court will be called upon to issue future rulings affecting Movants, a motion to recuse is timely.[124]

V. CONCLUSION

Litigants before the federal bankruptcy courts should be able to expect fair treatment, such that they may obtain justice, exercise remedies, and freely appeal adverse decisions, whatever the judge's personal opinions of the litigants. That is not what has happened in the proceedings before this Court, which is precisely why federal statute affords litigants the tool of recusal. This Court is evidently biased, cannot act in a just manner with respect to the Movants, and should recuse itself and allow all parties the fair day in court that the Constitution requires. Movants respectfully request that their Motion be granted. In the alternative, Movants hereby request that the Court make clear that any order denying recusal is final so that Movants may appeal the Court's order to the Northern District of Texas.

[124] Indeed, various courts have ordered recusal even on remand, after the district judge has presided over the action through pre-trial proceedings and trial. *See, e.g.*, *Johnson*, 120 F.3d at 1334 (recusal after trial and explaining that "the loss of efficiency and economy pales in comparison" to "the necessity to preserve the appearance of impartiality, fairness, and justice" on remand); *Kennedy*, 682 F.2d 259-60; *Sentis Group*. 559 F.3d at 905.

Dated: September 27, 2022

Respectfully submitted,

CRAWFORD, WISHNEW & LANG PLLC

/s/ Michael J. Lang
Michael J. Lang
Texas State Bar No. 24036944
mlang@cwl.law
1700 Pacific Ave, Suite 2390
Dallas, Texas 75201
Telephone: (214) 817-4500

Attorney for Movants James Dondero, The Dugaboy Investment Trust, Get Good Trust, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC

CERTIFICATE OF SERVICE

The undersigned certifies that on September 27, 2022, a true and correct copy of the above and foregoing document was served on all parties and counsel set to receive notice by the Court's ECF system.

/s/ Michael J. Lang
Michael J. Lang

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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.	Case No. 19-34054 (SGJ)
Debtor.	JAMES DONDERO, HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., NEXPOINT ADVISORS, L.P., THE DUGABOY INVESTMENT TRUST, THE GET GOOD TRUST, and NEXPOINT REAL ESTATE PARTNERS, LLC, F/K/A HCRE PARTNERS, LLC, A DELAWARE LIMITED LIABILITY COMPANY'S APPENDIX TO MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

APPENDIX TO MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

James Dondero, Highland Capital Management Fund Advisors, L.P., The Dugaboy Investment Trust, Get Good Trust, and NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC (collectively, "Movants") file this Appendix to Memorandum of Law in Support of Renewed Motion to Recuse Pursuant to 28 U.S.C § 455:

Exhibit	Description	Appendix Page No.
A	December 3, 2019, Hearing Transcript	APP. 0001 – APP. 0010
B	January 9, 2020, Hearing Transcript	APP. 0011 – APP. 0021
C	February 19, 2020, Hearing Transcript	APP. 0022 – APP. 0034
D	June 30, 2020, Hearing Transcript	APP. 0035 – APP. 0053

E	July 8, 2020, Hearing Transcript	APP. 0054 – APP. 0062
F	July 14, 2020, Hearing Transcript	APP. 0063 – APP. 0074
G	September 23, 2020, Hearing Transcript	APP. 0075 – APP. 0080
H	October 21, 2020, Hearing Transcript	APP. 0081 – APP. 0091
I	December 10, 2020, Hearing Transcript	APP. 0092 – APP. 0097
J	December 16, 2020, Hearing Transcript	APP. 0098 – APP. 0103
K	January 8, 2021, Hearing Transcript	APP. 0104 – APP. 0112
L	January 26, 2021, Hearing Transcript	APP. 0113 – APP. 0121
M	February 8, 2021, Hearing Transcript	APP. 0122 – APP. 0147
N	February 23, 2021, Hearing Transcript	APP. 0148 – APP. 0155
O	May 10, 2021, Hearing Transcript	APP. 0156 – APP. 0161
P	May 20, 2021, Hearing Transcript	APP. 0162 – APP. 0171
Q	June 8, 2021, Hearing Transcript	APP. 0172 – APP. 0177
R	June 10, 2021, Hearing Transcript	APP. 0178 – APP. 0183
S	June 25, 2021, Hearing Transcript	APP. 0184 – APP. 0189
T	March 1, 2022, Hearing Transcript	APP. 0190 – APP. 0195
U	August 31, 2022, Hearing Transcript	APP. 0196 – APP. 0212
V	September 12, 2022, Hearing Transcript	APP. 0213 – APP. 0239

W	August 4, 2021, Hearing Transcript	APP. 0240 – APP. 0246

Dated: September 27, 2022

Respectfully submitted,

CRAWFORD, WISHNEW & LANG PLLC

/s/ Michael J. Lang
Michael J. Lang
Texas State Bar No. 24036944
mlang@cwl.law
1700 Pacific Ave, Suite 2390
Dallas, Texas 75201
Telephone: (214) 817-4500

Attorneys for Movants

CERTIFICATE OF SERVICE

The undersigned certifies that on September 27, 2022, a true and correct copy of the above and foregoing document was served on all parties and counsel set to receive notice by the Court's ECF system.

/s/ Michael J. Lang
Michael J. Lang

EXHIBIT A

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

- -x

In the Matter of:

HIGHLAND CAPITAL MANAGEMENT, L.P., Case No.

Debtor. 19-12239(CSS)

- -x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

December 2, 2019

10:07 AM

B E F O R E:

HON. CHRISTOPHER S. SONTCHI

CHIEF U.S. BANKRUPTCY JUDGE

ECR OPERATOR: LESLIE MURIN

Acis, learned all about Acis' relationship to Highland. But the real issue before Your Honor is what does that have to do with this debtor, this debtor's assets and liabilities, and this debtor's operations. And as my comments will show, we think that's a significantly overblown argument.

Your Honor, during their presentation, Counsel really strayed a little bit from what the motion and the joinders sort of said. There they went through a painstaking analysis of the various factors supporting venue. I know Your Honor said that over three factors, you don't find that helpful, but the courts have relied on a series of factors.

And I think the reason why they have strayed away from that and focused on the committee being the one to support the transfer-of-venue motion and the facts of the Acis case is because when you pare it down, the actual factors demonstrate that there is no way the committee can carry its burden to demonstrate that venue should be transferred.

However -- Your Honor pointed to this at the beginning, in mentioning comments about forum-shopping -- the committee and Acis are really being disingenuous, and they have not told you the real reason that they want the case before Judge Jernigan.

At the first-day hearing, Your Honor, Acis said they intended to file a motion for an appointed trustee. The committee has told the debtor it intends to file a motion to

appoint a trustee after this hearing. The motion has not yet been filed, Your Honor, because they want Judge Jernigan to rule on that motion. And it's not because she's familiar with this debtor's business, this debtor's assets, or this debtor's liabilities, because she generally is not. It is because she formed negative views regarding certain members of the debtor's management that the committee and Acis hope will carry over to this case.

The convenience of the parties and the interests of justice and how this case is so unique are just a pretext. They want a trustee to run the debtor, and they want Judge Jernigan and not Your Honor to rule on that motion. That, Your Honor, is not a proper reason to transfer venue, but rather a transparent litigation ploy.

Similarly, Acis also wants the case to proceed in its home court where it has enjoyed success in litigating against the debtor. Your Honor mentioned the conflicts-of-interest theories. They're not just conflicts of interest between two jointly administered debtors. These go to the crux of what the Acis case is about and significant claims against the debtor.

The Court may ask, appropriately -- and the Court did -- why would the debtor file the case in Delaware? Chapter 11 is all about a fresh start. The debtor recognized concerns that the creditors had with certain aspects of its pre-petition conduct, and proactively appointed Brad Sharp as chief

restructuring officer with expanded powers, to oversee the debtor's operations.

Mr. Sharp worked with the debtor and Counsel to craft a protocol for transactions that would be subject to increased transparency. The debtor didn't have to do that. As Your Honor mentioned at the first-day hearing, the debtor operates its business in the ordinary course. But given the circumstances surrounding this case, given the history, we felt, and the CRO, importantly, felt it was important to get on the table what the debtor, through the CRO, believed was ordinary and what was not, so we could have a transparent discussion, discussion that, while we've made headway with the committee, we have not yet been able to come to an agreement.

The debtor filed the case in this district because it wanted a judge to preside over this case that would look at what's going on with this debtor, with this debtor's management, this debtor's post-petition conduct, without the baggage of what happened in a previous case, which contrary to what Acis and the committee says, has very little to do with this debtor.

These form insufficient grounds, Your Honor, to overturn the debtor's choice of venue, and the motion should be denied.

I would like to now walk through the statutory analysis, something that Counsel avoided, because again, I

think it highlights the weakness of their argument.

It is clear that the Delaware venue is proper, and 1408 says the places where a Chapter 11 debtor can file the case. As the vast majority of debtors who file cases in this district, the debtor filed here because it was domiciled in Delaware. It is a Delaware LP. But it goes further than that. 99.94 percent of its LP interests are owned by Delaware entities. And the general partner, Strand Advisors, is a Delaware general partner.

While many cases, Your Honor, before this court, rely on the domicile of one affiliate to bring other non-Delaware related affiliates before the court, that's not the case here. All you have, virtually, are Delaware entities, through the ownership structure.

As I will also discuss in a few moments, Your Honor, domicile is not the only connection that this debtor has to this district, as significant litigation matters involving the debtor, including those commenced by committee members, that was the catalyst to the filing, are pending in Delaware. Accordingly, the committee acknowledges, as they must, that Delaware is, of course, a proper venue.

However, they rely on 1412 which sets forth the standard -- test that the movant has to meet in order to transfer venue, either for the convenience of the parties or the interest of the justice.

willingness to hire Delaware Counsel.

The last argument --

THE COURT: Even when you do have mom and -- again, to comment on reality, even when you do have mom-and-pop creditors in businesses that are very locally focused, general practice today is to make their claims irrelevant, in that to the extent they have avoidance claims, they're paid on the first day. Their real concern is whether the business will continue or not.

Now, it's certainly true that pension claims are important, and proofs of claim are important. But we have many -- all courts have many procedures in place to ensure that those types of creditors can participate without having to go to the courthouse.

MR. POMERANTZ: Yes. So, Your Honor, Judge Gross also mentioned that in the Restaurants Acquisition case, which was a Texas-based --

THE COURT: He's a smart guy.

MR. POMERANTZ: We'll be sorry to see him go, Your Honor.

THE COURT: Yeah, absolutely.

MR. POMERANTZ: Which was a Texas-based restaurant chain that had more of a local flair. But he made the comments Your Honor made.

The last argument the committee makes is that Texas is

more convenient. And this is really the crux, which I'll spend some time over the next few minutes.

Texas is more convenient -- convenient -- because the Texas bankruptcy court, where Acis is pending has, in their words, already expended great time and effort familiarizing itself with the debtor and its operations. You've heard statements like "learning curve". You heard statements about everything that the debtor -- that Judge Jernigan has found out about this debtor, and how important and how helpful it is, and how Your Honor will be behind the learning curve. We just don't buy that, Your Honor.

And aside from that argument, the arguments that the committee makes for transfer are arguments that could be made in any case before Your Honor.

THE COURT: Yeah, I was going to say that's kind of an interesting argument, because actually it assumes Judge Jernigan's going to ignore the rules of evidence in making factual findings, because you're limited to the record before you on a specific motion. And what fact you may have learned with regard to something a person has done, maybe that goes into questions of credibility on cross-examination or direct testimony, but to actually base your decision on a fact that's not in the record for the specific proceeding would be improper.

MR. POMERANTZ: Look, I agree, Your Honor. And the

familiarity with the type of business -- if I wasn't speaking to Your Honor or your brethren or many other judges around the country, I'd say well, maybe there are certain judges who haven't dealt with large financial services company, may not know what a CLO, may not know what a hedge fund is or private equity fund is. I'm very confident that Your Honor has had many cases with sophisticated financial instruments, likely CLO obligations, so that Your Honor not only has a good base of knowledge that would give you the same base of knowledge that Judge Jernigan has, but as we've also found, you are a fairly quick study and that I have no doubt that you could come up-to-speed without very little effort.

So their argument is a grossly overstated interpretation of what the Acis case was about and that what was learned in that case has any relevance. As a part -- as a result of the Acis plan confirmation, Acis is no longer part of the debtor's organizational structure. The debtor owns no equity in Acis. And the debtor no longer provides any advisory services to Acis.

We admit that Judge Jernigan conducted many hearings, and she issued several lengthy opinions, and she heard from a variety of witnesses. And I'm sure Your Honor -- if Your Honor has not -- Your Honor might read the opinions that she wrote that are attached to the exhibits, the plan confirmation opinion, the arbitration opinion, the involuntary opinion; and

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

I, Clara Rubin, certify that the foregoing transcript is a true and accurate record of the proceedings.

December 3, 2019

CLARA RUBIN DATE

eScribers, LLC
352 Seventh Avenue, Suite #604
New York, NY 10001
(973) 406-2250
operations@escribers.net

EXHIBIT B

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 9, 2020
	9:30 a.m. Docket
Debtor.	
	DEBTOR'S MOTION TO COMPROMISE CONTROVERSY WITH OFFICIAL COMMITTEE OF UNSECURED CREDITORS [281]

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

APPEARANCES:

For the Debtor: Jeffrey N. Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

For the Debtors: Ira D. Kharasch
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

For the Debtor: John A. Morris
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

For the Debtors: Melissa S. Hayward
Zachery Z. Annable
HAYWARD & ASSOCIATES, PLLC
10501 N. Central Expressway,
Suite 106
Dallas, TX 75231
(972) 755-7104

MS. LAMBERT: Well, I mean, either that or we need to clear the room.

THE COURT: I've read the arbitration award.

MS. LAMBERT: Right.

THE COURT: It's in my brain.

MS. LAMBERT: Right. Okay.

THE COURT: Uh-huh.

MS. LAMBERT: And so one of the arguments here today is that the U.S. Trustee is representing the SEC and representing other Government agencies and things. No. Obviously, that is not the U.S. Trustee --

THE COURT: I didn't hear that.

MS. LAMBERT: Okay. The -- one of the positions has been, in the papers, is, well, that we don't have standing to raise their issues. And that's true.

THE COURT: Okay.

MS. LAMBERT: But the problem is that the U.S. Trustee has been constrained from discussing those issues with the SEC. The arbitration award is very relevant to the SEC's oversight. I anticipate the evidence today will be that the SEC, after the financial crisis of 2008, imposed restrictions on this Debtor on breach of fiduciary duty issues. I anticipate that the arbitration findings would be very relevant to whether those issues are ongoing or not.

THE COURT: Okay. Let me weigh in. I view the legal

standard that this Court has to weigh today as being: Is the Debtor proposing something that is reflective of sound business judgment, reasonable business judgment? And to the extent this is a compromise of controversies with the Committee, is this fair and equitable and in the best interest of the estate?

And as Mr. Pomerantz has said, you know, a lot of this maybe doesn't even need Court approval. But to the extent there are aspects of this that are appropriate to seek Court approval on, you know, this is my task. I have to look at what's presented, and is this reflective of sound business judgment? Is this fair and equitable? Is it in the best interest?

So, assuming there are tons of bad facts here reflected in the arbitration award, reflected in other evidence, bad facts that might justify a trustee, a Chapter 11 trustee, is this nevertheless, what's proposed today, a reasonable compromise of, you know, the trustee arguments the Committee could make or, you know, is this a reasonable framework for going forward? Okay?

So I guess what I'm saying is I'm confused about, you know, do I need to look at the arbitration award? Do we need to have evidence of all of that? I can assume that there are terrible facts out there that might justify a trustee, but I'm looking at what's proposed. Is this a fair and equitable way

to resolve the disputes? Is it sound business judgment? Frankly, is it a pragmatic solution here to preserve value? So that's the legal standard I have in my mind here.

MS. LAMBERT: Yes, Your Honor.

THE COURT: Okay.

MS. LAMBERT: The standard is whether it is fair and equitable to resolve the issues in the Chapter 11 trustee motion, and it is the U.S. Trustee's position that they are not resolved by this. And how are they not resolved? Number one, they're not resolved because the problems that led to the breach of fiduciary duty issues and findings are more pervasive, both based on this Court' finding in the *Acis* case and in the arbitration court's finding in Mr. Dondero. Other officers are implicated.

THE COURT: But how --

MS. LAMBERT: Other employees are implicated.

THE COURT: Okay. I feel like maybe we're talking at each other, not getting each other. I've got a proposed solution here to totally change the playing field, if you will. Bring in incredibly qualified people to --

MS. LAMBERT: Those people --

THE COURT: -- to change out the, you know, the person that you say breached fiduciary duties, the, you know, mismanagement, whatever bad labels we have here, but bring in a clean slate.

very compelling appeal. Among them, certainly, the Committee that's negotiated this term sheet retains the right at any time to move for a Chapter 11 trustee if it believes there are grounds. The Committee is granted standing to pursue estate claims, certain estate claims right off the bat, without having to come back and ask the Court, without having to rely on the Debtor to pursue that. There are document production provisions, document preservation provisions, a shared privilege negotiated, that are very powerful tools for the Committee, and certainly operating protocols that have been negotiated regarding the Debtor's operations that are very powerful tools for the Committee.

I said many times during the *Acis* case -- those who were here will remember -- that the company, *Acis*, was not a great fit for Chapter 11. Lots of companies aren't great fits for Chapter 11, I suppose, but the kind of business it was was kind of tough to maneuver in Chapter 11. Human beings and their expertise create value. And while we had a Chapter 11 trustee, a stranger come in and take control over Acis, you know, there's great uncertainty whether that stranger is going to be able to preserve value and have the smooth transition into Chapter 11 that's really going to be the best fit.

Here, as I've said earlier, the legal standard I view as controlling here is 363 and whether what has been proposed reflects reasonable business judgment. Is there a sound

business justification for proposing the independent slate of directors at the GP level for the Debtor, the protocols, the negotiation with the Committee, the document sharing, the standing given to them? Does all of this reflect reasonable business judgment? And I find, quite clearly, it does. I find it to be a pragmatic solution to the Committee's concerns about existing management and control.

And I think I used the words "fair and equitable," not just Ms. Lambert, because it is also presented to the Court as a 9019 compromise of disputes with the Committee, and we traditionally use a fair and equitable and best interest of the estate analysis in this context. So, to the extent that applies, I do find this a fair and equitable way of resolving the disputes with the Committee, and I find this to be in the best interest of the estate. So I do approve this.

And by approving this motion, I'm approving the term sheet as it's been presented, the various terms therein, the exhibits thereto. I'm specifically approving the new independent directors, the document management and preservation process, the standing to the Committee over certain of the estate claims, the reporting requirements, the operating protocols, the whole bundle of provisions.

Now, there is one specific thing I want to say about the role of Mr. Dondero. When Ms. Patel got up and talked about the newest language that has been added to the term sheet, she

highlighted in particular the very last sentence on Page 2 of the term sheet, the sentence reading, "Mr. Dondero shall not cause any related entity to terminate any agreements with the Debtor." Her statement that that was important, it really resonated with me, because, you know, as I said earlier, I can't extract what I learned during the *Acis* case, it's in my brain, and we did have many moments during the *Acis* case where the Chapter 11 trustee came in and credibly testified that, whether it was Mr. Dondero personally or others at Highland, they were surreptitiously liquidating funds, they were changing agreements, assigning agreements to others. They were doing things behind the scenes that were impacting the value of the Debtor in a bad way.

So not only do I think that language is very important, but I am going to require that language to be put in the order. Okay? So we're not just going to have an order approving the term sheet that has that language. I want language specifically in the order. You know, you can figure out where the appropriate place to stick it in the order is, but I want specific language in here regarding Mr. Dondero's role. I also -- the language in there that his role as an employee of the Debtor will be subject at all times to the supervision, direction, and authority of the Debtors, I want that language in there as well. Let's go ahead and put the language in there that at any time, in any event, the

independent directors can determine he's no longer going to be retained. I want that in the order.

And I'm sure most of you can read my mind why, but I want it crystal clear that if he violates these terms, he's violated a federal court order, and contempt will be one of the tools available to the Court. He needs to understand that. Mr. Ellington needs to understand that. You know, if there are any games behind the scene, not only do I expect the Committee is going to come in and highlight that to the Court and file a motion for a trustee or whatever, but we're going to have a contempt of court issue.

So, anybody want to respond to that?

MR. POMERANTZ: Your Honor, Jeff Pomerantz; Pachulski Stang Ziehl & Jones.

We hear Your Honor. What I thought I'd do now is I have a clean redline of the order, of course not including the provision you just requested, --

THE COURT: Uh-huh.

MR. POMERANTZ: -- which we will go back and upload and hope to get an order signed by Your Honor today, if you're around. But to go over the other changes, the changes to Jefferies, the other language changes I discussed before. I gave a copy to Ms. Lambert and to the Committee. May I approach with a --

THE COURT: You may.

MR. POMERANTZ: Thank you.

THE COURT: Okay. All right. (Pause.) All right. The form of order looks fine to me. Obviously, you'll add the Dondero-related language, and we may have further wording tweaks negotiated with the CLO Issuers. But, again, I approve all of this. I didn't say on the record the compensation, but certainly I am approving that as reasonable. I expect these three directors are going to be working very, very hard. And so, as you said, not 50,000-foot level monitoring, actually rolling up sleeves on-site, so I think the compensation is reasonable.

MR. POMERANTZ: Thank you, Your Honor. We will submit an order shortly that includes Your Honor's language requested.

THE COURT: Okay.

MR. POMERANTZ: Are you around this afternoon?

THE COURT: I am around, --

MR. POMERANTZ: Okay.

THE COURT: -- so just pick up the phone or send an email to Traci, my courtroom deputy, --

MR. POMERANTZ: Yes.

THE COURT: -- so she can tell me, "It's in your queue to sign."

MR. POMERANTZ: She has been extremely helpful and responsive.

THE COURT: All right. Very good. I'll sign your order on the CRO, then.

MR. DEMO: Okay. Thank you, Your Honor.

THE COURT: All right. Well, if there's nothing else, I'll be on the lookout for your orders. And, again, if you could coordinate with Traci to make sure she's clear on everything you need set on the 21st.

MR. POMERANTZ: Thank you very much, Your Honor.

THE COURT: All right.

MR. CLEMENTE: Thank you, Your Honor.

MR. DEMO: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 11:54 a.m.)

--oOo--

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 **12/10/2020**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT C

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

In Re:	**Case No. 19-34054-sgj-11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas February 19, 2020 9:30 a.m.
Debtor.	
	MOTIONS

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

APPEARANCES:

For the Debtor:	Greg Demo John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Debtor:	Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067 (310) 277-6910
For the Debtor:	Melissa S. Hayward Zachery Z. Annable HAYWARD & ASSOCIATES, PLLC 10501 N. Central Expressway, Suite 106 Dallas, TX 75231 (972) 755-7104
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539

the original motion but which the Debtor no longer seeks to pursue?

A One of the matters that was pending when we took office was an appeal, and I believe it was still in the District Court, and that related to an alleged conflict of interest by the Winstead firm. And so there was an objection to their fees and an appeal concerning payment of Winstead fees. And the Board has decided not to go forward with that appeal.

Q Okay. So the Board -- did you hear the opening from Acis's counsel that charged that the Debtor was just doing more scorched-earth litigation tactics? Did you hear that charge?

A I heard that, yes.

Q Okay. But yet the Board has instructed Foley not to pursue the Winstead matter; is that right?

A That's correct.

Q And just again, for the record, why did the Board make that decision?

A The Board made that decision because we just thought it was in the best interest of the Debtor and this estate not to do that.

Q And did the Debtor see any benefit to pursuing that particular litigation?

A You know, there -- a benefit could be articulated, but we decided not to pursue it.

Q Okay. So, that, plus the Neutra appeal, are two -- I mean, I apologize, withdrawn. That, plus the DAF matter, are two examples where the Board exercised its judgment not to pursue pending litigation; is that fair?
A That's correct.
Q Okay. Is the Board supportive of the Debtor's application to retain Foley for the three matters you have described?
A It is.
Q And without revealing privileged communications, can you describe generally the diligence that the Board conducted to reach that decision?
A Well, we met with some of the people that work at Highland. We met with the Debtor's attorneys, the Pachulski firm. We did have a couple of meetings with Ms. Patel and Mr. Terry. Some of us have reviewed the pleadings, some more than others. And, well, we may have done other things, but those are the ones that come to mind right now.
Q I don't know if you mentioned it, but did you confer with Ms. O'Neil?
A Oh, yes, we did. We talked with Ms. O'Neil about it.
Q Okay. And what was the purpose of the diligence that you just described for the Court?
A Well, ultimately, what we as a board were trying to do was to conduct kind of a cost-benefit analysis to the estate: How much will this potentially cost us? What's the potential

upside of pursuing it? And based upon that cost-benefit analysis, we thought that this was the best thing to do.

Q Okay. Let's just focus on a couple of very narrow 327(e) issues. Is the Debtor seeking to retain Foley to act as general bankruptcy counsel?

A No.

Q And which firm serves as general bankruptcy counsel?

A That would be the Pachulski firm.

Q Okay. And do you know whether Foley Gardere represented the Debtor's interest in each of the three matters that you've described?

A It has been representing the Debtor previously.

Q Okay. So let's talk about those three matters. The first one I believe you said was with respect to the representation of the Debtor in connection with an $8 million claim that it has against Acis; is that right?

A That's correct.

Q And is that the claim -- is that the subject of a formal proof of claim?

A Yes.

Q Okay.

A It is a claim filed in the Acis case.

Q I've placed before you an exhibit binder, and I would ask you to turn first to Exhibit 4.

A Okay.

that benefits everybody.

So I guess, Your Honor, I mean, I don't know what else to say about the benefits of the Neutra appeal except that the testimony, I think, speaks for itself. But, you know, I -- and in terms of --

THE COURT: Again, fight the claim of a creditor. Foley can represent Highland in the adversary proceeding, wherever that goes forward.

MR. DEMO: Yeah.

THE COURT: Probably District Court, not this Court. At least some of it, if not all of it. But anyway, I'm digressing. They can object to Acis's proof of claim. They can object to Terry's proof of claim. I mean, --

MR. DEMO: And conversely, Your Honor, if -- if --

THE COURT: -- this has nothing to do with -- I mean, I don't get the appeal. I mean, I --

MR. DEMO: Right.

THE COURT: Neutra can appeal, HCLOF can appeal, but I'm not seeing the benefit to Highland.

MR. DEMO: And I guess the only thing I would say, Your Honor, is if there is an improper benefit, we are not saying that the fee applications are sacrosanct. People can challenge the improper benefit there.

And again, the settlement gave broad discretion to the Committee to pursue insider claims. So if an insider is

receiving a benefit from this, the Committee has standing to pursue that.

So it's not a null set, Your Honor, whereas cutting off the appeal now does take away that possibility.

THE COURT: How would I be cutting off the appeal? I'm not cutting off the appeal. King & Spalding can go in there and fight hard. Foley can go in there and fight hard for Neutra. So, --

MR. DEMO: One second, Your Honor.

(Counsel confer.)

MR. DEMO: And I guess, you know, Your Honor, and I do want to reiterate that there is no other party with an economic incentive to fight the Neutra appeal the way that the Debtor has an economic incentive.

THE COURT: That makes no sense to me. HCLOF is the one who hated this injunction.

MR. DEMO: That's not the Neutra appeal, Your Honor. That's the confirmation order.

THE COURT: Well, okay. Neutra gets its company back if they win.

MR. DEMO: And we would get our contracts back.

THE COURT: And arguably, it can control Acis, maybe, okay, and it can assign management contracts to whoever it wants. That just -- and it says it'll assign them to Highland. If you can trust Jim Dondero, then Highland's going

to benefit if Neutra wins that appeal. Right?

MR. DEMO: Yes. Yes, Your Honor.

THE COURT: Okay. So that --

MR. DEMO: Highland would benefit greatly --

THE COURT: Okay.

MR. DEMO: -- if Neutra were to win that appeal.

THE COURT: Okay. Okay. Well, but first Neutra benefits, right? And then --

MR. DEMO: No.

THE COURT: -- Highland only secondarily benefits --

MR. DEMO: I -- I --

THE COURT: -- if Jim Dondero keeps his word and gives the management contracts back to Highland.

MR. DEMO: Jim Dondero would also have to repay the $8 million in claim, even if he didn't reinstate those contracts. And that $8 million would be hundred-cent dollars.

THE COURT: Okay.

MR. DEMO: So, worst case, --

THE COURT: It would have been nice to have him testify as to all of this.

MR. DEMO: Worst --

THE COURT: It would be more compelling if I had him.

MR. DEMO: Well, --

THE COURT: Okay? But I don't think --

MR. DEMO: -- I can only do so much, Your Honor.

THE COURT: -- that's going to happen anytime soon.

MR. DEMO: But I guess worst-case scenario is that it's $8 million in hundred-cent dollars.

THE COURT: Okay.

MR. DEMO: And that's not nothing for $500,000. And only a portion of that $500,000.

THE COURT: Okay.

MR. DEMO: Thank you, Your Honor.

THE COURT: Okay. Mr. Lamberson?

MR. LAMBERSON: Your Honor, do you want a closing from me? Or no?

THE COURT: I don't really need it. Thank you.

MR. LAMBERSON: Okay.

THE COURT: Okay.

MR. LAMBERSON: Because I know your hearing starts in about two minutes.

THE COURT: All right. So, I just hate it that we spent so much time on this. I hate it that we spent so much time, but, I mean, I understand. I understand. You know, I think the employment application was filed pretty early in the case, right, and -- October 29th. And it was continued, continued, continued, because we were getting objections from the Committee, or they wanted time to look at it, I guess. And now you're kind of up against the wire, right, because oral arguments are set at the Fifth Circuit next month. So I,

you know, I hate it that we were here, but I understand it.

But I'm concerned. I'm concerned -- well, here's the deal. We have a great board, and I totally get that Bankruptcy Courts should defer heavily to the reasonable exercise of business judgment by a board. And we've got great professionals. And we've got this case, I think, on a good track as a general matter now. But I'm concerned that Dondero or certain in-house counsel has -- you know, they're smart, they're persuasive -- that -- what are the words I want to look for -- they have exercised their powers of persuasion or whatever to make the Board and the professionals think that there is some valid prospect of benefit to Highland with these appeals, when it's really all about Neutra, HCLOF, and Mr. Dondero. That's what I believe.

I mean, this is awkward, right, because you want to defer to the debtor-in-possession, but I have this long history, and I can think through the scenarios. If this is reversed, here is how it will play out. If this is reversed, here is how it might play out. And I know, you know, there are multiple ways it might play out, but I cannot believe there is a chance in the world there is economic benefit to Highland if these things get reversed. Economic benefit to Neutra: Yeah, maybe. Economic benefit to HCLOF: Well, they'll get what they want. You know, whether it's an economic benefit, I don't know. But benefit to Highland? I just don't think the

evidence has been there to convince me it's reasonable business judgment for Highland to pay the legal fees associated with the appeal.

And even more concerning to me is a valid point was made that Highland is in bankruptcy because of litigation, litigation, litigation. The past officers and directors and controls' propensity to fight about everything. This isn't a balance sheet restructuring, okay? It's not a Chapter 11 caused by operational problems or revenue disruption or who knows what kind of disruption. It's about years of litigation finally coming home to roost. And this just appears to be more of the same, potentially.

Okay. Parties have a right to appeal. I respect that. Neutra, go for it. HCLOF, go for it. But this estate and its creditors should not bear the burden of having Highland pay for that, when, again, I don't think there's any evidence to suggest they could benefit at the end of the day.

So what I'm going to do is I'm going to approve the retention of Foley to represent Highland in the Acis case. We all know the adversary is stayed right now. It may or may not ever be un-stayed, depending on what strategies people want to pursue. But Highland, I think a meritorious case has been presented, and under 327(e) I will approve Foley representing Highland in all Acis matters. Okay? The Acis bankruptcy case. The adversary proceeding, if it goes forward. And so

that's my ruling.

I will additionally rule, for the avoidance of doubt, that if Foley wants to represent Neutra in the appeals and get paid by Neutra, I don't have any problem with that. In other words, I'm not going to find something like there's a conflict with the estate, you know, because of its simultaneous representation of Neutra. That's fine. But I'm not going to approve Highland paying anything in connection with either of those appeals. So that is the ruling of the Court.

Have I left any gaps here?

MR. DEMO: Your Honor, just one clarification.

THE COURT: Uh-huh.

MR. DEMO: Foley is representing Highland Capital Management in the appeal of the confirmation order to the Fifth Circuit. I just want to clarify that your ruling that Highland can represent -- I'm sorry -- Foley can represent Highland in all Acis matters extends to their representation of Highland Capital Management in the appeal of the confirmation order that's set for March 30th.

THE COURT: Okay. Let me think through that.

MR. DEMO: And again, Your Honor, there's been no objection to that.

THE COURT: King & Spalding is in there representing HCLOF. Foley would be representing both Neutra and Highland in connection with the confirmation order?

THE COURT: Okay. Thank you all.

(Proceedings concluded at 1:44 p.m.)

--oOo--

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 **02/20/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT D

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

In Re:	**Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas June 30, 2020 9:30 a.m. Docket
Debtor.	MOTION FOR REMITTANCE OF FUNDS HELD IN REGISTRY OF COURT FILED BY CLO HOLDCO, LTD. (590)

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

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor:	Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067 (310) 277-6910
For the Debtor:	John A. Morris Greg Demo PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For CLO Holdco, Ltd., Movant:	John J. Kane Brian W. Clark KANE RUSSELL COLEMAN LOGAN, P.C. 901 Main Street, Suite 5200 Dallas, TX 75202 (214) 777-4261
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539

the argument that you can't look at the Bankruptcy Code to determine whether the money should come out of the registry or not, and then be back in front of you, you know, three or four weeks later to relitigate any of those issues.

So that was absolutely my recollection and understanding, Your Honor, and I think from your comments I intuit that it was your understanding as well, that this was not something that we were going to deal with again very quickly, but was something to preserve the status quo, a reasonable solution, an equitable solution under Section 105. And I believe that's what Your Honor ordered.

THE COURT: All right. Well, I'll let you go ahead and make your opening statement. I think Mr. Kane was finished before I started asking my questions.

MR. CLEMENTE: Okay.

THE COURT: Mr. Clemente, you may proceed.

MR. CLEMENTE: Thank you, Your Honor. I appreciate that. So, and I'll try and be brief on the opening.

OPENING STATEMENT ON BEHALF OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

MR. CLEMENTE: Your Honor, like it or not, CLO Holdco is not an independent, unrelated, third-party investor merely seeking distributions on account of its own arm's-length independent investments. Instead, CLO is a related party in literally every sense of the word. That's not in dispute.

That is part of the Jim Dondero or Mr. Dondero web of entities.

CLO Holdco is effectively controlled by Mr. Dondero. It was seeded and received assets transferred from the Debtor, including the assets giving rise to the distribution that's in the registry. None of that is in dispute. All of this at a time when Mr. Dondero controlled the Debtor as well as the parties through the various intermediate transactions that ultimately resulted in the assets arriving in CLO Holdco. That is not in dispute.

Mr. Dondero's past fraudulent conduct, including fraudulent transfers, is also not in dispute. He was on all sides of this transaction. And therefore this transaction, along with many of the others, must be viewed with skepticism and scrutinized very closely by the Committee and by this Court.

The Committee has only just begun such work, Your Honor. And given the Byzantine empire created by Mr. Dondero, it will take time and significant resources to fully and properly conduct an investigation.

And Mr. Kane referred to, did we do discovery? We did not. Our reaction to this motion was the same as Your Honor. And as you can see by the stipulations that we have agreed to for purposes of this hearing, we didn't want this to be a situation where the estate would spend a tremendous amount of

resources to deal with something that we thought that was dealt with on March 4th.

But aside from that, given the web that's been created here, we can't just isolate one piece of it. We can't just be like, I'm going to look at the CLO Holdco documents and be able to develop a full theory. This is a tapestry of interrelated entities that is opaque and vague and purposely so. So you can't just focus on one piece and then try and say, well, I know what this piece is, because that piece has many interrelated complex ramifications and relationships where, frankly, you can't just say, okay, let's focus on this one issue, because you're going to miss the entire tapestry.

We still need to examine, as I mentioned, the whole thing, and this takes time and it takes an investment. So while I understand CLO Holdco wants to receive its distribution, I also understand that my constituency wants to be paid, some of whom have been waiting for over a decade.

To be clear, Your Honor, my constituency didn't choose to be here in the bankruptcy. But CLO Holdco chose to associate itself with Mr. Dondero and to take assets from Highland in convoluted related-party transactions and reap the benefits of those transactions. CLO Holdco can't now step away from that and try and suggest to Your Honor that this is about taking time under 28 U.S.C. 2042. That was never what it was about on March 4th, and it's not what it's about today.

Holdco has or doesn't have, we have no idea. And it's controlled, ultimately, let us not lose sight of the fact, by Mr. Dondero.

So, allowing CLO Holdco to take distributions will place them with an offshore entity, potentially outside the jurisdiction of this Court, or at the very least, placed in five or six entities removed or who knows where, including potentially other foreign entities.

Therefore, exercising authority under Section 105 is consistent with preserving, protecting, and maximizing the value of the Debtor's estate, which estate includes claims, causes of action, and avoidance actions.

As you know, 105 is the means and -- circumstances (audio gap) preserve and protect the estate.

And to be sure, this is not inconsistent with any other provision of the Bankruptcy Code, and it's, in fact, from our perspective, in furtherance of the goals of the Code.

Your Honor, regarding the payments that Mr. Kane (audio gap), the fact that a few payments were made on the note doesn't change the fact that Section 105 applies and the Court should deny the motion.

As with all that is Highland, nothing is simple or easy. First, CLO Holdco received millions more in assets and transfers, aside from the interests giving rise to the distributions at issue. So the fact that there were payments

on the notes really speak nothing to the fact of whether the overall transaction was for reasonably equivalent value or otherwise problematic, especially when there is nothing in the record regarding the Dugaboy Trust, its wherewithal to pay, or the fairness of the terms of the note, or any of that. Or why the note was structured this way or, you know, what the Get Good Trust and the Dugaboy Trust do, how they interact, who makes decision on what gets paid and doesn't get paid.

The few payments, while interesting, Your Honor, again, do not establish reasonably equivalent value or the propriety, in our view, of the transfers.

Finally, as this Court knows, reasonably equivalent value is not determinative of whether the transfer was intentionally fraudulent or otherwise potentially avoidable or problematic. So, while deeds are interesting, Your Honor, I would submit that they don't move the needle in changing the fact that the motion should be denied.

Now, Your Honor, to the point that you raised with me before I started my remarks here. Much has been made about inappropriate prejudgment remedy or attachment or similar arguments. I submit this case is moot, Your Honor. Again, at the risk of repeating myself, I will emphasize that CLO Holdco is not an independent third party. Like it or not, it is tied up in a ruinous web with Mr. Dondero, and that in and of itself makes this case unique and distinguishes it from the

other cases cited by CLO Holdco.

Additionally, Your Honor, the current circumstances are distinguishable because the Debtor had control over these funds. That's why we were in front of you on March 4th. I agree, and I'm not arguing, that the Debtor did not own these funds. But it clearly had control over them at the time that it sought to make the distributions on March 4th. So, in my humble opinion, Your Honor, that means the Court had control over that.

Having them held in a registry while an investigation occurs is not akin to slapping a lien on someone's house or taking possession of an automobile, like the cases cited by Mr. Kane where they require there's some -- an adversary proceeding or some type of complaint.

The situation here, again, Your Honor, matters. The Debtor was before you seeking your authority to make this distribution. That is entirely different than if I were to walk in here and say my colleague, Mr. Twomey, I think that, you know what, I don't like him and so I have a claim against him, and I want Your Honor to enjoin him from being able to sell his automobile. That is entirely different, and in my view completely distinguishes it from any of the cases that Mr. Kane cited, including, of course, I have much respect for Judge Houser, but including the case authored by Judge Houser.

So, Your Honor, again, having them held in the registry is

attachment. Bankruptcy Rules aren't structured like that.

But importantly, Mr. Clemente presented no facts to support his balancing of harms argument and presented no facts to establish that he has any viable claims against CLO Holdco. Arguments that James Dondero participated in frauds does not mean that there's a claim or cause of action that the Committee can assert against CLO Holdco, which is what would be required to obtain an injunction.

This is a big if. If the Committee is seeking to obtain an injunction, it must satisfy its burden of proving under 7065 and the four-factor test established by *Janvey v. Alguire* in the Fifth Circuit in 2011 and the many cases before that. And it just can't do it.

So I want to leave the Court with one case citation, because if the Court is considering some means of entering a preliminary injunction outside of an adversary proceeding, I was able to find a grand total of one case that address that in the Fifth Circuit. And that is the 1995 decision of *In re Zale* in which the Fifth Circuit noted that the only way a 105(a) preliminary injunction could be issued, after a finding of these unusual circumstances and the like, was if all of the protections of an adversary proceeding had been afforded to the non-movant and if the party that was requesting the injunction satisfied the four-factor test that's found in 7065.

There are no extraordinary circumstances or unusual circumstances here. And if this Court believes that the context of this case warrants that, then the Committee would still have to satisfy that four-factor test for a preliminary injunction. And it has the burden of proof on those four factors. It hasn't presented any evidence whatsoever to support that it can meet the first, let alone the second, third, and fourth factors of that test.

So, Your Honor, with that, I'll close our case, unless you have additional questions, and request that the Court grant CLO Holdco's motion.

THE COURT: A couple of follow-up questions. I have certain facts in my brain, and I can't remember if they're in evidence or stipulated to or I read them in a pleading. So, I just want to ask: Somewhere I remember seeing that CLO Holdco, or, you know, maybe it's its parent, I think -- Mr. Clemente said we have a Byzantine structure here and we have a sub-web within a bigger web with regard to CLO Holdco. But, anyway, CLO Holdco or its parent has assets of approximately $225 million? Is that evidence or undisputed?

MR. KANE: Your Honor, that was contained in one of the pleadings asserted, I believe, by the Committee, and that was the Charitable DAF entities, not necessarily CLO Holdco. There hasn't been any evidence presented by the Committee of the assets held by CLO Holdco other than what we have before

the Court.

THE COURT: Okay. So it's not something you would stipulate or offer one way or another?

MR. KANE: No, Your Honor, I think that's factually incorrect and I don't stipulate to that.

THE COURT: Okay. I think my notes show that that was the alleged amount of assets as of September 30, 2019. But, again, that may have just been a pleading, not anything in evidence.

All right. And are Mr. Scott or Mr. Dondero on the phone today or on the video? I'm just curious.

MR. KANE: Your Honor, I lost you on the video a little bit, but assuming you can hear me, though, Mr. Scott is not. We had conversations with the Committee about various exhibits and whether or not Mr. Scott would be here to testify to prove up exhibits. Once the exhibits were all stipulated as admissible, then there was no need for Mr. Scott to participate.

THE COURT: Okay. I was not going to ask him anything. I just was curious if he was listening in. Or Mr. Dondero, for that matter. I guess Mr. Dondero is not on the line, correct? (Pause.) All right. I'll --

MR. KANE: Your Honor, I -- I think -- I'm sorry. I've had no conversations with Mr. Dondero. I have no idea whether he's on the line.

THE COURT: Okay. I'll take silence to mean he's probably not, but --

All right. I asked that question for, I guess, a couple of reasons. But the main reason I asked is -- and I'm going to say this as kindly as I can. They're not here to hear it anyway. But I feel like perhaps they are a little tone deaf, for lack of a better term, on how this all looks to the Court today. And what I mean by that is, obviously, I assume it was their decision to bring this motion, at least Mr. Scott's, and likely Mr. Dondero as well had some involvement in that decision. And the reason I say that it feels like they're a little tone deaf about how this looks is that we just had an extensive hearing and some very thorough pleadings, a lot of evidence uploaded, on a $2.5 million issue. And I don't -- you know, I appreciate that that is a significant sum of money, but we've used the word context a lot this morning: In the context of this reorganization, it seems like a very big deal was raised here, at the choice of Mr. Scott and Mr. Dondero, over a $2.5 million issue, in the context of a reorganization that involves at least hundreds of millions of dollars of debt, if not over a billion. UBS says they're owed a billion.

And I just asked my question a minute ago about the value of assets that the DAF or CLO Holdco or that sub-structure has managed, because while no one will commit, is it $225 million

or not, you know, I take it that the Committee had a good faith basis for saying that, and if it's not that, it's probably a quite sizable number.

Again, so I'm kind of thinking out loud about the proportionality of this issue. $2.5 million, not anything to sneeze at, but we're talking about a Charitable DAF that probably has many, many, many more times that of assets. And so there was certainly no equitable argument of hardship or, you know, significant detriment that's befalling CLO Holdco by the tying up of this money in the registry of the Court for this relatively short time period. So, again, it feels a little tone deaf to be bringing this argument, occupying so much time from the parties, the lawyers, the Court, over this issue.

And just to further elaborate on that, it matters to me, and I say this about the tone-deafness, partly because I thought -- I said this at the beginning of the hearing, and I still say it -- we already put this issue to rest, albeit temporarily, in March. And in April, we get this new motion. Again, I recognize the language of the March order reserved everyone's rights to come back and argue about this, but, again, the buzzwords for this hearing are going to be context matters, I guess. Mr. Clemente, you get credit for that buzz phrase, those buzzwords.

Again, I issued the order with regard to putting these

monies in the registry of the Court at the suggestion of Mr. Dondero's very wonderful lawyer, retired Judge Lynn. And, again, the context was we had a protocol order early in this case that the Committee negotiated heavily with regard to monies being disbursed out under the control of the Debtor, and heavily negotiated. I remember the CLO Issuers, I think, had some pause and concerns and got their language into that order.

So we had this protocol order. Debtor was worried about violating the protocol order, so Debtor files the motion February 24th, wanting the blessing of a court order before it transferred these monies to CLO Holdco and some other Highland-affiliated entities. There were vehement objections, and the Court issued the order saying, Let's put these monies into the registry of the Court, at the suggestion of very able counsel as to how we could resolve that contested matter we were there on on March 4th.

So, you know, a month later, April, we have this new motion of CLO Holdco reviving the dispute, the $2.5 million dispute that we had just put to rest temporarily in March at the suggestion of lawyers. I didn't issue a 105 injunction outside the context of an adversary proceeding just on my own, *sua sponte*. It was suggested to me that this was a good solution. People embraced it. That's what we did. And I sure didn't have in my brain that a month later we'd have a

brand new motion regarding whether these monies should be disbursed to CLO Holdco all over again, when that was the issue that was already before the Court in March.

I, again, fully recognize that everybody reserved their rights, but I focus on this context because, again, I wish Mr. Dondero and Mr. Scott were on the call to hear this: This almost feels like a good faith issue to me. You know, maybe I would feel slightly different if there had been a broad emphasis, heavy emphasis, CLO Holdco standing up through a lawyer that day saying, We're just letting you know, we're going to get together a motion in very short order and tee this up again. Because I would have probably said no. You know, if -- let's just hear it right now today, if this is only a three-week mandate or whatever. So, good faith is something that I can't help but scratch my head and be troubled by.

So, I want to emphasize that CLO Holdco's lawyer has made perfect arguments regarding the potential legal issues here. There are some valid arguments here about is this tantamount, holding the money in the registry of the Court that a non-debtor asserts is its property, is that tantamount to a prejudgment remedy? You know, did it require an adversary proceeding? Did it require the traditional four-prong prove-up for a preliminary injunction? And did the Court just give short shrift to those legal technicalities?

Again, these are compelling arguments, but I'm overruling the arguments because, again, I believe it ignores the context that CLO Holdco essentially consented, acquiesced, in this placeholder keep-the-status-quo solution. And I question its good faith in, so quickly after consenting, bringing this motion.

But moreover, I do find that in the unique context of the disputes before the Court on March 4th, I did have authority to issue a 105 injunction. 105, as we all know, at Subsection (a) gives a bankruptcy court authority to issue orders necessary or appropriate to carry out provisions of Title 11, and the last sentence even provides a mechanism for the Court to *sua sponte* take action to, among other things, prevent an abuse of process or just do what's necessary or appropriate to implement court orders or rules.

So I think, again, in the context before the Court, it was not only a consensual thing, but the Court had authority. And the backdrop of this, again, cannot be overstated. Again, to use Mr. Clemente's word, we have this Byzantine structure here. It's a lot for the Committee to get its arms around. And even the CLO Holdco structure -- again, I'm looking at my notes, my fancy chart -- we have CLO Holdco, a Cayman Island entity. Its parent is Charitable DAF Fund, LP, another Cayman Island entity. It, in turn, is owned by Charitable DAF Holdco, Ltd., yet another Cayman Island entity. Its general

partner happens to be a Delaware entity, Charitable DAF GP, LLC, but the beneficial owners of it are the three Highland Foundations, of which Dondero is president and director, and Mr. Scott the treasurer and director.

So, I'm not saying the Byzantine structure is in and of itself problematic, although one might wonder why a charitable organization needs to have three offshore entities as part of its structure. I digress. But we all know a Byzantine structure and ties to Dondero do not mean something is attackable in and of itself, but we have had issues raised about the Dynamic Fund and the various transfers with regard to Dugaboy, the Dondero Family Trust, and Get Good Trust and the note. All of that is worthy of examination, and the Committee has not had all that long in this case to investigate it.

So, I'm going to say a couple of more things. First, the motion is denied, but I'm going to put more strings on it than that. I'm denying the motion, but as part of this ruling I'm going to order that the Committee has 90 days, unless the Court happens to extend that on motion or agreement of the parties, to file an adversary proceeding against CLO Holdco or the money shall be released. Okay?

So, again, I intended it, as I think everybody did, to be a placeholder, to keep the status quo little bit. Again, Mr. Kane has raised good arguments that maybe an adversary

conceivably was necessary or might become necessary. So here we have a requirement of an adversary within 90 days or the money shall be released to Holdco -- again, unless someone moves to extend that or I get an agreement to extend that and I happen to decide to issue an order extending that.

I presume that if an adversary is filed, then if the Committee wants that money to continue to be held in the registry of the Court, then they would have to file an application for injunctive relief, essentially, to keep the money in the registry of the Court pending the resolution of the adversary proceeding.

So that is the ruling of the Court. Mr. Clemente, I'll ask you to draft up the order. And I reserve the right to supplement this oral ruling in that form of order. And please run it by Mr. Kane before electronically submitting it to the Court.

Now, I'm going to say a couple of other things, and then I'll, before closing, I'll ask if there are questions or other announcements. I have told the parties and the lawyers to focus on a plan and problem-solving how we're going to pay creditors. And I think I expressed my strong hope that people would stop litigating everything. I think I'm remembering saying this most recently at the UBS hearing a few weeks ago on a motion to lift stay. Once again, we had a very lengthy hearing that day. I denied the motion. And here we are

as I can to distance CLO Holdco from that taint, because understanding that it's in what has been alleged as a Byzantine web, we think it's important to separate CLO Holdco and its operations to ensure that things are done in an appropriate fashion with square corners.

That's all I have, Your Honor. We have no objection to the additional funds being pled into the registry of the Court. We can agree those funds would be adjudicated as part of this dispute. We understand that we did not prevail, and we appreciate your Court hearing our argument.

(Proceedings concluded at 12:06 p.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **07/02/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT E

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

In Re:	)	**Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas July 8, 2020
Debtor.	)	1:30 p.m. Docket
	)	- MOTION TO EXTEND EXCLUSIVITY PERIOD (737)
	)	- MOTION TO EXTEND TIME TO REMOVE ACTIONS (747)

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

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor:	Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067 (310) 277-6910
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539
For the Debtor:	Zachery Z. Annable Melissa S. Hayward HAYWARD & ASSOCIATES, PLLC 10501 N. Central Expressway, Suite 106 Dallas, TX 75231 (972) 755-7104
For Acis Capital Management GP, LLC:	Rakhee V. Patel Annmarie Antoinette Chiarello WINSTEAD, P.C. 2728 N. Harwood Street, Suite 500 Dallas, TX 75201 (214) 745-5250

been working very cooperatively with our creditors over the last few months and we're just seeking to do it the best way.

So nothing I've said today, nothing, you know, should come as and will come as a surprise to the Committee, but we're working better, recognizing that ultimately the creditors want to be paid, and doing that in an appropriate manner and a thoughtful manner is what the Debtor is committed to do with its partner, the Committee, in this process.

THE COURT: Okay. Sort of jumping back, I forgot to ask earlier when we were talking about Acis: Has the Fifth Circuit rescheduled oral argument on the appeal of the Acis confirmation order and order for relief?

MR. POMERANTZ: I believe -- Your Honor, maybe Ms. Patel would know off the top of her head.

THE COURT: Ms. Patel?

MS. PATEL: Your Honor, it was -- it was briefly -- I -- and I say briefly, it was briefly we had -- we got a notice at some point, I believe in early June, that the Fifth Circuit had reset oral argument. And then approximately, I can't remember exactly, but it was like, I don't know, a week or maybe ten days later, we got a notice that it was cancelled again. We have not received notice that it is rescheduled, so it is still pending. But it has not been taken off oral -- it has not been taken off oral argument at some juncture.

THE COURT: Okay. Well, I acknowledge that that is a

pandemic disruption for sure. It would have been nice to have that resolved one way or another by now.

MS. PATEL: Agreed, Your Honor. We were trying to figure out, frankly, in the week to ten days that it took from the scheduling to how it was cancelled, exactly how our team was going to get down to New Orleans. And the -- I think the leading contender was to rent an RV and drive down so we could safely get there. So it certainly has been a casualty of the pandemic.

THE COURT: Okay. All right. Two more questions. And this one has been a bit of a tough one for me to decide whether I should broach this topic or not. You know, I read the newspapers, the financial papers, just like everyone else, and I saw a headline that I wished almost I wouldn't have seen, and it was a headline about Dondero or Highland affiliates getting three PPP loans. And, you know, I'm only supposed to consider evidence I hear in the courtroom, right, or things I hear in the courtroom, but I've got this extrajudicial knowledge right now thanks to just keeping up on current events. I decided I needed to ask about this.

What can you tell me about this, Mr. Pomerantz? I mean, I assumed, from less-than-clear reporting, that it wasn't Highland Capital Management, LP, but I'd like to hear anything you can report about this.

MR. POMERANTZ: So, look, Your Honor, the first I

could say is that, to my knowledge, Highland Capital, the Debtor, has not obtained a PPP loan. I know there have been discussions with certain funds that basically have certain assets, private operating companies, about obtaining PPP loans. I don't have the specifics for Your Honor. I'm happy to provide that.

Of course, to the extent Mr. Dondero, on any of his affiliated funds that are under the control of the Debtor, I would have no way of answering that, but I'm happy to follow up with that with the Board and report back to Your Honor in whatever appropriate manner you felt to obtain that information.

THE COURT: Okay. Well, let's have a report on that on the 14th when we come in. You know, maybe Mr. Seery or Mr. Sharp or some other person. But you can probably imagine the different things going through my brain. You know, well, first, let's see if it was -- you know, I don't -- again, I'm not expecting it to be Highland Capital Management, LP. I would be beyond shocked if, you know, that somehow happened when they're in bankruptcy. And, you know, I think it would require a 364 motion, just like any other borrowing, although I know it's kind of a forgivable loan. Strange bird.

But then if it's some affiliate of Highland, I still feel like we need some transparency and disclosure on that. I mean, I -- and who were the human beings behind it. It just

busiest judges in the country right now. I'm wondering when were they contacted. Was it really recently, or a week or two ago? Because they've probably gotten ten new mega-cases in the past two weeks.

MR. POMERANTZ: So, Your Honor, the last -- the last two weeks, again, probably since June 15th, we had been discussing the structure of a mediation. We, the Debtor, proposed perhaps a combination of Judge Isgur and Jones. We initially had that conversation with Mr. Clemente, and then we socialized it with the rest of the Committee members. As of last Thursday, I believe it was, we had consensus that Judge Jones, and if available, also Judge Isgur, would make sense.

I sent an email to Judge Jones' clerk, indicating that we had a hearing today, that it would be helpful if we got a response, and this morning, two hours before the hearing, Judge Jones' clerk responded and told Mr. Clemente and I that he is available and ready and suggested that we have a conference with -- again, I'm not sure if it'll be him or his clerk, to talk about availability. Of course, we didn't want to go ahead and have that discussion until, you know, we got Your Honor's input on it.

THE COURT: Okay. I mean, a couple of things come to mind. One is I am just flabbergasted that they would have any availability. I know they're -- I'm aware of Judge Jones doing hearings on weekends.

But second, I'm also concerned what is their idea of availability. Because in order for a mediator to meaningfully help you on this, I mean, it's going to take not just hours but days of time, unless you want the mediator to just have a 30,000-foot view. And I mean, I just cannot imagine, --

MR. POMERANTZ: So, --

THE COURT: -- once again, that they would have days and days to come up to speed with, you know, 11 years of litigation or however long it was, not that long, with UBS, you know the years with Acis, you know, the various alleged claims and causes of action, and, you know, the Byzantine structure here. I mean, you know, not that they have to be, you know, as educated as a judge presiding over litigated matters, but I just cannot imagine they could meaningfully spend time on this.

So what are you all envisioning? Because I know what I'm envisioning, and maybe we're not seeing it the same way. I mean, what are you thinking? That you'll go in and spend a day with, you know, maybe just each of you doing a 25-page white paper, and you'll either settle it by the end of the day or not, or what?

MR. POMERANTZ: So, let me start by saying that when everyone raised the issue of Judge Jones and Isgur, everyone had the same potential concern that Your Honor has mentioned. You know, my firm and me personally, I'm involved in a couple

of cases before Judge Jones now, significant cases. So there was a concern.

I think people also generally thought that if they accepted and they knew what they were getting into, they would want to do a good job and they'd have the time.

We have not had the ability to have an extensive discussion. That discussion could either occur with Mr. Clemente and myself speaking to the clerk or the judge, or if Your Honor -- nothing stops Your Honor from picking up the phone, speaking to Judge Jones and asking him as well.

But I expect it to be a very intensive mediation process. I do understand that Judge Jones only does mediations in person, so this would require people getting to Houston, which, in my experience, while I have participated in mediations virtually on the phone, it's a lot more effective to be in person. We would anticipate detailed mediation briefs. We would envision each of the parties speaking to Judge Jones to give him their perspective. But it would be -- it would be a significant assignment.

Again, whether we would conclude at the end of August, I don't know, but I would contemplate a good two, three days of in-person mediation at the end of August, and then probably, if necessary, to set up for something else, which, again, there are several different things. And I mentioned in my opening remarks why I think people like Judge Jones -- and

nothing else, we'll go ahead and adjourn for today. And I'll keep -- if there's anything worthwhile to report on the mediation front before we have our hearing on the 14th, I'll have my courtroom deputy reach out to all counsel by email and let you know. Okay? All right.

MR. POMERANTZ: Thank you very much, Your Honor.

MS. PATEL: Thank you, Your Honor.

THE COURT: Thank you. We stand adjourned.

THE CLERK: All rise.

(Proceedings concluded at 3:00 p.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **07/09/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT F

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

In Re:	)	**Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas July 14, 2020
Debtor.	)	1:30 p.m. Docket
	)	APPLICATIONS TO EMPLOY JAMES P. SEERY AND DEVELOPMENT SPECIALISTS, INC. (774, 775)

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

WEBEX/TELEPHONIC APPEARANCES:

For the Debtors: Jeffrey N. Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067
(310) 277-6910

For the Debtors: John A. Morris
Greg Demo
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

For the Debtors: Ira D. Kharasch
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

For the Debtors: Zachery Z. Annable
Melissa S. Hayward
HAYWARD & ASSOCIATES, PLLC
10501 N. Central Expressway,
Suite 106
Dallas, TX 75231
(972) 755-7104

file Multi-Strat as a bankruptcy, it was hard to get folks to really come to the table and think about how to settle that issue.

These issues in regard to the total case are much more complicated. We're going to file a plan. We believe that will set a bit of a crucible to folks to think about how to move forward with their claims. We are, as Jeff Pomerantz mentioned last time, agreed in principle, but we have some issues to work through with Redeemer that we hope to be able to resolve by this week. And so that's my internal goal, but I expect to be able to do it.

The reason that's complex is not that it's simply a -- the arbitration award is not simply a money award; it actually requires certain offsets, it requires certain assets be sold and paid for. And we're trying to carve our way around some of those, because they (inaudible) agreement, because they're -- they're more difficult than simply exchanging cash for assets, because we don't have the ability to do that right now. We don't have the cash, and we're in bankruptcy.

So I do believe that we can get these done. And then if mediation is something that would work, great. We're going to try to do it without mediation as well. Going to try to do it before we get to mediation and resolve claims. And if we're unable to do that, hopefully mediation will push it forward or we have to have a fallback, which will be dispositive motions

with respect to certain of the claims.

But we expect to have and I think we have a number of claims objections that have (inaudible). We've resolved those. We're really down to three claims. And one of them is almost done.

Q All right. At the last hearing, --

MR. MORRIS: Your Honor, that really does finish the substance of the testimony with respect to this motion, but at the last hearing Your Honor raised some questions about PPP loans.

THE COURT: Yes.

MR. MORRIS: Would you like me to just take a moment with Mr. Seery to address that?

THE COURT: Yes, please.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q Mr. Seery, you're aware that the Judge raised some questions about whether and to what extent the Debtor may have been involved in any of the PPP loans?

A Yes.

Q And have you done any work to try to figure out the answers to the questions the Judge posed?

A Well, work in response to the question, but also work previously. So, just a -- quickly, as I think we all know, the PPP program was put forth to try to give companies cash

that they had to use for employee payments, to continue to keep payroll supported and to continue to have folks hold their jobs.

We have -- and I think the *Business Insider* article, which I'm not familiar, I know the publication is not something I seen much, but I'm not familiar with the specifics of that article, and -- but any PPP, away from the assets that HCMLP actually owns or controls. And we've got -- we've got three -- and I think there's some substance to the article. But we've got three businesses. And these are -- this is public, but I'll go into the -- sort of the obvious reasons without going into the specifics of the business around the ones that I know of well.

Carey Limousine is a business that transports folks in high-quality cars from airports or from events or between businesses. It was hit severely by the COVID-19 pandemic., particularly with respect to the air transportation, which was really one of its biggest areas. The business, notwithstanding Uber and the other type of shared ride services, had actually done quite well, and Highland was an owner of a significant portion of that business related to some loans that it held in various funds.

That business's management, with its own outside counsel, sought a PPP loan. Then our director came to us and discussed with the Board the propriety of that loan. We engaged outside

counsel, not bankruptcy counsel but counsel that had particularized expertise in PPP, and spent a ton of time really understanding both the law as well as the specific regs. Carey did get a PPP loan. It is potentially forgivable, depending on how it's used.

The second entity that was similar but didn't come to the Board, we have a business called SSP, which is an excellent highway business that provides equip -- materials for a lot of different road construction, but primarily highway road construction. Very well run business. That entity got a PPP loan as well, primarily worried about whether the construction on the highways would shut down.

So it's been -- I don't believe that's really happened in Texas, which is where most of their business is, but they qualified for that loan. They did not come to the Board. A very specific carve-out, because one of the interest holders that we share that position with is a Small Business Administration fund and, so it was very clear that it was entitled to that loan.

Then there's a third entity called Roma that got a very small PPP loan. We don't control the entity and we were not involved in its acquisition of that loan. Again, it would have to be used as required.

One of the things I want to make sure that is in the record and for Your Honor with respect to Carey, we spent a

lot of time as a Board focused on, one, whether it was legal to get that loan, first. We're doing everything right, by the book. We're not going to play in the gray. There is no gray. There's black and white in these areas.

Number two, was it ethical, was it appropriate that we went and got this loan or that Carey went and got this loan? Management, with the outside counsel, was sure that we could do it, but we didn't want to take their word for it, so we went out and got our own counsel, third-party counsel for the Board to make sure that this was appropriate.

Three, the requirements around these loans are significant and the penalties for violating them are severe. So if you get a loan by mistake, are you really required to pay it back? And if you're mistaken, that will be expensive, but it won't be a real penalty. But if you get a loan that's really inappropriate, that you shouldn't have gotten, that was a material misstatement of any of the facts around it, the penalties are significant. And not only in terms of the opprobrium that you'd suffer in the press, because that's coming, but in terms of how you use the funds.

So they can only be used in very specific ways, and we were exceptionally careful around this program.

The basis of the program is to keep people employed. And with a business like Carey Limousine in particular, where there's a significant amount of debt, where the business is

shut down by COVID, where we didn't have the funds to put into Carey, nor even if we wanted to, we might not have been able to do it without the Committee's approval because of the protocol, a PPP loan was not only legal but it was appropriate. And it's being used in that fashion, meaning to keep employees employed.

Q Thank you very much, Mr. Seery.

MR. MORRIS: Your Honor, I have no further questions of Mr. Seery. Does the Court have any questions?

THE COURT: I actually have a follow-up question regarding the PPP, just to kind of put a bow on this.

EXAMINATION BY THE COURT

THE COURT: I'm looking at the demonstrative aide. I don't know if you, Mr. Seery, have it there handy.

THE WITNESS: I do, Your Honor.

THE COURT: Okay. So I'm turning to Page 6, the chart, the subchart, Investments and Subsidiaries. The third column, Privately-Held Equity, Various Companies. I mean, that would be the type of investment entity we're talking about here that got the PPP loan: Carey Limousine, SSP, Roma? Nothing that was -- well, I'm going to say Highland affiliate. Affiliate, that's a dicey term, but that's the type of entity in the organizational structure we're talking about, correct?

THE WITNESS: Those are the ones -- I want to be very careful, because I know what I know and I know I won't

represent anything that I don't know.

So, with respect to the entities that HCMLP, the Debtor, controls, that's absolutely the case. I don't know, and I can try to find out, but they are not HCMLP-controlled entities. Whether other entities in the related-party complex received loans -- so, obviously, HCMLP did not receive a loan. And the only entities that we were involved with is the ones I mentioned to you.

And I should mention, there are other entities in the privately-held equity that got other government money, in the medical space, that they didn't even ask for. HHS pushed forward payments to folks in the business, medical healthcare-providing businesses, to assure that they had liquidity to provide. And so -- and this has been described to me exactly this way, that they woke up in the morning and found money in their account. And with one of the companies, they actually returned a bunch of the money because it was from a dormant provider number and they didn't believe it was appropriate to keep that money. So that was one of the entities that we control with other investors.

But with respect to our HCMLP entities, these are the only ones I know. With respect to other related entities that might be in the family of businesses, for lack of a better term, that were alluded to in the *Business Insider* article, I don't know that answer. So, I -- if I -- I can try to find

out. I just don't know the answer, Your Honor.

THE COURT: All right. Thank you. Well, this has been extremely helpful.

I should ask does anyone have any questions of Mr. Seery? The Committee counsel, perhaps? Anyone else?

MR. CLUBOK: Your Honor, this is Andrew Clubok. In light of the testimony, I do have some questions on behalf of UBS.

THE COURT: All right. Briefly. Go ahead.

MR. CLUBOK: Okay.

MR. MORRIS: Your Honor? Your Honor, I'm sorry to interrupt, but there's no objection lodged here. If Your Honor wants to permit it, that's obviously the Court's prerogative. But as just a point of order, having not lodged an objection, I don't know what right anybody has to cross-examine the witness.

THE COURT: All right. Well, that's why I said briefly. I think that Mr. Morris makes a good point, Mr. Clubok. You could have filed a written objection, response, comment, or something. So, you're a party in interest. I'll give you a little bit of leeway here. But please keep it brief.

MR. CLUBOK: Yeah. Thank you, Your Honor. It's just some of the things that Mr. Seery said which we didn't expect to hear that has raised a few questions that I just very

briefly will try to address.

CROSS-EXAMINATION

BY MR. CLUBOK:

Q Mr. Seery, good afternoon. I'm Andrew Clubok, Latham & Watkins, on behalf of UBS.

Mr. Seery, you talked about the fiduciary duties you've understood yourself to have with respect to certain parties, and my question to you is: Have you understood, since the beginning of your service as an Independent Director of Strand, that you had fiduciary duties to the unsecured creditors of the Debtor?

A It's a -- it's a -- the answer is I understand the fiduciary duties very well. I think we have fiduciary duties to the estate. So Highland -- what I tried to explain is that Highland, as an asset manager, has very specific fiduciary duties that are set forth in (inaudible) in the cases and the rules that have interpreted it. We, as directors of Strand, have a duty to the estate.

I don't think it's -- I don't think it's fair, and I'd have to subject myself to some education from counsel, I don't think it's fair to say we had a specific fiduciary duty to a particular creditor.

So, for example, if I had a fiduciary duty to UBS, it would be very difficult for me to object to UBS's claim. It would be -- I don't know how I could do that as a fiduciary.

yesterday counsel for Mr. Dondero filed a joinder in the Debtors' objection to Acis's claim. So, again, just thinking about this in the context of mediation, I think, with that joinder, they will be a necessary party. So, going back to Mr. Seery's point, this is not just --

THE COURT: Oh, absolutely. Mr. Dondero is --

MS. PATEL: -- a two-party --

THE COURT: -- going to be a required party in mediation. Absolutely. So, --

MS. PATEL: Thank you, Your Honor.

THE COURT: All right. Well, if there's nothing further, we'll see you on the 21st. And, again, my courtroom deputy may be reaching out before then if we've got things nailed down on mediation.

(Proceedings concluded at 4:54 p.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **07/16/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT G

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE THE HONORABLE STACEY G. JERNIGAN, JUDGE

In Re:	) Case No. 18-30264-SGJ-11
	) Case No. 18-30265-SGJ-11
	) (Jointly administered under
ACIS CAPITAL MANAGEMENT, L.P.	) Case No. 18-30264-SGJ-11)
and ACIS CAPITAL MANAGEMENT GP,	)
LLC,	) DEBTORS' MOTION to FILE
	) REDACTED QUARTERLY REPORTS
Debtors.	)
	) September 23, 2020
	) Dallas, Texas

Appearances via video and/or telephone:

For the Reorganized Debtors:	Annemarie Chiarello Rahkee V. Patel Winstead PC 500 Winstead Building 2728 North Harwood Street Dallas, Texas 75201
For James Dondero:	D. Michael Lynn, of Counsel Bonds Ellis Eppich Schafer Jones LLP 420 Throckmorton Street, Suite 1000 Forth Worth, Texas 76102
For William T. Neary, United States Trustee:	Lisa L. Lambert, Assistant U.S. Trustee Office of the U.S. Trustee, Region 6 1100 Commerce Street, Room 976 Dallas, Texas 75242-1496
Digital Court Reporter:	United States Bankruptcy Court Northern District of Texas Michael F. Edmond, Judicial Support Specialist Earle Cabell Building, U.S. Courthouse 1100 Commerce Street, Room 1254 Dallas, Texas 75242 (214) 753-2062, direct; 753-2072, fax
Certified Electronic Transcriber:	Palmer Reporting Services 1948 Diamond Oak Way Manteca, California 95336-9124

Proceedings recorded by digital recording;
transcript produced by federally-approved transcription service.

thing that it might be is commercial information, but I really don't think there's been a showing that it is of the nature that 107(b) is intended to address.

Now don't get me wrong, I am very troubled by some of what I've heard today. I doubt Mr. Dondero is listening in personally, but I'm going to say, and maybe it will get back to him, maybe it won't, but that I'm very troubled by hearing that Dondero-controlled entities, and I believe the DAF, based on what I've heard in the past, is Dondero controlled, I'm very troubled that Dondero-controlled entities are suing Acis and parties that have dealt with Acis, U.S. Bank, Brigade, and the Moody's one is really mind-boggling, but I'm very troubled that this could be hampering Acis' ability to do a reset and it's driving up expenses.

And if these lawsuits were brought before me through a removal or any other mechanism, you know, first, I would have to look at subject matter jurisdiction of the Bankruptcy Court. Yes, we're way past the effective date of Acis' plan, but the Fifth Circuit case authority provides that if there is a dispute postconfirmation that bears on the interpretation, implementation, or execution of a confirmed plan, then the Bankruptcy Court has subject matter jurisdiction in that context. And it sure sounds like, hearing Mr. Terry's version of things today, which sounded very credible, that this is potentially impinging on the reorganization and plan of Acis.

So it's very troubling to me that — well, I've said it before in Highland hearings, that these battles just continue on, but if it's impairing with a plan I confirmed, it's impairing a plan I confirmed, it's impairing the ability to perform under that plan, then that is a problem for the plaintiffs.

Now I've heard there is no pending litigation in that regard, but I'm troubled by the April 2020 letter I saw that is essentially a suggestion we may start this up again, the litigation that we dismissed. It's just ridiculous, for lack of a better term, that Dondero and his entities would be doing some of the things it sounds like they're doing: Suing Moody's, for crying out loud, for not downgrading the Acis CLOs. If Mr. Dondero doesn't think that is so transparently vexatious litigation, yeah, I'm going out there and saying that. I haven't seen it, but, come on.

So, bottom line, I don't find the 107 standard here is met today, so I am denying entirely the motion. I haven't been convinced that this is commercial information that 107(b) justifies redacting or sealing. But, again, I am most troubled by what I've heard today.

I have found Mr. Terry to be a very credible witness today on these points. He's testified in this Court many times and I continue to find him a very credible witness.

And so to the extent Mr. Dondero is listening or gets

a transcript, I hope it's loud and clear to him that to the extent you are engaging in efforts surreptitious or overt to derail Acis in its reorganization, there is going to be a price to pay for that. So I hope that message gets to him.

Very troubled, very troubled by what I've heard today.

All right. Well, I think that concludes our business here today. Is there anything else anyone wants to raise?

MS. LAMBERT: Judge Jernigan, Ms. Lambert for the U.S. Trustee. Would you like me to prepare an order just as for the reasons stated?

THE COURT: I would like you to do that. Thank you very much. All right.

MS. LAMBERT: And I think I will order the — I think I will order the transcript and have it sent to Mr. Lynn.

THE COURT: All right. Thank you.

(The hearing was adjourned at 5:21 o'clock p.m.)

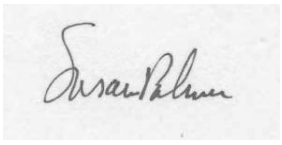
—o0o—

State of California)
) SS.
County of San Joaquin)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

I am a Certified Electronic Reporter and Transcriber by the American Association of Electronic Reporters and Transcribers, Certificate Nos. CER-124 and CET-124. Palmer Reporting Services is approved by the Administrative Office of the United States Courts to officially prepare transcripts for the U.S. District and Bankruptcy Courts.



Susan Palmer
Palmer Reporting Services

Dated September 26, 2020

EXHIBIT H

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
	Wednesday, October 21, 2020
	10:00 a.m. Docket
Debtor.	
	MOTION TO COMPROMISE CONTROVERSY WITH ACIS CAPITAL MANAGEMENT [1087]
	Continued from 10/20/2020

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

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor:	Ira D. Kharasch Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067 (310) 277-6910
For the Debtor:	John A. Morris Gregory V. Demo PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For Acis Capital Management GP, LLC:	Annmarie Antoinette Chiarello WINSTEAD, P.C. 2728 N. Harwood Street, Suite 500 Dallas, TX 75201 (214) 745-5250
For Acis Capital Management GP, LLC:	Brian Patrick Shaw ROGGE DUNN GROUP, P.C. 500 N. Akard Street, Suite 1900 Dallas, TX 75201 (214) 239-2707

motion that ever comes before it.

I daresay that Mr. Terry and Ms. Patel and Mr. Shaw firmly believe that their client has been wronged and that they're entitled to $75 million or more. Thankfully, they were able to check their egos at the door and come to an agreement, I guess, that they believe represents a fair and reasonable compromise.

So I understand that while -- that Mr. Dondero embraced and appreciated the arguments that the Debtor made in its pleading, but the fact of the matter is the Debtor came to a position when it had the choice of either going forward with that litigation, with all of the costs and risks and uncertainty that were described, or taking this settlement. And it came to the -- I believe the record shows -- the very considered and reasonable decision to end all of the litigation with Acis on the terms set forth in the agreement.

And I just wanted to kind of -- that doesn't go to any of the particular -- necessarily go to any of the particular elements of the legal standard, but so much time was spent trying to tie Mr. Seery and the Debtor to the objection, and I think -- I think it's important for the Court to look at this in context.

And frankly, there are other very substantial claims out there. And Mr. Seery was very clear that each case is going to be judged on its own merits. And just because we've

settled a case where we put forth a strong legal position here, it's only because we got to terms that the Debtor felt were fair and reasonable. We've taken -- and parties do this all the time. They take their litigation position and we're going to take our litigation position. But when it comes to settlement, you have to view: What are the alternatives? And that's all Mr. Seery did. That's what the board did, servant of their fiduciary duties.

And I'm going to talk in a few minutes about the benefits to the estate that this settlement entails, but I just -- I was a little surprised that anybody would try to say that because we took a position in litigation we're not allowed to compromise that position. Because if that were the standard, Your Honor, no 9019 would ever be approved, because, by definition, 9019s are compromises.

So let me turn for a moment now to the actual elements of the standard under 9019. The first one is the probability of success on the merits. As I said, Mr. Seery felt strongly about the position, but he also articulated some very, very specific concerns, from *Mirant* to the Court's views on equities that may not be -- the Court may not share our views on equities. The Court may not share. The Court has a lot of experience with these particular litigants. The Court has already assessed the credibility of certain witnesses in relation to the claims at issue in this matter. The Court has

already rendered decisions with respect to certain aspects of this matter. And so the Debtor took all of those things into account in assessing the probability of success on the merits, and that's all very much in the record.

But I did want to point to one other piece of evidence that hasn't been discussed yet, and that is Professor Rapoport's expert report that has now been admitted into evidence. You know, I question the weight that the Court should give, but never -- only because I'm not sure how -- the depth of the opinion. But nevertheless, Professor Rapoport specifically says at the top of Page 5, on Page 13, at the very end of her opinion as to Question 1, she says, in substance, if the Court follows *Mirant* and otherwise finds that damages would benefit the Acis estate, then the Acis claim, valued by Acis at least $75 million, could have significant value. Still, that value would depend on how the Court found -- how the facts fall after the Court hears testimony and is able to weigh the evidence.

That's kind of what Mr. Seery did. So I'm not even sure that there's a dispute, frankly, over the probability of success. Nobody has quantified it. Nobody asked Mr. Seery to quantify it. We haven't gone down that path.

But Professor Rapoport, in her very first opinion, said: Could be zero, could be $75 million or more. It depends on where the Court comes out.

consistent with the Bankruptcy Rules. The notice was given on September 23rd, so we're certainly good from notice and opportunity to be heard, from that standpoint.

As we all know and as I went through yesterday in ruling on the Redeemer Committee settlement, I am consulting Bankruptcy Rule 9019 as well as the abundance of jurisprudence that tells bankruptcy courts how they are to evaluate compromises and settlements: Cases such as *AWECO*, *Jackson Brewing*, *TMT Trailer*, *Cajun Electric*, and *Foster Mortgage*, significantly, among the cases.

I am to look at, obviously, whether the proposed compromise is fair and equitable and in the best interest of creditors when considering probability of success in future litigation, with due consideration for the uncertainty of law and fact; when considering the complexity and likely duration of future litigation and any attendant inconvenience and delay; and all other factors bearing on the wisdom of the compromise.

Case law also talks about the Court probing into whether a settlement is within the range of reasonableness, and obviously the Court should consider the paramount interests of creditors.

So, here, giving all due consideration of the record before me and the very eloquent arguments, I am going to approve the compromise today.

I'm going to turn for a moment to Mr. Seery's testimony. Just as I found his testimony to be very credible with regard to the Redeemer Committee settlement, I once again found it to be very credible and compelling in connection with the Acis and Terry settlements.

Among other things, I believe his testimony reflected a deep understanding of the risks and rewards of further litigation and the uncertainty that there was in both the law and the fact. He mentioned his understanding of the *Mirant* holding and how that absolutely posed some risks for the estate in challenging the claims of the reorganized Acis. He mentioned what I consider significant due diligence that he performed. He mentioned not only reading many of the rulings of this Court throughout the tortured history of the Acis bankruptcy, but he mentioned meeting with the board members. In fact, meeting with Mr. Terry and Acis's professionals. He picked out certain of the issues, the fact issues, the $10 million note transfer that was argued to be a fraudulent transfer. He described the disputes regarding the changing of the fee structure imposed by Highland or Highland entities on Acis, and he expressed concerns regarding the cost of litigating all of that.

He spoke in depth about Mr. Terry's claims regarding his retirement funds, and said he thought it was a pretty straightforward win for the Terrys that he thought should have

been settled years ago for full value.

He mentioned his knowledge about the Guernsey litigation, that being a jurisdiction where loser pays. So that was sort of an open-shut one as far as he was concerned. And he talked about the Acis GP proof of claim in some depth, regarding the lawsuits in New York.

So, again, I find that he was very compelling and his testimony reflected significant due diligence.

Now, the next thing I want to highlight that is very compelling to me in deciding I should approve this settlement is -- and I probably should have mentioned this first and foremost -- this was a mediated settlement. This is certainly some indication of its good faith and arm's-length nature, and certainly is a point in favor of the wisdom of the settlement, given that we had two very respected co-mediators, retired Judge Gropper from the Bankruptcy Court of the Seventh District of New York. Ms. Mayer was a partner at Weil Gotshal with a very impressive career background. And so it, again, it is a point very much in favor of the *bona fides* of this settlement. So I cannot overstate that one.

A few other points I will make. In looking at the risks and rewards and likely expense and inconvenience of further litigation, while Professor Rapoport estimated maybe $350,000 to $1.1 million of fees might be incurred for future litigation of the issues between Highland and Acis, and while

I respect her views tremendously -- I know she's been a fee examiner in many, many cases and really has some *bona fides* in speaking about fees in bankruptcy cases -- I tend to think that is an extremely low estimate. And I can't separate from this analysis my own experience and knowledge with how litigious and expensive things have historically been between Acis and Highland.

I cannot remember the final fee application amounts of the Chapter 11 Trustee and his professionals, but I know that in a year-plus of the Acis case, the fees were much, much larger than this amount, and I seem to remember that at least Foley Lardner had a very, very large unsecured claim in this case related to its fees representing *Highland v. Acis*, millions of dollars.

So, with complete respect to Professor Rapoport, I believe with all my heart that that number is way, way low as far as future fees and expenses.

And as Ms. Chiarello pointed out and I think Mr. Morris pointed out, we don't actually have evidence of Mr. Dondero's willingness to pay legal fees for fights of *Highland v. Acis*. While certainly I believe one hundred percent that Mr. Lynn was told that Dondero would pay those fees and he has every reason to believe him, I just don't have the equivalent of evidence there that I can point to, evidence being Mr. Dondero testifying that he would do that and maybe putting something

else in front of me to show a commitment.

So I again will turn to Ms. Rapoport's report. While she used words to the effect of, you know, she thought challenging this would be a reasonable endeavor, I think that, all in all, Mr. Seery was just very credible in his evaluation of things and his strong feeling from the beginning that we're going to fight this, it should be zero, and then as he did his due diligence, as he looked at some of the issues -- and I will point out that Professor Rapoport identified 16 issues of law this Court would have to determine, in her estimation, and then there could be potentially 12 fact issues the Court might have to rule on, depending on how I ruled on the 16 issues of law. I don't think I could do that as swiftly as maybe this case needs and deserves to get on its way to reorganization, and I do think the settlement enhances the likelihood of confirmation of a plan in the near future. While we may have miles to go before we get there, I think this settlement is a step in the right direction, just like the settlement with the Redeemer Committee is a step in the right direction. And that's a big factor in my mind. I'm supposed to look at all factors bearing on the wisdom of the compromise, and I think the compromise enhances the prospect of a reorganization sooner rather than later.

All right. I reserve the right to supplement in more detailed findings and conclusions, but Mr. Morris, I'm going

THE COURT: All right.

MR. KHARASCH: If we need more time, obviously, we will be letting you know.

THE COURT: All right. So, rescheduled for 10:30 tomorrow morning. And if there's nothing further, we're adjourned. Thank you.

MR. KHARASCH: Thank you, Your Honor. Appreciate it.

THE CLERK: All rise.

(Proceedings concluded at 11:26 a.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **10/24/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT I

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
	December 10, 2020
	9:30 a.m. Docket
Debtor.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 20-3190-sgj**
Plaintiff,	- MOTION FOR PRELIMINARY INJUNCTION
v.	- MOTION FOR TEMPORARY RESTRAINING ORDER
JAMES D. DONDERO,	
Defendant.	

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

WEBEX/TELEPHONIC APPEARANCES:

For the Plaintiff:	Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Plaintiff:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Chicago, IL 60603 (312) 853-7539

THE COURT: Yes.

MR. BONDS: Can I have a second? Mr. Dondero did apologize to counsel and to Mr. Seery as well, and so the idea that Mr. Dondero has not apologized is not entirely correct.

THE COURT: Okay. Well, if I misunderstood, I apologize. But I guess what I was really trying to convey is, in a situation like this, I think coming into court and taking his lumps and saying things under oath might have been a better way to proceed.

I guess the second thing I want to say is I wish Mr. Dondero was here, because maybe I'm reading this wrong, but I think he needs to hear and know he is not in charge anymore of Highland. It may have been his baby. He may have created its wealth. But when he and the board made the decision to file Chapter 11, number one, that changed everything. And then number two, when the Committee was formed and was threatening "We think we need a Chapter 11 trustee because of conflicts of interest of Mr. Dondero and others," and when the Committee negotiated something short of that with the Debtor in January 2020, you know, a settlement that involved Mr. Dondero no longer being in charge, no longer being CEO, no longer having any role except portfolio manager with the Debtor, and when various protocols were negotiated, heavily negotiated, for weeks, detailed, complex protocols, life changed even further. It changed when he filed Chapter 11, when he put his baby,

Highland, in Chapter 11, and then it changed further in January 2020 when this global corporate governance settlement was reached. As we know, it involved independent new board members coming in and eventually a new CEO. He's not in charge.

Now, that doesn't mean he's not a party in interest, and he can certainly weigh in with pleadings in the bankruptcy court. But these communications that I've admitted into evidence, and the declaration, the sworn declaration of Mr. Seery, suggest to me that he's not fully appreciating that, sorry, you're not in charge. And when you chose to put the company in bankruptcy because of the overwhelming debt, it started a cascade of events, so that now I'm depending on a debtor-in-possession with a new board and a new CEO and a Committee of very sophisticated members and professionals who are working in tandem with the Debtor to be in charge, basically. All right? So that's another thing I just feel compelled to say for Mr. Dondero's benefit.

I guess another thing is there was a little bit of a theme, Mr. Bonds, in your comments that Mr. Dondero is just concerned, more than anything else, about the way employees are being treated, or at least that's a major concern. And I don't find that to be especially compelling. I mean, maybe if he was sworn under oath and testified, I would believe that, but it doesn't feel like what's really going on here. Again,

he took the step of deciding that the company should file Chapter 11. We had the change in corporate governance in January. And he has the ability -- everyone, I think, would very much be interested in a plan that he supports. You know, he wants to get the company back. That has been made clear in hearings from time to time, and I believe, from Seery's declaration and Highland's lawyers, that they've been and will remain receptive to Mr. Dondero's ideas for a different type of plan that might allow him to get back into control of Highland, if he puts in adequate consideration that makes the Committee and others happy.

But we're in a proverbial the-train-is-leaving-the-station posture right now. Okay? We've got confirmation coming up the second week of January or something like that. Okay. So the train is leaving the station, so we're running out of time to hear what Dondero might want to do as far as an alternative plan.

So, as far as the requested TRO, I appreciate that Mr. Dondero and his counsel are worried about some ambiguity, but I'm looking through the literal wording that has been proposed, and the wording proposed is that Dondero is temporarily enjoined and restrained for communicating, whether orally, in writing, or otherwise, directly or indirectly, with any board member, unless Mr. Dondero's counsel and counsel for the Debtor are included in such communications. Not ambiguous

Court next Wednesday, he needs to testify. And if NexPoint, through whoever their decision-maker is, is wanting to urge a position to the Court, they need a human being to testify. And I'll hear Seery and I'll hear Dondero and I'll hear whoever that person is, and that's what's going to matter, you know, most to me. Yeah, we have some legal issues, certainly, but I like to hear business people explain things, no offense to the lawyers. But it's always very helpful to hear the business people in addition to the lawyers. All right. So, Mr. Morris, you're going to upload that TRO for me.

MR. MORRIS: Yes, Your Honor.

THE COURT: Mr. Wright, you can upload your order setting your motion for hearing next Wednesday at 1:30. And I think we have our game plan for now. Anything else? All right. We're adjourned.

THE CLERK: All rise.

(Proceedings concluded at 11:33 a.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **12/11/2020**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT J

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
	Wednesday, December 16, 2020
	1:30 p.m. Docket
Debtor.	
	- MOTION FOR ORDER IMPOSING TEMPORARY RESTRICTIONS [1528]
	- DEBTOR'S EMERGENCY MOTION TO QUASH SUBPOENA AND FOR ENTRY OF PROTECTIVE ORDER [1564, 1565]
	- JAMES DONDERO'S MOTION FOR ENTRY OF ORDER REQUIRING NOTICE AND HEARING [1439]

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

WEBEX APPEARANCES:

For the Debtor:	Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtor:	John A. Morris Gregory V. Demo PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539

The Movants are not parties to those agreements. The testimony is undisputed that there are many holders of preferred shares and notes that have had no notice of this proceeding that will undoubtedly be impacted by the tying of the hands of the portfolio manager. The chart that was attached as Exhibit B expressly shows just what a large portion of interested parties and people who would be affected by this motion are not -- they didn't get notice. There was no attempt to get notice. There was no attempt to get their consent. All of that testimony is now in the record, and I think due process alone would prevent the entry or even the consideration of an order of this type.

There is nothing improper that's been alleged. There is no -- there is no allegation of fraud. There is no allegation of breach of contract of any kind. There's not even a question of business judgment. The Movants didn't even do their diligence to ask the Debtor why they made these transactions. There is nothing in the record that shows that the Debtor, as the portfolio manager of the CLOs, did anything improper.

The only thing that the Movants care about is that they don't like the results in two particular trades. I don't think that that meets their burden of persuasion that the Court should enter an order of this type, and I would like to relieve Mr. Seery of the burden, frankly, and the Court, of

having to put on testimony to justify transactions that really aren't even being questioned, Your Honor.

So the Debtor would respectfully move for the denial of the motion and the relief sought therein.

THE COURT: All right. Your request for a directed verdict, something equivalent to a directed verdict here, is granted. I agree that the Movant has wholly failed to meet its burden of proof here today to show the Court, persuade the Court that, as Mr. Morris said, I should essentially tie the hands of the Debtor as a portfolio manager here, as stated. Nothing improper has been alleged. There has been no showing of a statutory right here, or a contractual right here, on the part of the Movants.

I am -- I'm utterly dumbfounded, really. I agree with the -- I was going to say innuendo; not really innuendo -- I agree with part of the theme, I think, asserted by the Debtor here today that this is Mr. Dondero, through different entities, through a different motion. I feel like he sidestepped the requirement that I stated last week that if we had a contested hearing on his motion, Dondero's motion, that I was going to require Mr. Dondero to testify. He apparently worked out an eleventh hour agreement with the Debtor on his motion to avoid that. But, again, these so-called CLO Motions very clearly, very clearly, in this Court's view, were pursued at his sole direction here.

This is almost Rule 11 frivolous to me. You know, we're -- we didn't have a Rule 11 motion filed, and, you know, I guess, frankly, I'm glad that a week before the holidays begin we don't have that, but that's how bad I think it was, Mr. Wright and Mr. Norris. This is a very, very frivolous motion. Again, no statutory basis for it. No contractual basis. You know, you didn't even walk me through the provisions of the contracts. I guess that would have been fruitless. But you haven't even shown something equitable, some lack of reasonable business judgment.

Bluntly, don't waste my time with this kind of thing again. You wasted my time. We have 70 people on the video. Utter waste of time.

All right. So, motion is denied. Mr. Morris, please upload an order.

MR. MORRIS: Thank you, Your Honor.

THE COURT: All right. Do we have any other business to accomplish today?

MR. POMERANTZ: I don't think so, Your Honor. I know we will see you tomorrow in connection with Mr. Daugherty's relief from stay motion.

THE COURT: Well, yeah, we do have that. Okay. We will see you tomorrow. We stand adjourned.

MR. CLEMENTE: Thank you, Your Honor.

MR. MORRIS: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 3:05 p.m.)

--oOo--

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 **12/17/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT K

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
	)	Friday, January 8, 2021
	)	9:30 a.m. Docket
Debtor.	)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	**Adversary Proceeding 20-3190-sgj**
Plaintiff,	)	PRELIMINARY INJUNCTION HEARING [#2]
v.	)	
JAMES D. DONDERO,	)	
Defendant.	)	

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

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor/Plaintiff: Jeffrey N. Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

For the Debtor/Plaintiff: John A. Morris
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

David Klos, who is the person who put the model together, who has been working on it for six or nine months, and no one else S has a copy of? Yes. Yeah, I have to -- I have to access him. I don't believe that's the -- inappropriate or in any way violating the spirit of the TRO.

I believe settlement in this case is only going to happen with somebody fostering communication. And Ellington's role, which I thought was a good one and I thought he was performing well as settlement counsel, was an important role. And I used him for things like -- and Seery also used him for things. As recently as two days before Ellington was fired, Seery gave him a shared services proposal to negotiate with me. Ellington has always been the go-between from a settlement and a legal standpoint. I think his role there was -- it was valued. To try to honor the TRO was things like Multi-Strat, that I didn't remember correctly. Ninety percent of the time or for the last 20 years I would have gone directly to Accounting and Dave Klos for it, but I purposely went to settlement counsel in terms of Ellington in order to get the Multi-Strat information which we needed in order to put the pot plan together that we went to the Independent Board with at the end of December.

Q (faintly) And do you recall the questions that Debtor's counsel had regarding the letters sent by K&L Gates to clients of the Debtor?

MR. MORRIS: I'm sorry, Your Honor. I had trouble hearing that question.

THE COURT: Please repeat.

MR. BONDS: Sure.

BY MR. BONDS:

Q Do you recall the questions Debtor's counsel had regarding the letters sent by K&L Gates to the clients of the Debtor -- to the Debtor?

A Yes.

Q You testified on direct that the letters were sent to do the right thing; is that correct?

A Yes.

Q What did you mean by that?

A I don't want to repeat too much of what I just said, but the Debtor has a contract to manage the CLOs, which in no way is it not in default of. It doesn't have the staff. It doesn't have the expertise. Seery has no historic knowledge on the investments. The investment staff of Highland has been gutted, with me being gone, with Mark Okada being gone, with Trey Parker being gone, with John Poglitsch being gone.

And there's -- there's a couple analysts that are a year or two out of school. The overall portfolio is in no way being understood, managed, or monitored. And for it to be amateur hour, incurring losses for no business purpose, when the investors have requested numerous times for their account

not to be traded, is crazy to me. Where the investors say, We just want our account left alone. We just want to keep the exposure. And Jim Seery decides no, there's -- I'm going to turn it into cash for no reason. I'm just going to sell your assets and turn them to cash and incur losses by doing it the week of Thanksgiving and the week of Christmas. I think it's -- it's shameful. I'm glad the compliance people and the general counsel at HFAM and NexPoint saw it the same way. I didn't edit their letters, proof their letters, tell them how to craft their letters. They did that themselves, with regulatory counsel and personal liability. They put forward those letters.

MR. MORRIS: Your Honor (garbled) the testimony that Mr. Dondero just gave about these people saw it. They're not here to testify how they saw it. We know that Mr. Dondero personally saw and approved the letters before they went out. He can testify what he thinks, what he believes. I have no problem with that. But there should be no evidence in the record of what the compliance people thought, believed, understood, anything like that. It's not right.

THE COURT: All right. That's essentially a --

MR. BONDS: Your Honor?

THE COURT: -- a hearsay objection, I would say, or lack of personal knowledge, perhaps. Mr. Bonds, what is your response?

MR. BONDS: Your Honor, my response would be that there are several exhibits the Debtor introduced today that stand for the proposition that the compliance officers were concerned. So I think there is ample evidence of that in the record.

THE COURT: I didn't --

MR. MORRIS: Your Honor, the letter --

THE COURT: I did not understand what you said is in the record. Say again.

MR. BONDS: Your Honor, I'm sorry. The -- there are -- there are references that are replete in the record that have to do with the compliance officers' understanding of the transactions.

THE COURT: I don't know what you're referring to.

THE WITNESS: Your Honor?

THE COURT: I've got a lot of exhibits. You're going to have to point out what you think --

THE WITNESS: Can I -- can I -- can I -- can I answer for -- that for a second? The letters that were signed by the compliance people or by the businesspeople at NexPoint and HFAM objecting to the transactions, those letters were their beliefs, their researched beliefs. They weren't --

THE COURT: Okay.

THE WITNESS: -- micromanaged by me. You know, they weren't -- I agree with them, but those weren't my beliefs

that they've stated. Those were their own beliefs and their own research, --

THE COURT: All right.

THE WITNESS: -- and the record should reflect --

THE COURT: This is clearly hearsay. I mean, it's one thing to have a letter, but to go behind the letter and say, you know, what the beliefs inherent in the words were is inadmissible. All right? So I strike that.

THE WITNESS: Maybe ask your question again.

BY MR. BONDS:

Q Yeah. What is your understanding of the rights that these parties had and what do you believe that was intended to be conveyed by the compliance officers?

MR. MORRIS: Objection. Calls -- calls for Mr. Dondero to divine the intent of third parties. Hearsay.

THE COURT: I sustain.

MR. BONDS: Your Honor, --

MR. MORRIS: No foundation.

MR. BONDS: -- I don't agree. I think that this is asking Mr. Dondero what he thinks.

MR. MORRIS: The letters speak for themselves, Your Honor.

THE COURT: Okay. I sustain --

MR. MORRIS: And Mr. --

THE COURT: I sustain the objection.

MR. MORRIS: All right. Thank you.

THE WITNESS: Ask me what I know. Or ask me what my concerns --

BY MR. BONDS:

Q Let me ask you this. What were your concerns relating to the compliance officers' exhibit?

A My concerns regarding the transaction, the transactions, which may repeat what I've said before, but I do want to make sure it gets in the record. So if we have to make a -- these were my concerns, whether or not they were the compliance people's concerns. I believe they were, and I believe they were similar, but I'm just going to say these are -- these were my concerns.

The Debtor, with its contractual -- with its contract with the CLOs, were in no way -- was in no way compliant with that contract or not in default of that contract. Bankruptcy is a reason for default. Not having the key men specified in the contract currently employed by the Advisor is a violation. Not having adequate investment staff to manage the portfolio is a violation of that contract. Announcing that you're laying off everybody and will no longer be a registered investment advisor is proclaiming that you, if you even have any -- any -- pretend that you're qualified or in compliance with the contract now, you're broadcasting that you won't be in three weeks, are -- are all mean that you're not in good

MR. BONDS: Thank you, Your Honor.

(Proceedings concluded at 4:09 p.m.)

--oOo--

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 **01/11/2021**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT L

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
	Tuesday, January 26, 2021
	9:30 a.m. Docket
Debtor.	
	MOTION FOR ENTRY OF ORDER AUTHORIZING DEBTOR TO IMPLEMENT KEY EMPLOYEE PLAN [1777]
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 21-3000-sjg**
Plaintiff,	
v.	PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AGAINST CERTAIN ENTITIES OWNED AND/OR CONTROLLED BY MR. JAMES DONDERO [5]
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.	
Defendants.	

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

WEBEX APPEARANCES:

For the Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtor:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700

can't talk them about specifically, but they're at least 20 percent better than what the Debtor has put forward as far as a plan. And what we put forward is elegant, it's simpler, it treats the employees fairly, it gives the business continuity, it gives investors continuity, and it's not just a harsh, punitive liquidation that's going to end up in a myriad of litigation.

We're paying a premium, it's a capitulation price, to try and get to some kind of settlement. And I encourage you to look at it. It's elegant. It's straightforward. It's simple. And now that you've encouraged and gotten us up to a number that's well in excess of the Debtor, maybe a little pressure on other people to treat employees fairly, maybe not liquidate a business that's important in Dallas, that has been a big business for a number of years, doing enormous good things for a lot of people.

You know, we went into bankruptcy with $450 million of assets and almost no debt. And we've been driven into the ground by the process. And then the plan is to just harshly liquidate going forward. I -- I -- it's crazy. I don't know what else to do to stop the train other than what we've offered.

THE COURT: All right. Well, I hear what you're saying, and I do, just because -- I don't know if you left the room or not, but we did have discussion of Section 206 of the

Investment Advisers Act today. It was put on the screen. Mr. Post was asked what was unlawful as far as what had happened here, what was going on here, what was fraudulent, deceptive, or manipulative, in parsing through the words of the statute. And he said Mr. Seery engaged in deceptive acts because he wasn't trying to maximize value. Okay? I'm not an expert on the Investment Advisers Act, but I know that that was not a deceptive act.

And so I'll allow the plan to be filed under seal, but it's not going to be unsealed absent an order of the Court. Okay? So we'll just leave it at that for now. And while I still encourage good-faith negotiations here, I've said it umpteen times, where you're tired of the cliché, probably: The train is leaving the station. And if you want the Court to have patience in the process and if you want the parties to cooperate in good faith, it might help if we didn't have things like Dugaboy and Get Good Trust filing a motion for an examiner 15 months into the case.

I mean, it feels to me, Mr. Dondero, whether I'm right or wrong, that it's like you've got a twofold approach here: I either get the company back or I burn the house down. And I'm telling you right now, if we don't have agreements, --

MR. DONDERO: That's not true.

THE COURT: -- if we don't have agreements and we come back on the 5th for a continuation of this hearing and a

motion to hold you in contempt, you know, I'm leaning right now, based on what I've heard so far, and I know I haven't heard everything, but I'm leaning right now towards finding contempt and shifting a whole bundle of attorneys' fees. That, to me, seems like the likely place we're heading.

I mean, I commented at the December hearing on the preliminary injunction against you personally that it had been like a $250,000 hearing, I figured, okay, just guesstimating everybody's billable rate times the hours we spent. Well, here we were again, and I know we've got all this time outside the courtroom preparing, taking depositions. I mean, what else is a judge to think except, by God, let's drive up administrative expenses as much as we can; if we can't win, we're going to go down fighting? That's what this looks like. Okay? So if it's not really what's going on, then you've got to work hard to change my perceptions at this point.

MR. RUKAVINA: Your Honor, I hear everything what you're saying, and I'm going to discuss it very bluntly with my clients. But we're being asked not to exercise contract rights in the future. This is not a contempt hearing. And Your Honor, we did ask and offered the estate a million dollars, found money, plus to waive almost all our plan objections, if they would just put this case on pause for 30 days.

So we are trying. We are trying creative solutions here.

We know that the train is leaving. We've put our money where our mouth is. We will continue trying. But Your Honor, this is not a contempt proceeding, and my clients are not Mr. Dondero. You've heard they're independent boards.

MR. POMERANTZ: I can't leave that last comment without a response. Yes, there was an offer of a million dollars, by an entity that owes the estate multiples of that. So they are offering to pay us something that they already owe us. So Mr. Rukavina continues try to do this. We will not stand for it.

MR. RUKAVINA: That is not a fair statement, sir. I misrepresented nothing. We were offering you a million dollars, with no conditions, earned upon receipt, with no credit, no deduction for any of our liability. So you're free to say no, sir, but you're not going to tell the judge that I misrepresented something.

THE COURT: All right.

MR. POMERANTZ: Should tell the Court --

THE COURT: You know what?

MR. POMERANTZ: -- that that entity owed the Debtor.

THE COURT: You know what? You know what? I am more focused on, Mr. Rukavina, your comment that this Court can't enjoin your clients from exercising contractual rights when, again, in January of 2020, the representation was made and it was ordered, "Mr. Dondero shall not cause any related entity

to terminate any agreements with the Debtor." Okay? That was -- go back and look at the transcript. That was so meaningful to me.

We were facing a possible trustee. And that's what I did in the *Acis* case. Okay? I had a Chapter 11 trustee. And it was not a perfect fit, to be sure. But it is where we were heading in this case, had the lawyers and parties not negotiated what they did. That was a very important provision, convincing me that, you know what, I think the structure they've got will be better than a trustee. And it has, for the most part. But the fees have gone out the roof, and I lay that at the feet of Mr. Dondero, for the most part. Okay? We have a bomb thrown every five minutes by either him personally or the Dugaboy or the Get Good Trust or the Funds or the Advisors or I don't know who else. Okay?

So the train is leaving the station, unless you all come to me and say, okay, we've maybe got a -- Mr. Pomerantz's word -- grand solution here. Okay? If you get there in the next few days, wonderful. Okay? But I don't know what else to say except I'm tired of the carpet-bombing, and if I had to rule this minute, there would be a huge amount of fee-shifting for what we went through today, for what we went through in December, for the restriction motion that, after I called it frivolous, the lawyers were sending letters pretty much regurgitating the same arguments. All right. So, not a happy

camper.

But upload your order on the motion to seal the plan. And, again, it's not going to be unsealed absent a further order of the Court. And if you all come to me next week and say, hey, we've got something in the works here, okay, I'll consider unsealing it and letting you go down a different path. But I'm not naïve. I feel like this is just more burning the house down, maybe. I don't know. I hope I'm wrong. I hope I'm wrong. But all right. So I guess we'll see you next week.

MR. POMERANTZ: Thank you, Your Honor.

MR. MORRIS: Thank you, Your Honor.

THE COURT: All right. We're adjourned.

MR. RUKAVINA: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 6:08 p.m.)

--oOo--

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 **01/28/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

camper.

But upload your order on the motion to seal the plan. And, again, it's not going to be unsealed absent a further order of the Court. And if you all come to me next week and say, hey, we've got something in the works here, okay, I'll consider unsealing it and letting you go down a different path. But I'm not naïve. I feel like this is just more burning the house down, maybe. I don't know. I hope I'm wrong. I hope I'm wrong. But all right. So I guess we'll see you next week.

MR. POMERANTZ: Thank you, Your Honor.

MR. MORRIS: Thank you, Your Honor.

THE COURT: All right. We're adjourned.

MR. RUKAVINA: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 6:08 p.m.)

--oOo--

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 **01/28/2021**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

EXHIBIT M

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
	)	Monday, February 8, 2021
	)	9:00 a.m. Docket
Debtor.	)	
	)	BENCH RULING ON CONFIRMATION
	)	HEARING [1808] AND AGREED
	)	MOTION TO ASSUME [1624]
	)	

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

WEBEX APPEARANCES:

For the Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539
For James Dondero:	D. Michael Lynn John Y. Bonds, III Bryan C. Assink BONDS ELLIS EPPICH SCHAFER JONES, LLP 420 Throckmorton Street, Suite 1000 Fort Worth, TX 76102 (817) 405-6900
For Get Good Trust and Dugaboy Investment Trust:	Douglas S. Draper HELLER, DRAPER & HORN, LLC 650 Poydras Street, Suite 2500 New Orleans, LA 70130 (504) 299-3300

of evidence, considering testimony from five witnesses and thousands of pages of documentary evidence, in considering whether to confirm the Plan pursuant to Sections 1129(a) and (b) of the Bankruptcy Code.

The Court finds and concludes that the Plan meets all of the relevant requirements of Sections 1123, 1124, and 1129 of the Code, and other applicable provisions of the Bankruptcy Code, but is issuing this detailed ruling to address certain pending objections to the Plan, including but not limited to objections regarding certain Exculpations, Releases, Plan Injunctions, and Gatekeeping Provisions of the Plan.

The Court reserves the right to amend or supplement this oral ruling in more detailed findings of fact, conclusions of law, and an Order.

First, by way of introduction, this case is not your garden-variety Chapter 11 case. Highland Capital Management, LP is a multibillion dollar global investment advisor, registered with the SEC pursuant to the Investment Advisers Act of 1940. It was founded in 1993 by James Dondero and Mark Okada. Mr. Okada resigned from his role with Highland prior to the bankruptcy case being filed. Mr. Dondero was in control of the Debtor as of the day it filed bankruptcy, but agreed to relinquish control of it on or about January 9, 2020, pursuant to an agreement reached with the Official Unsecured Creditors' Committee, which will be described later.

Although Mr. Dondero remained on as an unpaid employee and portfolio manager with the Debtor after January 9, 2020, his employment with the Debtor terminated on October 9, 2020. Mr. Dondero continues to work for and essentially control numerous nondebtor companies in the Highland complex of companies.

The Debtor is headquartered in Dallas, Texas. As of the October 2019 petition date, the Debtor employed approximately 76 employees.

Pursuant to various contractual arrangements, the Debtor provides money management and advisory services for billions of dollars of assets, including CLOs and other investments. Some of these assets are managed pursuant to shared services agreements with a variety of affiliated entities, including other affiliated registered investment advisors. In fact, there are approximately 2,000 entities in the Byzantine complex of companies under the Highland umbrella.

None of these affiliates of Highland filed for Chapter 11 protection. Most, but not all, of these entities are not subsidiaries, direct or indirect, of Highland. And certain parties in the case preferred not to use the term "affiliates" when referring to them. Thus, the Court will frequently refer loosely to the so-called, in air quotes, "Highland complex of companies" when referring to the Highland enterprise. That's a term many of the lawyers in the case use.

Many of the companies are offshore entities, organized in

such faraway jurisdictions as the Cayman Islands and Guernsey.

The Debtor is privately owned 99.5 percent by an entity called Hunter Mountain Investment Trust; 0.1866 percent by the Dugaboy Investment Trust, a trust created to manage the assets of Mr. Dondero and his family; 0.0627 percent by Mark Okada, personally and through family trusts; and 0.25 percent by Strand Advisors, Inc., the general partner.

The Debtor's primary means of generating revenue has historically been from fees collected for the management and advisory services provided to funds that it manages, plus fees generated for services provided to its affiliates.

For additional liquidity, the Debtor, prior to the petition date, would sell liquid securities in the ordinary course, primarily through a brokerage account at Jefferies, LLC. The Debtor would also, from time to time, sell assets at nondebtor subsidiaries and distribute those proceeds to the Debtor in the ordinary course of business.

The Debtor's current CEO, James Seery, credibly testified that the Debtor was "run at a deficient for a long time and then would sell assets or defer employee compensation to cover its deficits." This Court cannot help but wonder if that was necessitated because of enormous litigation fees and expenses that Highland was constantly incurring due to its culture of litigation, as further addressed hereafter.

Highland and this case are not garden-variety for so many

11 case is its postpetition corporate governance structure. Highland filed bankruptcy October 16, 2019. Contentiousness with the Creditors' Committee began immediately, with first the Committee's request for a change of venue from Delaware to Dallas, and then a desire by the Committee and the U.S. Trustee for a Chapter 11 or 7 trustee to be appointed due to concerns over and distrust of Mr. Dondero and his numerous conflicts of interest and alleged mismanagement or worse.

After many weeks of the threat of a trustee lingering, the Debtor and the Creditors' Committee negotiated and the Court approved a corporate governance settlement on January 9, 2020 that resulted in Mr. Dondero no longer being an officer or director of the Debtor or of its general partner, Strand.

As part of the court-approved settlement, three eminently-qualified Independent Directors were chosen by the Creditors' Committee and engaged to lead Highland through its Chapter 11 case. They were James Seery, John Dubel, and Retired Bankruptcy Judge Russell Nelms. They were technically the Independent Directors of Strand, the general partner of the Debtor. Mr. Dondero had previously been the sole director of Strand, and thus the sole person in ultimate control of the Debtor.

The three independent board members' resumes are in evidence. James Seery eventually was named CEO of the Debtor. Suffice it to say that this changed the entire trajectory of

the case. This saved the Debtor from a trustee. The Court trusted the new directors. The Creditors' Committee trusted them. They were the right solution at the right time.

Because of the unique character of the Debtor's business, the Court believed this solution was far better than a conventional Chapter 7 or 11 trustee. Mr. Seery, in particular, knew and had vast experience at prominent firms with high-yield and distressed investing similar to the Debtor's business. Mr. Dubel had 40 years of experience restructuring large, complex businesses and serving on their boards of directors in this context. And Retired Judge Nelms had not only vast bankruptcy experience but seemed particularly well-suited to help the Debtor maneuver through conflicts and ethical quandaries.

By way of comparison, in the Chapter 11 case of Acis, the former affiliate of Highland that this Court presided over two or three years ago, which company was much smaller in size and scope than Highland, managing only five or six CLOs, a Chapter 11 trustee was elected by the creditors that was not on the normal rotation panel for trustees in this district, but rather was a nationally-known bankruptcy attorney with more than 45 years of large Chapter 11 case experience. This Chapter 11 trustee performed valiantly, but was sued by entities in the Highland complex shortly after he was appointed, which this Court had to address. The Acis trustee

could not get Highland and its affiliates to agree to any actions taken in the case, and he finally obtained confirmation of a plan over Highland and its affiliates' objections in his fourth attempted plan, which confirmation then was promptly appealed by Highland and its affiliates.

Suffice it to say it was not easy to get such highly-qualified persons to serve as independent board members and CEO of this Debtor. They were stepping into a morass of problems. Naturally, they were worried about getting sued, no matter how defensible their efforts might be, given the litigation culture that enveloped Highland historically. It seemed as though everything always ended in litigation at Highland.

The Court heard credible testimony that none of them would have taken on the role of Independent Director without a good D&O insurance policy protecting them, without indemnification from Strand, guaranteed by the Debtor; without exculpation for mere negligence claims; and without a gatekeeper provision, such that the Independent Directors could not be sued without the bankruptcy court, as a gatekeeper, giving a potential plaintiff permission to sue.

With regard to the gatekeeper provision, this was precisely analogous to what bankruptcy trustees have pursuant to the so-called "Barton Doctrine," which was first articulated in an old U.S. Supreme Court case.

The Bankruptcy Court approved all of these protections in a January 9, 2020 order. No one appealed that order. And Mr. Dondero signed the settlement agreement that was approved by that order.

An interesting fact about the D&O policy came out in credible testimony at the confirmation hearing. Mr. Dubel and an insurance broker from Aon, named Marc Tauber, both credibly testified that the gatekeeper provision was needed because of the so-called, and I quote, "Dondero Exclusion" in the insurance marketplace.

Specifically, the D&O insurers in the marketplace did not want to cover litigation claims that might be brought against the Independent Directors by Mr. Dondero because the marketplace of D&O insurers are aware of Mr. Dondero's litigiousness. The insurers would not have issued a D&O policy to the Independent Directors without either the gatekeeping provision or a "Dondero Exclusion" being in the policy.

Thus, the gatekeeper provision was part of the January 9, 2020 settlement. There was a sound business justification for it. It was reasonable and necessary. It was consistent with the Barton Doctrine in an extremely analogous situation -- *i.e.*, the independent board members were analogous to a three-headed trustee in this case, if you will. Mr. Dondero signed off on it. And, again, no one ever appealed the order

approving it.

The Court finds that, like the Creditors' Committee, the independent board members here have been resilient and unwavering in their efforts to get the enormous problems in this case solved. They seem to have at all times negotiated hard and with good faith. As noted previously, they changed the entire trajectory of this case.

Still another reason why this was not your garden-variety case was the mediation effort. In summer of 2020, roughly nine months into the Chapter 11 case, this Court ordered mediation among the Debtor, Acis, UBS, the Redeemer Committee, and Mr. Dondero. The Court selected co-mediators, since this seemed like such a Herculean task, especially during COVID-19, where people could not all be in the same room. Those co-mediators were Retired Bankruptcy Judge Allan Gropper from the Southern District of New York, who had a distinguished career presiding over complex Chapter 11 cases, and Ms. Sylvia Mayer, who likewise has had a distinguished career, first as a partner in a preeminent law firm working on complex Chapter 11 cases, and subsequently as a mediator and arbitrator in Houston, Texas.

As noted earlier, the Acis claim was settled during the mediation, which seemed nothing short of a miracle to this Court, and the UBS claim was settled many months later, and this Court believes the groundwork for that ultimate

settlement was laid, or at least helped, through the mediation. And as earlier noted, other enormous claims have been settled during this case, including that of the Redeemer Committee, who, again, had asserted approximately or close to a $200 million claim; HarbourVest, who asserted a $300 million claim; and Patrick Daugherty, who asserted close to a $40 million claim.

This Court cannot stress strongly enough that the resolution of these enormous claims and the acceptance of all of these creditors of the Plan that is now before the Court seems nothing short of a miracle. It was more than a year in the making.

Finally, a word about the current remaining Objectors to the Plan before the Court. Once again, the Court will use the phrase "not garden-variety." Originally, there were over one dozen objections filed to this Plan. The Debtor has made various amendments or modifications to the Plan to address some of these objections. The Court finds that none of these modifications require further solicitation, pursuant to Sections 1125, 1126, 1127 of the Code, or Bankruptcy Rule 3019, because, among other things, they do not materially adversely change the treatment of the claims of any creditor or interest holder who has not accepted in writing the modifications.

Among other things, there were changes to the projections

that the Debtor filed shortly before the confirmation hearing that, among other things, show the estimated distribution to creditors and compare plan treatment to a likely disbursement in a Chapter 7.

These do not constitute a materially adverse change to the treatment of any creditors or interest holders. They merely update likely distributions based on claims that have now been settled, and they've otherwise incorporated more recent financial data. This happens often before confirmation hearings. The Court finds that it did not mislead or prejudice any creditors or interest holders, and certainly there was no need to resolicit the Plan.

The only Objectors to the Plan left at this time were Mr. Dondero and entities that the Court finds are controlled by him. The standing of these entities to object to the Plan exists, but the remoteness of their economic interest is noteworthy, and the Court questions the good faith of the Objectors. In fact, the Court has good reason to believe that these parties are not objecting to protect economic interests they have in the Debtor, but to be disruptors.

Mr. Dondero wants his company back. This is understandable. But it's not a good faith basis to lob objections to the Plan. The Court has slowed down confirmation multiple times on the current Plan and urged the parties to talk to Mr. Dondero. The parties represent that

they have, and the Court believes that they have.

Now, to be specific about the remoteness of the objectors' interests, the Court will address them each separately. First, Mr. Dondero has a pending objection. Mr. Dondero's only economic interest with regard to the Debtor at this point is an unliquidated indemnification claim. And based on everything this Court has heard, his indemnification claim will be highly questionable at this juncture.

Second, a joint objection has been filed by the Dugaboy Trust and the Get Good Trust. As for the Dugaboy Trust, it was created to manage the assets of Mr. Dondero and his family, and it owns a 0.1866 percent limited partnership interest in the Debtor. The Court is not clear what economic interest the Get Good Trust has, but it likewise seems to be related to Mr. Dondero, and it has been represented to the Court numerous times that the trustee is Mr. Dondero's college roommate.

Another group of Objectors that has joined together in one objection is what the Court will refer to as the Highland and NexPoint Advisors and Funds. The Court understands they assert disputed administrative expense claims against the estate. While the evidence presented was that they have independent board members that run these companies, the Court was not convinced of their independence from Mr. Dondero. None of the so-called independent board members of these

entities have ever testified before the Court. Moreover, they have all been engaged with the Highland complex for many years.

The witness who testified on these Objectors' behalves at confirmation, Mr. Jason Post, their chief compliance officer, resigned from Highland after more than twelve years in October 2020, at the same time that Mr. Dondero resigned or was terminated by Highland. And a prior witness recently for these entities whose testimony was made part of the record at the confirmation hearing essentially testified that Mr. Dondero controlled these entities.

Finally, various NexBank entities objected to the Plan. The Court does not believe they have liquidated claims. Mr. Dondero appears to be in control of these entities as well.

To be clear, the Court has allowed all of these objectors to fully present arguments and evidence in opposition to confirmation, even though their economic interests in the Debtor appear to be extremely remote and the Court questions their good faith. Specifically on that latter point, the Court considers them all to be marching pursuant to the orders of Mr. Dondero.

In the recent past, Mr. Dondero has been subject to a TRO and preliminary injunction by the Bankruptcy Court for interfering with the current CEO's management of the Debtor in specific ways that were supported by evidence. Around the

time that this all came to light and the Court began setting hearings on the alleged interference, Mr. Dondero's company phone supplied to him by Highland, which he had been asked to turn in, mysteriously went missing. The Court merely mentions this in this context as one of many reasons that the Court has to question the good faith of Mr. Dondero and his affiliated objectors.

The only other pending objection besides these objections of the Dondero and Dondero-controlled entities is an objection of the United States Trustee pertaining to the release, exculpation, and injunction provisions in the Plan.

In juxtaposition to these pending objections, the Court notes that the Debtor has resolved earlier-filed objections to the Plan filed by the IRS, Patrick Daugherty, CLO Holdco, Ltd., numerous local taxing authorities, and certain current and former senior-level employees of the Debtor.

With that rather detailed factual background addressed, because certainly context matters here, the Court now addresses what it considers the only serious objections raised in connection with confirmation. Specifically, the Plan contain certain releases, exculpation, plan injunctions, and a gatekeeper provision which are obviously not fully consensual, since there are objections. Certainly, these provisions are mostly consensual when you consider that parties with hundreds of millions of dollars' worth of legitimate claims have not

Now, after all of that, this Court believes the following can be gleaned from *Pacific Lumber*. First, the Fifth Circuit hinted that consensual exculpations and/or consensual nondebtor third-party releases are permissible. The Court was, of course, dealing with nonconsensual exculpations in *Pacific Lumber*. In this regard, I note Page 252, where the Court cited various prior Fifth Circuit authority and then stated, "These cases seem broadly to foreclose nonconsensual nondebtor releases and permanent injunctions."

The second thing that can be gleaned from *Pacific Lumber*: The Fifth Circuit hinted that nondebtor releases may be permissible in cases involving global settlements of mass claims against the debtors and co-liable parties. The Court, of course, referred to 524(g), but various other cases which approved nondebtor releases where mass claims were channeled to a specific pool of assets.

Third, the Fifth Circuit outright held that exculpations from negligence for a Creditors' Committee and its members are permissible because the concept is both consistent with 1103(c), "which implies Committee members have qualified immunity for actions within the scope of their duties," and a good policy result, since "if members of the Committee can be sued by persons unhappy with the outcome of the case, it will be extremely difficult to find members to serve on an official committee."

Fourth, the Fifth Circuit recognized in *Pacific Lumber* that *res judicata* may bar complaints regarding an impermissible plan release, citing to its earlier *Republic Supply v. Shoaf* opinion.

Now, being ever-mindful of the Fifth Circuit's words in *Pacific Lumber*, this Court cannot help but wonder about at least three things.

First, did the Fifth Circuit leave open the door that facts/equities might sometimes justify approval of an exculpation for a person other than a Creditors' Committee and its members? For example, the Fifth Circuit stated, in referring to the plan proponents Marathon and MRC, that "Any costs the released parties might incur defending against suits alleging such negligence are unlikely to swamp either of these parties or the consummated reorganization." Here, this Court can easily expect the proposed exculpated parties to incur costs that could swamp them and the reorganization based on the past litigious conduct of Mr. Dondero and his controlled entities. Do these words of the Fifth Circuit hint that equities/economics might sometimes justify an exculpation?

Second, did the Fifth Circuit's rationale for permitted exculpations to Creditors' Committee and their members, which was clearly policy-based, based on their implied qualified immunity flowing from their duties in Section 1103 and their disinterestedness, and the importance of their role in a

Chapter 11 case, did this rationale leave open the door to sometimes permitting exculpations to other parties in a particular Chapter 11 case besides Creditors' Committees and their members? For example, in a situation such as the Highland case, in which Independent Directors, brought in to avoid a trustee, are more like a Creditors' Committee than an incumbent board of directors.

Third, the Fifth Circuit's sole statutory basis was Section 524(e). This Court would humbly submit that this is a statute dealing with prepetition liability in which some nondebtor is liable with the Debtor. Exculpation is a concept dealing with postpetition liability.

The Ninth Circuit recently, in a case called *Blixseth v. Credit Suisse*, 961 F.3d 1074 (9th Cir. 2020), approved the validity of an exculpation clause incorporated into a confirmed Chapter 11 plan that purported to absolve certain nondebtor parties that were "closely involved" in drafting the plan. They were the largest secured creditor, a purchaser, and an individual who was an indirect owner of certain of the debtor companies. The exculpation was from any negligence, liability, for "any act or omission in connection with, related to, or arising out of the Chapter 11 cases."

By the time the appeal was before the Ninth Circuit, the only issue was the propriety of the exculpation clause as to the large secured creditor, which was also a plan proponent,

since all the other exculpated parties had settled with the appellant.

The Court, in determining that the exculpation clause was permissible as to the secured lender, concluded that Section 524(e) "does not bar a narrow exculpation clause of the kind here at issue -- that is, one focused on actions of various participants in the plan approval process and relating only to that process," Page 1082. Why? Because "Section 524(e) establishes that discharge of a debt of the debtor does not affect the liability of any other entity on such debt." In other words, the discharge in no way affects the liability of any other entity for the discharged debt. By its terms, 524(e) prevents a bankruptcy court from extinguishing claims of creditors against nondebtors over the very discharged debt through the bankruptcy proceedings.

The Court went on to explicitly disagree with *Pacific Lumber* in its analysis of 524(e), reiterating that an exculpation clause covers only liabilities arising from the bankruptcy proceedings and not of any of the debtor's discharged debt. Footnote 7, Page 1085.

Ultimately, the Court held that under Section 105(a), which empowers a bankruptcy court to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of Chapter 11 and Section 1123, which establishes the appropriate content of the bankruptcy plan, under these

sections, the bankruptcy court had authority to approve an exculpation clause intended to trim subsequent litigation over acts taken during the bankruptcy proceedings and so render the plan viable.

This Court concludes that, just as the Fifth Circuit left open the door for consensual exculpations and releases in *Pacific Lumber*, just as it left open the door for consensual exculpations and releases in *Pacific Lumber*, its dicta suggests that an exculpation might be permissible if there is a showing that "costs that the released parties might incur defending against suits alleging such negligence are likely to swamp either the Exculpated Parties or the reorganization." Again, that was a quote from the Fifth Circuit.

If ever there were a risk of that happening in a Chapter 11 reorganization, it is this one. The Debtor's current CEO credibly testified that Mr. Dondero has said outside the courtroom that if Mr. Dondero's own pot plan does not get approved, that he will "burn the place down." Here, this Court can easily expect the proposed exculpated parties might expect to incur costs that could swamp them and the reorganization process based on the past litigious conduct of Mr. Dondero and his controlled entities.

Additionally, this Court concludes that the Fifth Circuit's rationale in *Pacific Lumber* for permitted exculpations to Creditors' Committees and their members, which

was clearly policy-based based on their implied qualified immunity flowing from Section 1103 and their importance in a Chapter 11 case, leaves the door open to sometimes permitting exculpations to other parties in a particular Chapter 11 case besides a UCC and its members.

Again, if there was ever such a case, the Court believes it is this one, in which Independent Directors were brought in to avoid a trustee and are much more like a Creditors' Committee than an incumbent board of directors. While, admittedly, there are a few exculpated parties here proposed beyond the independent board, such as certain employees, it would appear that no one is invulnerable to a lawsuit here if past is prologue in this Highland saga.

The Creditors' Committee was initially not keen on exculpations for certain employees. However, Mr. Seery credibly testified that there was a contentious arm's-length negotiation over this and that he needs these employees to preserve value implementing the Plan. Mr. Dondero has shown no hesitancy to litigate with former employees in the past, to the *nth* degree, and there is every reason to believe he would again in the future, if able.

Finally, in this situation, in the case at bar, we would appear to have a *Shoaf* reason to approve the exculpations. The January 9, 2020 order of this Court, Docket Entry 339, which approved the independent board and an ongoing corporate

appropriate. They are entirely consistent with and permissible under Bankruptcy Code Sections 1123(a)(5), 1123(a)(6), 1141(a) and (c), and 1142, as well as Bankruptcy Rule 3016(c), which articulates the form that a plan injunction must be set forth in a plan.

The Court finds the objections to the Plan Injunctions to be unfounded, and they are thus overruled without much discussion here.

Now, lastly, the Gatekeeper Provision. It appears at Paragraph 4 of Article IX.F of the Plan and provides, in pertinent part, "Subject in all respects to Article XII.D, no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 case, the negotiation of the Plan, the administration of the Plan, or property to be distributed under the Plan, the wind-down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing, without the Bankruptcy Court (1) first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including but not limited to negligence, bad faith, criminal misconduct and willful misconduct, fraud, or gross negligence against a Protected Party; and (2) specifically authorizing such

Enjoined Party to bring such claim or cause of action against such Protected Party, provided, however, that the foregoing will not apply to a claim or cause of action against Strand or against any employee other than with respect to actions taken, respectively, by Strand or any such employee from the date of appointment of the Independent Directors through the effective date. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in Article XI, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action."

This gatekeeper provision appears necessary and reasonable in light of the litigiousness of Mr. Dondero and his controlled entities that has been described at length herein. Provisions similar to this have been approved in this district in the *Pilgrim's Pride* case and the *CHC Helicopter* case. The provision is within the spirit of the Supreme Court's Barton Doctrine. And it appears consistent with the notion of a pre-filing injunction to deter vexatious litigants that has been approved by the Fifth Circuit in such cases as *Baum v. Blue Moon Ventures*, 513 F.3d 181, and in the *In re Carroll* case, 850 F.3d 811, which arose out of a bankruptcy pre-filing injunction.

The Fifth Circuit, in fact, noted in the *Carroll* case that federal courts have authority to enjoin vexatious litigants

under the All Writs Act, 28 U.S.C. § 1651. And additionally, under the Bankruptcy Code, a bankruptcy court can issue any order, including a civil contempt order, necessary or appropriate to carry out the provisions of the Code, citing, of course, 105 of the Bankruptcy Code.

The Fifth Circuit stated that, when considering whether to enjoin future filings against a vexatious litigant, a bankruptcy court must consider the circumstances of the case, including four factors: (1) the party's history of litigation; in particular, whether he has filed vexatious, harassing, or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing the litigation, or perhaps intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party's filings; and (4) the adequacy of alternatives.

In the *Baum* case, the Fifth Circuit stated that the traditional standards for injunctive relief -- *i.e.*, irreparable harm and inadequate remedy at law -- do not apply to the issuance of an injunction against a vexatious litigant.

Here, although I have not been asked to declare Mr. Dondero and his affiliated entities as vexatious litigants *per se*, it is certainly not beyond the pale to find that his long history with regard to the major creditors in this case has strayed into that possible realm, and thus this Court is justified in approving this provision.

One of the Objectors' lawyers stated very eloquently in closing argument, in opposing the plan injunction and gatekeeping provisions, that "Even a serial killer has constitutional rights," suggesting that these provisions would deprive Mr. Dondero and his controlled entities of fundamental rights or due process somehow. But to paraphrase the district court in the *Carroll* case, no one, rich or poor, is entitled to abuse the judicial process. There exists no constitutional right of access to the courts to prosecute actions that are frivolous or malicious. The Plan injunction and gatekeeper provisions in Highland's plan simply set forth a way for this Court to use its tools, its inherent powers, to avoid abuse of the court system, protect the implementation of the Plan, and preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants.

Accordingly, the Objectors' objections to this provision are overruled.

As earlier stated, this Court reserves the right to alter or supplement this ruling in a written order. In this regard, the Court directs Debtor's counsel -- I hope you are still awake; it's been a long time -- the Court directs Debtor's counsel to submit a form of order. And specifically, I assume that you've already prepared or have been in the process of preparing a set of findings of fact, conclusions of law, and confirmation order that tracks the confirmation evidence and

to win, I turned it off.

I'm sorry. That's terrible. You know, my law clerk, my law clerk that you can't see, Nate, he is from Ann Arbor, Michigan, University of Michigan, and he almost cried when I said I didn't like Tom Brady the other day. So, I apologize.

MR. POMERANTZ: Your Honor, one other comment. We had our motion to assume our nonresidential real property lease that was also on. It got missed in all the fanfare, but it was -- it has been unopposed and essentially done pursuant to stipulation. So we'd like to submit an order on that as well.

THE COURT: Okay. I have seen that, and I approve it under 365. You may submit the order. Okay. Thank you.

MR. POMERANTZ: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 10:35 a.m.)

--oOo--

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 **02/09/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT N

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
	Tuesday, February 23, 2021
	9:00 a.m. Docket
Debtor.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 20-3190-sgj**
Plaintiff,	PLAINTIFF'S MOTION FOR ORDER REQUIRING JAMES DONDERO TO SHOW CAUSE WHY HE SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING THE TRO [48]
v.	
JAMES D. DONDERO,	
Defendant.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 21-3010-sgj**
Plaintiff,	DEBTOR'S EMERGENCY MOTION FOR MANDATORY INJUNCTION REQUIRING THE ADVISORS TO ADOPT AND IMPLEMENT A PLAN FOR THE TRANSITION OF SERVICES BY FEBRUARY 28, 2021 [2]
v.	
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.,	
Defendants.	

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

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor/Plaintiff: Jeffrey N. Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

really was just a termination of the agreement, in accordance with the terms. And I had put the provisions up before the Court during my opening and walked Mr. Seery through. That's the basis for the --

THE COURT: Okay.

MR. MORRIS: -- termination of the agreement. It's not rejection at all.

THE COURT: Fair point.

MR. RUKAVINA: And Your Honor, there's no -- there's no -- yeah, there's no problem. There's no problem on that. We do not disagree. We do not disagree with Mr. Morris.

THE COURT: Fair point. I made the mistake of belts and suspenders, trying to fill in any hole there might be. But yes, I had the evidence that there was a termination of both agreements on November 30th. One of them had a 60-day window before it became effective, the other a 30-day. So they are terminated.

All right. Mr. Morris, anything else from you?

MR. MORRIS: No. We'll prepare a form of order.

THE COURT: All right. Mr. Rukavina, anything further from you?

MR. RUKAVINA: Your Honor, obviously, I have questions. I have reservations. I need to look at whether the Court's findings are going to be binding in this adversary proceeding. So, at this point in time, I'm just not prepared

to really say anything lest I get myself in trouble. But I thank you for your time today.

THE COURT: All right. Well, they are what they are, and I hope we're not in an argument about that down the road. But it seems like my hopes are always dashed when I want things to be worked out.

I don't want you to think my calm demeanor means I am a happy camper. I am not. I am beyond annoyed. I mean, I can't even begin to guesstimate how many wasted hours were spent on the drafting Option A, Option B. Wait. Let me pull up the exact words. Mr. Norris confirming, We withdrew Option B after the Debtor accepted it.

I mentioned fee-shifting once before in a different context, and, of course, we haven't even gotten to the motion for a show cause order declaring Mr. Dondero in contempt. I don't know if the lawyers fully appreciate how this looks. Mr. Rukavina, you said that I have formed opinions that you don't think are fair and made comments about vexatious litigation and whatnot. But while I continue, I promise you, to have an open mind, it is days like this that make me come out with statements that Mr. Dondero, repeating his own words, apparently, he's going to burn the house down if he doesn't get his baby back.

I mean, it seems so obviously transparent that he's just driving the legal fees up. It's as though he doesn't want the

creditors to get anything, is the way this looks. If he wants me to have a different impression, then he needs to start behaving differently. I mean, I can't even imagine how many hundreds of thousands of dollars of legal fees were probably spent the past two weeks on Option A, Option B, and all the different sub-agreements and whatnot. And as recently as Friday afternoon, the K&L Gates lawyer saying we have a deal, and then, oh, wait, maybe not, maybe we do, maybe we don't. And then Mr. Dondero acting like he had no clue what the K&L Gates lawyers were saying as far as we have a deal. And Mr. Norris distancing himself from having seen any of that, and I didn't have power. You know, I'm sure he had a cell phone, like the rest of us, that gets emails. I'm making a supposition. I shouldn't make that. But it just feels like sickening games.

And again, if this keeps on, if this keeps on, one day, one day, there may be an enormous attorney fee-shifting order. And, of course, I would have to find bad faith, and I wouldn't be surprised at all if I get there.

So I don't know if Mr. Dondero is listening. I suspect, if he is, he doesn't care much. But I am --

MR. DONDERO: I'm on the line, Judge.

THE COURT: Okay.

MR. DONDERO: I'm on the line.

THE COURT: I'm glad you're on the line. I cannot

overstate how very annoyed I am by hearing all these hours of testimony and to feel like none of it was necessary. None of it was necessary. Okay? There could have been a consensual deal --

MR. DONDERO: Judge, you have to pay attention -- Judge, you have to pay attention to what's going on, okay?

THE COURT: I am --

MR. DONDERO: When I was president of Highland, --

THE COURT: -- razor-sharp focused on what is going on. Okay? I read every piece of paper. I listen to every sentence of testimony. And what is going on --

MR. DONDERO: Okay. How about this, Your Honor?

THE COURT: -- is an enormous waste of parties and lawyer time and resources. People need to get their eye on the ball. Well, certain people do have their eye on the ball, but certain people do not. Okay? So we're done. You've got your divorce now. Okay? And if the operating plan is all shored up, as Mr. Norris testified, it sounds like you're in good shape. All right?

Mr. Morris, I'll look for the order from you.

MR. MORRIS: Thank you, Your Honor.

THE CLERK: All rise.

(Pause.)

THE COURT: Oh, Michael?

(Court confers with Clerk.)

THE CLERK: Hello? Hang on. Mr. Morris?

THE COURT: Is anyone still there?

THE CLERK: Mr. Rukavina is still there. Mr. Rukavina, Mr. Morris, are you all still there?

MR. RUKAVINA: Judge, this is Davor.

THE COURT: All right.

MR. RUKAVINA: I think we're all wondering whether we're going to have the contempt hearing.

THE COURT: Well, yes, that's why I came back in.

MR. RUKAVINA: I can't hear you, Judge. We can't hear you.

THE COURT: I realized I -- it's 4:19 Central time. We are not starting the contempt hearing.

Mr. Morris, are you there now?

MR. MORRIS: I am. I did have one suggestion.

THE COURT: All right. I neglected to mention our other setting, but we are not going to start at 4:19 Central time. Do we want to talk about scheduling on that?

MR. MORRIS: I did, Your Honor. And it's just an idea, and I understand we've had a long day. But I was going to suggest if there was any way to just get their motion *in limine* out of the way today, so that when we come back for the evidentiary hearing parties are fully prepared. If you don't want to do it, that's fine. Otherwise, I'm available at Your Honor's convenience.

THE CLERK: All rise.

(Proceedings concluded at 4:23 p.m.)

--oOo--

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 **02/24/2021**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT O

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
	Monday, May 10, 2021
	1:30 p.m. Docket
Debtor.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 20-3190-sgj**
Plaintiff,	- TRIAL DOCKET CALL
	- DEFENDANT'S EMERGENCY MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF DEFENDANT'S PETITION FOR WRIT OF MANDAMUS [154]
v.	
JAMES D. DONDERO,	
Defendant.	

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

WEBEX APPEARANCES:

For the Plaintiff: John A. Morris
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

For the Plaintiff: Jeffrey Nathan Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

permanent. I mean, I understand the -- well, right, I mean, with respect to the relief being sought, but with respect to preliminary (garbled) in attendance at the preliminary injunction hearing.

THE COURT: Okay. Unfortunately, you have connectivity issues suddenly.

MR. WILSON: You know, I've got -- I've got a different view on those things. I mean, the contempt hearing has some things --

THE COURT: Mr. Wilson, I don't know if --

MR. WILSON: And I think we lost Mr. Morris on the screen. Can you hear --

THE COURT: -- you can hear me, but we suddenly have very bad connectivity.

MR. WILSON: Can you hear me?

THE COURT: Your screen is frozen, your video is frozen, and I really didn't get any of the last two minutes.

MR. WILSON: Is it better now, Your Honor?

THE COURT: Well, I heard you say, "Is it better now?"

MR. WILSON: I'm going to log off and log back on.

THE COURT: Okay. We're going to have to -- we're going to have to cut this --

MR. WILSON: I'm going to try to log off and log on.

THE COURT: No. I'm ready to be finished with this

hearing. You need to go back and look at this, because I am leaning towards what Mr. Morris is arguing, and that is that this is really bad faith. Okay? There is no change of issues. It's been the same issue at the TRO hearing, at the preliminary injunction hearing. Okay. The motion for contempt, we were looking backwards a little at behavior. But the issues are not expanded. Okay? It's just duration of the injunction. And now a slightly skinnied-down injunction.

So, of course, I am willing to consider evidence I've heard at the TRO hearing and the preliminary injunction hearing. And I would note that on many, many, many of these exhibits, you didn't object. Or if you did, you argued it and I overruled it.

So you need to go back and look at this and think hard whether you're really going to press these issues at the trial. Okay? This is -- again, *Dondi*, we require counsel to work in good faith to streamline trials and work with people. If you can agree, if you can stipulate to evidence, that's what you need to do. And this looks like -- I don't know what it looks like. But if this is any guidance to you, it should be, if I admitted it at the TRO hearing, if I admitted it at the preliminary injunction hearing, it's fair game to consider it now.

Here's the last thing I want to say, and this is very big-picture, not unique to this adversary proceeding.

Can everyone hear me okay? I don't know if we're having connectivity issues. Can everyone hear me?

MR. MORRIS: Yes, Your Honor.

THE COURT: Can you hear me, Mr. Wilson?

MR. MORRIS: Yes, Your Honor.

MR. WILSON: Yes, Your Honor.

THE COURT: Okay. I have been pondering something the past few days. And I haven't figured out how I want to address it, but maybe Mr. Dondero's counsel and counsel from some of the Dondero-controlled entities, maybe they can listen to what I'm about to say and figure out a solution.

As you all know, there are so many law firms, so many lawyers involved now that are basically singing the same tune at a lot of these hearings as far as objections, me too, me too, me too. And so just quickly eyeballing what we have, we obviously have Mr. Dondero represented by Bonds Ellis. There is another firm that represents Mr. Dondero that filed a motion asking that I recuse myself. I can't remember the name of that firm, but I think they appealed my denial of that motion. So, I can't remember who that was. Then we have the various affiliates. We have -- well, I'll just start chronologically. Highland CLO Funding, Ltd. has historically been represented by King & Spalding. I don't know if that's -- I know there were some changes there with the ownership of that entity, so maybe they're gone. But then we have NexPoint

Can we just have an hoc committee each time?

I don't even think I listed all the law firms. I know a new law firm filed a lawsuit in front of Judge Jane Boyle recently. We've got a hearing on that coming up in June. I mean, and now you're -- I'm hearing there are going to be more. Well, if you don't figure out a way to rein it in, then I'm just going to have to get that list of who are the stakeholders in these entities, under oath, because I don't understand it. I don't understand why we need these many lawyers filing position papers.

So, all right. Well, we're going to adjourn, and I guess I'll see you next Monday, right?

MR. MORRIS: Thank you, Your Honor. Yes.

THE COURT: Okay. Thank you.

THE CLERK: All rise.

(Proceedings concluded at 3:07 p.m.)

--oOo--

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 **05/11/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT P

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE THE HONORABLE STACEY G. JERNIGAN, JUDGE

In Re:	Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	
Debtor.	
OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	Adv. Proc. No. 20-03195-sgj
Plaintiff,	PLAINTIFF'S MOTION for CONTINUANCE
v.	
CLO HOLDCO, LTD., et al.,	
Defendants.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Adv. Proc. No. 21-03003-sgj
Plaintiff,	
v.	DEFENDANT DONDERO'S MOTION to COMPEL DISCOVERY, the TESTIMONY of JAMES P. SEERY, JR.
JAMES DONDERO,	
Defendant.	May 20, 2021
	Dallas, Texas (Via WebEx)

Appearances in 21-03003:

For Plaintiff Highland Capital Management,
John A. Morris
Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Boulevard, 13th Floor
Los Angeles, California 90067

For Defendant-Movant James Dondero:
Michael P. Aigen
Stinson, L.L.P.
3102 Oak Lawn Avenue, Suite 777
Dallas, Texas 75219

Bryan C. Assink
Bonds Ellis Eppich Schafer Jones LLP
420 Throckmorton Street, Suite 1000
Forth Worth, Texas 76102

Appearances continued on next page.

We — it was more just a coordination thing. We intend that he will be at all hearings before, Your Honor, you know, Friday's hearing and substantive hearings. I just — I think this is more of a coordination issue, Your Honor, and I apologize.

THE COURT: Okay.

MR. ASSINK: There has been a lot going on.

THE COURT: Oh, don't I know. There's two of us, me and my Law Clerk working on this, and there are a bunch of y'all. So, yes, I feel — I feel absolutely what you feel and more as far as a lot going on.

So let me clarify. My language that ordered Mr. Dondero to be at every hearing was in the preliminary injunction that's now superseded by the agreed order y'all announced Tuesday. So are you telling me you thought now that mandate didn't apply? Is that one of the things —

MR. ASSINK: Not — not specifically, Your Honor, —

THE COURT: — I'm hearing?

MR. ASSINK: Not specifically, Your Honor. We thought perhaps the formal mandate in the order was no longer applying, but our understanding was you would want Mr. Dondero at substantive hearings going forward, and that has been our understanding. And we would expect him to be before Your Honor at all such hearings. Part of the basis, the reasoning he's not here today was perhaps as an oversight on my part due to the scheduling, and I had a lot of deadlines yesterday and I think

it just maybe fell through the cracks, and I apologize, Your Honor.

THE COURT: All right.

MR. ASSINK: You know, we — Your Honor, —

THE COURT: Well, I'm going to say a couple of things. You know this could have been raised Tuesday, when we were here on the adversary proceeding, in which the preliminary injunction was issued, okay, it would have been — it would have been wise, it would have been very wise to raise the issue.

Second, it screams irony, if nothing else, that at a time when I have under advisement a motion to hold Mr. Dondero in contempt of Court that there would be a trip-up, the second-recent trip-up, by the way, where he didn't appear at a hearing. There was a time a few weeks ago, two or three weeks ago, can't remember what hearing it was then, but he wasn't here.

Okay. The —

MR. ASSINK: Well, Your Honor, I just want to say —

THE COURT: — the third thing I'm going to say — the third thing I'm going to say is I guess I'll issue an order in the main case now, you know, a one- or two-sentence order in the main case saying repeating the sentence that was in the preliminary injunction, that he's going to show up at every hearing. I never said only at substantive hearings. The only thing I hesitated on at all, because I've done this in other

cases, is sometimes I'll say any hearing at which, you know, the person is taking a position, okay, an opposition, an objection, you know, even if you file a pleading taking a neutral stand, if he's going to file a pleading that requires the Court and all the lawyers' attention to some extent, he's going to need to be in court. So that's something I thought about doing, but then I was reminded, that I said, no, he's just going to be at all hearings in the future.

And procedural, substantive, I never made that distinction and I never would because — because it's taking up time, it's taking up time of the Court, lawyers, parties. And if he is going to use the offices of this Court or, you know, take up the time of any lawyers, then he needs to be a part of it, okay?

MR. ASSINK: Your Honor, yes, I —

THE COURT: So I thought I made that very clear the last time he didn't show up, but I think —

MR. ASSINK: Your Honor, I apologize. You know that's certainly not our intention here. We've been rushing around. I think this is more — this is more on — on me and just the fast pace with everything. We would intend that he would be here at all hearings. We're not trying to make any exception. We're not trying to say that the preliminary injunction got rid of his obligation to be before, Your Honor. You know, we weren't clear exactly what the directive was for these kinds of hearings, or

at least perhaps I wasn't fully, and — but, nevertheless, Your Honor, we would — we would have had him be here. I think the fast pace with the hearing settings and just everything going on, it might have slipped through the cracks. It's not — there was no ill will with him not being here, Your Honor. I apologize. It's just an oversight on our part. We would anticipate that he will be here for all future hearings. You know it's no disrespect to the Court. It was not an intentional thing. We apologize, Your Honor. So I understand the Court's comments. It's — but I just want to make clear it's we're not trying to be cute, we're not trying to say that, oh, the preliminary injunction is gone, he doesn't have to be here. That's not our intention, Your Honor. It was I think just an oversight and a scheduling issue this time, but Mr. Dondero will of course appear before Your Honor in all matters going forward, so I apologize.

THE COURT: All right. Well, again, you're scheduling. You sought the scheduling, you sought the emergency hearing, and this is the second time we've had this discussion in less than a month.

All right. So, Mr. Morris, back to you. I think —

MR. MORRIS: Yeah.

THE COURT: — you were about to answer the question of if Mr. Seery is going to be produced and talk about 13 different topics, why is it a big deal to talk about these other seven

that condition subsequent was, it was the liquidation of certain assets. Since the liquidation of those assets has not been completed, by definition, no other maker could have had a note or an oral agreement or an agreement of any kind of the type that Mr. Dondero has. So yet another reason why it fails to meet the burden, they fail to meet the burden under Rule 26. Nobody could have ever had the same note forgiven or agreement, because the condition subsequent hasn't been met yet.

THE COURT'S RULING ON THE MOTION TO COMPEL

THE COURT: All right. Well, I'm going to deny the motion to compel. I don't think that the burden has been met to establish the relevance of these, I guess it's — one, two, three, four, five — six topics that are now at issue, topics 9, 14 through 17, or 20, and, you know, I don't think the proportionality standard is met here.

I do think it would be not proportionate to the needs of the case for the CEO, who came in place in 2020, postpetition, two years after these notes were executed, to have to go do research about any loans made by Highland to any officers and employees over the years and, you know, I don't know who he's going to question, what policy he is going to look into that might be some substance or evidence as to oral agreements or forgiveness. I don't think he should have any obligation to search files and interview people to figure out what the affirmative defenses and Mr. Dondero are all about or

based in. And, again, no one would have better information about his own compensation than Mr. Dondero himself.

I mean I want to stress that this comes against a backdrop of — well, it seems like some antagonism, to say the least, on the part of Mr. Dondero where Mr. Seery's concerned. It seems like it's always a fight with Mr. Seery. And you say, well, we didn't handpick him as the 30(b)(6) witness, but, you know, the motion to compel names him by name. It just — it feels like another antagonistic move.

You've got him for a deposition next Monday on 13 or so different topics. I think it is appropriate to draw the line on these six or so topics that again just don't seem relevant or proportional to the needs of the case.

All right. So, Mr. Morris, would you please upload just a simple order reflecting the Court's ruling?

MR. MORRIS: I would be happy to, Your Honor.

THE COURT: Okay. Actually I'm going to ask Mr. Aigen to do it. I'm sorry. I need to be thinking about attorney's fees and who should bear the costs of what.

So, Mr. Aigen, would you please electronically submit an order?

MR. AIGEN: Yes.

THE COURT: All right. Thank you.

All right. Well, if there's nothing else on this particular adversary, let me just double check. Any

housekeeping matters before I move onto the other adversary?

MR. AIGEN: Not from the debtor, Your Honor.

MR. CLUBOK: Your Honor, —

THE COURT: All right.

MR. CLUBOK: I don't know if you're about to move on. Your Honor, can you hear me?

THE COURT: I'm sorry, Mr. Clubok?

MR. CLUBOK: Your Honor, —

THE COURT: Were you weighing in on —

MR. CLUBOK: Yeah, I'm — I'm sorry. It's not about that proceeding, but are you about to move on beyond — beyond the Highland matters?

THE COURT: No, no, no.

MR. CLUBOK: There was another Highland matter —

THE COURT: I was next — I was next going to go to the other adversary, the dispute between the committee and seven or so defendants. And, yes, I know we have UBS I guess all day tomorrow unless anything has changed. So we'll — we'll hear before we're done any previews about tomorrow.

All right, so moving on —

MR. CLUBOK: Thank you.

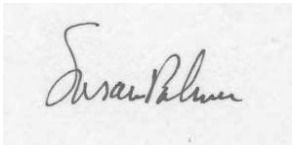
THE COURT: — the Committee versus CLO Holdco, 20-3195. We have a committee motion to basically stay the adversary proceeding for 90 days. So I will get lawyer appearances on that.

State of California)
) SS.
County of San Joaquin)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

I am a Certified Electronic Reporter and Transcriber by the American Association of Electronic Reporters and Transcribers, Certificate Nos. CER-124 and CET-124. Palmer Reporting Services is approved by the Administrative Office of the United States Courts to officially prepare transcripts for the U.S. District and Bankruptcy Courts.



Susan Palmer
Palmer Reporting Services

Dated May 22, 2021

EXHIBIT Q

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
	Tuesday, June 8, 2021
	9:30 a.m. Docket
Debtor.	
	- SHOW CAUSE HEARING (2255)
	- MOTION TO MODIFY ORDER AUTHORIZING RETENTION OF JAMES SEERY (2248)
	- MOTION FOR ORDER FURTHER EXTENDING THE PERIOD WITHIN WHICH DEBTOR MAY REMOVE ACTIONS (2304)

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

APPEARANCES:

For the Debtor: Jeffrey Nathan Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

For the Debtor: John A. Morris
Gregory V. Demo
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

For the Debtor: Zachery Z. Annable
HAYWARD & ASSOCIATES, PLLC
10501 N. Central Expressway,
Suite 106
Dallas, TX 75231
(972) 755-7104

the Committee maintaining a two-person membership at this point.

In terms of whether the MGM transaction is a game-changer, we've not yet seen, to Your Honor's point, how all of that rolls up through the various interests that the Debtor may or -- you know, may have --

THE COURT: Okay.

MR. CLEMENTE: -- that would be implicated by the MGM transaction. If ultimately the MGM transaction has to actually occur, right? I mean, so, you know, just based on what I read in the public documents, we're not sure when that transaction may actually happen. But obviously it's a good thing for the Debtor's estate because it's going to recognize value for the estate.

In terms of whether it ultimately changes how Mr. Dondero, you know, wishes to proceed, that's entirely up to him, Your Honor. But we don't see it as something at this point that would suggest that there's an overall back to let's talk about a pot plan because of where the MGM transaction might ultimately come out.

So I don't know if that's helpful to Your Honor, but those are -- that's my perspective.

THE COURT: Well, and I'm not trying to, you know, push a pot plan on anyone.

MR. CLEMENTE: No, I understand.

THE COURT: I'm just saying it looked like an economic windfall. I just -- I don't know how much is Highland versus other entities in the so-called byzantine complex, but, gosh, I just hoped that there might be something there to change the dynamic of, you know, lawsuit, lawsuit, lawsuit, lawsuit, motion for contempt, motion for contempt.

MR. CLEMENTE: Agreed, Your Honor.

THE COURT: Uh-huh.

MR. CLEMENTE: And like I said, it was a very positive development obviously for the creditors for the Debtor. But whether it's the game-changer that Your Honor would envision, I'm not sure that I can suggest at this point that it is.

I think that, you know, obviously, we don't like to see these lawsuits continue to be filed. That's the whole point of the gatekeeper order, Your Honor.

THE COURT: Uh-huh.

MR. CLEMENTE: I didn't say anything during the hearing, but obviously the January 9th order, as Your Honor has said many times, was in the context of a trustee being appointed.

THE COURT: Right. Right.

MR. CLEMENTE: Right? So, and the July 16th order, very similar vein, it's an outshoot of that. In fact, it was contemplated in the January 9th settlement that a CEO could be

appointed.

So I think, again, it's just -- it's important, the context in which that January 9th order came into play, for this very reason, so we could avoid this type of litigation, Your Honor.

THE COURT: Uh-huh.

MR. CLEMENTE: And so again, I didn't -- I obviously didn't rise to mention that during the hearing, but Your Honor is already aware of that. I didn't need to remind Your Honor of that.

THE COURT: Uh-huh. Okay.

MR. CLEMENTE: Anything else for me, Your Honor?

THE COURT: No. Thank you.

MR. CLEMENTE: Okay, then, Your Honor.

THE COURT: Sorry I picked on you. But, all right. Well, again, I hope the message has landed in the way I hope will matter, and that is I'm going to look at your documents but I feel very strongly that, unless there's something in there that, whoa, is somehow eye-opening, I'm going to find contempt of court. It's just a matter of who and what the damages are. There's just not a thing in the world ambiguous about Paragraph 5 of the July 9th, 2020 order. So I'll get to it as soon as we humanly can get to it.

Mr. Morris, anything else?

MR. MORRIS: Nothing. No, thank you.

THE COURT: I guess I'll see you Thursday on the WebEx. Thank you.

THE CLERK: All rise.

(Proceedings concluded at 6:00 p.m.)

--oOo--

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 **06/09/2021**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT R

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
	Thursday, June 10, 2021
	9:30 a.m. Docket
Debtor.	
	MOTION TO COMPEL COMPLIANCE WITH BANKRUPTCY RULE 2015.3 FILED BY GET GOOD TRUST AND THE DUGABOY INVESTMENT TRUST (2256)
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 21-3006-sgj**
Plaintiff,	DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND BRIEF IN SUPPORT [15]
v.	
HIGHLAND CAPITAL MANAGEMENT SERVICES, INC.,	
Defendant.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 21-3007-sgj**
Plaintiff,	DEFENDANT'S MOTION FOR LEAVE TO AMEND ANSWER TO PLAINTIFF'S COMPLAINT [16]
TO v.	
HCRE PARTNERS, LLC N/K/A NEXPOINT REAL ESTATE PARTNERS, LLC,	
Defendant.	

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

MS. DRAWHORN: Uh-huh. Yes. And I understand that, Your Honor. And the issue, I think, with you -- we need to have this motion resolved, because it -- unless the Court is going to continue discovery or stay. You know, one of the reasons why we had initially requested the expedited hearing was because of the discovery is continued -- continuing to -- discovery deadlines are continuing to move. And obviously whatever the Court decides on this motion for leave to amend will determine what the scope of that discovery is.

Similarly, if the Debtor decides to amend, that could change the scope of discovery as well.

So we are open to continuing deadlines, and I think, you know, might end up filing a motion to continue. I haven't conferred with Mr. Morris yet. I suspect he's opposed, based on our prior conversations. But that's something that might be helpful, especially if the Court is concerned on how it will affect the motion to withdraw the reference, to -- maybe we continue some of these upcoming deadlines, and that might appease, you know, solve some of your concerns.

THE COURT: All right. Well, Rule 15(a), of course, is the governing rule here, and the case law is abundant that courts "should freely give leave when justice so requires." And the law is also abundantly clear that the rule "evinces a bias in favor of granting leave to amend." And again and again, cases say that leave should be granted unless there's

substantial reason to deny leave, and courts may consider factors such as delay or prejudice to the non-movant, bad faith or dilatory motives on the part of the movant, repeated failure to cure deficiencies, or futility of the amendment.

While the Debtor has presented arguments that there might be bad faith here on the part of the Movants and there might be futility in allowing the amendments because of various strong arguments and defenses the Debtor believes it has to this issue of agreements with regard to the notes that allegedly provide affirmative defenses, the Court believes the rule requires me to allow leave to amend the answer.

Now, a couple of things. I am going to require, though, that the amended answer be more specific than has been suggested. I am going to agree that if new affirmative defenses are made that there was this agreement to forgive when certain conditions happened, then there does need to be identification of who the human beings were that were involved in making the agreement, the date of any agreement or agreements, and disclose what documents substantiate the agreement or reflect the agreement. All right? So if that could --

MR. MORRIS: Your Honor?

THE COURT: Yes?

MR. MORRIS: John Morris. I apologize for interrupting, but just a fourth thing is what is the

agreement? I mean, what is the agreement?

THE COURT: Well, okay. That's fair enough. What is the agreement? I guess --

MR. MORRIS: And -- and --

THE COURT: -- that needs to be spelled out. I mean, I guess I was assuming that that would be spelled out in -- but maybe it's not. So we'll go ahead and add that.

As far as extension of the discovery, Ms. Drawhorn has offered that. I think it would be reasonable if the Debtor or Plaintiff wants that. Do you want an extension of discovery?

MR. MORRIS: What I really want, Your Honor, is a direction for them to serve this amended answer within 24 or 48 hours and grant leave to the Debtor to promptly file written discovery. We've got Nancy Dondero -- if it turns out -- and maybe Ms. Drawhorn can just answer the question right now. Who entered the agreement on behalf of the Debtor? Because I'm already taking Nancy Dondero's deposition on the 28th. And it seems to me, if they would just answer the question of whether Ms. Dondero is the person who did that, I could just add a notice of deposition and take the deposition on that date, too, and it would be, really, more efficient for everybody.

THE COURT: Ms. Drawhorn, who was the human being?

MS. DRAWHORN: Yes. It was -- yes, Nancy Dondero entered into the -- the subsequent agreement.

THE COURT: Please upload an order, Ms. Drawhorn, granting your motion with these specific requirements that I've orally worked in.

I think clients need to be careful what they ask for. I'm very concerned. And I know it was just argument and I'll hear evidence, but of all of the things that I guess -- well, I'm concerned about a lot of things, but do we have audited financial statements that didn't disclose these agreements with regard to --

MR. MORRIS: Yes, Your Honor.

THE COURT: I mean, that's -- I'm just -- you know, there's a lot to be concerned about on that point alone, I would think. But, all right. If there's nothing further, we are adjourned. Thank you.

THE CLERK: All rise.

(Proceedings concluded at 11:58 a.m.)

--oOo--

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 **06/12/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT S

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
	Friday, June 25, 2021
	9:30 a.m. Docket
Debtor.	
	EXCERPT: MOTION FOR MODIFICATION OF ORDER AUTHORIZING RETENTION OF JAMES P. SEERY, JR. DUE TO LACK OF SUBJECT MATTER JURISDICTION (2248)

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

WEBEX APPEARANCES:

For the Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtor:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For CLO Holdco, Ltd. and The Charitable DAF Fund, LP:	Jonathan E. Bridges Mazin Ahmad Sbaiti SBAITI & COMPANY, PLLC JP Morgan Chase Tower 2200 Ross Avenue, Suite 4900 W Dallas, TX 75201 (214) 432-2899
For Get Good Trust and Dugaboy Investment Trust:	Douglas S. Draper HELLER, DRAPER & HORN, LLC 650 Poydras Street, Suite 2500 New Orleans, LA 70130 (504) 299-3300

any exceptional circumstances to declare the order or any of its provisions void. The Movants have put on no evidence that constitutes surprise or constitutes newly-disputed evidence. So why are there no exceptional circumstances here such that the Court might find, you know, a void order or void provisions of an order?

First, this Court concludes that there's no credible argument that the Court overreached its jurisdiction with the gatekeeping provisions in the order. Gatekeeping provisions are not only very common in the bankruptcy world -- in retention orders and in plan confirmation orders, for example -- but they are wholly consistent with the *Barton* case, the U.S. Supreme Court's *Barton's* case, and its progeny that has become known collectively as the *Barton* doctrine. Gatekeeping provisions are wholly consistent with 28 U.S.C. Section 959(a)'s complete language.

The Fifth Circuit has blessed gatekeeping provisions in all sorts of contexts. It has blessed them in the situation of when *Stern* claims are involved in the *Villegas* case. It even blessed Bankruptcy Courts' gatekeeping functions a long time ago, in 1988, in a case that I don't think anyone mentioned in the briefing, but as I've said, my brain sometimes goes down trails, and I'm thinking of the *Louisiana World Exposition* case in 1988, when the Fifth Circuit blessed there a procedure where an unsecured creditors' committee can

bring causes of action against persons, such as officers and directors or other third parties, if they first come to the Bankruptcy Court and show a colorable claim. They have to come to the Bankruptcy Court, show they have a colorable claim and they're the ones that should be able to pursue them. Not exactly on point, but it's just one of many cases that one could cite that certainly approve gatekeeper functions of various sorts of Bankruptcy Courts.

It doesn't matter which court might ultimately adjudicate the claims; the Bankruptcy Court can be the gatekeeper.

And the Court agrees with the many cases cited from outside this circuit, such as the case in Alabama, in the Eleventh Circuit, and there was another circuit-level case, at least one other, that have held that the *Barton* doctrine should be extended to other types of case fiduciaries, such as debtor-in-possession management, among others.

Finally, as I pointed out in my confirmation ruling in this case, gatekeeping provisions are commonplace for all types of courts, not just Bankruptcy Courts, when vexatious litigants are involved. I have commented before that we seem to have vexatious litigation behavior with regard to Mr. Dondero and his many controlled entities.

Now, as far as the Movants' argument that there was not just improper gatekeeping provisions but actually an improper discharge in the Seery retention order of negligence claims or

other claims that don't rise to the level of gross negligence or willful misconduct, again, I reiterate there's nothing exceptional in the bankruptcy world about exculpation provisions like this. They absolutely are a term of employment very often. Just like compensation, they're frequently requested, negotiated, and approved. They are normal in the corporate governance world, generally. They are normal in corporate contracts between sophisticated parties. And most importantly of all, even if this Court overreached with the exculpation provisions in the Seery retention order, even if it did, res judicata bars the attack of these provisions at this late stage, under cases such as *Shoaf*, *Republic Supply v. Shoaf* from the Fifth Circuit, the *Espinosa* case from the U.S. Supreme Court, and even *Applewood*, since the Court finds the language in this order was clear, specific, and unambiguous with regard to the gatekeeping provisions and the exculpation provisions.

Last, and this is the part where I said I'm going to get to this agreement that has been submitted, the Second Amended and Restated Investment Advisor Agreement or whatever the title is. I am more than a little disturbed that so much of the theme of the Movants' pleadings and arguments, and I think even representations to the District Court, have been they have these sacred jury trial rights, these inviolate jury trial rights, and an Article I Court like this Court should

annoyance or anything like that. I guess what I'm trying to do is I don't want anyone to mistake the delay in ruling on the contempt motion to mean I'm just not that -- you know, I'm not prioritizing it, other things are more serious to me or important to me, or I'm going to take two months to get to it. It's literally been I've been in trial almost all day long every day since you were here. But trust me, I'm about as upset as upset can be about what I heard on June 8th, and I'm going to get to that ruling, and I know what I'm going to do. And, well, like I said, it's just a matter of figuring out dollars and whom, okay? There's going to be contempt. I just haven't put it on paper because I've been in court all day and I haven't come up with a dollar figure. Okay?

So I hope -- I don't know if that matters very much, but it should.

All right. We stand adjourned.

(Proceedings concluded at 3:35 p.m.)

--oOo--

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 **06/29/2021**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT T

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
	March 1, 2022
	1:30 p.m. Docket
Reorganized Debtor.	
	- REORGANIZED DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH PATRICK DAUGHERTY [3088]
	- REORGANIZED DEBTOR'S MOTION FOR ENTRY OF AN ORDER FURTHER EXTENDING THE PERIOD WITHIN WHICH IT MAY REMOVE ACTIONS [3199]
ELLINGTON,	**Adversary Proceeding 22-3003-sgj**
Plaintiff,	
	STATUS CONFERENCE
v.	(NOTICE OF REMOVAL)
DAUGHERTY,	
Defendant.	

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

APPEARANCES:

For the Debtor: John A. Morris
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

For Scott Ellington: Debra A. Dandeneau
Laura R. Zimmerman
BAKER & MCKENZIE, LLP
452 Fifth Avenue
New York, NY 10018
(212) 626-4875

consent to Bankruptcy Court adjudication or are we going to have a motion for remand.

So I don't know what we're going to attempt to accomplish here because later in this month we have set a hearing on Mr. Ellington's motion for remand and abstention. So I'll ask counsel, did you all view this setting as something that, you know, we needed to address issues on, or is it premature before we have the hearing on the motion for remand and abstention?

MR. YORK: Your Honor, this is Drew York from Gray Reed. I represent Mr. Daugherty in the adversary action. And I agree with the Court that it is, based upon the motion to abstain and remand that was filed, it's premature. We set the status conference at the Court's request immediately after we filed the removal notice. I think we can address all of the issues at the hearing at the end of the month.

THE COURT: All right. Ms. --

MS. DANDENEAU: Your Honor?

THE COURT: Go ahead.

MS. DANDENEAU: We agree with Mr. York and the Court, Your Honor.

THE COURT: Okay. Well, so I guess we will see you at the end of the month. I think, what is it, maybe March 28th, something like that? March 29th?

MS. DANDENEAU: I believe it's March 29th.

THE COURT: Okay. And you know that I tend to sometimes share my views just to see if it will spur a fit of reasonableness or encourage people to settle or walk away. I'm pretty exasperated with that attempt in this case. But this litigation is -- I'm going to call it the stalking lawsuit. Okay? Every time -- I don't know how much longer it will be in my court, but as long as it's in my court I'm going to call it what it is, a stalking lawsuit. It is one grown man accusing another grown man of stalking. You know, it's just embarrassing to me, and it should be embarrassing to those involved.

Now, I have read the lawsuit and I have read that Mr. Ellington accuses Mr. Daugherty of driving by his house, driving by his father's house, driving by his sister's house, driving by his office, 143 sightings, he's taking pictures. And you know, if that's true, again, that's embarrassing. If -- I don't even know what to say except this is embarrassing. One grown man accusing another grown man of stalking. Okay? A statute, by the way, that was designed to protect, you know, ex-wives, girlfriends, battered women, from abusive men. You know, gender doesn't matter, but wow. It's just -- I don't know what to say except people should be embarrassed, and so that's what I'm going to say.

I don't know if it's going to make a whit of difference in anyone's litigation posture. But we'll come back on March

29th and we'll do what we need to do on the motions before the Court.

(Proceedings concluded at 3:41 p.m.)

--oOo--

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 **03/07/2022**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

29th and we'll do what we need to do on the motions before the Court.

(Proceedings concluded at 3:41 p.m.)

--oOo--

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 **03/07/2022**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT U

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
	August 31, 2022
	9:30 a.m. Docket
Reorganized Debtor.	
	STATUS CONFERENCE RE: MOTION FOR FINAL APPEALABLE ORDER FILED BY JAMES DONDERO [3406]

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

APPEARANCES:

For the Reorganized Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 11th Floor Los Angeles, CA 90067 (310) 277-6910
For the Reorganized Debtor:	Melissa S. Hayward HAYWARD, PLLC 10501 N. Central Expressway, Suite 106 Dallas, TX 75231 (972) 755-7104
For James Dondero, Movant:	Michael Justin Lang CRAWFORD WISHNEW & LANG, PLLC 1700 Pacific Avenue, Suite 2390 Dallas, TX 75201 (214) 817-4500
Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062

And when he, being Judge Kinkeade, after the briefs were filed, he obviously was looking at it, he questioned his jurisdiction, he requested briefing on the jurisdiction, because in that order that he sent out requesting the briefing, he pointed out -- you know, one of the issues he pointed out was the Court's language, the reservation language in the order. And, again, Highland argued that because of that language, among other things, that language made the order not final.

So all we're saying, all we're asking is just remove that language so when we file the writ of mandamus that argument isn't there. The Court is done dealing with the issue. Nobody can disagree with it.

You know, nobody -- Highland is not agreeing that we, you know, can seek mandamus, so I'm not saying that. And I'm not asking the Court to agree to that. Mandamus is a -- we believe is an option. It's still on the table. And we're just dealing with one issue that came up before and just trying to head it off before -- so that we don't have to come back down and ask the Court to remove it later.

THE COURT: All right. Mr. Pomerantz, what do you want to say about this?

MR. POMERANTZ: So, Your Honor, this is extremely frustrating. I know Your Honor had said you didn't want to waste Court time. There has already been a tremendous amount

of Court time that's wasted.

When we got this motion, it was a head-scratcher. We read it as seeking way more things than what Mr. Lang is saying now. If he had called up and asked us if we had any issue, subject to Your Honor's agreement, to remove that last sentence, we would have said we don't, because the briefing before the District Court and the District Court's decision have really nothing to do with that last sentence. Maybe the -- Judge Kinkeade mentioned it in his December order, but it's clear, as Your Honor mentions, from the reading of the District Court opinion that it is irrelevant.

And the argument that the Court, the District Court which denied interlocutory appeal is somehow, once that sentence is eliminated, going to entertain and grant a writ of mandamus is farcical. It's just not going to happen. And unfortunately, what's going to happen is we're going to have to spend more time, more money, and more effort.

And Your Honor, I know the motion to strike has been resolved, but I'd just like to mention it, because this is -- continues to be frustrating from the Highland side. They filed an appendix that sought to slip in three letters written by attorneys for various Dondero entities that were essentially a smear campaign, a smear campaign on Mr. Seery, a smear campaign on the Independent Directors, incidentally, which may be actionable in its own right.

That had nothing to do with bias. They wanted to slip that in, somehow it would get into the appellate record, if and when they ever got to an appeals court.

So what do we do, Your Honor? We called them up, called Mr. Lang up and said, will you withdraw the letters? There's no basis for those to be included in the appendix. He said no. Said, okay, will you make the deponents -- the people who wrote the letters available for deposition? Wouldn't agree to that, either.

And then we go to the time and the money, we file our motion to strike, and lo and behold, which has become a considerable pattern in this case, Your Honor, what does Mr. Lang do? He calls up and says, I will withdraw the letters. Okay? That's aside. We got what we wanted. There's nothing we can do. But it is kind of frustrating, how that -- how that played out.

Your Honor, this motion, to the extent it asks for that sentence to be removed, that's fine. Again, we think it's a legal nullity. What Mr. Lang asked for in his motion is for Your Honor to issue a final order. Your Honor can't determine whether your order is final. We've made that point in our opposition. It seems maybe now Mr. Lang is walking back on that. There's nothing you can do. Your Honor can issue an order; it'll be up to the District Court.

With respect to the supplement, Your Honor, as we put in

the record, we think all the quote/unquote evidence that was submitted just is a severe mischaracterization of the record. And it's important, Your Honor, that not only does the -- we agree that the evidence can come in, but we think Your Honor has to make a determination whether those additional allegations of bias and evidence do in fact demonstrate bias. What we think Mr. Lang wanted to do, or the Appellants wanted to do, or the Movants, they wanted to have that information come in and argue at first blush to the Appellate Court that that is bias, without having had Your Honor make the initial determination, as you would have if there was a motion to reconsider, as you would have if there was a new motion.

And so we think it's very important that Your Honor consider those additional allegations. We think categorically they do not demonstrate any bias, and our Exhibit A goes through each item and points out the severe mischaracterizations.

So, Your Honor, we've wasted a lot of time. We've wasted a lot of money. But if all they want is to remove that sentence, supplement the record, have Your Honor deny the motion yet again after considering the additional evidence, we do not have an opposition to that. But it was -- kind of took a long time and a lot of money to get to this place.

Thank you, Your Honor.

THE COURT: All right. And Mr. Lang, on the subject

of it took a lot of time and a lot of money, estate resources, to get to this place, I just want to note a couple of things. And I guess I'm happy to hear any response to these things that I feel very frustrated about.

Again, my focus at this point is judicial resources as well as estate resources. And no judge, no judge looks lightly on a motion to recuse. Okay? Any judge, I would think, is going to have some self-introspection. Like, oh my goodness, what would motivate someone to think this needs to be urged?

But, so on the topic of -- again, I want you to respond to this, Mr. Lang -- my concern about judicial resources and estate resources.

The timeline here -- and I always talk about timelines, I know -- but this Court signed the confirmation order in this case February 22, 2021, and your motion to recuse was filed about a month later, March 18, 2021. Now, here's the first thing I'll mention about judicial resources and estate resources. Your motion and brief to recuse included an appendix that was 200 -- no, excuse me, 2,722 pages long. Okay?

So any judge, again, has to take it seriously when a motion to recuse is filed. And the standard is I have to stand back and look at would a reasonable person have concerns here. So I can't just say, I know I'm not biased, I don't

think I'm biased; I have to look at what a reasonable person might think.

So you presented to me a 2,722-page appendix for me to do my job and look at what would a reasonable person think. So, then would it raise a doubt in the mind of a reasonable observer as to the judge's impartiality?

So I think here's another point that goes to judicial resources. I had my law clerk, just out of curiosity, count up for me how many orders that I had signed as of the day that the motion to recuse was filed, March 18, 2021, and I had presided over the bankruptcy case for 15 months at that point, but it had been in Delaware for two months before Dallas. On the day you had filed your motion to recuse, March 18, 2021, I had signed 263 orders in the Highland bankruptcy case and the adversary proceedings. It's a lot more now, of course. But so I suppose, if I was really to do my job thoroughly, I might look not merely at your 2,722 pages of appendix attached to your motion to recuse, but all 263 orders I had entered to see, hmm, would a reasonable observer question my impartiality?

So, anyway, this is all about judicial resources and estate resources. So, going down the timeline, March 23, 2021, five days after you filed the motion to recuse -- after, I will tell you, I won't say I dropped everything to pore through this, but spent a lot of time -- I issued an order

denying the motion to recuse.

Now, here's inside baseball, okay, if there ever was: The last sentence, reserving the right to supplement or amend, here's why I did it. I didn't know it would cause a brouhaha. Maybe I didn't give it enough thought. But in reading the case law during those many days and hours I spent focusing on your motion to recuse, I realized that most of the case law says you don't have to have a hearing, okay, the statute doesn't require a hearing, the case law says you don't have to have a hearing. And I cited some of that my order. But I thought, these Movants, after seeing this order, they may come back and say, you didn't give us our day in court. We wanted a hearing. We weren't just going to rely on our 2,722-page appendix. We wanted to put on witnesses.

So I didn't have to stick that sentence in there, but I was just sort of anticipating what the Movants might do.

Okay. So, live and learn. I guess I won't, if I'm ever confronted with the situation again, do that. But that's what that was about.

So, my law clerk went and looked at the appellate record in the past few days, because, I mean, again, head-scratcher. We were trying to get a feel for how big a deal was this sentence, okay, to the District Court, if at all. But anyway, we happened to note that in July, July 20, 2021, the District Court record on appeal was supplemented with 1,001 more pages

of record. So I guess, goodness gracious, poor Judge Kinkeade and his staff, they had 3,723 pages of appendix. I don't even know if that's all. You know, I don't know.

But so Judge Kinkeade dismissed the appeal because he said my order was interlocutory on February 9, 2022, and then we didn't see a motion for rehearing or an appeal to the Fifth Circuit or a petition for writ of mandamus to the Fifth Circuit. Five and half months later, this new motion for final appealable order and supplement to the motion to recuse is filed, containing 365 more pages. And then I see that, Mr. Lang, you filed an amended motion to take out certain of the items, with the agreement, the stipulation that was reached with Debtor's counsel, so it's now a 154-page appendix.

But I should add that, in Highland's objection to your latest motion, they attached 86 exhibits, and I couldn't count all those exhibits, but it was more than 5,500 pages. And it was, as I understood it, sort of almost like a rule of optional completeness. If you're going to submit these 154 pages to supplement the record, we think you need to attach more than snippets of a transcript here and there. You need to have the whole context.

So, anyway, I -- you know, look at what you're doing. I'm just -- and I guess I could totally appreciate and understand if there had been a brief order from Judge Kinkeade saying, because of that one sentence, this is an interlocutory order,

no leave to appeal an interlocutory order is warranted, end of order. And, frankly, when you filed your motion, this latest motion, having not seen Judge Kinkeade's order, I thought that's what it was going to say.

So, from the tone of your motion, it sounded like that's all his order was about, just: I have a problem with this last sentence, it makes the whole order interlocutory. And then I go back and read it and he gives four or five different reasons why an order denying a motion to recuse is interlocutory until the end of the case. I know that's a bizarre concept in the world of bankruptcy, but he considered this is even the rule in the world of bankruptcy.

So, anyway, help me to understand why this isn't unnecessary carpet-bombing the Court, me and whoever might hear your petition for writ of mandamus, and the Debtor estate, carpet-bombing us with paper and causing us to expend resources. And, again, we've got this backdrop of the original motion to recuse being filed 15 months after I started presiding over the case and after I had signed 263 orders.

Please, Mr. Lang, please help me to understand if this is warranted. Why, I mean, help me to understand why this is not wasting resources in your view and why this isn't just some strategy. Again, I'm trying to not play psychologist, I'm really trying to understand why you think this is fine.

MR. LANG: Well, Your Honor, we've moved to recuse, and we've stated the grounds, and we have put in documents from the record that we think support those grounds. We have not unnecessarily carpet-bombed. We've cited to the various transcripts. The length of the record is directly related to the length of the transcripts mostly, the various transcripts throughout the proceeding. And so, you know, with respect to the 2,722 pages of appendix, most of those are just complete copies of transcripts.

But again, we're just creating our record to support our position on our motion. And the current motion is eight pages. It's got reference to the additional grounds that we've set forth that we think support our motion. And we attached the various documents and transcripts that, again, support -- we think support our position. And we're making our record for appeal.

And as far as Mr. Pomerantz and the withdrawing of the letters, you know, I was getting ready for trial when Mr. Morris called. And he said, they're hearsay. We had a brief conversation. I disagreed. They filed their motion. When I got the time to look at it, I read through it, and Mr. Morris and I had a conversation, and we decided, you know what, we don't need them, we'll pull them out. Let's just do away with this issue. It's not worth the time to deal with it.

I'm sorry they had to file their motion. But, you know, I

couldn't drop everything at that moment to look through. And again, the reason that he gave was hearsay. So, you know, it's not gamesmanship. It was just, look, you know, when we got down to looking at it, when I looked at it, I decided it wasn't worth the effort and the hassle, and we agreed to pull them down and withdraw them. And that's why I filed the amended motion.

As far as the current appendix, Your Honor, we're just making a record. You know, we're trying to get this thing reviewed. We're making sure the Court is aware of all the grounds and having considered all the grounds and all the actions that we think support our motion. We're giving the Court the opportunity to look at it, and then just enter the order without that language and we'll deal with the mandamus.

Again, the issue is ultimately going to be reviewed. We're trying to get it reviewed. And you're right, you know, we don't have to, you know, you didn't have to have a hearing on the first deal, you don't have to have a hearing on this one.

THE COURT: Okay.

MR. POMERANTZ: Your Honor, this is -- this is just one more match in furtherance of Mr. Dondero's stated desire, as you've heard many times, to burn the place down. We would have hoped, and I guess it would have been naïve to hope, as I know Your Honor has hoped throughout the case, that at some

point in time the Dondero side would stop blaming Your Honor, blaming Mr. Seery, blaming the estate, and actually look at what he can do to put an end to this. Pay his notes, stop raising frivolous claims, so everyone can go on with his life. That's what the estate wanted to do and wants to do. That's what Mr. Seery wants to do. Unfortunately, Mr. Dondero doesn't seem capable of it, and this is just one more match on the flames. And Mr. Lang, doing his job, following his client's wishes, is just one more player in that. But it is extremely frustrating.

THE COURT: Okay. All right. Here's what I'm going to do. First, I'm simply going to deny the pending amended motion for final appealable order and supplement to motion to recuse, as it is procedurally improper as framed. Okay? It was kind of like a Rule 54 motion. It was kind of like a new motion to recuse. It was kind of like a Rule 59 motion for, you know, new -- to put in new evidence, have a new trial, but way untimely for that.

So I'm just denying the motion that's before me. Okay? And by doing that, I mean, I guess, I guess the stipulation and order that's before me on the motion to strike and the motion to compel, I guess I'll -- it's in my queue, I'll sign it, unless someone tells me there is a reason it doesn't make sense to sign it.

But I'm denying the motion before me. But just so it's

clear, Mr. Lang, it's without prejudice to you either filing a simple Rule 54 motion, without attachments, that simply asks me to strike the last sentence of my original order denying your motion to recuse from March 2021.

If you give me a simple Rule 54-based motion simply asking me to strike that sentence, I'll sign it. Without a waiting period. Without a hearing. And I assume Mr. Pomerantz doesn't have a problem with that.

MR. POMERANTZ: That is correct, Your Honor. If all that motion asks for, we would not oppose that.

THE COURT: Okay. It's also, my ruling today denying your motion, is without prejudice to you filing a new motion to recuse, if that's what you want to do, to start this over and supplement the record.

But, you know, proceed as you will. This Court is going to do its duty. And, well, if you want to do that, you do that, but I'll have a more elaborate order if I have to rule on a new motion to recuse. Among other things, I'm going to point out to the Court above, whoever hears this, that because I think timeliness was always an issue I raised in your original order, you know, filing a motion to recuse after confirmation, 15 months after this judge was assigned to the case, and after the judge had signed 263 orders.

You know, we have case authority, as I'm sure you researched and know, that talk about timeliness. Even though

it's not baked into the statute, 28 U.S.C. Section 455, it is a factor. And so this is not *A v. B* litigation. This is a case affecting many, many people. And at some point, don't we have to wonder why a motion would be filed after 263 orders? If your clients legitimately think there was bias, I don't know why they didn't raise the issue way, way earlier in the case.

And that's why these appendices are so huge, right? It dovetails with the timeliness. Okay? Fifteen months. There's a huge, huge, huge, huge record.

So, anyway, do you have any questions, Mr. Lang?

Again, I will say it for at least the third time this morning: I'm worried about judicial resources and estate resources. Okay? And, you know, I have to worry about I'll loosely call my bosses, okay, you know, the courts that grade my papers. The District Court who hears appeals and hears petitions for writ of mandamus. The Fifth Circuit. They're going to get frustrated with me if -- well, you know, if, for example, I had ruled on this motion before me today, a clearly procedurally defective motion. And if I just willy-nilly let people put things in the record without a procedurally proper basis, it just makes more work for the Court of Appeals, right?

So it's not just about the lawyers here. It's not just about me and my staff. It's about the people who grade my

papers. If I granted your motion as it's pending here before me today, I have every reason to think, whether it's Judge Kinkeade or the Fifth Circuit, they would think, what is this judge doing? Okay? So it's just procedurally defective, what you filed. Okay? But, again, you've got the ruling. Do you have any questions?

MR. LANG: I don't.

THE COURT: We're adjourned.

THE CLERK: All rise.

(Proceedings concluded at 10:25 a.m.)

--oOo--

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 **08/31/2022**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT V

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE:	.	Case No. 19-34054-11(SGJ)
	.	
HIGHLAND CAPITAL	.	Earle Cabell Federal Building
MANAGEMENT, L.P.,	.	1100 Commerce Street
	.	Dallas, TX 75242-1496
	.	
Debtor.	.	Monday, September 12, 2022
. . . . .	.	9:40 a.m.

TRANSCRIPT OF HEARING ON MOTION TO WITHDRAW PROOF OF CLAIM #146 BY HCRE PARTNERS, LLC (3443) AND REORGANIZED DEBTOR'S (A) OBJECTION TO MOTION TO QUASH AND FOR PROTECTION [DOCKET NO. 3464] AND (B) CROSS-MOTION TO ENFORCE SUBPOENAS TO ENFORCE SUBPOENAS AND TO COMPEL A DEPOSITION (3484)

BEFORE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT CHIEF JUDGE

TELEPHONIC APPEARANCES:

For Highland Capital Management, L.P.:	Pachulski Stang Ziehl & Jones LLP BY: JOHN MORRIS, ESQ. 780 3rd Avenue, 34th Floor New York, New York 10017
For NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC:	Hoge & Gameros, L.L.P. BY: CHARLES W. GAMEROS, JR., ESQ. 6116 North Central Expressway Suite 1400 Dallas, Texas 75206
Audio Operator:	Michael F. Edmond

Proceedings recorded by electronic sound recording, transcript produced by a transcript service.

LIBERTY TRANSCRIPTS
7306 Danwood Drive
Austin, Texas 78759
E-mail: DBPATEL1180@GMAIL.COM
(847) 848-4907

we've already said the Court should allow us to withdraw the proof of claim and condition it with prejudice.

There is no other lawsuit out there. There is no other position being taken anywhere. Frankly, Your Honor, the reason why I said admit the exhibits and I question their relevance is because none of them go to actual legal prejudice. Can't show it, hasn't shown it, hasn't demonstrated it. It says they did a lot of work, gave you the greatest hits of some email, but quite frankly, Your Honor, that goes to merit, not legal prejudice. That goes to, I believe, part of their story as to what happened.

The story that matters to me is we think things were going to happen during the estate, he's right. We didn't move for them. We looked back at it and said we don't need the proof of claim anymore, we should withdraw it. That's the only thing that's happened, and that's why we're here. We don't think he's entitled to discovery as to why we withdrew the proof of claim.

It's his burden to show legal prejudice. He can show it or he can't. He hasn't.

THE COURT: Okay.

MR. GAMEROS: The estate hasn't.

THE COURT: Mr. Gameros?

MR. GAMEROS: (Indiscernible) Mr. Dondero.

THE COURT: I have a question. I mean I'm looking at

your pleading, your motion to withdraw the proof of claim, and I'm looking at this wonderful chart you have on Page 7 saying here are the standards under Bankruptcy Rule 3006, you, Court, should consider. They were articulated in the Manchester case.

And it's not merely about is there any prejudice to the estate. I mean you set forth five factors. One is "reason for dismissal." One is diligence in bringing the motion to withdraw. One is undue vexatiousness. One is the matter's progression including trial preparation. One is duplication of expense of relitigation.

This is your own authority, which I believe actually is correctly articulating the standards. It's not just about prejudice. Yes, I agree that some of the case law has zeroed in on that one in particular. But I mean you say yourself reason for dismissal is a factor the Court must consider.

MR. GAMEROS: That's correct, Your Honor. Those are the factors, and I think our analysis on them is correct.

If we go all the way to trial and the result is that our proof of claim is denied, we're in the same position we are right now. So why should the parties, the estate, and the Court go through that exercise?

THE COURT: Okay. Well, that's another issue, I think, other than the reason for dismissal. But a follow-up question to what you just said is this.

Would you agree to a condition on the withdrawal of

your proof of claim that your client agrees that Highland has a 46-point whatever it was percent interest in SE Multifamily Holdings and your client waives any right in the future to challenge that interest?

MR. GAMEROS: Your Honor, if that's what the Court wants to put in an order and I have a chance to confer with my client on it, I'm pretty sure that would be agreeable.

THE COURT: Today's the day. I'm not going to continue. I've got, you know, the whole day booked if I needed it because I wasn't sure what you all were going to want to put on.

MR. GAMEROS: Your Honor, we'd agree with that.

MR. MORRIS: Your Honor, I'm sorry to interrupt, but a waiver of any appeal, too. I just hard that if that's what you want to put in the order, that's okay. But this case has to end, and that's what we're looking for.

We're a post-confirmation estate that will not go forward with the possibility hanging over its head that it may be divested of this asset. That is what this proof of claim and this dispute is about.

And what the debtor needs in order to avoid legal prejudice is the complete elimination of any uncertainty that it owns 46.06 percent of SE Multifamily. And if HCRE is not willing to give that comfort today, we again renew our request for a direction that the three HCRE witnesses appear for

substantive depositions and we get this on the trial calendar.

MR. GAMEROS: Your Honor, we'll agree to it.

THE COURT: Well, you know what, this is such a big deal I really need a client representative to say that. It would be that --

MR. GAMEROS: I don't have one here today, but I can get you one.

THE COURT: How soon --

MR. GAMEROS: Do you want me to file a stipulation or an affidavit?

THE COURT: Pardon?

MR. GAMEROS: Do you want me to file an affidavit?

THE COURT: Well, let's be a hundred percent clear. Your client would state that with the granting of the motion to withdraw proof of claim number 146, HCRE is irrevocably waiving the right to ever challenge Highland Capital Management's 46 percent interest -- and I know it's 46-point something -- 46 percent interest in SE Multifamily Holdings, LLC and is, likewise, waiving the right to appeal or challenge the order to this effect.

MR. MORRIS: Your Honor, if I may, perhaps we can take a ten-minute recess and allow him to consult with his client and perhaps get a client representative on the phone who can make that representation?

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

can get a client rep on the WebEx?

MR. GAMEROS: I'm pretty sure I can, Your Honor.

THE COURT: All right. Well, how about we take a 15-minute recess. Does that sound a reasonable amount of time? We've got, you know, two dozen people --

MR. GAMEROS: It does, Your Honor.

THE COURT: Two dozen people on the WebEx. I don't know if maybe one is a client representative, but we'll take a 15-minute break and I'll come back. Okay.

THE CLERK: All rise.

(Recess at 10:33 a.m./Reconvened at 10:50 a.m.)

THE CLERK: All rise.

THE COURT: Please be seated.

We're back on the record in Highland.

Mr. Gameros, how did you want to proceed now?

MR. GAMEROS: Your Honor wanted me to get a representative of NexPoint Real Estate Partners to state that they agree that the estate has its 46 percent interest in the company agreement subject to the company agreement. And I've got Mr. Sauter here who has authority to speak on behalf of NexPoint Real Estate Partners.

THE COURT: All right. Well, so what is his position with HCRE?

MR. SAUTER: Your Honor, I don't have -- this is DC Sauter. I don't have an official position with HCRE, but I

have spoken with Mr. Dondero and he has authorized me to appear here today and agree to the conditions that Mr. Gameros just outlined.

THE COURT: All right. Well, it sounds like hearsay to me. I don't know -- Counsel, let me have you both respond. You know, I worry about this will fall apart the minute Mr. Dondero is instructing a lawyer, I never agreed to that. I mean I just don't know. This is highly unusual.

First --

MR. GAMEROS: Your Honor, if I might?

THE COURT: Please.

MR. GAMEROS: Mr. Sauter is an officer of the Court. He works, you know, with Mr. Dondero at his business at NexPoint; certainly an authorized agent on behalf of NexPoint Real Estate Partners to make this agreement on behalf of NexPoint Real Estate Partners.

To the extent that the condition that you originally described as a conclusory matter, in other words, how to end the withdrawal, we already agreed to that, that we also can agree on the record to waive any appeal. Mr. Sauter is authorized to agree to that, as well.

So I think as an agent and a lawyer on behalf of NexPoint Real Estate Partners, he's fully able to do that.

THE COURT: How do I know he's able to do that?

And, by the way, if Mr. Dondero is in I guess the

last 15 minutes given him authority to testify before the Court, why couldn't Dondero just get on the WebEx himself?

MR. SAUTER: Your Honor, I think he felt more comfortable with me being a lawyer agreeing to those terms so that he wouldn't misstate something. He has been listening. I believe he's still on, although I'm not certain.

THE COURT: Mr. Morris, do you want to respond? I mean I'm not sure, frankly, I care what you say, no offense. I don't think I have a person with clear authority here.

MR. MORRIS: I'll just be quick and say I agree.

THE COURT: Okay. Mr. Gameros --

MR. GAMEROS: As an attorney for NexPoint Real Estate Partners, I have the authority to make that agreement on the record and it be binding. Mr. Sauter is confirming that authority having spoken with Mr. Dondero about it.

I think that the Court is fully --

THE COURT: Mr. Gameros --

MR. GAMEROS: -- capable of doing that --

THE COURT: Mr. Gameros, come on. You know this is the client's decision to make. Okay. I don't have a client representative. I don't have an officer or controlling equityholder as evidence here of --

MR. MORRIS: Mr. Dondero --

THE COURT: -- the willingness to make the agreement. Pardon?

MR. MORRIS: Can Mr. Dondero make the representation on the record to the Court that he is authorizing Mr. Sauter to waive any claim that HCRE has to Highland's 46.06 percent interest in SE Multifamily along with any appeal? This is just step one. But if Mr. Dondero was on the phone, let him speak up and make it crystal clear that he is delegating the full authority to Mr. Sauter to negotiate and enter into this consensual order on behalf of HCRE.

THE COURT: All right. Mr. Gameros, do you want to give your client authority to speak up? Your client representative, someone who's actually an officer or a controller or equity owner?

MR. GAMEROS: Your Honor, if Mr. Dondero can do that, that would be great. I don't know if he's in a place where he can do that.

THE COURT: All right. Mr. Dondero, if you can hear us, are you willing to give some quick testimony in that regard?

(No audible response)

MR. DONDERO: I can't see the box --

UNIDENTIFIED SPEAKER: Surprising that -- surprising he was on the phone before, but now he's not after delegating. Just I'm not --

MR. SAUTER: Your Honor, he's on the phone. I'm just -- if you will give me a minute, I got to run around the corner

and try to make sure he knows how to unmute himself.

THE COURT: Star 6. If he's on a phone, star 6 is the way to unmute himself. But I want to see video, too.

THE OPERATOR: There we go. Try again.

MR. DONDERO: Hello?

THE COURT: All right.

MR. DONDERO: Hello?

THE COURT: Mr. Dondero, is that you?

MR. DONDERO: It's me. I've been on the entire time.

THE COURT: All right. Can you turn your video on, please?

MR. DONDERO: I am on my cell phone.

THE COURT: Okay. Well, so I guess you just called in on your cell phone, you don't have a WebEx connection on your cell phone?

MR. DONDERO: I don't have a WebEx.

THE COURT: Okay. Well -- yeah, it sounded like you were in the same office as Mr. Sauter. Is that -- did I misunderstand?

MR. DONDERO: We work in the same office. I'm in my car. I just stepped out of my car.

THE COURT: All right. Well, this is not ideal, you know, without us seeing you. But I'll go ahead and swear you in. All right. Can you hear me okay? I need to swear you in.

MR. DONDERO: Yes.

THE COURT: All right.

JAMES DONDERO, HCRE'S WITNESS, SWORN

THE COURT: All right.

Mr. Gameros, do you want to ask him the questions we need to hear answers on, please?

MR. GAMEROS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. GAMEROS:

Q Mr. Dondero, on behalf of HCRE, do you agree as a condition for withdrawing the proof of claim that HCRE will not challenge the estate's ownership or equity interest in SE Multifamily subject to the company agreement?

A Yes.

Q Do you agree that you will not appeal and that, therefore, HCRE is waiving any appeal right to that determination as a condition of withdrawing the proof of claim?

A Yes.

MR. GAMEROS: Those are the questions for Mr. Dondero.

MR. MORRIS: Your Honor, if I may?

THE COURT: Mr. Morris, you may.

MR. MORRIS: I'm very uncomfortable. I'm very uncomfortable with the inclusion of the language subject to the company agreement. It sounds like a very conditional waiver. We need an irrevocable unconditional admission by HCRE that

Highland owns 46.06 percent of SE Multifamily, period, full stop. If they want to keep conditions in there and make it conditional and make it subject to other things, let's please deny the motion and proceed to trial.

THE COURT: All right. Well, Mr. --

MR. GAMEROS: The equity that they own is part of the company agreement. It's not modifying the company agreement by saying.

THE COURT: Well --

MR. MORRIS: Our ownership is not subject to the agreement. We either have an ownership interest or we don't. Our rights and obligations as a member of SE Multifamily are subject to the agreement, but our ownership interest is not. And that's the ambiguity that we need to remove.

THE COURT: Okay. Well, Mr. Gameros, do you want to rephrase the question or are you not willing to make the agreement as specific as Mr. Morris says he needs it?

MR. GAMEROS: That's what I'm -- I guess I don't understand what his complaint is. If the estate owns 46 percent of the equity of SE Multifamily, it owns that subject to the company agreement. It's not a separate ownership interest. So I don't know what the problem is.

THE COURT: Okay. Let me try to phrase it as I understand it.

What I understand has been asserted in the proof of

claim is that what was set forth in the agreement was a mistake, okay. A mistake. And it sounds like you're using language that says we'll agree the agreement, you know, they have a 46 percent interest pursuant to the agreement. But that doesn't change -- that does not really zero in on the argument made in the proof of claim that there was a mistake in the agreement, right?

So you'd have to go broader to completely resolve the issues raised in your proof of claim and say we agree, Highland has a 46.06 interest in SE Multifamily and we agree that is correct and we waive any right to challenge it in the future and we waive any right to appeal this order.

MR. GAMEROS: And, Your Honor, if that's the condition, I guess my concern is that the 46 percent is still part of the company agreement. We agree not to challenge it on the basis of anything asserted in the proof of claim, that being mistake, lack of consideration, or failure of consideration. Their 46 percent is their ownership interest in SE Multifamily and HCRE won't challenge that.

Is that sufficient?

THE COURT: Well, I need to hear from your client. I mean he needs to be asked every which way from Sunday whether he is waiving the right to challenge Highland's 46.06 interest from now until eternity, okay. That's basically, you know, we either have that agreement or we'll just have a trial.

CONTINUED DIRECT EXAMINATION

BY MR. GAMEROS:

Q Mr. Dondero, do you agree that NexPoint Real Estate Partners will not challenge in any way the estate's interest in SE Multifamily, its 46-point whatever percent interest that is?

A I think the nuance is that agreement is okay in current as of today. But it's part of an operating agreement, and that percentage ownership can change due to capital calls and other things. And it could change over time. It's never in a partnership agreement fixed into perpetuity. And so no businessman can agree to that.

If the Court wants it fixed into perpetuity, that would be very odd.

MR. MORRIS: Can we go to trial, Your Honor? Can we just deny the motion and go to trial? Let me have my depositions and go to trial. This is -- if Mr. Dondero wants to take that position, he's welcome to do that. But I'm entitled to finality, and I'd like to get there.

THE COURT: All right. Well, Mr. Gameros, anything else you want to ask your client that you think might be helpful?

BY MR. GAMEROS:

Q Mr. Dondero, you desire to withdraw the proof of claim. Correct?

A Yes.

Q And you agree to an order denying the proof of claim with prejudice. Correct?

A Yes.

Q And can you agree that HCRE will not challenge the equity ownership of its member in SE Multifamily of the estate?

A Yes.

MR. GAMEROS: Your Honor, I think there it is.

THE COURT: Mr. Morris, do you have any --

MR. GAMEROS: He agrees.

THE COURT: -- do you have any follow-up questions --

MR. MORRIS: The waiver of the right to --

THE COURT: -- Mr. Dondero?

MR. MORRIS: The waiver of the right to any appeal whatsoever. And I do have -- you know, there are the other conditions that we mentioned earlier, right? Either they have to also agree that Mr. Seery's deposition transcript shall never be used for any purpose at any time or they need to level the playing field and submit their witnesses to examination.

The playing field needs to be level here. Either if they want to use that deposition transcript for some purpose, I have no problem with that. Just let me take my depositions. If they don't want to submit their witnesses to depositions, then they also have to agree that that transcript will never be used for any other purpose. It's as if this proof of claim has never been filed, right, for that purpose, right. Because

that's just not fair. That's the legal prejudice.

How do you take my client's deposition on Wednesday and file this motion on Friday knowing your client's supposed to be deposed on Tuesday? Level the playing field. That's conditional number two.

And condition number three, frankly, Your Honor, this proof of claim was fraudulent. I mean my client has been damaged. My client has spent an enormous amount of money on this, and I'd like them to agree to if not make us whole, you know, do something because it's wrong. It's just wrong that Mr. Dondero files proofs of claim under penalty of perjury that have absolutely no basis in fact.

It's distressing. I'd like those two last issues addressed, as well.

MR. GAMEROS: Your Honor, in terms of the Court's questions in terms of finality with respect to the membership interest in SE Multifamily, Mr. Dondero agrees with the Court. He's already said that he won't waive -- that he waives, rather -- I'm sorry, let me start again.

He has said very clearly that he has waived appeal of this order allowing the withdrawal of the proof of claim with the conditions that you asked for. I think you should grant the motion to withdraw and we can put an end to all of this.

THE COURT: Okay.

MR. MORRIS: Here's the thing, Your Honor. We know

but it's also a big deal because we want to make sure only parties with legitimate claims are given a seat at the table, so to speak, in bankruptcy as far as, you know, their right to a distribution, their right to be heard in a case.

So, you know, that's the reason for the rule. We don't see it come into play very often, but it's there because we want to make sure that we protect the integrity of the bankruptcy process. And if someone files a proof of claim and it's pending and, you know, activity happens in the bankruptcy case as a result of it, that we don't just let a party say never mind.

So the Manchester case, which you both cited in your pleadings, has set forth fact-intensive factors -- fact-intensive inquiry. And, again, I'm just looking at HCRE's motion, Page 7. There was a chart and it sets forth the Manchester factors. Factor number one, diligence in bringing the motion to withdraw the proof of claim.

In Mr. Gameros' chart, his response to that factor is that HCRE brought its motion to withdraw immediately after conferring with debtor's counsel. I don't even know what that means, okay. But what I do know is in looking at diligence of bringing the motion, the proof of claim was filed April 8th, 2020. It was objected to, the proof of claim, July 30th, 2020. And then on August 12th, 2022, this motion to withdraw the proof of claim was filed.

So two years and one month after the objection was filed to the proof of claim HCRE withdraws it. So that doesn't seem very diligent. It's not diligent at all, to be honest.

Your second factor, you cited, Mr. Gameros, undue vexatiousness, and you say HCRE has not been vexatious in pursuing its proof of claim. And outside the motion to disqualify previous counsel, which is not substantive, everything in the matter has proceeded by agreement and there have been no hearings set or held.

Okay. Well, debtor has represented in its pleadings and today through counsel on the record that it has spent hundreds of thousands of dollars litigating this. It has mentioned that four depositions have been taken. It was Mr. Mark Patrick. It was the tax accounting firm. We had the B -- the entity -- BH Equities, LLC, their representative. And then Mr. Seery. So four depositions, and I'm told a lot of written discovery.

And on the day before the -- well, the day after, day or two after the Seery deposition, the motion to withdraw the proof of claim was filed after 5:00 in the evening on a Friday, August 12th, and I guess a couple of business days before the depositions were to occur of Mr. Dondero and the fellow, Mr. McGraner, and I feel like there was one other deposition. I'm losing track of those.

But --

THE CLERK: The 30(b)(6).

THE COURT: Oh, the 30(b)(6). The 30(b)(6) representative.

So on top of all of that, you know, Highland argues there was just simply no good-faith basis for the proof of claim. Proof of claim asserted the membership interest, Highland's 46.06 interest, set forth in the Multifamily LLC agreement were the result of mistake.

Mr. Dondero signed the agreement for both parties, HCRE and Highland. And then now the motion to withdraw says something to the effect of the anticipated issues have not materialized. So anyway, the undue vexatiousness factor I think weighs -- because of these factors I've mentioned, weighs in favor of there has been undue vexatiousness.

Factor number three, according to HCRE's motion to withdraw the proof of claim, is matter's progression including trial preparation. Again, four depositions, thousands of pages of written discovery. We were days away from the last depositions occurring, those of HCRE's potential witnesses and we have trials set. We have a trial set in November. So that factor, again, seems to weigh heavily in favor of Highland's objection here.

Duplication of expense of relitigation, here's why we got Mr. Dondero on the phone or wanted to have a witness with authority. Highland is saying we are concerned about

relitigation of this ownership interest issue. And as part of its argument, Highland has said we've got claims, we've got our own claims for breach of agreement and different things that are going to cause us to have to drill down on terms of the LLC agreement.

And we can't -- we don't want to face exposure on this issue of, well, you don't have the ownership interest or the rights you say you do, Highland. So, you know, if we could get ironclad language here of, you know, we waive the right, we agree that Highland has the 46.06 interest and we waive the right to challenge that, then I don't think we'd have to worry about relitigation of the issues in the proof of claim. But it feels like we had a little bit of reluctance to say it as forcefully as we would need to have it said to avoid relitigation.

Reason for dismissal, I don't know. I don't know what the reason for dismissal. Again, to quote HCRE's pleading on Page 7, the reason for dismissal is, "The operation of the company" -- I think that means SE Multifamily -- "during the case and the anticipated issues therewith have not materialized and NREP no longer desires to proceed in the matters raised in the proof of claim."

I mean that's just not in sync with the theory espoused in the proof of claim that we think there was a mistake made in the LLC agreement. So, again, looking at these

legal factors, I do not think that the correct result is to grant the motion to withdraw the proof of claim under Rule 3006 under the Manchester factors. I will throw in that I think there is potential for prejudice here of the debtor.

I mean not even considering that hundreds of thousands of dollars have been spent over two-plus years on this issue, you know, I remember very well the disqualifying motion. And I said Wick Phillips should be disqualified. I didn't shift fees because I just wasn't sure at the time that, frankly, HCRE should be imposed with the fees attributable to its lawyers, not recognizing the conflict of interest when they saw one. It was just a little fuzzy in my mind.

But I'm just letting you know that now that we are here many years later, many months later and we have all the sudden, okay, never mind, this is just a situation where I have some regrets I didn't shift fees, to be honest. But -- so the motion is denied. The depositions shall go forward. I'm not sure, you know, if the dates that have been proposed are still workable, but if someone wants to speak up now about those deposition dates to avoid an emergency hearing, I'm willing to hear that.

I think what I heard was, well, I don't know what -- have you talked about dates at all? Probably not, Mr. Morris, in light of this hearing today.

MR. MORRIS: We have not, Your Honor. But I do think

that Counsel and I can work that out. I'm not available until the week of the 26th. So it won't be early that week but sometime between let's say the 28th of September and the 7th of October, I'll be prepared to take these depositions. And I would respectfully request, and we can work with Ms. Ellison to try to find a trial date sometime the last week of October, first week of November so we can get this finished.

THE COURT: Okay. Did I dream up that there was a trial set already in November?

MR. MORRIS: You know what?

You know what, let's just keep that date, Your Honor. Let's just keep that date.

THE COURT: All right. Traci, are you still on the line? Can you confirm my memory? I thought we had a two-day trial set aside for this in November.

MS. ELLISON: Is this on the merits of HCRE's claims, Judge Jernigan? I have a note holding November 1 and 2.

THE COURT: Okay.

MR. MORRIS: Yeah.

THE COURT: So we'll go ahead and mark that down.

Now the last -- so you'll work on an a mutually agreeable date for these three remaining depositions sometime, you know, late September, early October. And I trust you will --

MR. MORRIS: Yeah. I would respectfully request that

Counsel just propose dates for the depositions. I'll wait to hear from him. But I think -- I'm representing to the Court that any time between September 28th and let's just give it two full weeks, October 12th. That's plenty of time in advance of the trial.

THE COURT: All right. Mr. Gameros, anything you want to add on that?

MR. GAMEROS: No, Your Honor. I'm sure we can work with Mr. Morris to get those scheduled.

THE COURT: All right. And here's actually the last thing I wanted to say.

You know, I had thought about, you know, waiting 24 hours to give you a ruling on this motion to withdraw the proof of claim and directing you all to kind of talk and see if maybe you could work out language, you know, without the pressure of the Court hovering over you that could make both of your clients satisfied.

I still encourage you to do that, but I'm going to pick on our U.S. Trustee. I see she's observing today, and I'm not going to ask you to say anything, Ms. Lambert. But if you all do agree, if you all in the next, you know, 24 hours come to some sort of agreement, I don't mean to be alarming, but I want it run by the U.S. Trustee because, you know, I've heard some things that have troubled me about the, you know, lack of good faith with regard to the proof of claim and, you know,

alleged gamesmanship.

And, you know, I talked earlier about this goes to the integrity of the system, you know, filing a proof of claim under penalty of perjury. Anyway, I'm feeling a little bit uncomfortable about signing off on an agreed order where there may be quid pro quos that went back and forth in connection with withdrawing a proof of claim. I mean at some point -- well, that's why we have scrutiny of these things under Rule 3006, right?

Again, there are integrity issues. And so I just -- you know, if you were to work out language, I want you to run it by Ms. Lambert and I want to hear that either she was okay with it or she wasn't okay with it or maybe she declines to comment. You know, I'm not going to tell her how to do her job, but I feel like that needs to happen, okay?

It's just something uncomfortable going on in my brain about, you know, again a proof of claim being on file two, almost two and a half years and then, you know, okay, never mind, okay, I agree to never mind as long as you agree to XYZ.

And I have no idea what's in the Seery transcript. I don't have it before me. But, you know, I don't even know what that's all about. I don't even know if I care what that's all about. I just know if there are quid pro quos I feel like, you know, maybe I need to have the U.S. Trustee, you know, not per

se signing off on any agreed order but at least kind of looking at it and telling me either U.S. Trustee's fine with it, U.S. Trustee is not fine with it, or U.S. Trustee declines to comment. Just I know that I've gone through the drill, okay?

So just letting you know I am still, you know, all open to an agreed resolution of this, okay. But we're going forward as if you can't get there, okay?

All right. I'll look for -- what am I going to look for? I'm going to look for an order denying the motion to withdraw proof of claim. I'm going to look for an order granting the -- well, an order resolving the objection to motion to quash and cross-motion for subpoenas saying that these three witnesses are going to appear at a mutually agreeable time either late September or early October.

All right. We're adjourned.

THE CLERK: All rise.

MR. MORRIS: Thank you, Your Honor.

(Proceedings concluded at 11:35 a.m.)

* * * * *

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

I, DIPTI PATEL, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Dipti Patel

DIPTI PATEL, CET-997

LIBERTY TRANSCRIPTS DATE: September 13, 2022

EXHIBIT W

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
	Wednesday, August 4, 2021
	9:30 a.m. Docket
Debtor.	
	- STATUS CONFERENCE RE: APPLICATION FOR ADMINISTRATIVE EXPENSES (1888)
	- MOTION FOR ORDER AUTHORIZING SALE OF CERTAIN PROPERTY (2535)
	- MOTION FOR ORDER AUTHORIZING SALE OF CERTAIN LIMITED PARTNERSHIP INTERESTS (2537)

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

WEBEX APPEARANCES:

For the Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtor:	John A. Morris Gregory V. Demo PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the NexBank Entities:	Lauren K. Drawhorn WICK PHILLIPS 3131 McKinney Avenue, Suite 100 Dallas, TX 75204 (214) 692-6200

motions.

THE COURT: All right. Anything else before I give a ruling?

All right. Well, the Court, of course, has jurisdiction over these two motions. I'll call them the Maple Avenue Motion and the PetroCap III Motion. The Court will specifically note for the record that notice has been proper under the Rules and sufficient. I'd note that July 8th these motions were filed.

The Court will also note for the record that the only objections that were lodged to these motions were withdrawn during the hearing before the evidence, as were separate bids that had been submitted. Thus, there are no pending objections, no pending bids at this juncture.

363(b) of the Bankruptcy Code applies to these proposed transactions.

With regard to Maple Holdings, this is, of course, technically a motion under 363(b) for approval for the Debtor to exercise its management rights in Maple Avenue Holdings, LLC to cause Maple Avenue Holdings, LLC to sell the real property at 2817 Maple Avenue, Dallas, Texas. So it's a usage, I guess you could say, of property outside the ordinary course of business.

And then with regard to the PetroCap III transaction, once again, 363(b) is the governing authority. The transaction is

either in the nature of a sale or usage in the form of a forfeiture of certain of the limited partnership interests and other rights in the agreements described in the motion.

The Court finds that the evidence very well demonstrated a sound business justification for both of these transactions and a reasonable business judgment has been exercised and these transactions are in the best interests of the estate.

First, with regard to the Maple Avenue transaction, the evidence showed that the purchase price, $9.75 million, is certainly within the range of market values that expert brokers and the Debtor's informal marketing process revealed. The Court believes that the Debtor and its professionals marketed the property appropriately, and this appears to be a sale process that has been undertaken in good faith without conclusion -- without collusion, I should say. The purchaser, Stonelake Capital Holdings, LP, is not an insider, and again appears to be a participant in an arm's length, good faith, and fair transaction.

The Court is not in the least troubled that we didn't have an auction. While auctions in the universe of Chapter 11 are a very common protocol, there's nothing in the Bankruptcy Code or Bankruptcy Rules that requires a public auction. And when we're talking about real estate, it's very common not to have an auction.

But in any event, the Court reiterates that the marketing

of this property and the sale process appear to be in all ways adequate and in good faith and have yielded fair value for the property. In any event, this is the highest and best offer the Debtor received.

So the Court approves the Maple Avenue Holdings, LLC transaction. The Court reserves the right to supplement this ruling in a written form of order.

Turning now specifically to PetroCap III, the Court likewise believes that there has been a reasonable effort on the part of the Debtor to maximize the value of these interests and rights. The Court believes that this transaction is the highest and best transaction that can be achieved by the estate. The Court believes this was arm's length and that all parties, including PetroCap, have acted in good faith. And so I should add both of these transactions are going to be free and clear of any interests, with those interests to attach to the proceeds.

The Court once again reserves the right to supplement in a more fulsome written ruling, but the Court hereby approves the PetroCap transaction.

To the extent these parties have asked for waiver of the 14 days under 6004, I can't remember if that request was made on both transactions or just the real estate transaction. Is that a request for both transactions, Mr. --

MR. POMERANTZ: Your Honor, I'm not sure it's even a

request for the Maple, because I think the closing is not expected to occur until after that 14-day period.

THE COURT: Okay.

MR. POMERANTZ: With respect to PetroCap, I'll ask Mr. Demo. Since he was going to present the specific facts, he may know the answer to whether we asked for the 14-day stay waiver there.

MR. DEMO: We did ask, Your Honor. Again, this is Greg Demo from Pachulski Stand Ziehl & Jones. So if we could have the 14-day waiver, that would be wonderful.

THE COURT: All right. Well, given that we have no objection and so no concern for an appeal, and otherwise given the circumstances of this transaction, I think that it is a reasonable request -- I see it right now -- to waive 6004(h). And so that request is granted. All right.

MR. DEMO: Thank you.

THE COURT: Well, is there any more business before we adjourn?

MR. POMERANTZ: Nothing from the Debtor, Your Honor.

THE COURT: All right. Well, I thank you all. You know, I'm --

MR. POMERANTZ: Your Honor, I just may point out that we do expect to be going effective either the end of this week or sometime beginning to middle of next week. So there'll obviously be a watershed event in the case that has been --

pretty much gone with these contempt motions.

And, again, read my last paragraph. I can understand getting bored reading that thing, but please read the last paragraph to know that it's going to get worse if we have another one of these hearings and I do find contempt.

So, all right. Well, we will see you all I guess on the 19th is my next -- I think that's where we have our next hearing.

(Proceedings concluded at 11:31 a.m.)

--oOo--

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 **08/05/2021**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT 9

The following constitutes the ruling of the court and has the force and effect therein described.

Signed March 4, 2024

United States Bankruptcy Judge

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

IN RE:	§	
	§	**Chapter 11**
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	
	§	**Case No. 19-34054-sgj-11**
Reorganized Debtor	§	

MEMORANDUM OPINION AND ORDER GRANTING HIGHLAND CAPITAL MANAGEMENT, L.P.'S MOTION FOR (A) BAD FAITH FINDING AND (B) ATTORNEYS' FEES AGAINST NEXPOINT REAL ESTATE PARTNERS LLC (F/K/A HCRE PARTNERS, LLC) IN CONNECTION WITH PROOF OF CLAIM # 146

I. INTRODUCTION

Before this court is a sanctions motion[1] filed by Highland Capital Management, L.P. ("Highland," the "Debtor," or the "Reorganized Debtor"). [2] The motion seeks sanctions against

[1] *Highland Capital Management, L.P.'s Motion for (A) Bad Faith Finding and (B) Attorneys' Fees against NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC) in connection with Proof of Claim 146* ("Sanctions Motion"). Dkt. No. 3851.

[2] Highland is a reorganized debtor under the confirmed *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* (the "Plan"). Dkt. No. 1808. *See Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief* ("Confirmation Order"). Dkt. No. 1943.

1934054240305000000000001

NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC ("NexPoint/HCRE") for its filing, prosecution, and then abrupt attempt to withdraw a meritless proof of claim (after almost three years of protracted litigation).

NexPoint/HCRE filed the subject proof of claim, #146 on the claims register ("Proof of Claim"), on April 8, 2020.[3] The Proof of Claim was signed electronically by James D. Dondero ("Dondero") and was prepared and filed by a law firm that was representing him personally at that time.[4] The Proof of Claim was not in a liquidated amount and was somewhat ambiguous. It stated in an Exhibit A thereto, that NexPoint/HCRE, which was a limited partner, along with Highland, in a limited liability company called SE Multifamily Holdings, LLC ("SE Multifamily")—an entity which owned valuable real estate—"may be entitled to distributions out of SE Multifamily, but such distributions have not been made because of the actions or inactions of the Debtor" and added that Highland's equity interest "may be the property of Claimant. Accordingly, Claimant may have a claim against the Debtor." NexPoint/HCRE stated that it would update the Proof of Claim to provide the exact amount of it "in the next ninety days" but never did.

Highland objected to the Proof of Claim. Thereafter, NexPoint/HCRE (while still not providing any liquidated amount of its Proof of Claim) refined its position therein to argue that the organizational documents relating to SE Multifamily improperly allocated the ownership percentages of the equity members, due to mutual mistake, lack of consideration, and/or failure of consideration. NexPoint/HCRE essentially sought to reform, rescind, and/or modify the SE Multifamily limited liability company agreement (and possibly other documentation) to give Highland less ownership (or no ownership interest) in SE Multifamily and, accordingly,

[3] Claim No. 146.

[4] Bonds Ellis Eppich Schafer Jones LLP.

NexPoint/HCRE would have a larger ownership interest in SE Multifamily. Next, there occurred years of litigation between the parties, including: (a) a skirmish over Highland's motion to disqualify NexPoint/HCRE's newest counsel (*i.e.,* a law firm that had represented both Highland and NexPoint/HCRE in transactions involving SE Multifamily), which was ultimately granted, and (b) an eleventh-hour attempt by NexPoint/HCRE to withdraw its Proof of Claim (by its newest law firm—this one #3 regarding the Proof of Claim), on the eve of depositions of its principals, including Dondero, and just prior to a trial on the merits. Highland objected to the withdrawal. The court held a hearing on that, as required by Bankruptcy Rule 3006. The court declined to allow withdrawal of the Proof of Claim, when the parties could not stipulate to an agreed form of order (*i.e.,* NexPoint/HCRE was unwilling to withdraw the Proof of Claim ***with prejudice*** to asserting its claims again in any future litigation in any forum).

Painfully, after all this, an evidentiary hearing was held on the merits of the Proof of Claim ("Trial") on November 1, 2022. During the Trial, Highland made an oral motion for a bad faith finding and assessment of attorneys' fees against NexPoint/HCRE in connection with its filing and prosecution of the Proof of Claim ("Oral Sanctions Motion"), which this court took under advisement, along with the consideration of the Proof of Claim as a whole.

On April 28, 2023, this court entered a 39-page memorandum opinion and order[5] sustaining Highland's objection to NexPoint/HCRE's Proof of Claim, but denying Highland's Oral Sanctions Motion, without prejudice, ***as procedurally deficient in that it was made orally and for the first time during the Trial.*** Thus, the Oral Sanctions Motion failed to provide NexPoint/HCRE sufficient notice and an opportunity to respond and, therefore, did not satisfy concerns of due process.

[5] *See Memorandum Opinion and Order Sustaining Debtor's Objection to, and Disallowing, Proof of Claim Number 146 [Dkt. No. 906]* ("Proof of Claim Disallowance Order"). Dkt. No. 3767.

On June 16, 2023, Highland filed the instant Sanctions Motion, setting forth the legal and factual bases for the relief sought. The Sanctions Motion specifically seeks a finding of bad faith against NexPoint/HCRE and reimbursement of Highland's attorneys' fees and costs, as a sanction for NexPoint/HCRE's filing and prosecution of the Proof of Claim.

After due notice to NexPoint/HCRE, and a hearing held January 24, 2024 on the Sanctions Motion ("Sanctions Motion Hearing"), and after consideration of the pleadings filed, evidence in the record, and arguments of counsel, the court finds, for the reasons detailed in the findings of fact and conclusions of law below,[6] that NexPoint/HCRE acted in bad faith and willfully abused the judicial process in filing, prosecuting, and then pursuing an eleventh-hour withdrawal of its Proof of Claim. Accordingly, NexPoint/HCRE will be required, as a sanction, to reimburse Highland's attorneys' fees and costs (totaling **$825,940.55)** incurred in connection with its objection to the Proof of Claim.

II. JURISDICTION

This court has jurisdiction and authority to determine and enter a final order in this matter, pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2)(A), (B), and (O) and 1334.[7]

III. BACKGROUND, PROCEDURAL HISTORY, AND FINDINGS OF FACT

A. Incorporation Herein of Proof of Claim Disallowance Order

As noted above, this court, on April 28, 2023, issued its 39-page Proof of Claim Disallowance Order, sustaining Highland's objection to NexPoint/HCRE's Proof of Claim

[6] To the extent that any of the findings of fact should be construed as a conclusion of law, it shall be construed as such. To the extent that any of the conclusions of law should be construed as a finding of fact, it shall be construed as such.

[7] The Fifth Circuit recently confirmed the jurisdiction and authority of bankruptcy courts to issue sanctions orders in connection with bankruptcy cases and proceedings over which they exercise jurisdiction, because they are in the nature of ***civil contempt*** orders—which are considered "part of the underlying case" – "because the bankruptcy court had jurisdiction over the [ ] bankruptcy case, it had jurisdiction to enter the sanctions order, too." *Kreit v. Quinn (In re Cleveland Imaging and Surgical Hospital, L.L.C.)*, 26 F.4th 285, 294 (5th Cir. 2022) (cleaned up).

following the Trial on same. The Proof of Claim Disallowance Order sets forth extensive procedural history, findings of fact, and conclusions of law pertaining to NexPoint/HCRE's filing and prosecution of its Proof of Claim, which Highland alleges in the instant Sanctions Motion was conducted in bad faith. NexPoint/HCRE did not appeal the Proof of Claim Disallowance Order. Thus, it is a final and non-appealable order.[8] The court hereby incorporates by reference the Proof of Claim Disallowance Order (and all of the findings and conclusions therein), as if set forth verbatim herein.[9]

B. Highland Files Sanctions Motion

On June 16, 2023, Highland filed the instant Sanctions Motion. It was supported with a Declaration of John A. Morris in support of the Sanctions Motion ("Morris Declaration")[10] and 431 pages of attached exhibits as set forth in the following table:

Exhibit A	NexPoint/HCRE's Proof of Claim[11]
Exhibit B	Highland's Objection to NexPoint/HCRE's Proof of Claim[12]
Exhibit C	NexPoint/HCRE's Response to Objection to Claim[13]

[8] The Proof of Claim Disallowance Order is one of the few bankruptcy court orders issued in this bankruptcy case that was not appealed by Dondero or a Dondero-controlled entity. Although the court has not counted the exact number of appeals filed by Dondero and/or Dondero-controlled entities in this bankruptcy case and related proceedings, this court takes judicial notice of information contained in a vexatious litigant motion filed by Highland in the district court (before Judge Brantley Starr), reflecting that Dondero and his controlled entities have "filed over 35 total appeals." *See Highland Capital Management, L.P.'s Reply to Objections to Motion to Deem the Dondero Entities Vexatious Litigants and for Related Relief*, 12, at ¶ 24, filed on February 9, 2024. Dkt. No. 189 (NDTX Case No. 3:21-cv-00881-X).

[9] The Proof of Claim Disallowance Order was attached as Exhibit D to the Declaration of John A. Morris, Dkt. No. 3852, which was filed by Highland in connection with, and in support of, the relief requested in the Sanctions Motion.

[10] Dkt. No. 3852.

[11] Claim No. 146, filed April 8, 2020.

[12] *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* ("Objection to Claim"), filed July 30, 2020. Dkt. No. 906.

[13] *NexPoint Real Estate Partners LLC's Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* ("Response to Objection to Claim"), filed October 19, 2020. Dkt. No. 1212.

Exhibit D	Proof of Claim Disallowance Order
Exhibit E	Transcript of November 1, 2022 Trial (on NexPoint/HCRE's Proof of Claim)
Exhibit F	Attorneys' Fees of Pachulski Stang Ziehl & Jones LLP ("PSZJ") for the period of August 1, 2021 through December 31, 2022 incurred in connection with the litigation on the NexPoint/HCRE Proof of Claim
Exhibit G	Invoices for court reporting services provided in connection with depositions taken and defended during the course of the Proof of Claim litigation
Exhibit H	Invoice for services rendered by David Agler, who provided specialized tax advice concerning SE Multifamily and other matters related to the Proof of Claim
Exhibit I	Summary of Fees and Expenses Incurred by Highland in Connection with NexPoint/HCRE's Proof of Claim

The Sanctions Motion (unlike the Oral Sanctions Motion made during the Trial) provided NexPoint/HCRE with due and appropriate notice of the legal and factual bases for Highland's request for a bad faith finding and reimbursement of attorneys' fees and costs incurred by it in litigating the Proof of Claim. As stated in the Sanctions Motion, the legal basis for Highland's request for reimbursement of its attorneys' fees as a sanction for NexPoint/HCRE's bad faith filing and prosecution of its Proof of Claim is the bankruptcy court's "inherent authority under section 105 of the Bankruptcy Code to issue sanctions after making a finding of bad faith."[14] Highland referred to specific documentary and testimonial evidence adduced during the Trial that it alleges supports a finding that NexPoint/HCRE filed and prosecuted its Proof of Claim in bad faith, and attached invoices evidencing its attorneys' fees and costs incurred as a direct result of this alleged bad faith.

[14] *See* Sanctions Motion, 10, ¶25.

Before NexPoint/HCRE filed its response to the Sanctions Motion, the matter was stayed on August 2, 2023, pending court-ordered global mediation.[15] The mediation ultimately proved to be unsuccessful.[16] Thereafter, NexPoint/HCRE filed its *Response to Debtor's Motion for (A) Bad Faith Finding and (B) Attorneys' Fees* ("Response")[17] on December 22, 2023. NexPoint/HCRE denies that it filed and prosecuted its Proof of Claim in bad faith and argues it should not be sanctioned at all. It further argues that, even if the filing and prosecution of the Proof of Claim are found to have been in bad faith, the amount of the fees incurred by Highland in connection with the Proof of Claim litigation is "*per se* excessive for a single proof of claim objection"[18] and "extraordinarily high given that this dispute could have been brought to a swift close many months ago"—if only NexPoint/HCRE had been allowed to withdraw its Proof of Claim in September of 2022.[19] Highland's has sought reimbursement of more than $800,000 in attorneys' fees and more than $16,000 in expenses, identified in Exhibits F through H (and summarized in Exhibit I) of the Morris Declaration as having been incurred by Highland in connection with its litigation of the Proof of Claim.

Highland filed its *Reply in Further Support of Its Motion for (A) Bad Faith Finding and (B) Attorneys' Fees against NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC) in*

[15] *See Order Granting in Part and Denying in Part Motion to Stay and to Compel Mediation*. Dkt. No. 3897. This was not the first time the bankruptcy court has ordered global mediation in the Highland case.

[16] *See Joint Notice of Mediation Report* filed on November 7, 2023. Dkt. No. 3995.

[17] Dkt. No. 3995.

[18] Response, 10, ¶34.

[19] Response, 13, ¶45. NexPoint/HCRE argues that, because it had sought to withdraw its Proof of Claim, any fees incurred by Highland after the filing of NexPoint/HCRE's motion to withdraw cannot be attributable to NexPoint/HCRE's alleged bad faith filing and prosecution of its Proof of Claim; rather, such fees were incurred by Highland as a result of Highland's decision to object to NexPoint/HCRE's withdrawal of its Proof of Claim and to proceed with the litigation, including taking depositions, and proceeding to "trial" on the merits instead of "taking a win" with NexPoint/HCRE's withdrawal of its Proof of Claim. *See* Response, 2.

Connection with Proof of Claim 146[20] on January 19, 2024, and filed an *Amended Reply in Further Support of Its Motion for (A) Bad Faith Finding and (B) Attorneys' Fees against NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC) in Connection with Proof of Claim 146* ("Reply")[21] on January 23, 2024. Highland argues that "[n]othing in the Response warrants the denial of the [Sanctions] Motion or its requested award of attorneys' fees" and that "the record makes clear" that NexPoint/HCRE and its principals "clearly and convincingly acted in bad faith by (a) knowingly filing and prosecuting a baseless Proof of Claim, . . . ([b]) seeking an unfair litigation advantage by trying to withdraw its Proof of Claim ***after*** taking Highland's depositions but ***before*** subjecting its own witnesses to questioning, and ([c]) trying at all times to preserve for another day the claims it asserted (*i.e.*, to "reform, rescind and/or modify the agreement")."[22]

The court held a hearing on the Sanctions Motion ("Hearing") on January 24, 2024, during which NexPoint/HCRE was given a full opportunity to respond to Highland's allegations of bad faith and request for sanctions.

IV. CONCLUSIONS OF LAW

A. The Sanctions Motion Satisfies Due Process Considerations

In invoking its inherent power to sanction bad faith conduct or a willful abuse of the judicial process, "[a] court must exercise caution . . . , and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." *In re Correra*, 589 B.R. 76, 125 (Bankr. N.D. Tex. 2018). As noted above, the court entered its Proof of Claim Disallowance Order on April 28, 2023, in which it sustained Highland's objection to, and disallowed, the Proof of Claim but denied, without prejudice, Highland's Oral Sanctions Motion

[20] Dkt. No. 4018.

[21] Dkt. No. 4023.

[22] Reply, 2, ¶2.

as being procedurally defective because, having been raised for the first time during Trial and not having been made in writing, it had not given NexPoint/HCRE adequate notice and an opportunity to respond to the specific allegations of bad faith being made against it. The court pointed out that it did not address or make any determination regarding the substance of Highland's requests in the Oral Sanctions Motion for a bad faith finding and sanctions against NexPoint/HCRE, subject to Highland's right seek a bad faith finding and sanctions against NexPoint/HCRE upon and after giving it proper notice and an opportunity to respond:

> Here, where the Reorganized Debtor's generic oral request for a finding of bad faith and for "an award costs for a bad faith filing" did not articulate the legal basis for such an award and was raised for the first time during the Trial, HCRE was not given sufficient notice and an opportunity to respond, and, therefore, the court will deny, without prejudice, [Highland's] request for reimbursement of its costs incurred in connection with its objection to HCRE's Proof of Claim.

Proof of Claim Disallowance Order, 38-39 (quoting *In re Emanuel*, 422 B.R. 453, 464 (Bankr. S.D.N.Y. 2010) ("[A] person facing possible sanctions is entitled to due process. . . . At a minimum, the respondent is entitled to notice of the authority for the sanctions, notice of the specific conduct or omission that forms the basis of possible sanctions and the opportunity to respond."); *In re Magari*, 2010 WL 817327 at **2-3 (Bankr. N.D. Tex. Mar. 4, 2010) ("By requesting the sanctions award, the Trustee has raised due process concerns that can only be satisfied by providing to the affected party sufficient notice and opportunity to respond.")).

The court concludes that the instant Sanctions Motion and Hearing have provided NexPoint/HCRE with the due process that was lacking in connection with the Oral Sanctions Motion. NexPoint/HCRE was given adequate notice of the legal authority invoked for sanctions (the bankruptcy court's inherent powers under section 105 of the Bankruptcy Code) and NexPoint/HCRE's specific conduct (the filing and prosecution of its Proof of Claim) that Highland

alleges to have been in bad faith, and NexPoint/HCRE was given adequate opportunity to respond through briefing and at the Hearing on the Sanctions Motion.

With due process concerns having been now addressed and satisfied, the court is able to address the substantive questions raised in the instant Sanctions Motion of (1) whether NexPoint/HCRE did, indeed, act in bad faith in the filing and prosecution of its Proof of Claim and (2) if so, whether an award of reimbursement of Highland's attorneys' fees and costs incurred in connection with its litigation of the Proof of Claim is an appropriate sanction for such bad faith.

B. NexPoint/HCRE Filed and Prosecuted its Proof of Claim in Bad Faith and Willfully Abused the Judicial Process

A bankruptcy court may sanction a litigant for bad faith filing or litigation if the court makes specific findings, based on clear and convincing evidence, of bad faith or willful abuse of the judicial process. *See Cleveland Imaging*, 26 F.4th at 292 (A bankruptcy court may only sanction a party using its inherent authority if "(1) the bankruptcy court finds that the party acted in bad faith or willfully abused the judicial process and (2) its finding is supported by clear and convincing evidence.") (citing *Cadle Co. v. Moore (In re Moore)*, 739 F.3d 724, 729-30 (5th Cir. 2014)). The bankruptcy court's power to sanction bad faith or willful abuse of the judicial process derives from its inherent authority under 11 U.S.C. § 105(a) to issue civil contempt orders. *Id.* at 294, 294 n.14 (quoting the "relevant part" of Bankruptcy Code section 105(a), which provides that bankruptcy courts may "sua sponte, tak[e] any action . . . necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.") (cleaned up).

Having reviewed the record and the evidence adduced at Trial and NexPoint/HCRE's response to the Sanctions Motion (both in its Response and at the hearing on the Sanctions Motion), the court finds and concludes that there is clear and convincing evidence here that

NexPoint/HCRE filed and prosecuted is Proof of Claim in bad faith and that it willfully abused the judicial process.

1. *Dondero's Execution and Authorization of the Filing of the Proof of Claim Without First Having Read the Document or Conducting Any Due Diligence Was in Bad Faith and a Willful Abuse of the Judicial Process*

As noted in the Proof of Claim Disallowance Order, NexPoint/HCRE filed its Proof of Claim in this Highland bankruptcy case on April 8, 2020, several months after the post-petition "nasty breakup" between Highland and its co-founder and president and chief executive officer, Dondero. NexPoint/HCRE described the basis of its claim in Exhibit A attached to its Proof of Claim:[23]

Exhibit A

> HCRE Partner, LLC ("Claimant") is a limited partner with the Debtor in an entity called SE Multifamily Holdings, LLC ("SE Multifamily"). Claimant may be entitled to distributions out of SE Multifamily, but such distributions have not been made because of the actions or inactions of the Debtor. Additionally, Claimant contends that all or a portion of Debtor's equity, ownership, economic rights, equitable or beneficial interests in SE Multifamily does [not] belong to the Debtor or may be the property of Claimant. Accordingly, Claimant may have a claim against the Debtor. Claimant has requested information from the Debtor to ascertain the exact amount of its claim. This process is on-going. Additionally, this process has been delayed due to the outbreak of the Coronavirus. Claimant is continuing to work to ascertain the exact amount of its claim and will update its claim in the next ninety days.

NexPoint/HCRE was one of the many non-debtor Dondero-controlled entities affiliated with Highland. Dondero was the president and sole manager of NexPoint/HCRE, and an individual named Matt McGraner ("McGraner") was NexPoint/HCRE's vice president and secretary. NexPoint/HCRE had no employees of its own but instead relied on Highland's employees (and employees of other entities controlled by Dondero) to conduct business on its behalf. Dondero executed the Proof of Claim as the "person who is completing and signing this claim," checking

[23] Claim No. 146.

the box that indicates he is "the creditor's attorney or authorized agent" and acknowledging that "I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct" and that "I declare under penalty of perjury that the foregoing is true and correct."[24] The evidence overwhelmingly supports a finding that Dondero signed and authorized the filing of the Proof of Claim (that the court ultimately determined was lacking in any factual or legal support) without having even read it and without conducting any due diligence on, or investigation into, whether the statements made in the Proof of Claim were truthful and accurate, which supports a finding that Dondero's signing and filing of the Proof of Claim on behalf of NexPoint/HCRE was done in bad faith and constituted a willful abuse of the judicial process.

At Trial, Dondero testified that he had authorized his electronic signature to be affixed to the document and to be filed on behalf of NexPoint/HCRE and admitted that he had not reviewed the document before doing so.[25] He further testified that he could not recall "personally [doing] any due diligence of any kind to make sure that Exhibit A was truthful and accurate before [he] authorized it to be filed,"[26] and, more specifically, that he did not, prior to authorizing his law firm (Bonds Ellis) to affix his electronic signature on, and to file, the Proof of Claim, review or provide comments to the Proof of Claim or its Exhibit A, review the SE Multifamily Amended LLC Agreement or any documents,[27] "check with any member of the real estate group to see whether or not they believed [the Proof of Claim] was truthful and accurate before [he] authorized Bonds Ellis to file it," or do "anything . . . to make sure that this proof of claim was truthful and accurate before [he] authorized [his] electronic signature to be affixed and to have it filed on behalf of

[24] Proof of Claim, 3.

[25] Transcript of the November 1, 2022 Trial on Debtor's Objection to HCRE's Proof of Claim ("Trial Tr.")[Dkt. No. 3616] 55:2-22.

[26] Trial Tr. 56:20-23.

[27] Trial Tr. 55:10-22, 56:15-57:6.

HCRE."[28] Moreover, he testified that he did not know whose idea it was to file the Proof of Claim,[29] who at NexPoint/HCRE worked with, or provided information to, Bonds Ellis to enable Bonds Ellis to prepare the Proof of Claim, what information was given to Bonds Ellis that enabled them to formulate the Proof of Claim, or whether "Bonds Ellis ever communicated with anybody in the real estate group regarding [the Proof of Claim]."[30]

Dondero has argued that he had a good faith basis to sign and file the Proof of Claim on behalf of NexPoint/HCRE because "he had a host of responsibilities across a sprawling and sophisticated corporate structure and relied on numerous individuals within that structure to help manage the day-to-day operations of Highland and its subsidiaries and managed funds"[31] and that he "ha[d] to rely on systems and processes[,]" because "[he] can't be directly involved in everything."[32] Dondero further testified that "[he] sign[s] a lot of high-risk documents and [has] to rely on the process and the people and internally and externally as part of the process to sign it without direct validation from or verification from me, and this [Proof of Claim] is another one of those items."[33]

Dondero's "I'm-a-very-busy-person/too-busy-to-be-bothered-to-investigate" excuse is not a defense, as a matter of law, to his bad faith and willful abuse of the judicial process in connection with the filing of the Proof of Claim. Nor is Dondero's claimed reliance on systems and processes in connection with the execution and filing of this Proof of Claim, as a matter of fact, supported by the evidence. The court notes that the Proof of Claim is not a complex, lengthy legal or

[28] Trial Tr. 57:25-58:16.

[29] Trial Tr. 57:7-9.

[30] Trial Tr. 56:1-14.

[31] Response, 7, ¶16.

[32] Trial Tr. 57:25-58:7.

[33] Trial Tr. 57:25-59:2.

corporate document; Exhibit A to the Proof of Claim, which set forth the basis for the claim, is only one paragraph long, yet Dondero did not even bother to read it before signing under penalty of perjury that the information contained in the Proof of Claim, including Exhibit A, was truthful and accurate. And, Dondero's own testimony contradicts his assertion that he relied on "systems and processes" and on other people within the "sprawling and sophisticated corporate structure" and his outside counsel to ensure the accuracy of the Proof of Claim. He had no reasonable or justifiable basis to rely on anyone or any "process" that was allegedly in place in connection with his signing of "high risk" documents, because he asked no questions, conducted no due diligence, and made no effort, whatsoever, to verify that the information that he was swearing was accurate under penalty of perjury was, in fact, truthful.

The court finds and concludes that the foregoing admissions by NexPoint/HCRE, through Dondero, provide clear and convincing evidence that ***NexPoint/HCRE filed its Proof of Claim*** in bad faith and willfully abused the judicial process.

2. *NexPoint/HCRE's Litigation Strategy and Actions in the Prosecution of Its Proof of Claim Are Further Evidence of Its Bad Faith and Willful Abuse of the Judicial Process*

Moreover, NexPoint/HCRE's ***litigation strategy and actions*** taken in the course of prosecuting its Proof of Claim over the next two and a half years, after filing it, ***provide further support for a finding that NexPoint/HCRE engaged in bad faith and willfully abused the judicial process***.

As noted in the Proof of Claim Disallowance Order, six months after Dondero signed and filed the Proof of Claim in April 2020, and in response to Highland's objection to its Proof of Claim,[34] NexPoint/HCRE fleshed-out the legal and factual bases for its claim:[35]

> After reviewing what documentation is available to [NexPoint/HCRE] with the Debtor, [NexPoint/HCRE] believes the organizational documents relating to SE Multifamily Holdings, LLC (the "SE Multifamily Agreement") improperly allocates the ownership percentages of the members thereto due to mutual mistake, lack of consideration, and/or failure of consideration. As such, [NexPoint/HCRE] has a claim to reform, rescind and/or modify the agreement.
>
> However, [NexPoint/HCRE] requires additional discovery, including, but not limited to, email communications and testimony, to determine what happened in connection with the memorialization of the parties' agreement and improper distribution provisions, evaluate the amount of its claim against the Debtor, and protect its interests under the agreement.

The Response was filed by a new law firm—Wick Phillips Gould & Martin, LLP ("Wick Phillips") – not the law firm of Bonds Ellis, which had handled the filing of the Proof of Claim. In the course of discovery, Highland became aware that Wick Phillips had jointly represented NexPoint/HCRE and Highland in connection with at least some of the underlying transactions that were the subject of the Proof of Claim, and, on April 14, 2021, more than a year after NexPoint/HCRE filed its Proof of Claim, Highland moved to disqualify Wick Phillips.[36] Notably, Highland's Plan had been confirmed on February 22, 2021, over the objections of Dondero and his related entities (including NexPoint/HCRE).[37] The effective date ("Effective Date") of the Plan occurred on August 11, 2021, and Highland became the Reorganized Debtor under the Plan.

---

[34] On July 30, 2020, Highland filed an objection to the allowance of the Proof of Claim, contending it had no liability under the Proof of Claim. *See Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims, (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims*, Dkt. No. 906.

[35] Response to Objection to Claim, 2-3, ¶¶ 5-6.

[36] Dkt. Nos. 2196-2198. On October 1, 2021, Highland filed a supplemental disqualification motion. Dkt. No. 2893.

[37] NexPoint/HCRE, represented by Wick Phillips, filed its *Objection to Debtor's Fifth Amended Plan of Reorganization* on January 5, 2021. Dkt. No. 1673.

Pursuant to the Plan, on or after the Effective Date, all or substantially all of the Debtor's assets vested in the Reorganized Debtor or the claimant trust ("Claimant Trust") created under the terms of the Plan, including Highland's 46.06% membership interest in SE Multifamily.

Meanwhile, NexPoint/HCRE vigorously fought the disqualification of Wick Phillips, filing its opposition to the disqualification motion on May 6, 2021,[38] and initiating a more than six-month period of expensive discovery and side litigation that culminated, after a lengthy hearing on the disqualification motion, with the entry by this court on December 10, 2021, of its *Order Granting in Part and Denying in Part Highland's Supplemental Motion to Disqualify Wick Phillips Gould & Martin, LLP As Counsel to HCRE Partners, LLC and for Related Relief* ("Disqualification Order"),[39] resolving the disqualification motion by, among other things, disqualifying Wick Phillips from representing NexPoint/HCRE in the contested matter concerning the Proof of Claim, but specifically denying Highland's request that NexPoint/HCRE reimburse it all costs and fees incurred in making and prosecuting the disqualification motion.[40]

In the instant Sanctions Motion, Highland acknowledged that the court denied Highland's specific request for sanctions of reimbursement of Highland's costs and fees in making the Disqualification Motion in its December 2021 Disqualification Order.[41] The court notes that the denial was not "with prejudice"[42] to Highland's right to bring a sanctions motion in the future in connection with allegations that NexPoint/HCRE's filing and prosecution of its Proof of Claim, including its vigorous defense of the Disqualification Motion. Notably, while Highland includes

[38] Dkt. Nos. 2278 and 2279.

[39] Dkt. No. 3106.

[40] Disqualification Order, 4.

[41] *See* Sanctions Motion, 4, ¶8.

[42] The Disqualification Order stated, in relevant part, "Highland's request that HCRE reimburse it all costs and fees incurred in making and prosecuting the Motion, including reasonable attorneys' fees, is **DENIED**."

a reference in the instant Sanctions Motion to the lengthy and expensive proceedings on the Disqualification Motion in its recitation of evidence in the record that supports Highland's allegations that NexPoint/HCRE engaged in bad faith conduct in the filing and prosecution of its Proof of Claim, it did ***not*** include them as part of the fees and costs for which Highland is seeking to be reimbursed by NexPoint/HCRE as a sanction for NexPoint/HCRE's bad faith filing and prosecution of its Proof of Claim.[43]

In any event, following the disqualification of Wick Phillips, NexPoint/HCRE hired yet a third law firm, Hoge & Gameros, LLP, in connection with this matter, and the parties engaged in a second round of extensive discovery, which included the exchange of written discovery and document production and the service of various deposition notices and subpoenas. On August 12, 2022, just two business days after NexPoint/HCRE completed the depositions of Highland's witnesses, and a day after NexPoint/HCRE made a supplemental production of more than 4,000 pages of documentation, and two business days before the consensually scheduled depositions of NexPoint/HCRE's witnesses, Dondero and McGraner, were set to occur, NexPoint/HCRE filed a motion to withdraw its Proof of Claim ("Motion to Withdraw").[44] By this point, Highland had spent hundreds of thousands of dollars objecting to the Proof of Claim.

Query why might NexPoint/HCRE have done this? Just six months earlier, Dondero's family trust, The Dugaboy Investment Trust, had represented to the bankruptcy court that

[43] *See* Morris Declaration, 3-4, at ¶11 (Referencing the court's denial in its Disqualification Order of Highland's previous request for attorneys' fees incurred in connection with the Disqualification Motion, Morris stated "[W]e reviewed the PSZJ Invoices and redacted all entries relating to the Disqualification Motion; thus, for the avoidance of doubt, Highland does not seek any fee award with respect to any work done in connection with the Disqualification Motion.").

[44] *See Motion to Withdraw Proof of Claim* [Dkt. No. 3442].

Highland's 46.06% interest in SE Multifamily was worth $20 million,[45] and now, NexPoint/HCRE (which presumably also spent substantial sums prosecuting its Proof of Claim during the nearly two and a half years of litigation) appeared willing to walk away from its multi-million dollar challenge to Highland's 46.06% interest in SE Multifamily. Highland objected to NexPoint/HCRE's Motion to Withdraw, and the court held a hearing on September 12, 2022 (as required by Bankruptcy Rule 3006), following which the court entered an order denying NexPoint/HCRE's Motion to Withdraw, for the reasons set forth on the record,[46] and directing the parties to "confer in good faith to complete the depositions" of Dondero, McGraner, and NexPoint/HCRE and otherwise comply with the scheduling order that had been entered by the court on this matter, which included appearing for an evidentiary hearing on November 1, 2022.[47] The court denied NexPoint/HCRE's Motion to Withdraw, in part, because it was concerned that the timing of it all–just two business days ***after*** completing Highland's depositions but two business days ***before*** the consensually-scheduled depositions of NexPoint/HCRE's witnesses were to take place—reflected gamesmanship on the part of NexPoint/HCRE (*i.e.,* NexPoint/HCRE prosecuted its Proof of Claim for two and a half years, through and including the taking of depositions of Highland's witness, while shielding its own witnesses from testifying). The court was also concerned by NexPoint/HCRE's repeated attempts to preserve its claims against Highland for use against Highland in the future. In fact, the court entered its order denying NexPoint/HCRE's Motion to Withdraw only after: (1) NexPoint/HCRE refused to agree, at the

[45] *See Motion for Determination of the Value of the Estate and Assets Held by the Claimant Trust* [Docket No. 3382]. As pointed out by Highland in its Response, "[t]here is no dispute that HCRE is the manager of SE Multifamily and therefore—through Mr. Dondero—would be best positioned to opine on the value of Highland's interest in SE Multifamily." Response, 9, at ¶27 n. 4.

[46] The court noted in its order denying HCRE's Motion to Withdraw that, under the Bankruptcy Rules, a creditor does not have an absolute right to withdraw a proof of claim.

[47] Dkt. No. 3525.

September 12 hearing, to language in an order allowing withdrawal of the Proof of Claim that stated, unequivocally, that NexPoint/HCRE waived the right to relitigate or challenge the issue of Highland's 46.06% ownership interest in SE Multifamily, and (2) counsel were thereafter unable, in the day or two after the hearing, to work out mutually acceptable language in an agreed order that protected both parties.[48] As noted in its order denying NexPoint/HCRE's Motion to Withdraw, the court had expressed concerns, during the hearing on the Motion to Withdraw, relating to the integrity of the bankruptcy system and claims process if it allowed NexPoint/HCRE to withdraw its Proof of Claim after two and a half years of litigation, and having caused Highland to spend hundreds of thousands of dollars litigating the Proof of Claim, while at the same time allowing NexPoint/HCRE to preserve its challenges to Highland's ownership interest in SE Multifamily to be used against Highland in the future. The court did not, at the time, make any express findings regarding NexPoint/HCRE's bad faith or abuse of the judicial process, only because Highland's mid-hearing Oral Sanctions Motion had not provided NexPoint/HCRE with adequate notice and an opportunity to respond.[49] With the instant Sanctions Motion, those due process concerns have been satisfied.

Having considered the evidence and argument of counsel at both the Trial on NexPoint/HCRE's Proof of Claim and the hearing on the Sanctions Motion, and the pleadings filed in connection with the Sanctions Motion, including NexPoint/HCRE's written Response, and based on the record as a whole, the court expressly finds and concludes that NexPoint/HCRE's

[48] At the end of the September 12 hearing, the court had expressed concerns about gamesmanship, but, at the same time, assured the parties that it was still open to signing an agreed order regarding withdrawal of the Proof of Claim, if counsel could work out mutually acceptable language that protected both parties "without the pressure of the Court hovering over you." *See* Transcript of Hearing on Motion to Withdraw, Dkt. No. 3519, 50:14-59:14. Apparently, counsel were unable to reach an agreement on the terms of an agreed order, and so the court signed the order at docket number 3525, denying NexPoint/HCRE's Motion to Withdraw.

[49] As noted below, NexPoint/HCRE persisted to the end in arguing that the disallowance of its Proof of Claim could not bar NexPoint/HCRE from making future challenges to Highland's 46.06% membership interest in SE Multifamily.

litigation strategy and actions in prosecution of its Proof of Claim (including vigorous opposition to the Disqualification Motion, the timing of the Motion to Withdraw, and its repeated and overt attempts to preserve the very claims upon which its Proof of Claim was based in connection with the Motion to Withdraw) demonstrates bad faith and a willful abuse of the judicial process on the part of NexPoint/HCRE.

3. NexPoint/HCRE's Admissions at Trial Are Further Evidence of its Bad Faith Filing and Willful Abuse of the Judicial Process

Following the denial of NexPoint/HCRE's Motion to Withdraw, the parties complied with the court's order to schedule the depositions of Dondero and McGraner at mutually agreeable times to complete discovery and then appeared at Trial on November 1, 2022. At the conclusion of the Trial, NexPoint/HCRE doubled-down on its request of the court "to grant the proof of claim and reallocate the equity [in SE Multifamily] based on the capital contribution[s]."[50] This was despite admissions by Dondero and McGraner in their Trial testimony that made it clear that NexPoint/HCRE did not, and never did, have a factual or legal basis for its request. Nevertheless, NexPoint/HCRE continued to the end to try to limit any order disallowing its Proof of Claim so as to preserve its right to assert the very claims asserted in its Proof of Claim (for rescission, reformation and/or modification of the SE Multifamily Amended LLC Agreement to reallocate the membership percentages) for use in the future.[51]

The Trial testimony of Dondero and McGraner revealed that NexPoint/HCRE had no factual basis to claim that a mistake was made by any of the parties, much less a mutual mistake

[50] Trial Tr. 179:23-25; 180:8-9.

[51] Trial Tr. 179:21-24 ("They want you to make findings that we can't raise any of these other issues, rescissions, stays, et cetera, going forward. That's not proper relief on a proof of claim."); 200:8-12 ("If Your Honor's going to deny the proof of claim, I would ask that you simply deny the proof of claim. We don't have an adversary proceeding here. There wasn't one started. Mr. Morris considered that and then didn't follow that path, because all we have here today is a proof of claim.").

of the parties, regarding the allocation of ownership percentages in SE Multifamily in corporate documentation,[52] and, in fact, "the evidence overwhelmingly point[ed] to the conclusion that both Mr. Dondero and Mr. McGraner understood that the allocation of 46.06% membership interest to Highland, and a total capital contribution by Highland of $49,000 in the Amended LLC Agreement, reflected the intent of the parties prior to, and at the time of, the execution of the Amended LLC Agreement."[53] The court specifically noted in the Proof of Claim Disallowance Order that Dondero admitted that he had not read or reviewed the Amended LLC Agreement or any drafts of it before he signed it—apparently the Amended LLC Agreement was one of those important, high-risk documents that Dondero was too busy to read or investigate before signing (like the Proof of Claim)—but he nevertheless testified that "the capital contributions and membership allocations contained in Schedule A of the Amended LLC Agreement comported with his understanding and intent when he signed the Amended LLC Agreement on behalf of HCRE and Highland."[54] NexPoint/HCRE was also unable to produce any evidence at Trial to support its factual allegation that there was a "lack of consideration" or a "failure of consideration" with respect to the Amended LLC Agreement, such that NexPoint/HCRE would be entitled to a

[52] The court concluded, specifically, that

> HCRE did not produce any evidence, much less clear and convincing evidence, that the parties to the Amended LLC Agreement – HCRE, Highland, BH Equities, and Liberty – had come to a specific and understanding, prior to the execution of the Amended LLC Agreement in March 2019, that the allocation of percentage membership interests in SE Multifamily was different from the percentage allocations contained in the Amended LLC Agreement. When asked on cross-examination, Mr. McGraner, HCRE's officer and co-owner who was most involved in the negotiations of the terms of the Amended LLC Agreement, was unable to identify any specific mistake made in the drafting of the Amended LLC Agreement. Neither he nor NexPoint/HCRE's other witness, Mr. Dondero, were able to point to a specific meeting of the minds of the members of SE Multifamily prior to (or after, for that matter) the execution of the Amended LLC Agreement that the parties intended Highland's allocation of SE Multifamily membership interests to be any percentage other than the 46.06% allocation attributed to Highland in the written Amended LLC Agreement.

Proof of Claim Disallowance Order, 30.

[53] *Id.*, 30-31.

[54] *Id.*, 31 n. 119.

reformation,[55] rescission,[56] or modification of it, to re-allocate the ownership percentages that the parties agreed to at the time of the execution of it.[57]

In fact, McGraner ultimately admitted in his Trial testimony that the only reason NexPoint/HCRE had for filing its Proof of Claim, which challenged Highland's title to its 46.06% membership interest in SE Multifamily, was, essentially, ***that NexPoint/HCRE was frustrated with the consequences of Dondero's decision in 2019 to seek bankruptcy protection for Highland (notably, the bankruptcy case was filed just a few months after the Amended LLC Agreement was executed), which resulted in Dondero losing control over Highland***, such that, as far as NexPoint/HCRE was concerned, its "partner" [in SE Multifamily] was no longer its "partner." The court noted in the Proof of Claim Disallowance Order that McGraner

> could not point to any provision of the Amended LLC Agreement that was either "wrong" or a "mistake;" rather, he testified that the "mistake" was "when the bankruptcy was filed and we can't amend it" because "[o]ur partners aren't our partners" – "if you have good partners and you're working with partners that are –

---

[55] After noting that "neither lack of consideration nor failure of consideration are bases for reformation of a contract under Delaware law (which is what NexPoint/HCRE is seeking in its Proof of Claim)," the court concluded that "HCRE is not entitled to reformation of the Amended LLC Agreement to reallocate the members' membership interests as requested based on its allegations of lack of consideration and/or failure of consideration." Proof of Claim Disallowance Order, 32 n. 120.

[56] The court noted in the Proof of Claim Disallowance Order that NexPoint/HCRE had not actually stated a claim for rescission of the Amended LLC Agreement with respect to its Proof of Claim, but that, if it had,

> Mr. Dondero's admission that he did not read the Amended LLC Agreement (or even have the terms explained to him by counsel or anyone else) prior to signing it on behalf of HCRE and Highland would bar any claim by HCRE for rescission of the Amended LLC Agreement. Moreover, even if HCRE's claim for rescission was not barred by Mr. Dondero's failure to read the Amended LLC Agreement prior to signing it, HCRE did not present any evidence of the other elements of a rescission claim: that the parties were mistaken as to a basic assumption on which the Amended LLC Agreement was made and that the mistake had a material effect on the agreed-upon exchange of performances.

Proof of Claim Disallowance Order, 33-34.

[57] *See* Proof of Claim Disallowance Order, 32-33 n. 120 (where the court found that "HCRE has not shown that there was a lack or failure of consideration on behalf of Highland in connection with the Amended LLC Agreement. . . . Under Delaware law, the courts 'limit [their] inquiry into consideration to its existence and not whether it is fair or adequate,' . . . . '[E]ven if the consideration exchanged is grossly unequal or of dubious value, the parties to a contract are free to make their bargain.' (citations omitted). Here, it is undisputed that Highland made a cash capital contribution of $49,000, that Highland was a jointly and severally liable coborrower under the KeyBank Loan, and that SE Multifamily (and HCRE), having no employees of their own, relied on Highland's employees to conduct business. Thus, HCRE's claim, to the extent it is based on alleged lack and/or failure of consideration fails.").

> that are known to you, then you make amendments to reflect the contributions of those partners, whether monetary or otherwise . . . [a]nd my understanding is I can't do that right now."[58]

McGraner testified that "despite Mr. Dondero being in control of both HCRE and Highland prior to the bankruptcy filing, and despite 'all of the fears [he] had [related to Highland's bankruptcy filing],' HCRE made no effort to amend the agreement before the bankruptcy or post-bankruptcy (because 'we didn't think it would be worth it')[ ][59] [and] 'because [it] hoped that the issues that caused the bankruptcy filing would resolve themselves.'"[60] This is not a good-faith basis for filing and prosecuting the Proof of Claim, and it exhibits a willful abuse of the bankruptcy claims process by NexPoint/HCRE.

In summary, the admissions by Dondero and McGraner in their Trial testimony made clear that NexPoint/HCRE never had a factual or legal basis for the Proof of Claim. NexPoint/HCRE's principals knew, at the time of filing and through its prosecution of the Proof of Claim, that there was no factual basis for its claim of rescission, reformation, and/or modification of the Amended LLC Agreement to dispossess Highland of some or all of its 46.06% membership interest in SE Multifamily. This clearly and convincingly constitutes bad faith by NexPoint/HCRE and a willful abuse of the judicial process.

C. Reimbursement of Attorneys' Fees and Costs Incurred by Highland in the Proof of Claim Litigation Is an Appropriate Sanction for NexPoint/HCRE's Bad Faith

Having found and concluded by clear and convincing evidence that NexPoint/HCRE filed and prosecuted (and attempted withdrawal of) its Proof of Claim in bad faith and willfully abused the judicial process, this court may use its inherent powers under Bankruptcy Code section 105(a)

---

[58] Proof of Claim Disallowance Order, 27 (citing Trial Tr. 114:24-115:16, 118:6-15).

[59] *Id.* (citing Trial Tr. 121:24-122:9).

[60] *Id.* at 28 (citing Trial Tr. 122:20-125:21).

to sanction it for such conduct. Reimbursement of the opposing party's fees and costs incurred in responding to a bad faith filing or willful abuse of the judicial process has been upheld as an appropriate form of sanctions. *See Cleveland Imaging*, 26 F.4th at 294 (upholding the bankruptcy court's sanction order that required the parties who were found to have filed bankruptcy petitions in bad faith to reimburse the fees incurred by a post-confirmation litigation trust in responding to the bad faith filing); *Carroll v. Abide (In re Carroll)*, 850 F.3d 811 (5th Cir. 2017) (bankruptcy court did not abuse its discretion in ordering the debtors to "pay $49,432, which represents the amount of attorneys' fees incurred by [the bankruptcy trustee] in responding to certain instances of the [debtors'] bad faith conduct."); *In re Yorkshire, LLC*, 540 F.3d 328, 332 (5th Cir. 2008) (affirming bankruptcy court's use of its inherent powers to issue monetary sanctions for bad faith filing that were, in part, based upon the opposing parties' attorneys' fees and costs "following an extensive hearing in which the bankruptcy court heard testimony from the parties and witnesses and made certain credibility determinations," and "made specific findings that Appellants acted in bad faith."); *In re Paige*, 365 B.R. 632, 637-399 (Bankr. N.D. Tex. 2007) (awarding attorneys' fees against debtor for their "bad faith" conduct during bankruptcy case, noting "[t]he sanction here is derived from the Court's inherent power to sanction" under section 105(a)); *In re Lopez*, 576 B.R. 84, 93 (S.D. Tex. 2017) (same). Any sanction imposed pursuant to a bankruptcy court's inherent powers for bad faith conduct or willful abuse of the judicial process "must be compensatory rather than punitive in nature." *In re Lopez*, 576 B.R. at 93 (quoting *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 108 (2017) (citing *Mine Workers v. Bagwell*, 512 U.S. 821, 826-30 (1994)). "[A] sanction counts as compensatory only if it is 'calibrate[d] to [the] damages caused by' the bad-faith acts on which it is based[,]" and "[a] fee award is so calibrated if it covers the legal bills that the litigation abuse occasioned." *Goodyear Tire & Rubber*, 581 U.S.

at 108 (quoting *Bagwell*, 512 U.S. at 834). The fee award must be "limited to the fees the innocent party incurred solely because of the misconduct—or put another way, to the fees that party would not have incurred but for the bad faith." *Id.* (quoting *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. at 104). The "'causal link' between the sanctionable conduct and the opposing party's attorney's fees" must be established "through a 'but-for test:' to wit, the complaining party may only recover the portion of fees that they would not have paid 'but-for' the sanctionable conduct." *Id.* (citing *Goodyear Tire & Rubber*, 581 U.S. at 108-109 (citing *Fox v. Vice*, 563 U.S. 826, 836 (2011)).

Here, as earlier noted, Highland has requested, as a sanction, reimbursement of its attorneys' fees and costs incurred by it in responding to NexPoint/HCRE's filing and prosecution of its Proof of Claim. Specifically, Highland seeks reimbursement of an aggregate amount of **$825,940.55**, consisting of

- **$782,476.50** in attorneys' fees charged by its primary bankruptcy counsel, PSZJ, for the period August 1, 2021 through December 31, 2022, for work performed in connection with the litigation of the Proof of Claim;[61]

- **$16,164.05** in third-party expenses for court reporting services provided in connection with the Proof of Claim litigation;[62] and,

[61] *See* Morris Declaration, 3-4, at ¶¶ 8-13, and Ex. F. As stated in the Morris Declaration, the $782,476.50 amount does not include any fees relating to the Disqualification Motion or any fees that PSZJ concluded were inadvertently coded by a timekeeper to the NexPoint/HCRE Claim Objection category "or that were otherwise unrelated to services rendered in connection with the Proof of Claim litigation." *Id.*, 3-4, at ¶¶ 11 and 12. By way of specific example, Morris stated that "in 2022 and 2023 we charged Highland for services rendered in connection with our unsuccessful attempts to obtain SE Multifamily's books and records but excluded those charges here because they do not directly relate to the litigation of HCRE's Proof of Claim; Highland is seeking those fees in the Delaware Chancery Court where Highland was forced to commence an action against HCRE for specific performance (Case No. 2023-0493-LM))." *Id.*, 4, at ¶ 12.

[62] *See id.*, 4, at ¶ 14, and Ex. G.

- **$27,300.00** in attorneys' fees charged by David Agler for providing Highland with specialized tax advice concerning SE Multifamily and other matters related to the Proof of Claim.[63]

NexPoint/HCRE challenges Highland's request for reimbursement of its fees on several bases. ***First***, it argues that it cannot be ordered to reimburse the fees and expenses incurred by Highland ***after*** NexPoint/HCRE attempted to withdraw its Proof of Claim because they do not satisfy the "but for" test for establishing a "causal link" between those fees and costs and NexPoint/HCRE's filing and pursuit of its Proof of Claim—that Highland cannot show that "but for" NexPoint/HCRE's filing and prosecution of its Proof of Claim, Highland would not have incurred those fees and costs. NexPoint/HCRE urges the court to adopt its narrative of the proceedings that "instead of taking a win, [Highland] and its lawyers chose to generate fees to get the same result" and thus Highland's attorneys' efforts were "totally unnecessary" and a "waste of time and resources" that was "the fault of [Highland], not [NexPoint/HCRE]."[64] NexPoint/HCRE states in its Response that "[h]ere, ***it is undisputed*** that, had [Highland] agreed to the withdrawal of the Proof of Claim many months ago – before engaging in costly additional discovery and preparing for and attending a trial on the merits of the claim – [Highland] would have been exactly in the same position that it is in now, but at far less expense" and further that "[t]he real, practical difference between refusing to consent to the withdrawal of [NexPoint/HCRE]'s Proof of Claim and instead prosecuting the Objection to its end is several hundred thousand dollars in attorneys' fees" and, thus, "[t]he Motion abjectly fails any 'but–for' analysis."[65]

---

[63] *See id.*, 4-5, at ¶¶ 15 and 16, and Ex. H. A summary of the aggregate fees and expenses of which Highland is seeking reimbursement in the Sanctions Motion is attached as Exhibit I to the Morris Declaration. *See id.*, 5, at ¶ 17, and Ex. I.

[64] Response, 2.

[65] Response, 20, at ¶60 (emphasis added).

The court disagrees with NexPoint/HCRE's "narrative" and its view of the evidence established at Trial. Highland ***does*** dispute NexPoint/HCRE's contention that, if only it had allowed it to withdraw its Proof of Claim and accepted a "win," that Highland would have been "exactly in the same position that it is in now [after a Trial and ruling on the merits of the Proof of Claim], but at far less expense." The court does as well. As Highland has argued, NexPoint/HCRE's Motion to Withdraw was itself filed in bad faith. Highland was forced to oppose the withdrawal of the Proof of Claim because NexPoint/HCRE would not agree to a withdrawal, with prejudice, to NexPoint/HCRE's right to challenge Highland's title to its 46.06% membership interest in SE Multifamily in the future.[66] The evidence clearly and convincingly established that any "win" or "victory" that Highland would have obtained through the withdrawal of the Proof of Claim[67]

> would have been pyrrhic because ***HCRE—in a clear act of bad faith—tried to withdraw its Proof of Claim while preserving the substance of it claims for another day***. Had HCRE's duplicitous strategy been successful, Highland's interest in SE Multifamily would have remained subject to challenge—an untenable result for anyone, let alone a post-confirmation entity seeking to implement a court-approved asset monetization plan.

The court finds and concludes, as argued by Highland, that there is clear and convincing evidence here that the fees and costs incurred by it, after NexPoint/HCRE sought to withdraw its Proof of Claim (*i.e.,* to prepare for the Trial and prosecute its objection to the Proof of Claim through a trial and ruling on the merits), would not have been incurred "but for" NexPoint/HCRE's bad faith. As pointed out by Highland and as noted above,[68] the court did not enter the Proof of Claim Disallowance Order in December 2022 in a vacuum. Rather, the court denied

---

[66] *See supra* note 45 and accompanying text.

[67] Response, 5, at ¶18.

[68] *See supra* at pages 16-17.

NexPoint/HCRE's Motion to Withdraw only ***after:*** (1) the court had expressed concerns that the timing and context of its filing of its Motion to Withdraw suggested gamesmanship on its part, and that the integrity of the bankruptcy system and claims process would be in jeopardy if the court were to simply allow withdrawal, without protecting Highland from future challenges to its membership interest in SE Multifamily (particularly, after Highland had spent hundreds of thousands of dollars to that point in objecting to the Proof of Claim); and (2) NexPoint/HCRE refused to agree to language in an order that would alleviate these expressed concerns. The court—having now made an express finding that NexPoint/HCRE's filing of its Motion to Withdraw was in bad faith and part of its willful abuse of the bankruptcy claims process that began with the filing of its Proof of Claim in April 2020—now expressly finds that the fees and costs incurred by Highland after NexPoint/HCRE filed its Motion to Withdraw were necessary for Highland to protect its interests and would not have been incurred "but for" NexPoint/HCRE's bad faith conduct and willful abuse of the judicial process.

Second, NexPoint/HCRE objects to Highland's fees ($809,776.50) and expenses ($16,164.05) as being "*per se* excessive for a single proof of claim objection."[69] Highland argues that "[s]pending less than 5% of the value of an asset (according to Mr. Dondero's family trust) to obtain good, clear title is economically rational and consistent with the Claimant Trust's duty to maximize value for the benefit of the Claimant Trust's beneficiaries." Per the Morris Declaration, Highland only seeks reimbursement of expenses and fees charged to Highland for expenses incurred and work performed in litigating the Proof of Claim (but—as noted earlier—specifically excluding any fees charged relating to the Disqualification Motion). The court agrees with Highland and finds that the fees and expenses incurred by it in objecting to the Proof of Claim,

[69] Response, 10, ¶34.

including the fees incurred ***after*** NexPoint/HCRE sought to withdraw its Proof of Claim, were reasonable and necessary for Highland to protect a valuable asset—it's 46.06% interest in SE Multifamily—and, thus, they are not excessive.

Third, NexPoint/HCRE complains, in its Response, that the fees charged by PSZJ were unreasonable and excessive because the PSZJ invoices show that it was seeking reimbursement for fees charged by "layers of timekeepers whose identities and roles have not been disclosed."[70] NexPoint/HCRE points out three professionals (two of whom billed one hour or less) who were identified in PSZJ's invoices only by their initials.[71] In its Reply, Highland identified the timekeepers by name—as a litigator who billed one hour of time; a bankruptcy attorney who billed 0.6 hours of time; and a bankruptcy partner who billed 15.1 hours of time—all of whom were "called upon to provide discrete support."[72] Collectively, the three previously "unidentified" attorneys charged just 0.023% of the total fee request.[73] PSZJ's identification of the "unidentified timekeepers" and explanation of the work performed by them satisfies the court that these fees were reasonable and necessary fees incurred as a direct result of NexPoint/HCRE's bad faith filing and prosecution of its Proof of Claim. The court rejects NexPoint/HCRE's suggestion that PSZJ overstaffed and overbilled the file because there were "layers of timekeepers." As pointed out in Highland's Reply, "over 82% of the charges related to one litigation partner . . . , one litigation associate . . . , and one paralegal" and "[t]wo other lawyers who have been on the Pachulski team since the inception of this engagement . . . billed relatively modest amounts of time over the course

[70] *Id.*, 13, ¶45.

[71] *Id.*, 12, ¶38.

[72] Reply, 9, ¶28.

[73] *Id.*

of this prolonged litigation."[74] There is simply no factual basis to support a conclusion that the matter was overstaffed.

Fourth, NexPoint/HCRE objects to $9,840 charged by two attorneys for travel time,[75] while acknowledging that those attorneys' non-working travel time was billed at half of the attorneys' regular hourly rate.[76] As pointed out by Highland in its Reply, Highland agreed to pay for travel time in its pre-petition engagement letter, so those "charges cannot come as a surprise to Mr. Dondero."[77] The court takes judicial notice of the fact that attorneys charging half of their hourly rates for non-working travel time, as PSZJ did here, pursuant to its engagement letter with Highland that was approved when the court authorized the retention of PSZJ as counsel for the Debtor, is common practice and is a commonly approved term of engagement of professionals in bankruptcy cases. The $9,840 charged by two attorneys for travel time in this matter was a reasonable and necessary expense incurred by Highland in responding to NexPoint/HCRE's bad faith filing and prosecution of its Proof of Claim.

Fifth, and finally, NexPoint/HCRE objects to the fees charged by David Agler (39 hours of work performed at $700 per hour) for providing Highland with tax advice in August 2022, on the basis that the invoice attached as Exhibit H to the Morris Declaration "indicated that it was 'unbilled' work" and that "[w]hatever work he did, it did not manifest itself in the proceedings."[78] Highland pointed out that it ***had*** explained, in the Morris Declaration, that Mr. Agler provided "specialized tax advice concerning SE Multifamily and other matters related to the Proof of

[74] *Id.*, 9, ¶28 n. 5.

[75] Response, 12, ¶37.

[76] *Id.*, 11, ¶36 (Table 1).

[77] Reply, 9-10, ¶29.

[78] Response, 12, ¶42.

Claim."[79] Highland provided a more detailed description of the services provided by Mr. Agler and why those services were necessary in its Reply: "Mr. Agler provided his services in August 2022 in conjunction with Highlands's deposition preparation, including the deposition of SE Multifamily's accountant. These services were necessary because—as Mr. Dondero and Mr. McGraner admitted and as the evidence showed—Highland's participation in SE Multifamily was expected to provide substantial tax benefits."[80] The court finds that the fees charged by David Agler for work performed for Highland that are set forth in Exhibit H to the Morris Declaration were reasonable and necessary expenses incurred by Highland in responding to HCRE's bad faith conduct and that they would not have been incurred "but for" NexPoint/HCRE's bad faith conduct and willful abuse of the judicial process.

The court has determined that the full amount of fees – $809,776.50 – and costs – $16,164.05 – that are set forth in detail in Exhibits F through H (and summarized on Exhibit I) of the Morris Declaration were reasonable and necessary for Highland to respond to, and would not have been incurred "but for," NexPoint/HCRE's bad faith filing and prosecution of its Proof of Claim, which the court has found to have been a willful abuse by NexPoit/HCRE of the judicial process. Under Fifth Circuit precedent, it is appropriate for the court, in the use of its inherent power under Bankruptcy Code § 105(a), to order NexPoint/HCRE, as a compensatory sanction for its bad faith conduct and willful abuse of the judicial process, to reimburse Highland the full amount of fees and costs requested by Highland, which, in the aggregate, total $825,940.55. NexPoint/HCRE's objections to such amounts as excessive, unnecessary, unreasonable, or unrelated to NexPoint/HCRE's bad faith conduct, are overruled.

---

[79] Reply, 10, ¶30 (citing Morris Declaration, ¶15).

[80] *See id.* (citing Morris Declaration, Ex. [E] (Trial Transcript) 43:2-14; 83:17-84:2; 191:23-193:21 (citing to testimony and tax returns that were admitted into evidence)).

V. CONCLUSION AND ORDER

In summary, the court has determined that NexPoint/HCRE was given adequate notice and an opportunity to respond to the Sanctions Motion and that there is clear and convincing evidence that it filed and prosecuted its Proof of Claim, including its eleventh-hour attempt to withdraw its Proof of Claim, in bad faith and that it willfully abused the judicial process. Such conduct directly caused Highland to incur $825,940.55 in fees and expenses. In the exercise of its inherent power under Bankruptcy Code § 105(a), the court will grant Highland's Sanctions Motion and order NexPoint/HCRE to reimburse Highland for those fees and expenses as an appropriate sanction for NexPoint/HCRE's bad faith or willful abuse of the judicial process.

Accordingly, and based on the foregoing findings of fact and conclusions of law, including those findings and conclusions in this court's Proof of Claim Disallowance Order, which has been incorporated herein by reference,

IT IS ORDERED that the Sanctions Motion [Dkt. No. 3851] be, and hereby is **GRANTED**;

IT IS FURTHER ORDERED that, in order to compensate Highland for loss and expense resulting from NexPoint/HCRE's bad faith and willful abuse of the judicial process, in filing and prosecuting its Proof of Claim, NexPoint/HCRE is hereby directed to pay Highland the compensatory sum of **$825,940.55**.

###End of Memorandum Opinion and Order###

EXHIBIT 10

Docket #4039 Date Filed: 03/05/2024

The following constitutes the ruling of the court and has the force and effect therein described.

Signed March 4, 2024

United States Bankruptcy Judge

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

IN RE:	§	
	§	**Chapter 11**
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	
	§	**Case No. 19-34054-sgj-11**
Reorganized Debtor	§	

MEMORANDUM OPINION AND ORDER GRANTING HIGHLAND CAPITAL MANAGEMENT, L.P.'S MOTION FOR (A) BAD FAITH FINDING AND (B) ATTORNEYS' FEES AGAINST NEXPOINT REAL ESTATE PARTNERS LLC (F/K/A HCRE PARTNERS, LLC) IN CONNECTION WITH PROOF OF CLAIM # 146

I. INTRODUCTION

Before this court is a sanctions motion[1] filed by Highland Capital Management, L.P. ("Highland," the "Debtor," or the "Reorganized Debtor"). [2] The motion seeks sanctions against

[1] *Highland Capital Management, L.P.'s Motion for (A) Bad Faith Finding and (B) Attorneys' Fees against NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC) in connection with Proof of Claim 146* ("Sanctions Motion"). Dkt. No. 3851.

[2] Highland is a reorganized debtor under the confirmed *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* (the "Plan"). Dkt. No. 1808. *See Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief* ("Confirmation Order"). Dkt. No. 1943.

NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC ("NexPoint/HCRE") for its filing, prosecution, and then abrupt attempt to withdraw a meritless proof of claim (after almost three years of protracted litigation).

NexPoint/HCRE filed the subject proof of claim, #146 on the claims register ("Proof of Claim"), on April 8, 2020.[3] The Proof of Claim was signed electronically by James D. Dondero ("Dondero") and was prepared and filed by a law firm that was representing him personally at that time.[4] The Proof of Claim was not in a liquidated amount and was somewhat ambiguous. It stated in an Exhibit A thereto, that NexPoint/HCRE, which was a limited partner, along with Highland, in a limited liability company called SE Multifamily Holdings, LLC ("SE Multifamily")—an entity which owned valuable real estate—"may be entitled to distributions out of SE Multifamily, but such distributions have not been made because of the actions or inactions of the Debtor" and added that Highland's equity interest "may be the property of Claimant. Accordingly, Claimant may have a claim against the Debtor." NexPoint/HCRE stated that it would update the Proof of Claim to provide the exact amount of it "in the next ninety days" but never did.

Highland objected to the Proof of Claim. Thereafter, NexPoint/HCRE (while still not providing any liquidated amount of its Proof of Claim) refined its position therein to argue that the organizational documents relating to SE Multifamily improperly allocated the ownership percentages of the equity members, due to mutual mistake, lack of consideration, and/or failure of consideration. NexPoint/HCRE essentially sought to reform, rescind, and/or modify the SE Multifamily limited liability company agreement (and possibly other documentation) to give Highland less ownership (or no ownership interest) in SE Multifamily and, accordingly,

[3] Claim No. 146.

[4] Bonds Ellis Eppich Schafer Jones LLP.

NexPoint/HCRE would have a larger ownership interest in SE Multifamily. Next, there occurred years of litigation between the parties, including: (a) a skirmish over Highland's motion to disqualify NexPoint/HCRE's newest counsel (*i.e.,* a law firm that had represented both Highland and NexPoint/HCRE in transactions involving SE Multifamily), which was ultimately granted, and (b) an eleventh-hour attempt by NexPoint/HCRE to withdraw its Proof of Claim (by its newest law firm—this one #3 regarding the Proof of Claim), on the eve of depositions of its principals, including Dondero, and just prior to a trial on the merits. Highland objected to the withdrawal. The court held a hearing on that, as required by Bankruptcy Rule 3006. The court declined to allow withdrawal of the Proof of Claim, when the parties could not stipulate to an agreed form of order (*i.e.,* NexPoint/HCRE was unwilling to withdraw the Proof of Claim ***with prejudice*** to asserting its claims again in any future litigation in any forum).

Painfully, after all this, an evidentiary hearing was held on the merits of the Proof of Claim ("Trial") on November 1, 2022. During the Trial, Highland made an oral motion for a bad faith finding and assessment of attorneys' fees against NexPoint/HCRE in connection with its filing and prosecution of the Proof of Claim ("Oral Sanctions Motion"), which this court took under advisement, along with the consideration of the Proof of Claim as a whole.

On April 28, 2023, this court entered a 39-page memorandum opinion and order[5] sustaining Highland's objection to NexPoint/HCRE's Proof of Claim, but denying Highland's Oral Sanctions Motion, without prejudice, ***as procedurally deficient in that it was made orally and for the first time during the Trial.*** Thus, the Oral Sanctions Motion failed to provide NexPoint/HCRE sufficient notice and an opportunity to respond and, therefore, did not satisfy concerns of due process.

[5] *See Memorandum Opinion and Order Sustaining Debtor's Objection to, and Disallowing, Proof of Claim Number 146 [Dkt. No. 906]* ("Proof of Claim Disallowance Order"). Dkt. No. 3767.

On June 16, 2023, Highland filed the instant Sanctions Motion, setting forth the legal and factual bases for the relief sought. The Sanctions Motion specifically seeks a finding of bad faith against NexPoint/HCRE and reimbursement of Highland's attorneys' fees and costs, as a sanction for NexPoint/HCRE's filing and prosecution of the Proof of Claim.

After due notice to NexPoint/HCRE, and a hearing held January 24, 2024 on the Sanctions Motion ("Sanctions Motion Hearing"), and after consideration of the pleadings filed, evidence in the record, and arguments of counsel, the court finds, for the reasons detailed in the findings of fact and conclusions of law below,[6] that NexPoint/HCRE acted in bad faith and willfully abused the judicial process in filing, prosecuting, and then pursuing an eleventh-hour withdrawal of its Proof of Claim. Accordingly, NexPoint/HCRE will be required, as a sanction, to reimburse Highland's attorneys' fees and costs (totaling **$825,940.55)** incurred in connection with its objection to the Proof of Claim.

II. JURISDICTION

This court has jurisdiction and authority to determine and enter a final order in this matter, pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2)(A), (B), and (O) and 1334.[7]

III. BACKGROUND, PROCEDURAL HISTORY, AND FINDINGS OF FACT

A. Incorporation Herein of Proof of Claim Disallowance Order

As noted above, this court, on April 28, 2023, issued its 39-page Proof of Claim Disallowance Order, sustaining Highland's objection to NexPoint/HCRE's Proof of Claim

[6] To the extent that any of the findings of fact should be construed as a conclusion of law, it shall be construed as such. To the extent that any of the conclusions of law should be construed as a finding of fact, it shall be construed as such.

[7] The Fifth Circuit recently confirmed the jurisdiction and authority of bankruptcy courts to issue sanctions orders in connection with bankruptcy cases and proceedings over which they exercise jurisdiction, because they are in the nature of ***civil contempt*** orders—which are considered "part of the underlying case" – "because the bankruptcy court had jurisdiction over the [ ] bankruptcy case, it had jurisdiction to enter the sanctions order, too." *Kreit v. Quinn (In re Cleveland Imaging and Surgical Hospital, L.L.C.)*, 26 F.4th 285, 294 (5th Cir. 2022) (cleaned up).

following the Trial on same. The Proof of Claim Disallowance Order sets forth extensive procedural history, findings of fact, and conclusions of law pertaining to NexPoint/HCRE's filing and prosecution of its Proof of Claim, which Highland alleges in the instant Sanctions Motion was conducted in bad faith. NexPoint/HCRE did not appeal the Proof of Claim Disallowance Order. Thus, it is a final and non-appealable order.[8] The court hereby incorporates by reference the Proof of Claim Disallowance Order (and all of the findings and conclusions therein), as if set forth verbatim herein.[9]

B. Highland Files Sanctions Motion

On June 16, 2023, Highland filed the instant Sanctions Motion. It was supported with a Declaration of John A. Morris in support of the Sanctions Motion ("Morris Declaration")[10] and 431 pages of attached exhibits as set forth in the following table:

Exhibit A	NexPoint/HCRE's Proof of Claim[11]
Exhibit B	Highland's Objection to NexPoint/HCRE's Proof of Claim[12]
Exhibit C	NexPoint/HCRE's Response to Objection to Claim[13]

[8] The Proof of Claim Disallowance Order is one of the few bankruptcy court orders issued in this bankruptcy case that was not appealed by Dondero or a Dondero-controlled entity. Although the court has not counted the exact number of appeals filed by Dondero and/or Dondero-controlled entities in this bankruptcy case and related proceedings, this court takes judicial notice of information contained in a vexatious litigant motion filed by Highland in the district court (before Judge Brantley Starr), reflecting that Dondero and his controlled entities have "filed over 35 total appeals." *See Highland Capital Management, L.P.'s Reply to Objections to Motion to Deem the Dondero Entities Vexatious Litigants and for Related Relief*, 12, at ¶ 24, filed on February 9, 2024. Dkt. No. 189 (NDTX Case No. 3:21-cv-00881-X).

[9] The Proof of Claim Disallowance Order was attached as Exhibit D to the Declaration of John A. Morris, Dkt. No. 3852, which was filed by Highland in connection with, and in support of, the relief requested in the Sanctions Motion.

[10] Dkt. No. 3852.

[11] Claim No. 146, filed April 8, 2020.

[12] *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* ("Objection to Claim"), filed July 30, 2020. Dkt. No. 906.

[13] *NexPoint Real Estate Partners LLC's Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* ("Response to Objection to Claim"), filed October 19, 2020. Dkt. No. 1212.

Exhibit D	Proof of Claim Disallowance Order
Exhibit E	Transcript of November 1, 2022 Trial (on NexPoint/HCRE's Proof of Claim)
Exhibit F	Attorneys' Fees of Pachulski Stang Ziehl & Jones LLP ("PSZJ") for the period of August 1, 2021 through December 31, 2022 incurred in connection with the litigation on the NexPoint/HCRE Proof of Claim
Exhibit G	Invoices for court reporting services provided in connection with depositions taken and defended during the course of the Proof of Claim litigation
Exhibit H	Invoice for services rendered by David Agler, who provided specialized tax advice concerning SE Multifamily and other matters related to the Proof of Claim
Exhibit I	Summary of Fees and Expenses Incurred by Highland in Connection with NexPoint/HCRE's Proof of Claim

The Sanctions Motion (unlike the Oral Sanctions Motion made during the Trial) provided NexPoint/HCRE with due and appropriate notice of the legal and factual bases for Highland's request for a bad faith finding and reimbursement of attorneys' fees and costs incurred by it in litigating the Proof of Claim. As stated in the Sanctions Motion, the legal basis for Highland's request for reimbursement of its attorneys' fees as a sanction for NexPoint/HCRE's bad faith filing and prosecution of its Proof of Claim is the bankruptcy court's "inherent authority under section 105 of the Bankruptcy Code to issue sanctions after making a finding of bad faith."[14] Highland referred to specific documentary and testimonial evidence adduced during the Trial that it alleges supports a finding that NexPoint/HCRE filed and prosecuted its Proof of Claim in bad faith, and attached invoices evidencing its attorneys' fees and costs incurred as a direct result of this alleged bad faith.

[14] *See* Sanctions Motion, 10, ¶25.

Before NexPoint/HCRE filed its response to the Sanctions Motion, the matter was stayed on August 2, 2023, pending court-ordered global mediation.[15] The mediation ultimately proved to be unsuccessful.[16] Thereafter, NexPoint/HCRE filed its *Response to Debtor's Motion for (A) Bad Faith Finding and (B) Attorneys' Fees* ("Response")[17] on December 22, 2023. NexPoint/HCRE denies that it filed and prosecuted its Proof of Claim in bad faith and argues it should not be sanctioned at all. It further argues that, even if the filing and prosecution of the Proof of Claim are found to have been in bad faith, the amount of the fees incurred by Highland in connection with the Proof of Claim litigation is "*per se* excessive for a single proof of claim objection"[18] and "extraordinarily high given that this dispute could have been brought to a swift close many months ago"—if only NexPoint/HCRE had been allowed to withdraw its Proof of Claim in September of 2022.[19] Highland's has sought reimbursement of more than $800,000 in attorneys' fees and more than $16,000 in expenses, identified in Exhibits F through H (and summarized in Exhibit I) of the Morris Declaration as having been incurred by Highland in connection with its litigation of the Proof of Claim.

Highland filed its *Reply in Further Support of Its Motion for (A) Bad Faith Finding and (B) Attorneys' Fees against NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC) in*

[15] *See Order Granting in Part and Denying in Part Motion to Stay and to Compel Mediation*. Dkt. No. 3897. This was not the first time the bankruptcy court has ordered global mediation in the Highland case.

[16] *See Joint Notice of Mediation Report* filed on November 7, 2023. Dkt. No. 3995.

[17] Dkt. No. 3995.

[18] Response, 10, ¶34.

[19] Response, 13, ¶45. NexPoint/HCRE argues that, because it had sought to withdraw its Proof of Claim, any fees incurred by Highland after the filing of NexPoint/HCRE's motion to withdraw cannot be attributable to NexPoint/HCRE's alleged bad faith filing and prosecution of its Proof of Claim; rather, such fees were incurred by Highland as a result of Highland's decision to object to NexPoint/HCRE's withdrawal of its Proof of Claim and to proceed with the litigation, including taking depositions, and proceeding to "trial" on the merits instead of "taking a win" with NexPoint/HCRE's withdrawal of its Proof of Claim. *See* Response, 2.

Connection with Proof of Claim 146[20] on January 19, 2024, and filed an *Amended Reply in Further Support of Its Motion for (A) Bad Faith Finding and (B) Attorneys' Fees against NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC) in Connection with Proof of Claim 146* ("Reply")[21] on January 23, 2024. Highland argues that "[n]othing in the Response warrants the denial of the [Sanctions] Motion or its requested award of attorneys' fees" and that "the record makes clear" that NexPoint/HCRE and its principals "clearly and convincingly acted in bad faith by (a) knowingly filing and prosecuting a baseless Proof of Claim, . . . ([b]) seeking an unfair litigation advantage by trying to withdraw its Proof of Claim ***after*** taking Highland's depositions but ***before*** subjecting its own witnesses to questioning, and ([c]) trying at all times to preserve for another day the claims it asserted (*i.e.*, to "reform, rescind and/or modify the agreement")."[22]

The court held a hearing on the Sanctions Motion ("Hearing") on January 24, 2024, during which NexPoint/HCRE was given a full opportunity to respond to Highland's allegations of bad faith and request for sanctions.

IV. CONCLUSIONS OF LAW

A. The Sanctions Motion Satisfies Due Process Considerations

In invoking its inherent power to sanction bad faith conduct or a willful abuse of the judicial process, "[a] court must exercise caution . . . , and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." *In re Correra*, 589 B.R. 76, 125 (Bankr. N.D. Tex. 2018). As noted above, the court entered its Proof of Claim Disallowance Order on April 28, 2023, in which it sustained Highland's objection to, and disallowed, the Proof of Claim but denied, without prejudice, Highland's Oral Sanctions Motion

[20] Dkt. No. 4018.

[21] Dkt. No. 4023.

[22] Reply, 2, ¶2.

as being procedurally defective because, having been raised for the first time during Trial and not having been made in writing, it had not given NexPoint/HCRE adequate notice and an opportunity to respond to the specific allegations of bad faith being made against it. The court pointed out that it did not address or make any determination regarding the substance of Highland's requests in the Oral Sanctions Motion for a bad faith finding and sanctions against NexPoint/HCRE, subject to Highland's right seek a bad faith finding and sanctions against NexPoint/HCRE upon and after giving it proper notice and an opportunity to respond:

> Here, where the Reorganized Debtor's generic oral request for a finding of bad faith and for "an award costs for a bad faith filing" did not articulate the legal basis for such an award and was raised for the first time during the Trial, HCRE was not given sufficient notice and an opportunity to respond, and, therefore, the court will deny, without prejudice, [Highland's] request for reimbursement of its costs incurred in connection with its objection to HCRE's Proof of Claim.

Proof of Claim Disallowance Order, 38-39 (quoting *In re Emanuel*, 422 B.R. 453, 464 (Bankr. S.D.N.Y. 2010) ("[A] person facing possible sanctions is entitled to due process. . . . At a minimum, the respondent is entitled to notice of the authority for the sanctions, notice of the specific conduct or omission that forms the basis of possible sanctions and the opportunity to respond."); *In re Magari*, 2010 WL 817327 at **2-3 (Bankr. N.D. Tex. Mar. 4, 2010) ("By requesting the sanctions award, the Trustee has raised due process concerns that can only be satisfied by providing to the affected party sufficient notice and opportunity to respond.")).

The court concludes that the instant Sanctions Motion and Hearing have provided NexPoint/HCRE with the due process that was lacking in connection with the Oral Sanctions Motion. NexPoint/HCRE was given adequate notice of the legal authority invoked for sanctions (the bankruptcy court's inherent powers under section 105 of the Bankruptcy Code) and NexPoint/HCRE's specific conduct (the filing and prosecution of its Proof of Claim) that Highland

alleges to have been in bad faith, and NexPoint/HCRE was given adequate opportunity to respond through briefing and at the Hearing on the Sanctions Motion.

With due process concerns having been now addressed and satisfied, the court is able to address the substantive questions raised in the instant Sanctions Motion of (1) whether NexPoint/HCRE did, indeed, act in bad faith in the filing and prosecution of its Proof of Claim and (2) if so, whether an award of reimbursement of Highland's attorneys' fees and costs incurred in connection with its litigation of the Proof of Claim is an appropriate sanction for such bad faith.

B. NexPoint/HCRE Filed and Prosecuted its Proof of Claim in Bad Faith and Willfully Abused the Judicial Process

A bankruptcy court may sanction a litigant for bad faith filing or litigation if the court makes specific findings, based on clear and convincing evidence, of bad faith or willful abuse of the judicial process. *See Cleveland Imaging*, 26 F.4th at 292 (A bankruptcy court may only sanction a party using its inherent authority if "(1) the bankruptcy court finds that the party acted in bad faith or willfully abused the judicial process and (2) its finding is supported by clear and convincing evidence.") (citing *Cadle Co. v. Moore (In re Moore)*, 739 F.3d 724, 729-30 (5th Cir. 2014)). The bankruptcy court's power to sanction bad faith or willful abuse of the judicial process derives from its inherent authority under 11 U.S.C. § 105(a) to issue civil contempt orders. *Id.* at 294, 294 n.14 (quoting the "relevant part" of Bankruptcy Code section 105(a), which provides that bankruptcy courts may "sua sponte, tak[e] any action . . . necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.") (cleaned up).

Having reviewed the record and the evidence adduced at Trial and NexPoint/HCRE's response to the Sanctions Motion (both in its Response and at the hearing on the Sanctions Motion), the court finds and concludes that there is clear and convincing evidence here that

NexPoint/HCRE filed and prosecuted is Proof of Claim in bad faith and that it willfully abused the judicial process.

1. *Dondero's Execution and Authorization of the Filing of the Proof of Claim Without First Having Read the Document or Conducting Any Due Diligence Was in Bad Faith and a Willful Abuse of the Judicial Process*

As noted in the Proof of Claim Disallowance Order, NexPoint/HCRE filed its Proof of Claim in this Highland bankruptcy case on April 8, 2020, several months after the post-petition "nasty breakup" between Highland and its co-founder and president and chief executive officer, Dondero. NexPoint/HCRE described the basis of its claim in Exhibit A attached to its Proof of Claim:[23]

Exhibit A

> HCRE Partner, LLC ("Claimant") is a limited partner with the Debtor in an entity called SE Multifamily Holdings, LLC ("SE Multifamily"). Claimant may be entitled to distributions out of SE Multifamily, but such distributions have not been made because of the actions or inactions of the Debtor. Additionally, Claimant contends that all or a portion of Debtor's equity, ownership, economic rights, equitable or beneficial interests in SE Multifamily does [not] belong to the Debtor or may be the property of Claimant. Accordingly, Claimant may have a claim against the Debtor. Claimant has requested information from the Debtor to ascertain the exact amount of its claim. This process is on-going. Additionally, this process has been delayed due to the outbreak of the Coronavirus. Claimant is continuing to work to ascertain the exact amount of its claim and will update its claim in the next ninety days.

NexPoint/HCRE was one of the many non-debtor Dondero-controlled entities affiliated with Highland. Dondero was the president and sole manager of NexPoint/HCRE, and an individual named Matt McGraner ("McGraner") was NexPoint/HCRE's vice president and secretary. NexPoint/HCRE had no employees of its own but instead relied on Highland's employees (and employees of other entities controlled by Dondero) to conduct business on its behalf. Dondero executed the Proof of Claim as the "person who is completing and signing this claim," checking

[23] Claim No. 146.

the box that indicates he is "the creditor's attorney or authorized agent" and acknowledging that "I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct" and that "I declare under penalty of perjury that the foregoing is true and correct."[24] The evidence overwhelmingly supports a finding that Dondero signed and authorized the filing of the Proof of Claim (that the court ultimately determined was lacking in any factual or legal support) without having even read it and without conducting any due diligence on, or investigation into, whether the statements made in the Proof of Claim were truthful and accurate, which supports a finding that Dondero's signing and filing of the Proof of Claim on behalf of NexPoint/HCRE was done in bad faith and constituted a willful abuse of the judicial process.

At Trial, Dondero testified that he had authorized his electronic signature to be affixed to the document and to be filed on behalf of NexPoint/HCRE and admitted that he had not reviewed the document before doing so.[25] He further testified that he could not recall "personally [doing] any due diligence of any kind to make sure that Exhibit A was truthful and accurate before [he] authorized it to be filed,"[26] and, more specifically, that he did not, prior to authorizing his law firm (Bonds Ellis) to affix his electronic signature on, and to file, the Proof of Claim, review or provide comments to the Proof of Claim or its Exhibit A, review the SE Multifamily Amended LLC Agreement or any documents,[27] "check with any member of the real estate group to see whether or not they believed [the Proof of Claim] was truthful and accurate before [he] authorized Bonds Ellis to file it," or do "anything . . . to make sure that this proof of claim was truthful and accurate before [he] authorized [his] electronic signature to be affixed and to have it filed on behalf of

[24] Proof of Claim, 3.

[25] Transcript of the November 1, 2022 Trial on Debtor's Objection to HCRE's Proof of Claim ("Trial Tr.")[Dkt. No. 3616] 55:2-22.

[26] Trial Tr. 56:20-23.

[27] Trial Tr. 55:10-22, 56:15-57:6.

HCRE."[28] Moreover, he testified that he did not know whose idea it was to file the Proof of Claim,[29] who at NexPoint/HCRE worked with, or provided information to, Bonds Ellis to enable Bonds Ellis to prepare the Proof of Claim, what information was given to Bonds Ellis that enabled them to formulate the Proof of Claim, or whether "Bonds Ellis ever communicated with anybody in the real estate group regarding [the Proof of Claim]."[30]

Dondero has argued that he had a good faith basis to sign and file the Proof of Claim on behalf of NexPoint/HCRE because "he had a host of responsibilities across a sprawling and sophisticated corporate structure and relied on numerous individuals within that structure to help manage the day-to-day operations of Highland and its subsidiaries and managed funds"[31] and that he "ha[d] to rely on systems and processes[,]" because "[he] can't be directly involved in everything."[32] Dondero further testified that "[he] sign[s] a lot of high-risk documents and [has] to rely on the process and the people and internally and externally as part of the process to sign it without direct validation from or verification from me, and this [Proof of Claim] is another one of those items."[33]

Dondero's "I'm-a-very-busy-person/too-busy-to-be-bothered-to-investigate" excuse is not a defense, as a matter of law, to his bad faith and willful abuse of the judicial process in connection with the filing of the Proof of Claim. Nor is Dondero's claimed reliance on systems and processes in connection with the execution and filing of this Proof of Claim, as a matter of fact, supported by the evidence. The court notes that the Proof of Claim is not a complex, lengthy legal or

[28] Trial Tr. 57:25-58:16.

[29] Trial Tr. 57:7-9.

[30] Trial Tr. 56:1-14.

[31] Response, 7, ¶16.

[32] Trial Tr. 57:25-58:7.

[33] Trial Tr. 57:25-59:2.

corporate document; Exhibit A to the Proof of Claim, which set forth the basis for the claim, is only one paragraph long, yet Dondero did not even bother to read it before signing under penalty of perjury that the information contained in the Proof of Claim, including Exhibit A, was truthful and accurate. And, Dondero's own testimony contradicts his assertion that he relied on "systems and processes" and on other people within the "sprawling and sophisticated corporate structure" and his outside counsel to ensure the accuracy of the Proof of Claim. He had no reasonable or justifiable basis to rely on anyone or any "process" that was allegedly in place in connection with his signing of "high risk" documents, because he asked no questions, conducted no due diligence, and made no effort, whatsoever, to verify that the information that he was swearing was accurate under penalty of perjury was, in fact, truthful.

The court finds and concludes that the foregoing admissions by NexPoint/HCRE, through Dondero, provide clear and convincing evidence that ***NexPoint/HCRE filed its Proof of Claim*** in bad faith and willfully abused the judicial process.

2. *NexPoint/HCRE's Litigation Strategy and Actions in the Prosecution of Its Proof of Claim Are Further Evidence of Its Bad Faith and Willful Abuse of the Judicial Process*

Moreover, NexPoint/HCRE's ***litigation strategy and actions*** taken in the course of prosecuting its Proof of Claim over the next two and a half years, after filing it, ***provide further support for a finding that NexPoint/HCRE engaged in bad faith and willfully abused the judicial process***.

As noted in the Proof of Claim Disallowance Order, six months after Dondero signed and filed the Proof of Claim in April 2020, and in response to Highland's objection to its Proof of Claim,[34] NexPoint/HCRE fleshed-out the legal and factual bases for its claim:[35]

> After reviewing what documentation is available to [NexPoint/HCRE] with the Debtor, [NexPoint/HCRE] believes the organizational documents relating to SE Multifamily Holdings, LLC (the "SE Multifamily Agreement") improperly allocates the ownership percentages of the members thereto due to mutual mistake, lack of consideration, and/or failure of consideration. As such, [NexPoint/HCRE] has a claim to reform, rescind and/or modify the agreement.
>
> However, [NexPoint/HCRE] requires additional discovery, including, but not limited to, email communications and testimony, to determine what happened in connection with the memorialization of the parties' agreement and improper distribution provisions, evaluate the amount of its claim against the Debtor, and protect its interests under the agreement.

The Response was filed by a new law firm—Wick Phillips Gould & Martin, LLP ("Wick Phillips") – not the law firm of Bonds Ellis, which had handled the filing of the Proof of Claim. In the course of discovery, Highland became aware that Wick Phillips had jointly represented NexPoint/HCRE and Highland in connection with at least some of the underlying transactions that were the subject of the Proof of Claim, and, on April 14, 2021, more than a year after NexPoint/HCRE filed its Proof of Claim, Highland moved to disqualify Wick Phillips.[36] Notably, Highland's Plan had been confirmed on February 22, 2021, over the objections of Dondero and his related entities (including NexPoint/HCRE).[37] The effective date ("Effective Date") of the Plan occurred on August 11, 2021, and Highland became the Reorganized Debtor under the Plan.

---

[34] On July 30, 2020, Highland filed an objection to the allowance of the Proof of Claim, contending it had no liability under the Proof of Claim. *See Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims, (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims*, Dkt. No. 906.

[35] Response to Objection to Claim, 2-3, ¶¶ 5-6.

[36] Dkt. Nos. 2196-2198. On October 1, 2021, Highland filed a supplemental disqualification motion. Dkt. No. 2893.

[37] NexPoint/HCRE, represented by Wick Phillips, filed its *Objection to Debtor's Fifth Amended Plan of Reorganization* on January 5, 2021. Dkt. No. 1673.

Pursuant to the Plan, on or after the Effective Date, all or substantially all of the Debtor's assets vested in the Reorganized Debtor or the claimant trust ("Claimant Trust") created under the terms of the Plan, including Highland's 46.06% membership interest in SE Multifamily.

Meanwhile, NexPoint/HCRE vigorously fought the disqualification of Wick Phillips, filing its opposition to the disqualification motion on May 6, 2021,[38] and initiating a more than six-month period of expensive discovery and side litigation that culminated, after a lengthy hearing on the disqualification motion, with the entry by this court on December 10, 2021, of its *Order Granting in Part and Denying in Part Highland's Supplemental Motion to Disqualify Wick Phillips Gould & Martin, LLP As Counsel to HCRE Partners, LLC and for Related Relief* ("Disqualification Order"),[39] resolving the disqualification motion by, among other things, disqualifying Wick Phillips from representing NexPoint/HCRE in the contested matter concerning the Proof of Claim, but specifically denying Highland's request that NexPoint/HCRE reimburse it all costs and fees incurred in making and prosecuting the disqualification motion.[40]

In the instant Sanctions Motion, Highland acknowledged that the court denied Highland's specific request for sanctions of reimbursement of Highland's costs and fees in making the Disqualification Motion in its December 2021 Disqualification Order.[41] The court notes that the denial was not "with prejudice"[42] to Highland's right to bring a sanctions motion in the future in connection with allegations that NexPoint/HCRE's filing and prosecution of its Proof of Claim, including its vigorous defense of the Disqualification Motion. Notably, while Highland includes

[38] Dkt. Nos. 2278 and 2279.

[39] Dkt. No. 3106.

[40] Disqualification Order, 4.

[41] *See* Sanctions Motion, 4, ¶8.

[42] The Disqualification Order stated, in relevant part, "Highland's request that HCRE reimburse it all costs and fees incurred in making and prosecuting the Motion, including reasonable attorneys' fees, is **DENIED**."

a reference in the instant Sanctions Motion to the lengthy and expensive proceedings on the Disqualification Motion in its recitation of evidence in the record that supports Highland's allegations that NexPoint/HCRE engaged in bad faith conduct in the filing and prosecution of its Proof of Claim, it did ***not*** include them as part of the fees and costs for which Highland is seeking to be reimbursed by NexPoint/HCRE as a sanction for NexPoint/HCRE's bad faith filing and prosecution of its Proof of Claim.[43]

In any event, following the disqualification of Wick Phillips, NexPoint/HCRE hired yet a third law firm, Hoge & Gameros, LLP, in connection with this matter, and the parties engaged in a second round of extensive discovery, which included the exchange of written discovery and document production and the service of various deposition notices and subpoenas. On August 12, 2022, just two business days after NexPoint/HCRE completed the depositions of Highland's witnesses, and a day after NexPoint/HCRE made a supplemental production of more than 4,000 pages of documentation, and two business days before the consensually scheduled depositions of NexPoint/HCRE's witnesses, Dondero and McGraner, were set to occur, NexPoint/HCRE filed a motion to withdraw its Proof of Claim ("Motion to Withdraw").[44] By this point, Highland had spent hundreds of thousands of dollars objecting to the Proof of Claim.

Query why might NexPoint/HCRE have done this? Just six months earlier, Dondero's family trust, The Dugaboy Investment Trust, had represented to the bankruptcy court that

[43] *See* Morris Declaration, 3-4, at ¶11 (Referencing the court's denial in its Disqualification Order of Highland's previous request for attorneys' fees incurred in connection with the Disqualification Motion, Morris stated "[W]e reviewed the PSZJ Invoices and redacted all entries relating to the Disqualification Motion; thus, for the avoidance of doubt, Highland does not seek any fee award with respect to any work done in connection with the Disqualification Motion.").

[44] *See Motion to Withdraw Proof of Claim* [Dkt. No. 3442].

Highland's 46.06% interest in SE Multifamily was worth $20 million,[45] and now, NexPoint/HCRE (which presumably also spent substantial sums prosecuting its Proof of Claim during the nearly two and a half years of litigation) appeared willing to walk away from its multi-million dollar challenge to Highland's 46.06% interest in SE Multifamily. Highland objected to NexPoint/HCRE's Motion to Withdraw, and the court held a hearing on September 12, 2022 (as required by Bankruptcy Rule 3006), following which the court entered an order denying NexPoint/HCRE's Motion to Withdraw, for the reasons set forth on the record,[46] and directing the parties to "confer in good faith to complete the depositions" of Dondero, McGraner, and NexPoint/HCRE and otherwise comply with the scheduling order that had been entered by the court on this matter, which included appearing for an evidentiary hearing on November 1, 2022.[47] The court denied NexPoint/HCRE's Motion to Withdraw, in part, because it was concerned that the timing of it all–just two business days ***after*** completing Highland's depositions but two business days ***before*** the consensually-scheduled depositions of NexPoint/HCRE's witnesses were to take place—reflected gamesmanship on the part of NexPoint/HCRE (*i.e.,* NexPoint/HCRE prosecuted its Proof of Claim for two and a half years, through and including the taking of depositions of Highland's witness, while shielding its own witnesses from testifying). The court was also concerned by NexPoint/HCRE's repeated attempts to preserve its claims against Highland for use against Highland in the future. In fact, the court entered its order denying NexPoint/HCRE's Motion to Withdraw only after: (1) NexPoint/HCRE refused to agree, at the

[45] *See Motion for Determination of the Value of the Estate and Assets Held by the Claimant Trust* [Docket No. 3382]. As pointed out by Highland in its Response, "[t]here is no dispute that HCRE is the manager of SE Multifamily and therefore—through Mr. Dondero—would be best positioned to opine on the value of Highland's interest in SE Multifamily." Response, 9, at ¶27 n. 4.

[46] The court noted in its order denying HCRE's Motion to Withdraw that, under the Bankruptcy Rules, a creditor does not have an absolute right to withdraw a proof of claim.

[47] Dkt. No. 3525.

September 12 hearing, to language in an order allowing withdrawal of the Proof of Claim that stated, unequivocally, that NexPoint/HCRE waived the right to relitigate or challenge the issue of Highland's 46.06% ownership interest in SE Multifamily, and (2) counsel were thereafter unable, in the day or two after the hearing, to work out mutually acceptable language in an agreed order that protected both parties.[48] As noted in its order denying NexPoint/HCRE's Motion to Withdraw, the court had expressed concerns, during the hearing on the Motion to Withdraw, relating to the integrity of the bankruptcy system and claims process if it allowed NexPoint/HCRE to withdraw its Proof of Claim after two and a half years of litigation, and having caused Highland to spend hundreds of thousands of dollars litigating the Proof of Claim, while at the same time allowing NexPoint/HCRE to preserve its challenges to Highland's ownership interest in SE Multifamily to be used against Highland in the future. The court did not, at the time, make any express findings regarding NexPoint/HCRE's bad faith or abuse of the judicial process, only because Highland's mid-hearing Oral Sanctions Motion had not provided NexPoint/HCRE with adequate notice and an opportunity to respond.[49] With the instant Sanctions Motion, those due process concerns have been satisfied.

Having considered the evidence and argument of counsel at both the Trial on NexPoint/HCRE's Proof of Claim and the hearing on the Sanctions Motion, and the pleadings filed in connection with the Sanctions Motion, including NexPoint/HCRE's written Response, and based on the record as a whole, the court expressly finds and concludes that NexPoint/HCRE's

[48] At the end of the September 12 hearing, the court had expressed concerns about gamesmanship, but, at the same time, assured the parties that it was still open to signing an agreed order regarding withdrawal of the Proof of Claim, if counsel could work out mutually acceptable language that protected both parties "without the pressure of the Court hovering over you." *See* Transcript of Hearing on Motion to Withdraw, Dkt. No. 3519, 50:14-59:14. Apparently, counsel were unable to reach an agreement on the terms of an agreed order, and so the court signed the order at docket number 3525, denying NexPoint/HCRE's Motion to Withdraw.

[49] As noted below, NexPoint/HCRE persisted to the end in arguing that the disallowance of its Proof of Claim could not bar NexPoint/HCRE from making future challenges to Highland's 46.06% membership interest in SE Multifamily.

litigation strategy and actions in prosecution of its Proof of Claim (including vigorous opposition to the Disqualification Motion, the timing of the Motion to Withdraw, and its repeated and overt attempts to preserve the very claims upon which its Proof of Claim was based in connection with the Motion to Withdraw) demonstrates bad faith and a willful abuse of the judicial process on the part of NexPoint/HCRE.

3. NexPoint/HCRE's Admissions at Trial Are Further Evidence of its Bad Faith Filing and Willful Abuse of the Judicial Process

Following the denial of NexPoint/HCRE's Motion to Withdraw, the parties complied with the court's order to schedule the depositions of Dondero and McGraner at mutually agreeable times to complete discovery and then appeared at Trial on November 1, 2022. At the conclusion of the Trial, NexPoint/HCRE doubled-down on its request of the court "to grant the proof of claim and reallocate the equity [in SE Multifamily] based on the capital contribution[s]."[50] This was despite admissions by Dondero and McGraner in their Trial testimony that made it clear that NexPoint/HCRE did not, and never did, have a factual or legal basis for its request. Nevertheless, NexPoint/HCRE continued to the end to try to limit any order disallowing its Proof of Claim so as to preserve its right to assert the very claims asserted in its Proof of Claim (for rescission, reformation and/or modification of the SE Multifamily Amended LLC Agreement to reallocate the membership percentages) for use in the future.[51]

The Trial testimony of Dondero and McGraner revealed that NexPoint/HCRE had no factual basis to claim that a mistake was made by any of the parties, much less a mutual mistake

[50] Trial Tr. 179:23-25; 180:8-9.

[51] Trial Tr. 179:21-24 ("They want you to make findings that we can't raise any of these other issues, rescissions, stays, et cetera, going forward. That's not proper relief on a proof of claim."); 200:8-12 ("If Your Honor's going to deny the proof of claim, I would ask that you simply deny the proof of claim. We don't have an adversary proceeding here. There wasn't one started. Mr. Morris considered that and then didn't follow that path, because all we have here today is a proof of claim.").

of the parties, regarding the allocation of ownership percentages in SE Multifamily in corporate documentation,[52] and, in fact, "the evidence overwhelmingly point[ed] to the conclusion that both Mr. Dondero and Mr. McGraner understood that the allocation of 46.06% membership interest to Highland, and a total capital contribution by Highland of $49,000 in the Amended LLC Agreement, reflected the intent of the parties prior to, and at the time of, the execution of the Amended LLC Agreement."[53] The court specifically noted in the Proof of Claim Disallowance Order that Dondero admitted that he had not read or reviewed the Amended LLC Agreement or any drafts of it before he signed it—apparently the Amended LLC Agreement was one of those important, high-risk documents that Dondero was too busy to read or investigate before signing (like the Proof of Claim)—but he nevertheless testified that "the capital contributions and membership allocations contained in Schedule A of the Amended LLC Agreement comported with his understanding and intent when he signed the Amended LLC Agreement on behalf of HCRE and Highland."[54] NexPoint/HCRE was also unable to produce any evidence at Trial to support its factual allegation that there was a "lack of consideration" or a "failure of consideration" with respect to the Amended LLC Agreement, such that NexPoint/HCRE would be entitled to a

[52] The court concluded, specifically, that

> HCRE did not produce any evidence, much less clear and convincing evidence, that the parties to the Amended LLC Agreement – HCRE, Highland, BH Equities, and Liberty – had come to a specific and understanding, prior to the execution of the Amended LLC Agreement in March 2019, that the allocation of percentage membership interests in SE Multifamily was different from the percentage allocations contained in the Amended LLC Agreement. When asked on cross-examination, Mr. McGraner, HCRE's officer and co-owner who was most involved in the negotiations of the terms of the Amended LLC Agreement, was unable to identify any specific mistake made in the drafting of the Amended LLC Agreement. Neither he nor NexPoint/HCRE's other witness, Mr. Dondero, were able to point to a specific meeting of the minds of the members of SE Multifamily prior to (or after, for that matter) the execution of the Amended LLC Agreement that the parties intended Highland's allocation of SE Multifamily membership interests to be any percentage other than the 46.06% allocation attributed to Highland in the written Amended LLC Agreement.

Proof of Claim Disallowance Order, 30.

[53] *Id.*, 30-31.

[54] *Id.*, 31 n. 119.

reformation,[55] rescission,[56] or modification of it, to re-allocate the ownership percentages that the parties agreed to at the time of the execution of it.[57]

In fact, McGraner ultimately admitted in his Trial testimony that the only reason NexPoint/HCRE had for filing its Proof of Claim, which challenged Highland's title to its 46.06% membership interest in SE Multifamily, was, essentially, ***that NexPoint/HCRE was frustrated with the consequences of Dondero's decision in 2019 to seek bankruptcy protection for Highland (notably, the bankruptcy case was filed just a few months after the Amended LLC Agreement was executed), which resulted in Dondero losing control over Highland***, such that, as far as NexPoint/HCRE was concerned, its "partner" [in SE Multifamily] was no longer its "partner." The court noted in the Proof of Claim Disallowance Order that McGraner

> could not point to any provision of the Amended LLC Agreement that was either "wrong" or a "mistake;" rather, he testified that the "mistake" was "when the bankruptcy was filed and we can't amend it" because "[o]ur partners aren't our partners" – "if you have good partners and you're working with partners that are –

---

[55] After noting that "neither lack of consideration nor failure of consideration are bases for reformation of a contract under Delaware law (which is what NexPoint/HCRE is seeking in its Proof of Claim)," the court concluded that "HCRE is not entitled to reformation of the Amended LLC Agreement to reallocate the members' membership interests as requested based on its allegations of lack of consideration and/or failure of consideration." Proof of Claim Disallowance Order, 32 n. 120.

[56] The court noted in the Proof of Claim Disallowance Order that NexPoint/HCRE had not actually stated a claim for rescission of the Amended LLC Agreement with respect to its Proof of Claim, but that, if it had,

> Mr. Dondero's admission that he did not read the Amended LLC Agreement (or even have the terms explained to him by counsel or anyone else) prior to signing it on behalf of HCRE and Highland would bar any claim by HCRE for rescission of the Amended LLC Agreement. Moreover, even if HCRE's claim for rescission was not barred by Mr. Dondero's failure to read the Amended LLC Agreement prior to signing it, HCRE did not present any evidence of the other elements of a rescission claim: that the parties were mistaken as to a basic assumption on which the Amended LLC Agreement was made and that the mistake had a material effect on the agreed-upon exchange of performances.

Proof of Claim Disallowance Order, 33-34.

[57] *See* Proof of Claim Disallowance Order, 32-33 n. 120 (where the court found that "HCRE has not shown that there was a lack or failure of consideration on behalf of Highland in connection with the Amended LLC Agreement. . . . Under Delaware law, the courts 'limit [their] inquiry into consideration to its existence and not whether it is fair or adequate,' . . . . '[E]ven if the consideration exchanged is grossly unequal or of dubious value, the parties to a contract are free to make their bargain.' (citations omitted). Here, it is undisputed that Highland made a cash capital contribution of $49,000, that Highland was a jointly and severally liable coborrower under the KeyBank Loan, and that SE Multifamily (and HCRE), having no employees of their own, relied on Highland's employees to conduct business. Thus, HCRE's claim, to the extent it is based on alleged lack and/or failure of consideration fails.").

> that are known to you, then you make amendments to reflect the contributions of those partners, whether monetary or otherwise . . . [a]nd my understanding is I can't do that right now."[58]

McGraner testified that "despite Mr. Dondero being in control of both HCRE and Highland prior to the bankruptcy filing, and despite 'all of the fears [he] had [related to Highland's bankruptcy filing],' HCRE made no effort to amend the agreement before the bankruptcy or post-bankruptcy (because 'we didn't think it would be worth it')[ ][59] [and] 'because [it] hoped that the issues that caused the bankruptcy filing would resolve themselves.'"[60] This is not a good-faith basis for filing and prosecuting the Proof of Claim, and it exhibits a willful abuse of the bankruptcy claims process by NexPoint/HCRE.

In summary, the admissions by Dondero and McGraner in their Trial testimony made clear that NexPoint/HCRE never had a factual or legal basis for the Proof of Claim. NexPoint/HCRE's principals knew, at the time of filing and through its prosecution of the Proof of Claim, that there was no factual basis for its claim of rescission, reformation, and/or modification of the Amended LLC Agreement to dispossess Highland of some or all of its 46.06% membership interest in SE Multifamily. This clearly and convincingly constitutes bad faith by NexPoint/HCRE and a willful abuse of the judicial process.

C. Reimbursement of Attorneys' Fees and Costs Incurred by Highland in the Proof of Claim Litigation Is an Appropriate Sanction for NexPoint/HCRE's Bad Faith

Having found and concluded by clear and convincing evidence that NexPoint/HCRE filed and prosecuted (and attempted withdrawal of) its Proof of Claim in bad faith and willfully abused the judicial process, this court may use its inherent powers under Bankruptcy Code section 105(a)

---

[58] Proof of Claim Disallowance Order, 27 (citing Trial Tr. 114:24-115:16, 118:6-15).

[59] *Id.* (citing Trial Tr. 121:24-122:9).

[60] *Id.* at 28 (citing Trial Tr. 122:20-125:21).

to sanction it for such conduct. Reimbursement of the opposing party's fees and costs incurred in responding to a bad faith filing or willful abuse of the judicial process has been upheld as an appropriate form of sanctions. *See Cleveland Imaging*, 26 F.4th at 294 (upholding the bankruptcy court's sanction order that required the parties who were found to have filed bankruptcy petitions in bad faith to reimburse the fees incurred by a post-confirmation litigation trust in responding to the bad faith filing); *Carroll v. Abide (In re Carroll)*, 850 F.3d 811 (5th Cir. 2017) (bankruptcy court did not abuse its discretion in ordering the debtors to "pay $49,432, which represents the amount of attorneys' fees incurred by [the bankruptcy trustee] in responding to certain instances of the [debtors'] bad faith conduct."); *In re Yorkshire, LLC*, 540 F.3d 328, 332 (5th Cir. 2008) (affirming bankruptcy court's use of its inherent powers to issue monetary sanctions for bad faith filing that were, in part, based upon the opposing parties' attorneys' fees and costs "following an extensive hearing in which the bankruptcy court heard testimony from the parties and witnesses and made certain credibility determinations," and "made specific findings that Appellants acted in bad faith."); *In re Paige*, 365 B.R. 632, 637-399 (Bankr. N.D. Tex. 2007) (awarding attorneys' fees against debtor for their "bad faith" conduct during bankruptcy case, noting "[t]he sanction here is derived from the Court's inherent power to sanction" under section 105(a)); *In re Lopez*, 576 B.R. 84, 93 (S.D. Tex. 2017) (same). Any sanction imposed pursuant to a bankruptcy court's inherent powers for bad faith conduct or willful abuse of the judicial process "must be compensatory rather than punitive in nature." *In re Lopez*, 576 B.R. at 93 (quoting *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 108 (2017) (citing *Mine Workers v. Bagwell*, 512 U.S. 821, 826-30 (1994)). "[A] sanction counts as compensatory only if it is 'calibrate[d] to [the] damages caused by' the bad-faith acts on which it is based[,]" and "[a] fee award is so calibrated if it covers the legal bills that the litigation abuse occasioned." *Goodyear Tire & Rubber*, 581 U.S.

at 108 (quoting *Bagwell*, 512 U.S. at 834). The fee award must be "limited to the fees the innocent party incurred solely because of the misconduct—or put another way, to the fees that party would not have incurred but for the bad faith." *Id.* (quoting *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. at 104). The "'causal link' between the sanctionable conduct and the opposing party's attorney's fees" must be established "through a 'but-for test:' to wit, the complaining party may only recover the portion of fees that they would not have paid 'but-for' the sanctionable conduct." *Id.* (citing *Goodyear Tire & Rubber*, 581 U.S. at 108-109 (citing *Fox v. Vice*, 563 U.S. 826, 836 (2011)).

Here, as earlier noted, Highland has requested, as a sanction, reimbursement of its attorneys' fees and costs incurred by it in responding to NexPoint/HCRE's filing and prosecution of its Proof of Claim. Specifically, Highland seeks reimbursement of an aggregate amount of **$825,940.55**, consisting of

- **$782,476.50** in attorneys' fees charged by its primary bankruptcy counsel, PSZJ, for the period August 1, 2021 through December 31, 2022, for work performed in connection with the litigation of the Proof of Claim;[61]
- **$16,164.05** in third-party expenses for court reporting services provided in connection with the Proof of Claim litigation;[62] and,

[61] *See* Morris Declaration, 3-4, at ¶¶ 8-13, and Ex. F. As stated in the Morris Declaration, the $782,476.50 amount does not include any fees relating to the Disqualification Motion or any fees that PSZJ concluded were inadvertently coded by a timekeeper to the NexPoint/HCRE Claim Objection category "or that were otherwise unrelated to services rendered in connection with the Proof of Claim litigation." *Id.*, 3-4, at ¶¶ 11 and 12. By way of specific example, Morris stated that "in 2022 and 2023 we charged Highland for services rendered in connection with our unsuccessful attempts to obtain SE Multifamily's books and records but excluded those charges here because they do not directly relate to the litigation of HCRE's Proof of Claim; Highland is seeking those fees in the Delaware Chancery Court where Highland was forced to commence an action against HCRE for specific performance (Case No. 2023-0493-LM))." *Id.*, 4, at ¶ 12.

[62] *See id.*, 4, at ¶ 14, and Ex. G.

- **$27,300.00** in attorneys' fees charged by David Agler for providing Highland with specialized tax advice concerning SE Multifamily and other matters related to the Proof of Claim.[63]

NexPoint/HCRE challenges Highland's request for reimbursement of its fees on several bases. ***First***, it argues that it cannot be ordered to reimburse the fees and expenses incurred by Highland ***after*** NexPoint/HCRE attempted to withdraw its Proof of Claim because they do not satisfy the "but for" test for establishing a "causal link" between those fees and costs and NexPoint/HCRE's filing and pursuit of its Proof of Claim—that Highland cannot show that "but for" NexPoint/HCRE's filing and prosecution of its Proof of Claim, Highland would not have incurred those fees and costs. NexPoint/HCRE urges the court to adopt its narrative of the proceedings that "instead of taking a win, [Highland] and its lawyers chose to generate fees to get the same result" and thus Highland's attorneys' efforts were "totally unnecessary" and a "waste of time and resources" that was "the fault of [Highland], not [NexPoint/HCRE]."[64] NexPoint/HCRE states in its Response that "[h]ere, ***it is undisputed*** that, had [Highland] agreed to the withdrawal of the Proof of Claim many months ago – before engaging in costly additional discovery and preparing for and attending a trial on the merits of the claim – [Highland] would have been exactly in the same position that it is in now, but at far less expense" and further that "[t]he real, practical difference between refusing to consent to the withdrawal of [NexPoint/HCRE]'s Proof of Claim and instead prosecuting the Objection to its end is several hundred thousand dollars in attorneys' fees" and, thus, "[t]he Motion abjectly fails any 'but–for' analysis."[65]

---

[63] *See id.*, 4-5, at ¶¶ 15 and 16, and Ex. H. A summary of the aggregate fees and expenses of which Highland is seeking reimbursement in the Sanctions Motion is attached as Exhibit I to the Morris Declaration. *See id.*, 5, at ¶ 17, and Ex. I.

[64] Response, 2.

[65] Response, 20, at ¶60 (emphasis added).

The court disagrees with NexPoint/HCRE's "narrative" and its view of the evidence established at Trial. Highland ***does*** dispute NexPoint/HCRE's contention that, if only it had allowed it to withdraw its Proof of Claim and accepted a "win," that Highland would have been "exactly in the same position that it is in now [after a Trial and ruling on the merits of the Proof of Claim], but at far less expense." The court does as well. As Highland has argued, NexPoint/HCRE's Motion to Withdraw was itself filed in bad faith. Highland was forced to oppose the withdrawal of the Proof of Claim because NexPoint/HCRE would not agree to a withdrawal, with prejudice, to NexPoint/HCRE's right to challenge Highland's title to its 46.06% membership interest in SE Multifamily in the future.[66] The evidence clearly and convincingly established that any "win" or "victory" that Highland would have obtained through the withdrawal of the Proof of Claim[67]

> would have been pyrrhic because ***HCRE—in a clear act of bad faith—tried to withdraw its Proof of Claim while preserving the substance of it claims for another day***. Had HCRE's duplicitous strategy been successful, Highland's interest in SE Multifamily would have remained subject to challenge—an untenable result for anyone, let alone a post-confirmation entity seeking to implement a court-approved asset monetization plan.

The court finds and concludes, as argued by Highland, that there is clear and convincing evidence here that the fees and costs incurred by it, after NexPoint/HCRE sought to withdraw its Proof of Claim (*i.e.,* to prepare for the Trial and prosecute its objection to the Proof of Claim through a trial and ruling on the merits), would not have been incurred "but for" NexPoint/HCRE's bad faith. As pointed out by Highland and as noted above,[68] the court did not enter the Proof of Claim Disallowance Order in December 2022 in a vacuum. Rather, the court denied

---

[66] *See supra* note 45 and accompanying text.

[67] Response, 5, at ¶18.

[68] *See supra* at pages 16-17.

NexPoint/HCRE's Motion to Withdraw only ***after:*** (1) the court had expressed concerns that the timing and context of its filing of its Motion to Withdraw suggested gamesmanship on its part, and that the integrity of the bankruptcy system and claims process would be in jeopardy if the court were to simply allow withdrawal, without protecting Highland from future challenges to its membership interest in SE Multifamily (particularly, after Highland had spent hundreds of thousands of dollars to that point in objecting to the Proof of Claim); and (2) NexPoint/HCRE refused to agree to language in an order that would alleviate these expressed concerns. The court—having now made an express finding that NexPoint/HCRE's filing of its Motion to Withdraw was in bad faith and part of its willful abuse of the bankruptcy claims process that began with the filing of its Proof of Claim in April 2020—now expressly finds that the fees and costs incurred by Highland after NexPoint/HCRE filed its Motion to Withdraw were necessary for Highland to protect its interests and would not have been incurred "but for" NexPoint/HCRE's bad faith conduct and willful abuse of the judicial process.

Second, NexPoint/HCRE objects to Highland's fees ($809,776.50) and expenses ($16,164.05) as being "*per se* excessive for a single proof of claim objection."[69] Highland argues that "[s]pending less than 5% of the value of an asset (according to Mr. Dondero's family trust) to obtain good, clear title is economically rational and consistent with the Claimant Trust's duty to maximize value for the benefit of the Claimant Trust's beneficiaries." Per the Morris Declaration, Highland only seeks reimbursement of expenses and fees charged to Highland for expenses incurred and work performed in litigating the Proof of Claim (but—as noted earlier—specifically excluding any fees charged relating to the Disqualification Motion). The court agrees with Highland and finds that the fees and expenses incurred by it in objecting to the Proof of Claim,

[69] Response, 10, ¶34.

including the fees incurred ***after*** NexPoint/HCRE sought to withdraw its Proof of Claim, were reasonable and necessary for Highland to protect a valuable asset—it's 46.06% interest in SE Multifamily—and, thus, they are not excessive.

Third, NexPoint/HCRE complains, in its Response, that the fees charged by PSZJ were unreasonable and excessive because the PSZJ invoices show that it was seeking reimbursement for fees charged by "layers of timekeepers whose identities and roles have not been disclosed."[70] NexPoint/HCRE points out three professionals (two of whom billed one hour or less) who were identified in PSZJ's invoices only by their initials.[71] In its Reply, Highland identified the timekeepers by name—as a litigator who billed one hour of time; a bankruptcy attorney who billed 0.6 hours of time; and a bankruptcy partner who billed 15.1 hours of time—all of whom were "called upon to provide discrete support."[72] Collectively, the three previously "unidentified" attorneys charged just 0.023% of the total fee request.[73] PSZJ's identification of the "unidentified timekeepers" and explanation of the work performed by them satisfies the court that these fees were reasonable and necessary fees incurred as a direct result of NexPoint/HCRE's bad faith filing and prosecution of its Proof of Claim. The court rejects NexPoint/HCRE's suggestion that PSZJ overstaffed and overbilled the file because there were "layers of timekeepers." As pointed out in Highland's Reply, "over 82% of the charges related to one litigation partner . . . , one litigation associate . . . , and one paralegal" and "[t]wo other lawyers who have been on the Pachulski team since the inception of this engagement . . . billed relatively modest amounts of time over the course

[70] *Id.*, 13, ¶45.

[71] *Id.*, 12, ¶38.

[72] Reply, 9, ¶28.

[73] *Id.*

of this prolonged litigation."[74] There is simply no factual basis to support a conclusion that the matter was overstaffed.

Fourth, NexPoint/HCRE objects to $9,840 charged by two attorneys for travel time,[75] while acknowledging that those attorneys' non-working travel time was billed at half of the attorneys' regular hourly rate.[76] As pointed out by Highland in its Reply, Highland agreed to pay for travel time in its pre-petition engagement letter, so those "charges cannot come as a surprise to Mr. Dondero."[77] The court takes judicial notice of the fact that attorneys charging half of their hourly rates for non-working travel time, as PSZJ did here, pursuant to its engagement letter with Highland that was approved when the court authorized the retention of PSZJ as counsel for the Debtor, is common practice and is a commonly approved term of engagement of professionals in bankruptcy cases. The $9,840 charged by two attorneys for travel time in this matter was a reasonable and necessary expense incurred by Highland in responding to NexPoint/HCRE's bad faith filing and prosecution of its Proof of Claim.

Fifth, and finally, NexPoint/HCRE objects to the fees charged by David Agler (39 hours of work performed at $700 per hour) for providing Highland with tax advice in August 2022, on the basis that the invoice attached as Exhibit H to the Morris Declaration "indicated that it was 'unbilled' work" and that "[w]hatever work he did, it did not manifest itself in the proceedings."[78] Highland pointed out that it ***had*** explained, in the Morris Declaration, that Mr. Agler provided "specialized tax advice concerning SE Multifamily and other matters related to the Proof of

[74] *Id.*, 9, ¶28 n. 5.

[75] Response, 12, ¶37.

[76] *Id.*, 11, ¶36 (Table 1).

[77] Reply, 9-10, ¶29.

[78] Response, 12, ¶42.

Claim."[79] Highland provided a more detailed description of the services provided by Mr. Agler and why those services were necessary in its Reply: "Mr. Agler provided his services in August 2022 in conjunction with Highlands's deposition preparation, including the deposition of SE Multifamily's accountant. These services were necessary because—as Mr. Dondero and Mr. McGraner admitted and as the evidence showed—Highland's participation in SE Multifamily was expected to provide substantial tax benefits."[80] The court finds that the fees charged by David Agler for work performed for Highland that are set forth in Exhibit H to the Morris Declaration were reasonable and necessary expenses incurred by Highland in responding to HCRE's bad faith conduct and that they would not have been incurred "but for" NexPoint/HCRE's bad faith conduct and willful abuse of the judicial process.

The court has determined that the full amount of fees – $809,776.50 – and costs – $16,164.05 – that are set forth in detail in Exhibits F through H (and summarized on Exhibit I) of the Morris Declaration were reasonable and necessary for Highland to respond to, and would not have been incurred "but for," NexPoint/HCRE's bad faith filing and prosecution of its Proof of Claim, which the court has found to have been a willful abuse by NexPoit/HCRE of the judicial process. Under Fifth Circuit precedent, it is appropriate for the court, in the use of its inherent power under Bankruptcy Code § 105(a), to order NexPoint/HCRE, as a compensatory sanction for its bad faith conduct and willful abuse of the judicial process, to reimburse Highland the full amount of fees and costs requested by Highland, which, in the aggregate, total $825,940.55. NexPoint/HCRE's objections to such amounts as excessive, unnecessary, unreasonable, or unrelated to NexPoint/HCRE's bad faith conduct, are overruled.

---

[79] Reply, 10, ¶30 (citing Morris Declaration, ¶15).

[80] *See id.* (citing Morris Declaration, Ex. [E] (Trial Transcript) 43:2-14; 83:17-84:2; 191:23-193:21 (citing to testimony and tax returns that were admitted into evidence)).

V. CONCLUSION AND ORDER

In summary, the court has determined that NexPoint/HCRE was given adequate notice and an opportunity to respond to the Sanctions Motion and that there is clear and convincing evidence that it filed and prosecuted its Proof of Claim, including its eleventh-hour attempt to withdraw its Proof of Claim, in bad faith and that it willfully abused the judicial process. Such conduct directly caused Highland to incur $825,940.55 in fees and expenses. In the exercise of its inherent power under Bankruptcy Code § 105(a), the court will grant Highland's Sanctions Motion and order NexPoint/HCRE to reimburse Highland for those fees and expenses as an appropriate sanction for NexPoint/HCRE's bad faith or willful abuse of the judicial process.

Accordingly, and based on the foregoing findings of fact and conclusions of law, including those findings and conclusions in this court's Proof of Claim Disallowance Order, which has been incorporated herein by reference,

IT IS ORDERED that the Sanctions Motion [Dkt. No. 3851] be, and hereby is **GRANTED**;

IT IS FURTHER ORDERED that, in order to compensate Highland for loss and expense resulting from NexPoint/HCRE's bad faith and willful abuse of the judicial process, in filing and prosecuting its Proof of Claim, NexPoint/HCRE is hereby directed to pay Highland the compensatory sum of **$825,940.55**.

###End of Memorandum Opinion and Order###

EXHIBIT 11

Amy L. Ruhland
Texas Bar No. 24043561
REICHMAN JORGENSEN LEHMAN & FELDBERG LLP
901 S. Mopac Expwy, Suite 300
Austin, TX 78746
Tel.: (737) 227-3102
aruhland@reichmanjorgensen.com

Charles W. Gameros, Jr., P.C.
Texas Bar No. 00796956
Douglas Wade Carvell, P.C.
Texas Bar No. 00796316
HOGE & GAMEROS. L.L.P.
6116 North Central Expressway, Suite 1400
Dallas, Texas 75206
Tel.: 214-765-6002
bgameros@legaltexas.com
wcarvell@legaltexas.com

Attorneys for NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC)

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

In re:	§	
	§	**Chapter 11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	**Case No. 19-34054-SGJ-11**
Debtor.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Movant,	§	
	§	**Contested Matter**
v.	§	
NEXPOINT REAL ESTATE PARTNERS, LLC, F/K/A HCRE PARTNERS, LLC,	§	
Respondent.	§	

1934054240318000000000004

MOTION FOR RELIEF FROM ORDER

Pursuant to Federal Rule of Bankruptcy Procedure 9024, NexPoint Real Estate Partners, LLC (f/k/a HCRE Partners, LLC) ("HCRE") files this Motion for Relief from Order ("Motion"), seeking reconsideration of and relief from the Bankruptcy Court's Memorandum Opinion and Order Granting Highland Capital Management, L.P.'s Motion for (A) Bad Faith Finding and (B) Attorneys' Fees Against NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC) in Connection with Proof of Claim # 146 ("Order"). Reconsideration of and relief from the Order is warranted for several independent reasons as detailed in HCRE's Memorandum of Law in Support of this Motion for Relief From Order filed simultaneously herewith.

Dated: March 18, 2024

Respectfully Submitted,

REICHMAN JORGENSEN LEHMAN & FELDBERG

/s/ Amy L. Ruhland
Amy L. Ruhland
Texas Bar No. 24043561
aruhland@reichmanjorgensen.com
901 S. Mopac Expwy, Suite 300
Austin, TX 78746
Tel.: (737) 227-3102

HOGE & GAMEROS. L.L.P

Charles W. Gameros, Jr., P.C.
Texas Bar No. 00796956
bgameros@legaltexas.com
Douglas Wade Carvell, P.C.
Texas Bar No. 00796316
wcarvell@legaltexas.com
6116 North Central Expressway, Suite 1400
Dallas, Texas 75206
Tel.: 214-765-6002

Attorneys for NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 18, 2024, a true and correct copy of this document was served electronically via the Court's CM/ECF system to the parties registered or otherwise entitled to receive electronic notices in this case.

/s/ Amy L. Ruhland
Amy L. Ruhland

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

In re:	§	
	§	**Chapter 11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	**Case No. 19-34054-SGJ-11**
	§	
Debtor.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Movant,	§	
	§	**Contested Matter**
v.	§	
	§	
NEXPOINT REAL ESTATE PARTNERS, LLC, F/K/A HCRE PARTNERS, LLC,	§	
	§	
Respondent.	§	

ORDER GRANTING MOTION FOR RELIEF FROM ORDER

Upon consideration of the Motion for Relief from Order ("Motion") and Memorandum of Law in support thereof filed by NexPoint Real Estate Partners, LLC (f/k/a HCRE Partners, LLC) ("HCRE"), seeking reconsideration of and relief from the Bankruptcy Court's Memorandum Opinion and Order Granting Highland Capital Management, L.P.'s Motion for (A) Bad Faith Finding

and (B) Attorneys' Fees Against NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC) in Connection with Proof of Claim # 146 ("Order"),

IT IS ORDERED the Motion [Dkt. ____] be, and hereby is **GRANTED**.

End of Order # #

EXHIBIT 12

Amy L. Ruhland
Texas Bar No. 24043561
REICHMAN JORGENSEN LEHMAN & FELDBERG LLP
901 S. Mopac Expwy, Suite 300
Austin, TX 78746
Tel.: (737) 227-3102
Email: aruhland@reichmanjorgensen.com

Charles W. Gameros, Jr., P.C.
Texas Bar No. 00796956
Douglas Wade Carvell, P.C.
Texas Bar No. 00796316
HOGE & GAMEROS. L.L.P.
6116 North Central Expressway, Suite 1400
Dallas, Texas 75206
Tel.: 214-765-6002
Email: bgameros@legaltexas.com
wcarvell@legaltexas.com

Attorneys for NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC)

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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.	Case N. 19-34054 (SGJ)
Debtor.	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RELIEF FROM ORDER

1934054240318000000000005

I. INTRODUCTION

Pursuant to Federal Rule of Bankruptcy Procedure 9024, NexPoint Real Estate Partners, LLC (f/k/a HCRE Partners, LLC) ("HCRE") files its Motion for Relief from Order ("Motion") to seek reconsideration of and relief from the Bankruptcy Court's Memorandum Opinion and Order Granting Highland Capital Management, L.P.'s Motion for (A) Bad Faith Finding and (B) Attorneys' Fees Against NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC) in Connection with Proof of Claim # 146 ("Order"). Reconsideration of and relief from the Order is warranted for several independent reasons.

First, one of the core premises of the Court's Order is contrary to the testimony of record. Specifically, the Court concluded that HCRE was acting in "bad faith" in part because it was "unwilling to withdraw the Proof of Claim with prejudice to asserting its claims again in any future litigation in any forum." Order at 2, 27. This is not true. To the contrary, two lawyers for HCRE and James Dondero himself repeatedly represented on the record that HCRE was willing to withdraw its Proof of Claim ("POC") *with prejudice* and to waive any right to appeal. And true to their word, HCRE did not file an appeal of the Court's order disallowing the POC. *Id.* at 5.

Second, because the Court's finding of bad faith is based on an erroneous premise of fact (HCRE's supposed refusal to withdraw the POC with prejudice), the Court's conclusion—that "but for" HCRE's refusal to withdraw the POC, Highland would not have incurred additional attorneys' fees and costs continuing to fight it—is wrong and should be corrected.

Finally, there are other problems with the Court's Order as well. For example, the Court purports to take judicial notice of "information" unrelated to HCRE contained in the legal argument section of a brief filed by Highland in another case. *See id.* at 5 n.8. This is improper for several reasons, including because the Court did not give HCRE an opportunity to be heard on

the information about which the Court took judicial notice and because the "information" is unsubstantiated legal argument. The Court also bases its finding that HCRE acted in bad faith in part on the action of its former counsel, Wick Phillips Gould & Martin, LLP ("Wick Phillips"), in contesting a motion filed by Highland seeking to disqualify Wick Phillips from its representation of HCRE. But the Court previously denied Highland its fees in connection with this fight, and not even Highland sought a "bad faith" finding or attorneys' fees on this basis. In any event, the law is clear that a finding of "bad faith" cannot be premised on a party's taking a reasonable but ultimately unsuccessful position in court.

The Court should revisit its finding of "bad faith" in light of the actual testimony of record, correct the mistakes in its Order, eliminate or reduce the fee award consistent with those corrections, and issue an amended order in its place. HCRE's Motion should be granted.

II. BACKGROUND

A. HCRE Files a Single Proof of Claim, and Highland Objects

With the assistance of outside counsel, HCRE filed its proof of claim (Claim #146) on April 8, 2020. Order at 2 & n. 3. Both Mr. Dondero, HCRE's sole manager, and Matt McGraner, HCRE's vice president, testified that outside counsel (Bonds Ellis Eppich Shafer Jones, LLP ("Bonds Ellis"), led by former bankruptcy judge Mike Lynn) prepared the POC, including Exhibit A describing the POC, and that HCRE relied on counsel's advice that filing the POC was necessary to protect HCRE's interests. *See* Nov. 1, 2022 Hr'g Tr., Ex. A, at 54:24-55:25, 59:11-60:5, 62:9-15, 74:23-75:8, 109:10-110:6. Highland never sought to depose Bonds Ellis about the investigation it performed before filing the POC, nor did Highland seek to elicit the testimony of D.C. Sauter, the in-house counsel responsible for communicating with Bonds Ellis about the POC.[1]

[1] It defies belief that former Judge Lynn would have agreed to file a POC without performing a proper investigation.

Highland objected to HCRE's POC on July 30, 2020. It did not do so in isolation but instead filed a First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims ("Omnibus Objection"). Dkt. 906. In its Omnibus Objection, Highland explained that it had identified 63 proofs of claim that were "no liability claims" because the claimed liability was not reflected in Highland's books and records. *Id.* at ¶ 22. HCRE's POC was among those 63 claims, which also included a multitude of other claims filed by individuals and entities, including various "unliquidated" claims asserted by the HarbourVest entities and even a claim for $500,000 asserted by Highland's attorney, John Morris. *See id.* at Schedule 6. Notably, although many of the "no liability claims" identified by Highland were either unliquidated, not specified, or later withdrawn, HCRE is the only party that Highland has accused of acting in "bad faith" for filing its POC.

In the meantime, HCRE hired new outside bankruptcy counsel, Wick Phillips, to pursue the POC. On October 19, 2020, Wick Phillips filed a Response to Debtor's Omnibus Objection ("Response") which further explained the basis for the POC. Dkt. 1212. Specifically, Wick Phillips explained:

> After reviewing what documentation is available to HCRE[] with the Debtor, HCRE[] believes the organizational documents relating to SE Multifamily Holdings, LLC (the "SE Multifamily Agreement") improperly allocates the ownership percentages of the members thereto due to mutual mistake, lack of consideration, and/or failure of consideration. As such, HCRE[] has a claim to reform, rescind and/or modify the agreement.

Id. at ¶ 5. Wick Phillips also clarified that HCRE required "additional discovery . . . to determine what happened in connection with the memorialization of the parties' agreement and improper

In any event, it was impossible after Judge Lynn's death for anyone (including Messrs. Dondero and McGraner) to question him about that investigation.

distribution provisions, evaluate the amount of its claim against the Debtor, and protect its interests under the agreement." *Id.* at ¶ 6. Nobody has suggested that Wick Phillips filed the Response in bad faith or violated its duties under Federal Rule of Bankruptcy Procedure 9011 by failing to perform a proper investigation or otherwise before filing the Response.

B. Highland Belatedly Moves to Disqualify Wick Phillips

After Wick Phillips filed its Response, the Court entered the parties' stipulated scheduling order in the contested matter on December 14, 2020. Dkt. 1568. Thereafter, the parties exchanged written discovery and served deposition notices. But Highland subsequently adjourned the scheduled depositions. Claiming to have discovered that Wick Phillips represented Highland in one or more transactions underlying the POC, on April 14, 2021, Highland filed a motion to disqualify Wick Phillips. *See* Dkt. 2197 at ¶ 4.

The Court suggests that HCRE "initiated a more than six-month period of expensive discovery and side litigation" in opposing Highland's motion to disqualify. *See* Order at 16. But that fight was "initiated" by Highland, not HCRE, well more than a year after Wick Phillips initially appeared in the case on behalf of HCRE. *Id.* At that point, it made little sense for HCRE to dispense with its chosen counsel well into the process of prosecuting the POC especially if, as Wick Phillips reasonably believed, the conflict was not one requiring its disqualification. Indeed, Texas ethics expert Ben Selman testified that the alleged conflict did not require the firm's disqualification. *See* Deposition of Ben Selman dated Sept. 17, 2021, Ex. B, at 57:7-59:17. Nor has anyone (including this Court) ever suggested that Wick Phillips took an unethical or sanctionable position in opposing Highland's disqualification motion. After all, had anyone believed as much, they could have sought or threatened sanctions against Wick Phillips under Federal Rule of Bankruptcy Procedure 9011, as Highland has threatened to do on several occasions

during these bankruptcy proceedings. It is unclear how Wick Phillips' defense of its representation could be in "bad faith" under these circumstances. Yet that is what the Court concluded in fashioning its "bad faith" finding. *See* Order at 20.

In any event, on May 24, 2021, the Court—at the urging of both parties—entered a scheduling order permitting limited discovery into the circumstances of Wick Phillips' prior representation of Highland and requiring the parties to file additional briefing following discovery. Dkt. 2361.[2] At the end of that process, on December 10, 2021, the Court ultimately entered an order granting in part and denying in part Highland's motion for disqualification. Dkt. 3106 at 3-4. Notably, the Court denied Highland's request for reimbursement of its costs and attorneys' fees incurred in connection with the motion for disqualification, *see id.* at ¶ 6, and Highland did not renew that request for fees as part of its "bad faith" motion.

C. HCRE Retains New Counsel and the Parties Engage in Discovery

After the disqualification of Wick Phillips, HCRE retained the law firm of Hoge & Gameros, L.L.P. to pursue the POC, and on June 9, 2022, the Court entered a new, agreed scheduling order in the matter. *See* Dkt. 3356. The scheduling order was subsequently twice amended by agreement of the parties, first on June 17, 2022, and again on August 9, 2022. Dkt. 3368, Dkt. 3438. The schedule entered on June 17 contemplated that the parties would complete fact discovery by August 1, 2022, expert discovery by August 19, 2022, and attend a two-day evidentiary hearing on November 1 and 2, 2022. *See* Dkt. 3368. However, after HCRE timely disclosed its expert on August 5, 2022, Highland indicated that it would seek to strike that expert, so the parties agreed to amend the scheduling order to allow the parties to brief, and the Court to hear, Highland's expected motion to strike. *See* Dkt. 3438. The remainder of the schedule was

[2] The Court subsequently amended the agreed scheduling order on August 23, 2021. Dkt. 2757.

pushed back to accommodate that motion. The amended schedule contemplated that briefing on the motion to strike would be complete on September 9, 2022 (*see* Dkt. 3438 at ¶ 1); that Highland would file a motion for summary judgment within 14 days of any order granting the motion to strike (*id.* at ¶ 2); that Highland would file a rebuttal expert report within 21 days of any order denying the motion to strike and also make its expert available for deposition thereafter (*id.* at ¶ 3); and that the parties would confer as necessary on a new date for the evidentiary hearing (*id.*). In addition, when the Court entered its last amended scheduling order in the matter, two fact depositions remained to be taken—a deposition of James Dondero, and a deposition of Matt McGraner, both in his individual capacity and as a 30(b)(6) witness for HCRE. *See* Dkts. 3415, 3416, 3418.

In other words, much remained to be done in the case, by both parties, and the case was still months away from any evidentiary hearing.

D. HCRE Files Its Motion to Withdraw the POC, Highland Objects, and the Court Denies the Motion

Three days after the Court entered an order amending the scheduling order to accommodate a briefing schedule on Highland's contemplated motion to strike, on August 12, 2022, HCRE filed its Motion to Withdraw Proof of Claim ("Motion to Withdraw"). HCRE did so after consultation with its outside counsel, and "in consideration of the cost and uncertainty of continuing to pursue the Claim in the face of Debtor's objection." *See* Dkt. 3443 at 2. Again, the tasks to be completed and the costs still to be incurred included fact and expert depositions, motion practice (including a motion to strike and a motion for summary judgment), potential rebuttal expert discovery, preparations for an evidentiary hearing, and a two-day evidentiary hearing. *See* Dkts. 3368, 3438. Thus, the Court's statement that the Motion to Withdraw was filed "just prior to a trial on the merits" is simply wrong. *See* Order at 3.

Highland opposed the Motion to Withdraw, arguing among other things that HCRE's "true intent" in filing the Motion was to "avoid[] depositions now, leav[e] the specter of future litigation hanging over Highland's head, and preserv[e] the ability to re-file its claim later." *See* Dkt. 3487 at ¶ 67.[3] The Court held a hearing on HCRE's Motion to Withdraw on September 12, 2022. Dkt. 3511.

The Court repeatedly cites as evidence of HCRE's "bad faith"—and Highland's entitlement to attorneys' fees—HCRE's "gamesmanship" in refusing to withdraw its POC with prejudice and instead trying preserve its right to fight Highland's ownership in SE Multifamily Holdings, LLC ("SE Multifamily") for another day. *See* Order at 3, 18, 27. But the record demonstrates that no such gamesmanship occurred.

In fact, two lawyers for HCRE and HCRE's sole manager, Mr. Dondero, all represented on the record to the Court that HCRE was willing to withdraw its POC *with prejudice* and to refrain from challenging Highland's interest in SE Multifamily. At the hearing on HCRE's Motion to Withdraw Proof of Claim, the following exchanges occurred:

> The Court: . . . .Would you agree to a condition on the withdrawal of your proof of claim that your client agrees that Highland has a 46-point whatever it was percent interest in SE Multifamily Holdings and your client waives any right in the future to challenge that interest?
>
> Mr. Gameros[4]: Your Honor, if that's what the Court wants to put in an order and I have a chance to confer with my client on it,

[3] Highland also argued that HCRE's "concerns about costs" were "not credible," since "all that remains is a few depositions and a short trial." Dkt. 3487 at ¶ 65. But as we know from the scheduling orders entered in the case, that was not "all that remain[ed]." *See* Dkts. 3368, 3438. Indeed, in the same breath that Highland claimed there was almost nothing left to do, Highland made clear its intention to file a summary judgment motion, which alone would have caused both parties to incur substantial additional cost. *See* Dkt. 3487 at ¶ 1.

[4] Mr. Gameros, as counsel for HCRE and as an attorney licensed in the state of Texas and admitted to practice in the Bankruptcy Court for the Northern District of Texas, was an officer of the Court with authority to bind HCRE. Indeed, the Supreme Court of the United States has recognized this principle for more than a century. *See Ex Parte Garland*, 731 U.S. 333 (1866) ("Attorneys and counselors are not officers of the United States; they are officers of the court, admitted as such by its order upon evidence of their possessing sufficient legal learning and fair private character.").

I'm pretty sure that would be agreeable.

The Court: Today's the day. I'm not going to continue.

Mr. Gameros: Your Honor, we'd agree with that.

Mr. Morris: Your Honor, I'm sorry to interrupt, but waiver of any appeal too. . . .

And what the debtor needs in order to avoid legal prejudice is the complete elimination of any uncertainty that it owns 46.06 percent of SE Multifamily. . . .

Mr. Gameros: Your Honor, we'll agree to it.

The Court: Well, you know what, this is such a big deal I really need a client representative to say that. . . .

September 12, 2022 Hearing Transcript ("Sept. Hr'g Tr."), Ex. C, at 33:23-34:5. At that point, the Court took at recess so that HCRE's counsel could get a client representative on the phone to make the same representation Mr. Gameros had just made:

Mr. Gameros: Your Honor wanted me to get a representative of NexPoint Real Estate Partners to state that they agree that the estate has its 46 percent interest in the company agreement subject to the company agreement. And I've got Mr. Sauter here who has authority to speak on behalf of NexPoint Real Estate Partners.

The Court: All right. Well so what is his position with HCRE?

Mr. Sauter: Your Honor, I don't have – this is D.C. Sauter. I don't have an official position with HCRE, but I have spoken with Mr. Dondero and he has authorized me to appear here today and agree to the conditions that Mr. Gameros just outlined.

Id. at 35:16-36:3. Still this was not sufficient for the Court, which characterized Mr. Sauter's representation on the record in open court as "hearsay." *Id.* at 36:4-8.[5] Although counsel for

[5] As Mr. Gameros pointed out in response to the Court's comment, Mr. Sauter (who also is an attorney licensed in the state of Texas representing HCRE) was also an officer of the Court with authority to bind HCRE. Sept. Hr'g Tr. at 36:12-23.

HCRE disagreed with the Court's characterization, to further assuage the Court's concern, he then elicited the following testimony from Mr. Dondero:

DIRECT EXAMINATION

By Mr. Gameros:

Q Mr. Dondero, on behalf of HCRE, do you agree as a condition for withdrawing the proof of claim that HCRE will not challenge the estate's ownership or equity interest in SE Multifamily subject to the company agreement?

A Yes.

Q Do you agree that you will not appeal and that, therefore, HCRE is waiving any appeal right to that determination as a condition of withdrawing the proof of claim?

A Yes.

Id. at 40:8-17.

By Mr. Gameros:

Q Mr. Dondero, you desire to withdraw the proof of claim. Correct?

A Yes.

Q ***And you agree to an order denying the proof of claim with prejudice. Correct?***

A ***Yes.***

Q ***And you agree that HCRE will not challenge the equity interest of its member in SE Multifamily?***

A ***Yes.***

Id. at 43:23-44:6 (emphases added). In short, there can be no doubt from this record that:

- HCRE was willing to withdraw its claim *with prejudice*;
- HCRE agreed to waive any right to appeal any order relating to its POC (to the extent that is even a legally permissible concession to extract from a party); and

- HCRE agreed not to challenge the equity interest of Highland in SE Multifamily.[6]

Nonetheless, the Court refused to accept these concessions. The Court's refusal stemmed from Mr. Dondero's testimony that Highland's interest in SE Multifamily was "subject to" the company agreement—i.e., the LLC agreement governing that entity. But of course that statement is true: every member of SE Multifamily is bound by the company's LLC agreement, which sets forth their rights and obligations vis-à-vis the company.[7] Mr. Dondero's only point was that the LLC agreement could in the future be amended to reflect different ownership percentages, which often happens as a result of capital calls, new investment dollars, and the like. *Id*. at 43:2-13. To be clear, what Highland and the Court were demanding was a concession that, even if SE Multifamily later made a capital call that was funded by other members but not by Highland, Highland's ownership percentage would not change. Nothing in law or equity requires a party to agree to such a restriction.

In short, the Court's repeated conclusion that HCRE refused to withdraw its POC with prejudice (and attempted to preserve its fight for another day) is wrong.

E. The Court Denies HCRE's Motion to Withdraw and Forces HCRE to Defend Itself in an Evidentiary Hearing

Two days after the September 12, 2022 hearing, the Court issued an order denying HCRE's Motion to Withdraw "for the reasons set forth on the record." Order at 18; *see also* Dkt. 3518. Subsequently, Highland took remaining fact depositions, and the parties prepared for and attended

[6] Mr. Gameros further expressly represented that HCRE would agree "not to challenge [Highland's interest] on the basis of anything asserted in the proof of claim, that being mistake, lack of consideration, or failure of consideration. Their 46 percent is their ownership interest in SE Multifamily and HCRE won't challenge that." Sept. Hr'g Tr. at 42:13-19.

[7] Even Highland's lawyer, John Morris, agreed—as he must—that Highland's "rights and obligations as a member of SE Multifamily are subject to the [LLC] agreement." Sept. Hr'g Tr. at 41:10-14. Mr. Morris argued, however, that Highland's "ownership interest" in SE Multifamily somehow exists independently of the LLC agreement. *Id.* This makes no sense and is contrary to arguments made by Mr. Morris at the evidentiary hearing on HCRE's POC. *See id.* at 16:24-17:10.

the evidentiary hearing ordered by the Court. The Court criticizes HCRE's counsel for arguing at the close of that hearing that the Court should "grant the proof of claim and reallocate the equity [in SE Multifamily] based on the capital contribution[s]." Order at 20. It is unclear what else HCRE's counsel was supposed to do in a circumstance where it was being forced to defend HCRE's position in an evidentiary hearing it did not want and sought to avoid by withdrawing its POC months earlier. In that very unusual procedural posture, counsel did the only logical and ethical thing he could do—he zealously defended his client's position. The Court's criticism is misplaced.

F. The Court Disallows HCRE's POC, and Highland Files its Bad Faith Motion

The Court entered an order disallowing HCRE's POC on April 28, 2023. On June 16, 2023, Highland filed the Bad Faith Motion. *See generally* Motion for (A) Bad Faith Finding and (B) Attorneys' Fees Against NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC) in Connection with Proof of Claim # 146 ("Bad Faith Motion"), Dkt. 3851. The Bad Faith Motion contained only two pages of legal argument. The first argument was titled "HCRE's Proof of Claim Was Filed in Bad Faith," and posits that Mr. Dondero conducted no diligence and had no basis to believe that the POC was truthful. *See id.* at ¶ 21. The only other legal argument made in Highland's Bad Faith Motion concerned its entitlement to a sanction in the form of recoupment of its attorneys' fees and expenses, citing as evidence various invoices and summaries of fees and expenses incurred. *Id.*, ¶ 24-26.

Notably, the Bad Faith Motion contained a single paragraph regarding Wick Phillips, which merely recounted that Wick Phillips represented HCRE until it was disqualified in

December 2021. *Id.* at ¶ 8. Highland did not argue that the Wick Phillips fight constituted bad faith on HCRE's part.[8]

On December 22, 2023, HCRE filed its Response to Debtor's Motion for (A) Bad Faith Finding and (B) Attorneys' Fees ("Opposition Brief"). Dkt. 3995. In its Opposition Brief, HCRE responded directly to Highland's two legal arguments, explaining why HCRE had a good faith basis to file the POC and contending that the fees sought by Highland are excessive. *Id.* at ¶¶ 50-63.

On January 19, 2024, Highland filed its Reply Brief. Dkt. 4018. The Reply Brief was 15 pages long (four pages longer than Highland's Bad Faith Motion) and contained new arguments that could not fairly be characterized as responsive to HCRE's Opposition Brief. For example, Highland argued for the first time in its Reply Brief that HCRE and its principals acted in bad faith by opposing Highland's motion to disqualify Wick Phillips and asks the Court to "find that HCRE's opposition to Highland's Disqualification Motion was made in bad faith." Reply Brief, Dkt. 4018, at ¶¶ 2, 12-14. In support of this new argument, Highland cited the Court to seven pages of "Exhibit 5." That citation does not correlate to any exhibits of record, much less to a citation from Highland's Bad Faith Motion.[9] And because this argument did not feature at all in Highland's Bad Faith Motion, HCRE had no reason to address or oppose it.

In addition, Highland argued for the first time in its Reply Brief that HCRE did not just *file* its POC in bad faith, it *tried to preserve the substance of its claim* in bad faith. Bad Faith Motion, Dkt. 4018, at ¶¶ 18-20. As explained extensively above, the parties sharply disagree about whether

[8] As a result, HCRE did not address the Wick Phillips disqualification issue in its opposition brief.

[9] HCRE assumes that Highland intended to cite to Exhibit E, which appears as docket entry 3852-5, but again the page citations appear nowhere in the Bad Faith Motion (nor could Highland's mere attachment of a 203-page transcript have alerted HCRE that Highland intended to rely on the newly cited testimony).

HCRE and its counsel adequately represented on the record before the Court that HCRE sought to withdraw its POC with prejudice and to forego any right of appeal. But regardless, this new legal argument was absent from Highland's Bad Faith Motion, and so again, HCRE had no notice that Highland's request for sanctions was also premised on HCRE's actions taken through the closing argument at the evidentiary hearing on HCRE's POC.

Because Highland's Reply Brief raised new arguments, HCRE told Highland it intended to file a motion to strike or for surreply. Ultimately, Highland agreed to file an amended brief striking the Wick Phillips argument but would not agree to strike the other new arguments raised in its Reply Brief. *See* Amended Reply, Dkt. 4023, at ¶¶ 11-14.

Nonetheless, the Court's Order adopted *all* of Highland's new arguments, including its stricken argument relating to Wick Phillips. Not only did the Court conclude that actions taken by HCRE (with the advice of counsel) throughout the contested matter on HCRE's POC constituted "bad faith" by HCRE, but the Court also concluded that HCRE acted in "bad faith" by contesting Highland's motion to disqualify Wick Phillips. *See* Order at 19-20, 23, 31.

III. THE BANKRUPTCY COURT SHOULD GRANT THIS MOTION

Pursuant to Federal Rule of Bankruptcy Procedure 9024 (which incorporates by reference Federal Rule of Civil Procedure 60), the Court may relieve a party from an order on one of several grounds, including because the Court made a "mistake" or for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1), (6). As explained above, the Court's conclusion that HCRE refused to withdraw its POC with prejudice was mistaken, rendering its Order erroneous in critical ways. In addition, relief from the Court's order is warranted because the Court reached other conclusions that are either based on a mistaken premise or were inappropriate and unjust under the circumstances of this case. HCRE's Motion should be granted and a new order issued.

A. The Court's Conclusion that HCRE Refused to Withdraw its POC With Prejudice Is Mistaken

In its Order, the Court repeatedly cites HCRE's supposed refusal to withdraw its POC with prejudice as a basis for the Court's finding of "bad faith." *See* Order at 3 (explaining that the Court would not allow HCRE to withdraw its POC because HCRE "was unwilling to withdraw the Proof of Claim ***with prejudice*** to asserting its claims again in any future litigation in any forum") (emphasis in original); *id.* at 18-19 (citing HCRE's "repeated attempts to preserve it claims against Highland for use against Highland in the future," as evidenced by HCRE's supposed "refus[al] to agree, at the September 12 hearing, to language in an order allowing withdrawal of the Proof of Claim that stated, unequivocally, that NexPoint/HCRE waived the right to relitigate or challenge the issue of Highland's 46.06% ownership interest in SE Multifamily"). But as the actual testimony at the September 12, 2022 hearing demonstrates, HCRE repeatedly attempted to withdraw its POC *with prejudice*, agreed *not to challenge* the equity interest of Highland in SE Multifamily, and even agreed to *waive* any right to appeal of an order denying its POC. *See supra* at Section II.D, pp. 7-9. The truth is, the Court and Highland simply refused to accept these concessions.

Instead, the Court and Highland insisted that HCRE and its counsel stipulate to something that was improper and made no sense: that Highland would *always* have a 46.06% interest in SE Multifamily, regardless of what happens in the future, and regardless of what the SE Multifamily LLC agreement might someday say. That is something HCRE had no obligation to agree to, because HCRE has no way to predict what might happen to SE Multifamily in the future, whether new investments in the company might someday be made or be required, and how those investments could change the relative ownership interests in the company. In short, the Court and Highland set up a straw man to ensure that HCRE would not be able to withdraw its POC.

The Court's Order should be corrected. HCRE *did* seek to withdraw its claim with prejudice. It *did* agree not to assert any of the bases for its POC in the future or to challenge Highland's ownership interest in SE Multifamily. And it agreed not to appeal any order disallowing the POC, a promise that HCRE ultimately fulfilled. The Court's order concluding otherwise is wrong, and a new Order should issue on this basis alone.

B. The Court's Conclusion that "But For" HCRE's Conduct, Highland Would Not Have Incurred Additional Attorneys' Fees, Is Based on a Mistaken Premise

The Court also premised its award of attorneys' fees and costs on the erroneous conclusion that HCRE "would not agree to [the POC's] withdrawal, with prejudice, to NexPoint/HCRE's right to challenge Highland's title to its 46.06% membership interest in SE Multifamily in the future." Order at 27. Specifically, the Court concluded that the fees and costs Highland incurred to continue fighting the POC after HCRE's attempted withdrawal would not have been incurred "but for" HCRE's bad faith attempted withdrawal. *Id.*[10] But again, the Court's finding that HCRE refused to withdraw its POC "with prejudice" is mistaken. HCRE most certainly tried to and desired to withdraw its claim with prejudice, as both its counsel and its sole manager testified. *See supra*, Section II.D, at pp. 7-9.

To bolster its "but for" conclusion on attorneys' fees post-dating HCRE's motion to withdraw, the Court also surmised that Highland is somehow in a different position today than it would have been had it simply "accepted a 'win'" and agreed to the withdrawal of HCRE's POC in September 2022. The Court does not explain what is different, except to default to its erroneous refrain that HCRE refused to withdraw its POC with prejudice. Order at 27.

[10] Notably, approximately $375,000 of the total $809,000 in fees incurred by Highland were incurred *after* the Court denied HCRE's motion to withdraw the POC. Dkt. 3852-5 and Dkt. 3995 at ¶ 43.

The record belies the Court's conclusion. Indeed, not even the Court's Memorandum Opinion and Order Sustaining Debtor's Objection to, and Disallowing, Proof of Claim Number 146 ("Order Denying POC") goes as far as the Court insisted that HCRE needed to go to avoid a full evidentiary hearing on the POC. Specifically, the Court's Order Denying POC *does not* hold that Highland will retain a 46.06% interest in SE Multifamily in perpetuity (which the Court must realize it does not have the power to order). To the contrary, the Court in its Order Denying POC *acknowledged* that, "under section 2.1 of the Amended LLC Agreement, Members may make future capital contributions to SE Multifamily . . . ." Order Denying POC, Dkt. 3767, at 36. And that is precisely why Mr. Dondero testified in September 2022 that he could not agree that Highland would hold a fixed 46.06% interest in SE Multifamily in perpetuity; it stands to reason that future capital contributions by Highland or others could change that percentage. The Court's Order Denying POC also does not purport to prevent HCRE from contesting Highland's interest in SE Multifamily in the future (for reasons other than those rejected by the Court). And for all the Court's (and Highland's) insistence about the importance of HCRE's withdrawal of its POC "with prejudice," the Court's own order does not disallow the claim "with prejudice." Instead, the actual Order merely states that Highland's objection to the POC is sustained and that the claim is disallowed "for all purposes." Order Denying POC at 39. In other words, the parties *are indeed in the exact same position* as they would have been had Highland just "taken the win" when HCRE sought to withdraw its POC over 17 months ago.

Under these circumstances, the Court's conclusion that "but for" HCRE's refusal to withdraw the POC with prejudice, Highland would not have incurred an additional $375,000 in attorneys' fees is wrong. The Court should amend the Order to eliminate the sanction or, at the very least, reduce the sanction by the amount of fees and costs incurred after HCRE expressly

agreed to withdraw the POC with prejudice.

C. There Are Other Problems With The Court's Order That Should Be Corrected

Finally, the Court should revise its Order to correct other mistakes and errors. In particular: (1) the Order purports to take judicial notice of an irrelevant and disputed issue contained in a brief filed by Highland in an unrelated proceeding; and (2) the Order adopts arguments made by Highland for the first time in its reply brief (including arguments about HCRE's "bad faith" in permitting Wick Phillips to contest Highland's disqualification motion) that HCRE never had an opportunity to respond to and should not have been considered by the Court in issuing its Order.

1. Taking Judicial Notice of Disputed "Information" Contained in the Argument Section of One Party's Brief Is Impermissible

While admitting that it "has not counted the exact number of appeals filed by Dondero and and/or Dondero-related entities in this bankruptcy case and related proceedings," the Court purports to take judicial notice of "information contained in a vexatious litigant motion filed by Highland in the district court (before Judge Brantley Starr), reflecting that Dondero and his controlled entities have "filed over 35 total appeals." Order at 5 n.8 (citing *Highland Capital Management, L.P.'s Reply to Objections to Motion to Deem the Dondero Entities Vexatious Litigants and for Related Relief*, 12 at ¶ 24, filed on February 9, 2024, Dkt. No. 189 (NDTX Case No. 3:21-cv-0881-X)). There are several problems with judicial notice under these circumstances.

First, the judicial notice does not comport with the Federal Rules of Evidence. Specifically, Rule 201 states that a court may only take judicial notice of "a fact that is not subject to reasonable dispute because it "is generally known within the trial court's territorial jurisdiction," or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)-(2). Neither circumstance exists here. Clearly, the number of appeals

filed by "Dondero or Dondero-related entities" is not "generally known": as the Court admits, even the Court does not know the number of appeals that fall into this category, and it is the Court that is closest to the bankruptcy and related proceedings. Nor is there any source that could "accurately and readily" convey this information in such a way that "cannot reasonably be questioned." There is no readily ascertainable definition of "Dondero-related entities," and several entities have repeatedly disputed that they are "Dondero-related" or "Dondero-controlled," including in the very proceeding from which the Court purports to draw its judicial notice. *See, e.g.*, *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P. et. al.*, Cause No. 3:21-cv-00881-x (N.D. Tex.), Dkt. 173 at p. 23.

Moreover, it is axiomatic that a court may not take judicial notice of argument contained in one party's brief, which is inherently untrustworthy and subject to dispute. *See Eastbourne Arlington One, LP v. JPMorgan Chase Bank, N.A.*, 2011 WL 3165683, at * 2 (N.D. Tex. July 27, 2011) (while a court may take judicial notice of court records "to establish the fact of their having been filed," it may not take judicial notice of such records "to establish the facts asserted therein."). In this case, the Court purports to take judicial notice of "information" contained in a reply brief filed by Highland. That information appears in an argumentative section of Highland's brief titled "The Dondero Entities Are Individually and Collectively Vexatious," and the particular paragraph itself cites no evidence to support the assertion. *See Highland Capital Mgmt., L.P. v. Highland Fund Advisors, L.P., et al.*, Case No. 3:21-cv-00881-x (N.D. Tex.), Dkt. 189 at p. 8 & ¶ 24. There is nothing about the noticed information that comports with the requirements of Rule 201.

Finally, the Court took judicial notice without giving HCRE an opportunity to be heard on the "fact" to be noticed, which is required. Under Rule 201, "a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial

notice before notifying a party, the party, on request, is still entitled to be heard." Fed. R. Civ. P. 201(e). Had the Court given HCRE the opportunity to be heard, HCRE would have pointed out that the "information" is not reliable for the reasons stated above. In addition, HCRE would have taken issue with being lumped together with other "Dondero-related entities" that have filed appeals because HCRE *has had no involvement in the overwhelming majority of those appeals*, making the judicial notice (presumably offered up to bolster the Court's "bad faith" finding) particularly inappropriate in this contested matter.

The judicial notice was improper, and the Court should strike that notice from its Order.

2. The Court's Order Improperly Adopts Arguments Made for the First Time In Highland's Reply Brief

The Court's Order also should be revised because, as set forth above, it improperly adopts arguments made by Highland that HCRE never had an opportunity to address and should not have factored into the Court's conclusion that HCRE acted in "bad faith." *See* Section II.F, *supra* at pp. 11-13.

It is black-letter law that "the scope of the reply brief must be limited to addressing the arguments raised by the response. The reply brief is not the appropriate vehicle for presenting new arguments or legal theories to the court.'" *Staton Holdings, Inc. v. First Data Corp.*, No. 3:04-cv-2321-P, 2005 WL 2219249, at *4 n.1 (N.D. Tex. Sept. 9, 2005) (quoting *United States v. Feinberg*, 89 F.3d 333, 340-41 (7th Cir. 1996)). As a result, "[a] court need not consider late-filed evidence or new facts that are raised for the first time in a reply brief." *In re Reagor-Dykes Motors, LP*, No. 18-50214-RLJ-11, 2022 WL 468065, at *4 (Bankr. N.D. Tex. Feb. 15, 2022) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894-98 (1990).

Highland's Reply Brief is replete with new argument not mentioned in the Bad Faith Motion. This is highly prejudicial to HCRE, which had no opportunity to address the new

arguments in the briefing before the Court despite requesting the opportunity to do so at the hearing on Highland's Bad Faith Motion. *See* Jan. 24, 2024 Hr'g Tr., Ex. D, at 69:12-16, 81:22-82:2. The prejudice is particularly acute where, as here, the movant's new arguments formed much of the basis for this Court's finding that various actions (not previously identified in the movant's opening brief) constituted "bad faith" meriting a multi-hundred-thousand-dollar sanction. The Court's wholesale adoption of Highland's arguments in its Order is proof positive that HCRE was prejudiced by Highland's tactics.

The Court's Order should be revised to account for this prejudice and to eliminate its reliance on the arguments raised by Highland for the first time in its Reply Brief.

IV. CONCLUSION

The Court's order sanctioning HCRE to the tune of more than $825,000 is severe and should be based on evidence that is "clear and convincing" and not mistaken or unfair. Unfortunately, the Court's order is premised on a core mistake of fact—that HCRE refused to withdraw its POC with prejudice and not contest Highland's equity interest in SE Multifamily. Contrary to the Court's conclusion, HCRE did agree to that relief. And other key parts of the Court's order are premised on flawed evidence or arguments that HCRE never had the opportunity to brief. The finding of "bad faith" and the sanction awarded under these circumstances are inappropriate. The Court should revisit its Order, correct the mistakes, and reissue an Order consistent with the record and the fairly made arguments of the parties. HCRE's Motion should be granted.

Dated: March 18, 2024

Respectfully Submitted, .

REICHMAN JORGENSEN LEHMAN & FELDBERG

/s/ Amy L. Ruhland
Amy L. Ruhland
Texas Bar No. 24043561
aruhland@reichmanjorgensen.com
901 S. Mopac Expwy, Suite 300
Austin, TX 78746
Tel.: (737) 227-3102

HOGE & GAMEROS. L.L.P

Charles W. Gameros, Jr., P.C.
Texas Bar No. 00796956
bgameros@legaltexas.com
Douglas Wade Carvell, P.C.
Texas Bar No. 00796316
wcarvell@legaltexas.com
6116 North Central Expressway, Suite 1400
Dallas, Texas 75206
Tel.: 214-765-6002

Attorneys for NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 18, 2024, a true and correct copy of this document was served electronically via the Court's CM/ECF system to the parties registered or otherwise entitled to receive electronic notices in this case.

/s/ Amy L. Ruhland
Amy L. Ruhland

EXHIBIT A

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE THE HONORABLE STACEY G. JERNIGAN, CHIEF JUDGE

In Re:	) Case No. 19-34054-sgj11
	)
	) TRANSCRIPT of the HEARING
HIGHLAND CAPITAL MANAGEMENT, L.P.,	) on DEBTOR'S OBJECTION to
	) HCRE's PROOF Of CLAIM
	)
Debtor.	)
	) November 1, 2022
	) Dallas, Texas

Appearances:

For the Debtor:	John A. Morris Hayley Winograd Pachulski Stang Ziehl & Jones LLP 780 Third Avenue, 39th Floor New York, New York 10017-2024 Zachery Z. Annable Hayward PLLC 10501 N. Central Expressway, Suite 106 Dallas, Texas 75231
For Creditor and Claimant NexPoint Real Estate Partners, also known as HCRE:	C. William "Bill" Gameros, Jr. D. Wade Carvell Hoge & Gameros, L.L.P. 6116 N. Central Expressway, Suite 1400 Dallas, Texas 75206
Digital Court Reporter:	United States Bankruptcy Court Michael F. Edmond Sr., Judicial Support Specialist 1100 Commerce Street, Room 1254 Dallas, Texas 75242
Certified Electronic Transcriber:	Susan Palmer Palmer Reporting Services

Proceedings recorded by digital recording;
transcript produced by federally-approved transcription service.

was going to obtain six percent of the SE Multifamily's membership interests, correct?

A. That B&H was going to take — yes, get six percent, correct —

Q. That's right. And you may not have known exactly how much Highland was going to get, but you — you do admit that you knew and understood at the time you signed this document that Highland was going to get a significant majority of the interests, correct?

A. That there would be a dilution for B&H coming in, but the percentages would be similar to the original —

Q. Okay.

A. — agreement, and I guess is what I knew in general.

Q. Right. So it was your understanding when you signed this document that Highland's 49-percent interest was going to be diluted by the six percent that was being granted to BH Equities, correct?

A. Generally, yes.

Q. Okay. So even though you didn't read Schedule A before signing the agreement, the schedule comports with your expectations when you signed the agreement on behalf of Highland and HCRE, correct?

A. Generally, yes.

Q. Okay. Let's just cut to the chase with the proof of claim. That's Exhibit 8. Do you have that in front of you, sir?

A. Yes.
Q. Okay. Your electronic signature is on the proof of claim, correct?
A. It — I'll — I'll stipulate to that, I guess, on —
Q. It's on the bottom of the page wherein the top left it says number 12.
A. Okay.
Q. Do you see your electronic signature?
A. Ye- — yes.
Q. Okay. And you authorized your electronic signature to be affixed to this document, correct?
A. Yes.
Q. And you authorized this document to be filed on behalf of HCRE, correct?
A. Yes.
Q. You didn't review this document before it was filed, correct?
A. Correct.
Q. And so you didn't review Exhibit A, which is the last page of the exhibit, you didn't review that before it was filed, correct?
A. Not that I recall.
Q. You can't identify — now this agreement was prepared by Bonds Ellis; do I have that right?
A. Correct.

correct?

A. I did not believe I needed to.

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

THE COURT: Redirect.

MR. GAMEROS: Very briefly, Your Honor, I've only got a couple of questions.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. GAMEROS:

Q. Mr. Dondero, you testified about the process for signing the LLC agreements, the KeyBank loan, and even the proof of claim. Would you please tell the Judge what the process is?

A. Well, it's different in everything, but any significant transaction goes through compliance and any significant transaction that includes multiple entities goes through rigorous compliance whereby, by compliance, without direct input of the investment people, investigate the basis of the transaction in the fairness of tr- — of the transaction and then sign off on that transaction. You know, so on any kind of investment, a normal — I know it's changed in the new Highland, but — but a normally-compliant advisor goes through a rigid, rigorous process regarding any sale of an asset.

As far as bankruptcy and the complexities of a bankruptcy that takes odd twists and turns, and just the

complexities of this bankruptcy in particular and the betrayal of the estate by insiders, you know, et cetera, you have to rely on outside counsel and you have to rely on — you have to rely on outside counsel and you have to rely on their expertise in the bankruptcy process.

Q. So —

MR. MORRIS: Your Honor, I move to strike the portions of the answer that refer to the new Highland's practices because the witness has no personal knowledge. I move to strike his reference to the betrayal of the estate as being outrageous. It's got absolutely nothing to do with his inability to review documents before he signs them.

THE COURT: Your response.

MR. GAMEROS: Your Honor, the witness was asked about the process, and that was one of the views that he had in terms of how he deals with external events, transactions. That's his view of the bankruptcy proceeding. Mr. Morris may not like it and Highland may not like that characterization or new Highland may not like that characterization, but it's a fair summary of the witness' answer. It's how he feels about what's going on. I think it's wholly appropriate.

THE COURT: Okay. I overrule. It's his view of the process, he was asked about the process, so —

MR. MORRIS: Your Honor, I'm going to try one more time. He can testify to his process all he wants. This is

and just grab my notebook.

THE COURT: You may, um-hum.

MR. GAMEROS: Thank you.

THE WITNESS: I got it. Oh, the — what —

MR. GAMEROS: That's Exhibit 8.

BY MR. GAMEROS:

Q. That's Highland's Exhibit 8, the proof of claim.

A. Yes.

Q. You relied on Bonds Ellis to draft the proof of claim, correct?

A. Yes.

Q. Did you do anything to interfere with Bonds Ellis' access to anyone at Highland or HCRE for drafting — Highland, I'm sorry — anyone at HCRE for drafting a proof of claim?

A. No.

Q. Did they ever talk to you about the proof of claim?

A. No. I mean knew generally we were filing a bunch of proofs of claims at the time, but not specifically.

MR. GAMEROS: All right. Thank you. I have no other questions, Your Honor.

THE COURT: Recross.

MR. MORRIS: I have nothing, Your Honor.

THE COURT: All right. Mr. Dondero, you're excused from the witness box.

THE WITNESS: Thank you.

with the DSI folks, Caruso, Fred Caruso, and my team.

Q. Okay. Who is DSI, just so the Court's clear on that?

A. I don't know what — I think they were the CRO, the chief reorg- — but this is the only part I really touched with them. And so the couple conversations I had with Fred were I think we both agreed that we're — it was going to be futile.

Q. Okay. And Mr. Caruso works for DSI?

A. I believe so.

Q. All right. Did HCRE try to pay back Highlands Capital?

A. I think so.

Q. Okay. What happened?

MR. MORRIS: I apologize, Your Honor. I didn't hear the answer.

THE WITNESS: I think so.

MR. MORRIS: Thank you.

THE COURT: Okay.

THE WITNESS: You bet.

BY MR. GAMEROS:

Q. What happened?

A. I — I was told it was returned.

Q. Okay. Do you know why?

A. I don't.

Q. All right. Why did HCRE file a proof of claim?

A. I think we were trying to protect our interests, advice of counsel. Again, the important point is my partners weren't my

partners, you know, in March of 2019. And then when the bankruptcy started, it kind of took on a life of its own.

Q. Do you know the proof of claim worked through the HCRE side of the house before it was filed?

A. Yeah. I mean our internal counsel at NexPoint, external counsel, you know, came to me and said that they thought it would be a good idea and generally told me what it was about, and I said okay.

MR. GAMEROS: Pass the witness, Your Honor.

THE COURT: Okay. Cross.

CROSS-EXAMINATION

BY MR. MORRIS:

Q. Good morning, Mr. McGraner.

A. Good morning, Mr. Morris.

MR. MORRIS: So may I just approach the witness to clean up the exhibits?

THE COURT: You may.

THE WITNESS: These are yours.

BY MR. MORRIS:

Q. Let's just do a little background here, Mr. McGraner. Since the time HCRE was formed, it's only been owned by you, Mr. Dondero, and Mr. Scott Ellington, correct?

A. Yes.

Q. And Mr. Dondero owns 70 percent, you own 25 percent, and Mr. Ellington owns five percent, correct?

A. I had good partners —

Q. — perspective, this dispute is really just a consequence of Highland's bankruptcy filing; isn't that right?

A. I think it's an unintended consequence, yeah.

Q. Let's talk about the proof of claim for a moment.

A. Okay.

Q. If we can go to Exhibit 8. You mentioned D. C. Sauter earlier. Did I hear that correctly?

A. Sure.

Q. And Mr. Sauter at the time the original LLC agreement was prepared and at the time the KeyBank loan was prepared and at the time the amended and restate LLC agreement was prepared, he was at Wick Phillips, right?

A. I think so.

Q. And then in the fall of 2019, or thereabouts, he came over to NexPoint; do I have that right?

A. I think so.

Q. Okay. And when he was at Wick Phillips he worked on Project Unicorn, didn't he?

A. Yeah.

Q. Yeah. And he is the one who showed you this proof of claim before it was filed on behalf of HCRE, correct?

A. I think so.

Q. Um-hum. You weren't given an opportunity to provide any comments to the document before it was filed, correct?

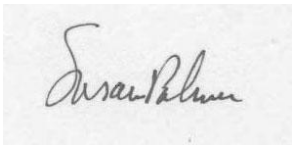
A. I think we — we spoke about it generally, conceptually.
Q. You — you weren't given the opportunity to provide any comments to the document before it was filed, correct?
A. I didn't think I needed to. I'm not a bankruptcy attorney, I don't know the process or what should be said. We relied on our counsel for that.
Q. Okay. So a simple question: You weren't given the opportunity to provide any comments to the document before it was filed, correct?
A. My answer is I was deferential to — to our counsel.
Q. You never gave Mr. Sauter any documents in connection with the proof of claim, correct?
A. Correct.
Q. You don't know whether Mr. Sauter ever gave any documents to Bonds Ellis in connection with this proof of claim, correct?
A. I don't know.
Q. You — you don't know, right? You have no personal knowledge —
A. I don't know —
Q. — of Mr. Sauter giving any documents to Bonds Ellis in connection with the proof of claim, correct?
A. Correct.
Q. You never discussed this document with Mr. Dondero, correct?
A. Correct.
Q. You never discussed this document with anybody at Bonds

State of California)
) SS.
County of Stanislaus)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

I am a Certified Electronic Reporter and Transcriber by the American Association of Electronic Reporters and Transcribers, Certificate Nos. CER-124 and CET-124. Palmer Reporting Services is approved by the Administrative Office of the United States Courts to officially prepare transcripts for the U.S. District and Bankruptcy Courts.



Susan Palmer
Palmer Reporting Services
P.O. Box 4082
Modesto, California 95352
(209) 915-3065

Dated November 5, 2022

EXHIBIT B

BEN SELMAN - 9/17/2021

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

IN RE:	)	CHAPTER 11
	)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	CASE NO.
	)	19-34054-SGI11
Debtor.	)	
----------x	)	
	)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	
	)	ADVERSARY
Plaintiff,	)	PROCEEDING
	)	NO:
Vs.	)	21-03000-SGI
	)	
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; NEXPOINT ADVISORS, L.P.; HIGHLAND INCOME FUND; NEXPOINT STRATEGIC OPPORTUNITIES FUND; NEXPOINT CAPITAL, INC.; AND CLO HOLDCO, LTD.,	)	
	)	
Defendants.	)	
----------/	)	

REMOTE DEPOSITION OF BEN SELMAN

Waco, Texas

Friday, September 17, 2021

Reported by:

KIM A. McCANN, RMR, CRR, CSR

JOB NO. 199442

A. Am I going to testify and give opinions is my understanding of the last question. And I hope I understood it correctly, but if that's the last question you asked, then my answer to that question is yes.

Q. Have you formed opinions?

A. I have.

Q. Okay. Please tell me what your opinions are.

A. My opinions are that the Wick Phillips firm represented both Highland and NREP together with other borrowers in regard to the bridge loan; that the bridge loan was consummated by execution on September 25, 2018, showing an effective date of September 26, 2018.

My opinion is that Wick Phillips' representation of all parties ceased at that point, and that representation was limited on the part of Wick Phillips with regard to the named parties in regard to the bridge loan as of the time of the execution, perhaps a bit earlier, but I don't really have a way to isolate that.

My opinion is further that some six months after the bridge loan was consummated, the

SE Multi-Family Company restated itself, and in doing so presented a contestable matter that bore no relationship of any materiality or of any substance to the bridge loan.

I believe the fact is that Wick Phillips began representation of NREP in regard to that narrow issue in a contested matter in the bankruptcy proceeding, and that this motion to disqualify and responsive motions about which we're talking today resulted from Wick Phillips' representation of NREP in a matter that is almost wholly dissimilar to the bridge loan. But that it certainly bears no same relationship to the bridge loan and appears to bear no substantial relationship to the bridge loan.

I haven't yet formulated but I will formulate at some point an opinion with regard to the document that we talked about earlier, the release from loan agreement document that I've recently received and needs to be studied.

I've reviewed it three or four times and I still have questions that need to be looked at before I'll have an opinion on it. But it is

my opinion based on the plain language of the release document that the bridge loan as a result of the release agreement between Highland Capital and the bridge loan lenders are between Highland Capital and two other allied companies appears to even further isolate the bridge loan from the instant contested matter litigation.

That having been said, there appears to be no discernible violation of Rule 1.9 of the ABA Model Rules or of 1.7 of the ABA Model Rules or of 1.06 of the Texas Disciplinary Rules of Professional Conduct or Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct by or through Wick Phillips' present representation of NREP in regard to the amended and restated SE Multi-Family Holdings, LLC.

Q. Sorry. You broke up on that last. Could you repeat the last thing you said, Mr. Selman?

A. Yes. The amended and restated SE Multi-Family Holdings, LLC.

Q. Before that. Go back -- could you repeat that entire last thought.

A. Not without a great deal of

BEN SELMAN - 9/17/2021

C E R T I F I C A T E

I, Kim A. McCann, RMR, CRR, CSR in and for the State of Texas, do hereby certify:

That BEN SELMAN, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness;

That pursuant to FRCP Rule 30, signature of the witness was requested by the witness or other party before the conclusion of the deposition;

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this September 17, 2021.

Kim A. McCann, RMR, CRR, CSR

EXHIBIT C

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE:	.	Case No. 19-34054-11(SGJ)
	.	
HIGHLAND CAPITAL	.	Earle Cabell Federal Building
MANAGEMENT, L.P.,	.	1100 Commerce Street
	.	Dallas, TX 75242-1496
	.	
Debtor.	.	Monday, September 12, 2022
. . . . .	.	9:40 a.m.

TRANSCRIPT OF HEARING ON MOTION TO WITHDRAW PROOF OF CLAIM #146 BY HCRE PARTNERS, LLC (3443) AND REORGANIZED DEBTOR'S (A) OBJECTION TO MOTION TO QUASH AND FOR PROTECTION [DOCKET NO. 3464] AND (B) CROSS-MOTION TO ENFORCE SUBPOENAS TO ENFORCE SUBPOENAS AND TO COMPEL A DEPOSITION (3484)

BEFORE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT CHIEF JUDGE

TELEPHONIC APPEARANCES:

For Highland Capital Management, L.P.:	Pachulski Stang Ziehl & Jones LLP BY: JOHN MORRIS, ESQ. 780 3rd Avenue, 34th Floor New York, New York 10017
For NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC:	Hoge & Gameros, L.L.P. BY: CHARLES W. GAMEROS, JR., ESQ. 6116 North Central Expressway Suite 1400 Dallas, Texas 75206
Audio Operator:	Michael F. Edmond

Proceedings recorded by electronic sound recording, transcript produced by a transcript service.

LIBERTY TRANSCRIPTS
7306 Danwood Drive
Austin, Texas 78759
E-mail: DBPATEL1180@GMAIL.COM
(847) 848-4907

your proof of claim that your client agrees that Highland has a 46-point whatever it was percent interest in SE Multifamily Holdings and your client waives any right in the future to challenge that interest?

MR. GAMEROS: Your Honor, if that's what the Court wants to put in an order and I have a chance to confer with my client on it, I'm pretty sure that would be agreeable.

THE COURT: Today's the day. I'm not going to continue. I've got, you know, the whole day booked if I needed it because I wasn't sure what you all were going to want to put on.

MR. GAMEROS: Your Honor, we'd agree with that.

MR. MORRIS: Your Honor, I'm sorry to interrupt, but a waiver of any appeal, too. I just hard that if that's what you want to put in the order, that's okay. But this case has to end, and that's what we're looking for.

We're a post-confirmation estate that will not go forward with the possibility hanging over its head that it may be divested of this asset. That is what this proof of claim and this dispute is about.

And what the debtor needs in order to avoid legal prejudice is the complete elimination of any uncertainty that it owns 46.06 percent of SE Multifamily. And if HCRE is not willing to give that comfort today, we again renew our request for a direction that the three HCRE witnesses appear for

substantive depositions and we get this on the trial calendar.

MR. GAMEROS: Your Honor, we'll agree to it.

THE COURT: Well, you know what, this is such a big deal I really need a client representative to say that. It would be that --

MR. GAMEROS: I don't have one here today, but I can get you one.

THE COURT: How soon --

MR. GAMEROS: Do you want me to file a stipulation or an affidavit?

THE COURT: Pardon?

MR. GAMEROS: Do you want me to file an affidavit?

THE COURT: Well, let's be a hundred percent clear. Your client would state that with the granting of the motion to withdraw proof of claim number 146, HCRE is irrevocably waiving the right to ever challenge Highland Capital Management's 46 percent interest -- and I know it's 46-point something -- 46 percent interest in SE Multifamily Holdings, LLC and is, likewise, waiving the right to appeal or challenge the order to this effect.

MR. MORRIS: Your Honor, if I may, perhaps we can take a ten-minute recess and allow him to consult with his client and perhaps get a client representative on the phone who can make that representation?

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

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

I, DIPTI PATEL, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Dipti Patel

DIPTI PATEL, CET-997

LIBERTY TRANSCRIPTS DATE: September 13, 2022

EXHIBIT D

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:

For the Reorganized Debtor:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7760
For NexPoint Real Estate Partners, LLC:	Charles William "Bill" Gameros, Jr. HOGE & GAMEROS, LLP 6116 N. Central Expressway, Suite 1400 Dallas, TX 75206 (214) 765-6002
For Hunter Mountain Investment Trust, The Dugaboy Investment Trust:	Deborah Rose Deitsch-Perez Michael P. Aigen STINSON, LLP 2200 Ross Avenue, Suite 2900 Dallas, TX 75201 (214) 560-2201
Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062

'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

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.)

--oOo--

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**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

INDEX

EXHIBIT 13

The following constitutes the ruling of the court and has the force and effect therein described.

Signed May 21, 2024

United States Bankruptcy Judge

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

IN RE:	§	
	§	**Chapter 11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	**Case No. 19-34054-sgj-11**
Reorganized Debtor.	§	

ORDER DENYING MOTION OF NEXPOINT REAL ESTATE PARTNERS, LLC (F/K/A HCRE PARTNERS, LLC) SEEKING RELIEF FROM ORDER PURSUANT TO FED. R. OF BANKR. P. 9024 AND FED. R. CIV. P. 60(b)(1) & (6)

On March 18, 2024, NexPoint Real Estate Partners, LLC (f/k/a HCRE Partners, LLC) ("HCRE") filed its *Motion for Relief from Order* (hereinafter, the "Rule 60(b) Motion"),[1] seeking reconsideration of and relief from this court's *Memorandum Opinion and Order Granting Highland Capital Management, L.P.'s Motion for (A) Bad Faith Finding and (B) Attorneys' Fees against NexPoint Real Estate Partners, LLC (f/k/a HCRE Partners, LLC) in connection with Proof*

[1] Bankr. Dkt. No. 4040.

1934054240521000000000001

of Claim # 146 ("HCRE Sanctions Order").[2] The parties stipulated to a briefing schedule and that the parties would seek a setting for a hearing ("Hearing") on the Rule 60(b) Motion. On April 22, 2024, Highland Capital Management, L.P. ("Highland" or "Reorganized Debtor") filed its response ("Response") in opposition to the Rule 60(b) Motion,[3] and HCRE filed its reply ("Reply") thereto on May 1, 2024.[4] The parties presented oral argument at the Hearing that was held on May 16, 2024.

HCRE and its Proof of Claim. By way of background, HCRE is an entity whose sole manager is James D. Dondero, the former Chief Executive Officer of the Reorganized Debtor. HCRE and Highland were essentially friendly business partners prepetition—not terribly surprising, as they each had the same chief executive. In any event, HCRE and Highland were equity owners/members of a limited liability company named SE Multifamily Holdings, LLC ("SE").[5] SE owned valuable real estate. SE was only formed in March 2019 and was governed by an amended LLC Agreement ("SE's LLC Agreement"). After Highland filed Chapter 11 in October 2019, and later became managed by three new independent directors and a new CRO and then new CEO, James Seery, Highland and HCRE were no longer amicable business partners. In fact, HCRE filed a proof of claim in Highland's bankruptcy case (on April 8, 2020), for an unliquidated sum, which was electronically signed by Mr. Dondero. The proof of claim asserted that HCRE had a claim against Highland to reduce Highland's equity ownership and rights in SE and, further, that it had grounds to reform, rescind, or modify SE's LLC Agreement based on a mutual mistake.[6] Two years and four months after HCRE filed the proof of claim, on August 12,

[2] Bankr. Dkt. Nos. 4038 & 4039.
[3] Bankr. Dkt. No. 4052.
[4] Bankr. Dkt. No. 4055.
[5] Note that there was also an unrelated minority owner (6%) in SE called BH Equities, LLC.
[6] Claim No. 146 & Bankr. Dkt. No. 1212.

2022, and after significant discovery and litigation regarding the proof of claim, HCRE moved to withdraw the proof of claim.

HCRE's Motion to Withdraw its Proof of Claim. There's a rule for withdrawing a proof of claim: Fed. R. Bankr. P. 3006. The bankruptcy court set a hearing, on September 12, 2022, as required by this rule, on HCRE's motion to withdraw the proof of claim ("Sept. 12, 2022 Proof of Claim Withdrawal Hearing").[7] After extensive discussion on the record, the bankruptcy court denied HCRE permission to withdraw its proof of claim—primarily because HCRE declined to withdraw the proof of claim with prejudice to any future litigation in any forum pertaining to the issues raised in the proof of claim. In other words, HCRE would not state unequivocally that it would not re-urge in the future its alleged present entitlement to reform or rescind SE's LLC Agreement. To be clear, HCRE expressed that it would withdraw its proof of claim with prejudice to re-asserting it in the bankruptcy court, and with prejudice to filing any appeal of a bankruptcy court order on same. ***But this type of withdrawal meant little—because the deadline/bar date for filing proofs of claim in the Highland bankruptcy case had passed 16 months earlier anyway***. HCRE would be time-barred from asserting its proof of claim at this late stage in the Highland bankruptcy case. The bankruptcy court was concerned that HCRE was attempting to preserve its present claims against Highland for use in the future in a different forum.[8] If there was going to be litigation over these issues, Highland thought it was time to get on with such litigation. The bankruptcy court was persuaded that, indeed, Highland would be prejudiced if HCRE were allowed to withdraw its proof of claim without clear and unequivocal language in the order that HCRE would not be able to assert its claims and/or theories regarding rescission and/or

[7] Bankr. Dkt. No. 3519 (Transcript).
[8] At the time, it appeared that litigation might be on the horizon in state court involving these parties and regarding business records production.

reformation of the SE LLC Agreement in any future litigation in any court or forum (after all, future litigation is not what a "fresh start" of bankruptcy is about). Thus, the bankruptcy court issued its Order denying withdrawal of the HCRE proof of claim on September 14, 2022 ("Order Denying Withdrawal of HCRE Proof of Claim").[9]

Trial on the HCRE Proof of Claim. Thereafter, the bankruptcy court held a trial on November 1, 2022, on the merits of HCRE's proof of claim and ultimately disallowed the proof of claim ("Claim Disallowance Order").[10] There was no evidence presented of any sort of mistake, mutual or otherwise, in connection with SE's LLC Agreement or any other basis for reformation or rescission of SE's LLC Agreement. Moreover, Mr. Dondero testified that he had not even read the HCRE proof of claim or conducted any due diligence regarding the HCRE proof of claim before authorizing his electronic signature to be affixed to it. HCRE did not appeal the Claim Disallowance Order.

Highland Motion for Sanctions Against HCRE. Highland thereafter filed a written motion for sanctions pertaining to HCRE conduct surrounding the proof of claim—seeking a bad faith finding and reimbursement of Highland's attorney's fees caused by HCRE's actions. Several months later (after, among other things, renewed attempts at global mediation of the remaining issues in the Highland bankruptcy case), the bankruptcy court granted Highland's motion for sanctions, after a contested hearing ("Order Imposing Sanctions").[11] The Order Imposing Sanctions (which shifted to HCRE approximately $825,000 of the Reorganized Debtor's attorney's fees and expenses incurred by Highland in connection with the HCRE proof of claim—which was less than the entire amount that the Reorganized Debtor had incurred regarding the HCRE proof

[9] Bankr. Dkt. No. 3518.
[10] Bankr. Dkt. No. 3766 & 3767.
[11] Bankr. Dkt. No. 4039.

of claim during the more than three years since it was filed)[12] is the order now subject to HCRE's Rule 60(b) Motion.

The Rule 60(b) Motion. HCRE argues, primarily, that the bankruptcy court made two core, related "mistakes" in connection with its Order Imposing Sanctions that it should correct pursuant to Rule 60(b)(1). First, the bankruptcy court allegedly made a "mistake" in refusing to permit HCRE to withdraw its proof of claim based on a mistaken belief by the bankruptcy court that HCRE was not willing to withdraw it with prejudice for all purposes. HCRE now stresses that it was, indeed, willing to withdraw the proof of claim with prejudice to any future litigation in any court—not just in the bankruptcy court. Second, HCRE further argues that the bankruptcy court's mistake of fact on this point caused it to erroneously require an unnecessary trial on the proof of claim—the result of which was Highland incurring/billing unnecessary fees relating to the proof of claim. The bankruptcy court then shifted those fees to HCRE in the Order Imposing Sanctions. HCRE asserts that it is incorrect as a matter of law to conclude that these fees would not have been incurred "but for" HCRE's bad faith conduct. *See Goodyear Tire & Rubber v. Haeger*, 581 U.S. 101, 108 (2017). Therefore, the bankruptcy court should not have shifted them to HCRE as part of the Order Imposing Sanctions.

The court denies the Rule 60(b) Motion. To be sure, this court does not disagree with HCRE that a mistake of fact ***or*** mistake of law can be grounds for granting a Rule 60(b) motion. *See Kemp v. United States*, 596 U.S. 528, 535-36 (2022). The court also does not disagree with

[12] Highland sought attorney's fees and expenses incurred relating to the HCRE proof of claim from the time period of August 1, 2021 through December 31, 2022. The HCRE proof of claim was filed April 8, 2020. Highland not only did not seek any reimbursement for any time and expense for the first 16 months after HCRE filed its proof of claim, but Highland ultimately did not seek (and the bankruptcy court did not allow) any fees that Highland incurred in successfully moving to disqualify HCRE's counsel in this matter, Wick Phillips (note: Wick Phillips was actually the second law firm that HCRE retained pertaining to its proof of claim; a different law firm originally filed the HCRE proof of claim (Bonds Ellis), followed by Wick Philips, and then the Hoge & Gameros, L.L.P. law firm took over, and now the law firm of Reichman Jergensen Lehman & Feldberg LLP is representing HCRE in this matter.

HCRE that an award of fees relating to sanctionable conduct must be limited to fees that would not have been incurred "but for" the sanctionable conduct. *Goodyear Tire*, 581 U.S. 101 at 104, 108 (the "causal link" between the sanctionable conduct and the opposing party's attorney's fees must be established through a "but-for" test; the complaining party may only recover the portion of fees that would not have been paid but-for the sanctionable conduct). However, the bankruptcy court does not believe it made a mistake of fact or of law with regard to either of these points.

First, the bankruptcy court does not believe it made a mistake of fact in interpreting what HCRE was and was not willing to do in connection with its motion to withdraw its proof of claim at the Sept. 12, 2022 Proof of Claim Withdrawal Hearing. HCRE used hedging language, to the extent that it appeared to be willfully obtuse on this point. It was not willing to withdraw the proof of claim ***with prejudice to ever litigating the issues raised in the proof of claim***. It was not future conduct and future theories that HCRE was worried about preserving in future litigation, and the bankruptcy court was certainly not engaging in a mission to ban all future litigation between these parties in perpetuity. The sole concern was about ***claims/theories in the HCRE proof of claim*** being resurrected somewhere else in the future. The transcript of the September 12, 2022 hearing is clear that there was much discussion on this point, and the court even gave the parties a 24-hour break to go talk outside the presence of the court—to hopefully wordsmith an agreed order withdrawing the proof of claim. Apparently, the parties could not reach an agreement on this relatively simple concept. So, the court would not allow withdrawal of the HCRE proof of claim without clarity that the proof of claim issues would not be raised in future litigation somewhere. The court set a trial on the merits of the proof of claim a few weeks later, as the parties were close to being trial-ready. Moreover, a review of the September 12, 2022 Transcript reflects that the bankruptcy court focused on multiple factors in disallowing withdrawal of the HCRE proof of

claim—the so-called *Manchester* factors—not simply the failure of HCRE to withdraw the proof of claim with prejudice to all future litigation. *Manchester, Inc. v. Lyle (In re Manchester, Inc.)*, 2008 Bankr. LEXIS 3312, *11-12 (Bankr. N.D. Tex. Dec. 19, 2008) (the *Manchester* factors include: (1) the movant's diligence in bringing the motion to withdraw, (2) any "undue vexatiousness" on the part of the movant, (3) the extent to which the suit has progressed, including the effort and expense undertaken by the non-moving party to prepare for trial, (4) the duplicative expense of re-litigation, and (5) the adequacy of the movant's explanation for the need to withdraw the claim). In other words, there were several factors that caused the bankruptcy court to deny withdrawal of the HCRE proof of claim.

Moreover, even if the court did make a mistake of fact in interpreting what HCRE was and was not willing to do (i.e., in deciphering what "with prejudice" did or did not mean)—and, in relying on this as a basis to deny HCRE permission to withdraw its proof of claim--wouldn't this have been an error of the bankruptcy court in entering its Order Denying Withdrawal of HCRE Proof of Claim? This order—entered September 14, 2023—was not appealed. Nor was the subsequent Order Disallowing Claim. In some ways, the Rule 60(b) Motion smacks of being a collateral attack on the Order Denying Withdrawal of Proof of Claim which was never appealed. Had there been an appeal of it, it would have been apparent that it was a multi-faceted decision, based on many factors (i.e., the *Manchester* factors)—not merely the "with prejudice" issues.[13]

Which leads to the last issue—was there a mistake of law in allowing reimbursement of Highland's fees and expense incurred ***after*** the Order Denying Withdrawal of HCRE Proof of Claim? In particular, over $300,000 of fees were incurred by Highland (and shifted by the court in the Order Imposing Sanctions) associated with the preparation for and trial on the HCRE proof

[13] Bankr. Dkt. No. 3519 (Transcript, pp. 51-55).

of claim. Was this a mistake of law? Only if the bankruptcy court made a mistake in ordering that there would be a trial on the HCRE proof of claim (i.e., only if the bankruptcy court erred in entering its Order Denying Withdrawal of HCRE Proof of Claim, and, as noted above, that order was not appealed by HCRE). The court never would have ordered trial on the merits if not for HCRE's conduct (beginning with its bad faith filing of its proof of claim and including refusing to withdraw its proof of claim with prejudice to all future litigation on the issues raised in the proof of claim). Thus, Highland would not have incurred this $300,000+ in fees and expenses "but-for" HCRE's conduct.

Having considered the Rule 60(b) Motion, the Response, the Reply, and the argument of the parties, the court finds that there is no basis or justification for granting HCRE the relief requested in its Rule 60(b) Motion. Any arguments made in the Rule 60(b) Motion not herein addressed are denied.

Accordingly,

IT IS ORDERED that the Rule 60(b) Motion be, and hereby is, **DENIED**.

###END OF ORDER###

EXHIBIT 14

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P. Reorganized Debtor.	Chapter 11 Case No. 19-34054 (SGJ)
MARC S. KIRSCHNER, AS LITIGATION TRUSTEE OF THE LITIGATION SUB-TRUST, *Plaintiff* v. JAMES D. DONDERO; MARK A. OKADA; SCOTT ELLINGTON; ISAAC LEVENTON; GRANT JAMES SCOTT III; STRAND ADVISORS, INC.; NEXPOINT ADVISORS, L.P.; HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; DUGABOY INVESTMENT TRUST AND NANCY DONDERO, AS TRUSTEE OF DUGABOY INVESTMENT TRUST; GET GOOD TRUST AND GRANT JAMES SCOTT III, AS TRUSTEE OF GET GOOD TRUST; HUNTER MOUNTAIN INVESTMENT TRUST; MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #1 AND LAWRENCE TONOMURA AS TRUSTEE OF MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #1; MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #2 AND LAWRENCE TONOMURA IN HIS CAPACITY AS TRUSTEE OF MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #2; CLO HOLDCO, LTD.; CHARITABLE DAF HOLDCO, LTD.; CHARITABLE DAF FUND, LP.; HIGHLAND DALLAS FOUNDATION; RAND PE FUND I, LP, SERIES 1; MASSAND CAPITAL, LLC; MASSAND CAPITAL, INC.; AND SAS ASSET	Adv. Pro. No. 21-03076-sgj

RECOVERY, LTD.,

Defendants.

HCMFA'S MOTION TO RECUSE PURSUANT TO 18 U.S.C. §§ 144 AND 455

Defendant Highland Capital Management Fund Advisors, L.P. ("HCMFA") files this Motion to Recuse (the "Motion") pursuant to 28 U.S.C. §§ 144 and 455.

For the reasons set forth in the Memorandum of Law in Support of this Motion and the exhibits referenced therein, and in consideration of the Affidavit of James D. Dondero filed simultaneously therewith, all of which are incorporated by reference as if fully set forth in this Motion, HCMFA respectfully requests that the Court recuse itself from the above-captioned Adversary Proceeding and any future contested matters involving HCMFA and grant HCMFA all other further relief, at law or equity, to which it is justly entitled.

Dated: February 27, 2023

Respectfully submitted,

STINSON LLP

/s/ Deborah Deitsch-Perez

Deborah Deitsch-Perez
Texas Bar No. 24036072
2200 Ross Avenue, Suite 2900
Dallas, Texas 75201
Telephone: (214) 560-2201
Facsimile: (214) 560-2203
Email: deborah.deitschperez@stinson.com

Counsel for Highland Capital Management Fund Advisors, L.P.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 27, 2023, a true and correct copy of this document was served electronically via the Court's CM/ECF system to the parties registered or otherwise entitled to receive electronic notices in this case.

/s/ Deborah Deitsch-Perez
Deborah Deitsch-Perez

EXHIBIT 15

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P. Reorganized Debtor.	Chapter 11 Case No. 19-34054 (SGJ)
MARC S. KIRSCHNER, AS LITIGATION TRUSTEE OF THE LITIGATION SUB-TRUST, *Plaintiff* v. JAMES D. DONDERO; MARK A. OKADA; SCOTT ELLINGTON; ISAAC LEVENTON; GRANT JAMES SCOTT III; STRAND ADVISORS, INC.; NEXPOINT ADVISORS, L.P.; HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; DUGABOY INVESTMENT TRUST AND NANCY DONDERO, AS TRUSTEE OF DUGABOY INVESTMENT TRUST; GET GOOD TRUST AND GRANT JAMES SCOTT III, AS TRUSTEE OF GET GOOD TRUST; HUNTER MOUNTAIN INVESTMENT TRUST; MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #1 AND LAWRENCE TONOMURA AS TRUSTEE OF MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #1; MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #2 AND LAWRENCE TONOMURA IN HIS CAPACITY AS TRUSTEE OF MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #2; CLO HOLDCO, LTD.; CHARITABLE DAF HOLDCO, LTD.; CHARITABLE DAF FUND, LP.; HIGHLAND DALLAS FOUNDATION; RAND PE FUND I, LP, SERIES 1; MASSAND CAPITAL, LLC; MASSAND CAPITAL, INC.; AND SAS ASSET	Adv. Pro. No. 21-03076-sgj

RECOVERY, LTD.,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.'S MOTION TO RECUSE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Defendant Highland Capital Management Fund Advisors, L.P. ("HCMFA" or the "Movant") moves to recuse Judge Stacey G. Jernigan from serving as the magistrate judge in this adversary proceeding filed by Marc S. Kirschner, as Trustee for the Litigation Sub-Trust ("Adversary Proceeding"). Recusal of Judge Jernigan is mandatory under 28 U.S.C. § 144 and 28 U.S.C. § 455 because the Judge clearly possesses an abiding animus and prejudice against James D. Dondero ("Mr. Dondero"), and by association, Movant, and any objective observer would question the Judge's impartiality under the circumstances presented.

By adopting an acerbic narrative about Mr. Dondero, his entities, his perceived affiliates, and their motivations—a narrative that the Debtor and its professionals have repeatedly used to their advantage—the Bankruptcy Judge has effectively hamstrung any litigant associated with Mr. Dondero from asserting or defending any of its positions in this Court. For example, Movant and others have alleged that the Debtor has managed and sold property and money in violation of bankruptcy provisions, or in violation of contractual obligations, fiduciary obligations, and federally-imposed duties. The Court's persistent response has been to deny these parties substantial justice, often departing from its usual practice and procedure in doing so. At the same time, the Court has summarily rejected any challenge to the Debtor's actions, evincing a dogmatic belief that the Debtor and its current management can do no wrong.

Moreover, Movant and other challengers to the Debtor have repeatedly been thrown out of court on unusual procedural technicalities. The Court also has stymied every attempt to hold someone on the Debtor's side accountable under federal law, with opinions that are frequently accompanied by extensive exposition of the Judge's unevidenced speculation regarding what dastardly plan she foiled. The Court's repeated *ad hominem* smears against the challengers and their lawyers, and its suppositions about their supposed connections to Mr. Dondero (a feature that

does not otherwise feature in the Court's other decisions, much less in other courts' decisions) are telling. Movant has been punished for fighting back to protect its interests, as is its constitutional right. That relentlessly unfair treatment, coupled with a recently discovered publication that operates as a window into Judge Jernigan's thinking about Mr. Dondero, is the basis of this motion.

Judge Jernigan has written and published a book exposing how she sees her relationship to Mr. Dondero. The book's antagonist, Cade Graham, is "a Dallas hedge fund manager…founder and CEO of Dallas based Ranger Capital, a multibillion dollar conglomerate, which managed not just hedge funds but private equity funds, CDOs, CLOs, REITs, life settlements, and all manner of complicated financial products." The book's protagonist is a bankruptcy judge, Avery Lassiter, who is in a battle with Graham. Everything Graham does is a pretext for sinister and illegal activity that only the Judge sees and therefore must bring to light. The parallels do not end there. That Judge Jernigan clearly perceives a battle between *herself* and Mr. Dondero—and that she is the one tasked with bringing the truth to light—wholly undermines the legitimacy of the Court and its rulings.

While normally, losing (even losing more than once) is not enough to ask for disqualification, it is the unbalanced nature of these proceedings that raises the palpable appearance of bias. The Judge's persistent negative treatment of Mr. Dondero and his perceived affiliates (including Movant) has chilled their invocation of legal process, making fair treatment in this Adversary Proceeding impossible. This Motion should be granted to salvage the Court's reputation as an impartial and neutral factfinder and to ensure that justice is done.

II. LEGAL STANDARD FOR RECUSAL

Two federal statutes govern recusal of judges for bias: 28 U.S.C. §§ 144 and 455. *See U.S. v. Brocato*, 4 F.4th 296, 301 (5th Cir. 2021). A judge's duty to rescue herself is "quite similar, if not identical" under both statutes. *U.S. v. York*, 888 F.2d 1050, 1053 (5th Cir. 1989). Notably,

both statutes are written in mandatory terms: if the terms of the statutes are met, recusal is required.

Section 144 mandates recusal when a judge "has a personal bias or prejudice" against or in favor of a party. 28 U.S.C. § 144. A motion under this statute must be supported by "a timely and sufficient affidavit" setting forth "the facts and the reasons for the belief that bias or prejudice exists[.]" *Brocato*, 4 F.4th 296 at 301 (citing 28 U.S.C. § 144). "A legally sufficient affidavit must: (1) state material facts with particularity; (2) state facts that, if true, would convince a reasonable person that a bias exists; and (3) state facts that show the bias is personal, as opposed to judicial, in nature." *Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 483 (5th Cir. 2003).

Under Section 455's broader standard, a judge must be recused if the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," or if the court's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a)-(b)(1). Thus, under Section 455, "recusal may be required even though the judge is not actually partial." *Patterson*, 335 F.3d at 484 (citing *In re Cont'l Airlines Corp*., 901 F.2d 1259, 1262 (5th Cir. 1990)). Therefore, the relevant inquiry under Section 455 is not whether the judge believes she is impartial. Rather, the critical question is whether "the 'average person on the street who knows all the relevant facts of a case'" might reasonably question the judge's impartiality. *In re Kansas Pub. Employees Retirement Sys*., 85 F.3d 1353, 1358 (8th Cir. 1996). Where the question of whether Section 455 requires disqualification is a "close one, the balance tips in favor of recusal." *Id*. at 484-85.

III. STATEMENT OF FACTS

Movant does not come to this Adversary Proceeding with a clean slate. To the contrary, as has been evident for several years, Judge Jernigan has an abiding animus against Mr. Dondero, Movant, and their perceived affiliates, formed well before Mr. Dondero's firm, Highland Capital Management, L.P. ("HCMLP" or the "Debtor"), sought chapter 11 bankruptcy protection. That

animus became apparent during the 2018 bankruptcy of Acis Capital Management, L.P. and its general partner, Acis Capital Management GP, LLC—companies for which Mr. Dondero previously served as Chief Executive Officer, and for which HCMLP provided certain management services. When HCMLP's own chapter 11 case was transferred to Judge Jernigan's court more than a year later, the Judge immediately made clear that she would not put aside her negative opinions formed during the Acis bankruptcy. As described in greater detail below, during the pendency of the subsequently-filed HCMLP bankruptcy, Judge Jernigan has repeatedly (1) singled out Mr. Dondero, Movant, and their attorneys for unfair treatment, (2) admonished Mr. Dondero, Movant, and their attorneys for invoking proper legal process to protect their interests, (3) refused to credit evidence of record when presented by Mr. Dondero, Movant, and their attorneys (even where that evidence was undisputed), and (4) departed from normal procedure where doing so would harm the legal position or rights of Mr. Dondero, Movant, and their attorneys. In short, any objective observer would have substantial reason to doubt Judge Jernigan's impartiality in any proceeding in which Mr. Dondero and Movant are defendants. Under these circumstances, recusal is mandatory.

A. The Court's Animus Toward Movant Began During The Acis Bankruptcy

Mr. Dondero's first encounter with Judge Jernigan came in the context of the involuntary bankruptcy of Acis Capital Management, L.P. and its general partner, Acis Capital Management GP, LLC (collectively, "Acis"). Prior to bankruptcy, Acis managed "hundreds of millions of dollars' worth of CLOs [collateralized loan obligations]." *In re Acis Capital Mgmt., L.P.*, *Bench Ruling and Memorandum of Law in Support of:* (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee's Third Amended Joint Plan ("Acis Bench Ruling"), Case

No. 18-30264-SGJ-11 (Bankr. N.D. Tex.), Acis Dkt. 287 at 10-11.[1] Joshua Terry ("Mr. Terry"), then an employee of HCMLP, served as portfolio manager for Acis. *Id.* at 10. But in June 2016, HCMLP terminated Mr. Terry "under contentious circumstances," allegedly stemming from "disagreements with Mr. Dondero." *Id.* JAMS arbitration between Mr. Terry and HCMLP ensued, and in October 2017, Mr. Terry obtained an arbitration award against Acis. *Id.* at 10-11.

Thereafter, contending that he had concerns that Acis had insufficient funds to pay his arbitration award, on January 18, 2018, Mr. Terry filed two involuntary chapter 7 bankruptcy petitions against Acis Capital Management, L.P. and Acis Capital Management GP, LLC. (the "Acis Bankruptcy"). *Id.* at 3, 11.[2]

After what Judge Jernigan described as an "astonishingly contentious" bankruptcy, *see id.* at 3, she issued an order confirming the Acis joint plan on January 31, 2019. *See* Acis Dkt. 829. Judge Jernigan's simultaneous Bench Ruling is replete with negative remarks about Mr. Dondero, his management decisions, and his businesses.

Indeed, in remarks that are eerily prescient of what was to come, Judge Jernigan concluded—without citing any evidence—that various entities were merely marching to the orders of Mr. Dondero and HCMLP, that testimony given by individuals affiliated with Mr. Dondero and his entities was not credible, that "the Highlands" (i.e., Dondero-affiliated entities objecting to the Acis plan) were merely acting in "lockstep," , and that the Highlands' party-in-interest status was "questionable." *See, e.g.*, Acis Bench Ruling, Acis Dkt. 827, at 3, 14-15, 17, 38, 42-45.

[1] For ease of reference, where the Movant refers to court dockets other than the HCMLP bankruptcy docket, the Movant includes a shorthand description of the docket referenced. For example, references to the Acis bankruptcy docket are to "Acis Dkt."
[2] The cases were later consolidated. *See* Order dated April 19, 2018, Acis Dkt. 137.

B. The Court's Continuing Animus Has Been Evident Throughout HCMLP's Bankruptcy Proceedings

Seeking a "fresh start," HCMLP filed its own chapter 11 petition in Delaware on October 16, 2019. Dkt. 3; *see also* Ex. C, Dec. 3, 2019 Hr'g Tr. at 78:21-23. The Unsecured Creditors Committee ("UCC") moved to transfer the case from the Delaware Bankruptcy Court to the United States Bankruptcy Court for the Northern District of Texas. At that time, HCMLP's counsel—Pachulski Stang Ziehl & Jones, the same counsel that continues to represent HCMLP to this day—argued that the case should not be transferred to Judge Jernigan's court because of the and negative opinions and "baggage" that the Court formed of HCMLP's management during the Acis bankruptcy. *See* Ex. C, December 3, 2019 Hr'g Tr. at 78:21-23. Over HCMLP's objection, the Delaware Bankruptcy Court transferred the case on December 4, 2019. *See* Order Transferring this Case to the United States Bankruptcy Court for the Northern District of Texas, Dkt. 1. As anticipated (and urged) by the UCC, the case landed in Judge Jernigan's court. Following transfer, Judge Jernigan immediately targeted Mr. Dondero—treatment that, over time, extended to Mr. Dondero's perceived affiliates (including the Movant) and even their lawyers.

What follows is a narrative description of only the most egregious examples.[3]

1. The Court Has Repeatedly Threatened Mr. Dondero And Movant And Accused Them Of Bad Acts Or Acting In "Bad Faith"

During the HCMLP bankruptcy proceedings, the Court has repeatedly threatened Mr. Dondero, Movant, and their lawyers or otherwise accused them of committing bad acts or acting in "bad faith," even when those parties and counsel are raising legitimate legal arguments or defending their rights.

[3] This brief seeks to highlight a sampling of Judge Jernigan's biased treatment of Mr. Dondero and the Movant. But there are countless other examples that support recusal in this case. For brevity's sake, the Movant attach as Exhibit B a chart containing other examples that are similar in kind, coupled with relevant citations to the record.

Indeed, at one of the earliest hearings following transfer of HCMLP's bankruptcy to Judge Jernigan's court, the Judge (1) expressed negative opinions about Mr. Dondero (although he had not yet filed any motion or objection in her court), (2) opined that Mr. Dondero had a *propensity* to engage in bad acts (based on Judge Jernigan's perceptions formed during the Acis Bankruptcy), and (3) *sua sponte* insisted that language be included in her order approving a settlement between the Debtor and the UCC allowing the Court to hold Mr. Dondero in contempt for violating the terms of that settlement. *See* Ex. D, Jan. 9, 2020 Hr'g Tr. at 52:10-25, 78:23-79:16, 80:3-6.

At a separate hearing held just a few months later in June 2020, Judge Jernigan openly questioned whether lawyers for CLO Holdco—an entirely separate entity that is a wholly owned subsidiary of a charitable Donor Advised Fund (the "DAF"), established by Mr. Dondero—were acting in good faith in seeking a release of funds belonging to CLO Holdco from the Court registry. *See* Ex. E, June 30, 2020 Hr'g Tr. at 82:3-11, 85:4-16.

This reaction was surprising because there was no dispute that the funds belonged to CLO Holdco. In fact, the Judge herself acknowledged that CLO Holdco's counsel made "perfect arguments" in support of the requested relief. *Id.* at 85:17-22. The Judge nonetheless made clear that she was suspicious of CLO Holdco's motion—a suspicion stemming entirely from her belief (unsupported by any evidence) that Mr. Dondero was behind the CLO Holdco filing and despite that CLO Holdco had independent outside counsel representing it. *Id.* at 82:3-11, 85:4-16.

Just over a week later, at a hearing on July 8, 2020, the Court *sua sponte* directed Debtor's counsel to investigate Mr. Dondero and certain "Highland affiliates" to ascertain whether they had received PPP loans. *See* Ex. F, July 8, 2020 Hr'g Tr. at 42:10-24. In asking for an investigation, Judge Jernigan made clear that her request was based on "extrajudicial knowledge" she had learned from reading "the newspapers, the financial papers," rather than any evidence or argument

presented in her courtroom. *Id.*[4]

At yet another hearing on December 16, 2020, Judge Jernigan openly chastised HCMFA and NexPoint Advisors, L.P. for filing a motion seeking to stop the Debtor and its management from liquidating certain collateralized loan obligations ("CLOs") pending confirmation of HCMLP's Fifth Amended Plan of Reorganization ("Plan"). Dkt. 1528. As HCMFA and NexPoint explained in their motion, they were concerned that the Debtor's premature liquidation of the CLOs would harm the investors to whom HCMFA and NexPoint owed a fiduciary duty. *Id.* at 9. Notwithstanding that concern and the very legitimate legal arguments made in the brief accompanying the motion, Judge Jernigan expressed her belief (untethered to evidence) that Mr. Dondero was behind the motion, concluded that HCMFA and NexPoint filed the motion for an improper purpose, and declared that the motion was "almost Rule 11 frivolous." *See* Ex. G, Dec. 16, 2020 Hr'g Tr. at 63:14-64:14. The Judge then used the opportunity to publicly condemn Mr. Dondero, despite the dearth of evidence to support the Judge's assumptions about his role in filing the motion.

That did not dissuade Judge Jernigan from reaching the same evidence-defying conclusion—and going further—just over one month later. At two hearings in January 2021, HCMFA and NexPoint were back before the Court, this time being accused by the Debtor of interfering with its management of the CLO portfolios. *See Highland Capital Mgmt., L.P. v. Highland Capital Mgmt. Fund Advisors, L.P., et al.*, Adv. Proc. No. 21-03000-sgj, Dkt. 6. Notwithstanding that Mr. Dondero had no continuing role with HCMLP and no ability to interfere with management of the CLO portfolios, Judge Jernigan yet again turned her attention to Mr.

[4] As Debtor's counsel confirmed, the PPP loans at issue in the article referenced by Judge Jernigan had nothing to do with HCMLP. Ex. F, July 8, 2020 Hr'g Tr. at 42:10-44:12. As a result, Judge Jernigan dropped the request.

Dondero, threatening to hold him in contempt of court based on actions taken by others, not Mr. Dondero. *See* Ex. H, Jan. 8, 2021 Hr'g Tr. at 119:6-122:25. She also suggested that Mr. Dondero had caused independent outside counsel to undertake the actions that were the subject of the adversary proceeding, without any evidence to support that finding. *See* Ex. I, Jan. 26, 2021 Hr'g Tr. at 251:24-252:5.

The Court's view of Mr. Dondero and his affiliates as "bad faith" actors persisted though confirmation of HCMLP's chapter 11 plan of reorganization ("Plan"). In her February 22, 2021, Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified), and (II) Granting Related Relief ("Confirmation Order"), Judge Jernigan again questioned the good faith of Mr. Dondero, and two trusts affiliated with Mr. Dondero—The Dugaboy Investment Trust and Get Good Trust—in objecting to Plan confirmation, labeling them "disruptors." Confirmation Order, Dkt. 1943, ¶ 17; *see also id.*, ¶ 19. Their objections specifically related to their desire to protect the assets and not allow those assets to be wasted—a position that is highly meritorious and far from frivolous.

Further still, during a June 2021 hearing in connection with adversary proceedings filed by the Debtor against Mr. Dondero and various of the companies for which HCMLP provided services, Judge Jernigan went so far as to suggest to HCMLP's counsel that HCMLP amend its complaint to include a fraudulent transfer claim against Mr. Dondero based solely on "allegedly problematic things" described by HCMLP's counsel during the hearing. *See* Ex. J, June 10, 2021 Hr'g Tr. at 81:5-82:12. HCMLP thereafter amended its complaint per Judge Jernigan's suggestion. *See* Adv. Case No. 21-3006-sgj, Dkt. 68.

In short, Judge Jernigan has—from start to finish and despite the evidence—consistently viewed Mr. Dondero and perceived affiliates (including Movant) as evildoers and made that bias

clear through repeated commentary and chastisements from the bench.

2. The Court Labeled Mr. Dondero as a "Vexatious" Litigant, Without Requiring Any Evidence To Support That Label

Yet another indication of the Court's bias is its repeated refrain that Mr. Dondero is a "vexatious" litigant, notwithstanding that no such finding has ever been made (and notwithstanding that Mr. Dondero has never been given the opportunity to brief or argue the issue).[5] Indeed, the record in the bankruptcy proceedings is littered with Judge Jernigan's refrain that Mr. Dondero is "vexatious:"

- Speaking about a lawsuit that Judge Jernigan knew nothing about and had not even read: "If Mr. Dondero doesn't think that is so transparently vexations litigation, yeah, I'm going out there and saying that. I haven't seen it [the compliant she was condemning as vexatious], but, come on." Ex. K, Hr'g Tr. dated Sep. 28, 2020 at 51:13-16.

- Offering up her *sua sponte* view on whether Mr. Dondero should be declared a "vexatious" litigant: "[A]lthough I have not been asked to declare Mr. Dondero and his affiliated entities as vexatious litigants per se, it is certainly not beyond the pale to find that his long history with regard to major creditors in this case has strayed into that possible realm, and thus this court is justified in approving this provision." Ex. L, Hr'g Tr. dated Feb. 8, 2021 at 46:20-25.

- Chastising CLO Holdco Ltd. and The Charitable DAF Fund, LP's counsel for filing a motion based on her view of Mr. Dondero: "I have commented before that we

[5] Under Texas law, a court "'may find a plaintiff a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant' and one of three additional prerequisites has occurred within the last seven years." *Baldwin v. Zurich Am. Ins. Co.*, Cause No. 1:17-CV-149-RP, 2017 WL 2963515, *4 (W.D. Tex. July 11, 2017) (citing Tex. Civ. Prac. & Rem. Code § 11.054). These additional elements include "(1) the filing of at least five suits as a pro se litigant that have been dismissed against the plaintiff; (2) relitigating a case pro se after having previously received an adverse and final determination; and a prior finding in state or federal court that the plaintiff is a vexatious litigant in an action concerning the same or substantially similar facts." *Id.* Putting aside that Mr. Dondero rarely has been a plaintiff in any action in which he has been involved, nothing in the bankruptcy record remotely supports the existence of the three elements required for a finding that Mr. Dondero is a "vexatious litigant."

> seem to have vexatious litigation behavior with regard to Mr. Dondero and his many controlled entities." Ex. M, Hr'g Tr. dated Jun. 25, 2021 at 109:20-22.[6]

The Judge's "vexatious" refrain has been so ubiquitous that it has found its way into various movants' papers and oral arguments and has been invoked as a reason to deny Mr. Dondero and Movant the relief they seek, or to reject their arguments out of hand as not credible—*even when the court was not in a position to adjudge credibility*. *See, e.g.*, HCMLP's Response to Movants' Renewed Motion to Recuse, Dkt. 3595, ¶¶ 2, 67 (describing Mr. Dondero as "quintessentially vexatious" and invoking "the never-ending, meritless, vindictive, and vexatious litigation strategy that Mr. Dondero stubbornly clings to regardless of the burdens imposed on the judicial system…" as a reason to deny recusal); Debtor's Omnibus Reply to Objections to Confirmation of Plan, Dkt. 1828, ¶ 22 (arguing that "[e]xculpation is particularly appropriate in this case to stem the tide of frivolous and vexatious litigation against the Exculpated Parties which Dondero and his Related Entities are seeking so desperately to continue to pursue"). Dkt. 1828, ¶ 22.

And while the Court has cited Mr. Dondero's pre-bankruptcy litigation reputation (itself unfounded), no court has previously found that Mr. Dondero (or his entities) ever filed a meritless suit or a frivolous defense or labeled him or them vexatious. Yet Judge Jernigan saw fit to include the term in her Confirmation Order, as part of her justification for discrediting the testimony of Mr. Dondero, overruling the objections raised by him and the Movant to Plan confirmation, and requiring them to channel any future motions or litigation through her. *See* Confirmation Order, Dkt. 1943, ¶ 80 (positing that "[t]he Gatekeeper Provision is also consistent with the notion of a prefiling injunction to deter vexatious litigants…").

Notably, although numerous parties-in-interest to the bankruptcy proceeding have filed

[6] CLO Holdco Ltd., The Charitable DAF Fund, LP, Get Good Trust, and Dugaboy Investment Trust moved to modify a portion of the Court's order retaining Mr. Seery relating to the scope of the Court's assertion of jurisdiction. *See id.*; *see also* Dkt. 2248.

repeated adversary proceedings against Mr. Dondero, HCMLP, and other affiliated entities, thereby driving up bankruptcy costs, complicating settlement of claims, and reducing the amount of funds available to creditors, the Court has never even suggested that any of *that* litigation is vexatious. Apparently, it is only when Mr. Dondero and his affiliates fight back against such suits or against the depletion of the estate by the Debtor's minders in violation of their obligations that the Court labels such action vexatious.

3. The Court Has Repeatedly Sanctioned Or Threatened To Sanction Mr. Dondero And His Lawyers

Notwithstanding that most courts use sanctions sparingly and only when absolutely necessary, Judge Jernigan also has repeatedly sanctioned Mr. Dondero and his counsel or threatened them with sanctions. The Court has not imposed similar punishment (or even threatened similar punishment) on any other party to the case.

In what is perhaps the most egregious example, the Court in August 2021 sanctioned Mr. Dondero in connection with a motion filed by two entities—the DAF and CLO Holdco—in consultation with their own, independent legal counsel. Specifically, the DAF and CLO Holdco filed a motion in the District Court challenging the bankruptcy court's gatekeeping order and *seeking permission* from the Court—in light of the gatekeeping order—to add James P. Seery (the Debtor's CEO and Chief Restructuring Officer) as a defendant. *Charitable DAF Fund, L.P. v. Highland Capital Mgmt., L.P.*, Case No. 21-cv-00842 (N.D. Tex.), Dkt. 6. That Order was denied without prejudice to refile after all named defendants had been served. Nonetheless, the Debtor filed a separate motion asking the Court to impose sanctions not only on the DAF and CLO Holdco and their counsel for seeking the Court's permission, but also to impose sanctions on Mr. Dondero, a non-party to the underlying Texas state-court lawsuit. Dkt. 2247. Mr. Dondero's only action was to alert the DAF and its Counsel of recently uncovered evidence of the value of the HarbourVest

interest in Highland CLO Fund, Ltd., as that evidence suggested that perhaps Mr. Seery had lied on the stand, and Highland was engaged in inappropriate self-dealing.

At the hearing on the Debtor's sanction motion, the testimony was undisputed that the DAF's general manager, Mark Patrick, authorized both the lawsuit and the motion for leave to add Mr. Seery as a defendant. Dkt. 2660 at 19. The testimony was also undisputed that, although Mr. Dondero was asked to provide, and in fact did provide, information in connection with those proceedings, he was not in a position to authorize any of the filings at issue and did not do so. *Id.* at 21. Despite this testimony, Judge Jernigan concluded that "Mr. Dondero sparked this fire," that the evidence was "clear and convincing that Mr. Dondero encouraged Mr. Patrick to do something wrong," and that the lawsuit filed by the DAF and Holdco was, in "th[e] Court's estimation, wholly frivolous." *Id.* at 26. In the end, the Court ordered Mr. Dondero to pay a startling $239,655, as a result of his supposed contempt, despite that the movant had only submitted bills of about $170,000 in attorneys' fees. *Id.* at 28-30. Worse still, the Court tacked on a monetary sanction of $100,000 to be paid by Mr. Dondero (or any other individual or entity) for any attempted appeal of the sanctions award. *Id.* at 30.[7] These results are not surprising given that Judge Jernigan – before any evidence was heard – instituted the proceeding with an order to show cause why the "violators" of her order should not be held in contempt – not "alleged violators," just "violators." *See* Dkt. 2255. Nothing could more clearly telegraph the prejudgment that had occurred.

In short, Judge Jernigan ignored undisputed testimony, concocted a way to saddle Mr. Dondero and others with a multi-hundred-thousand-dollar liability for seeking her permission to do something (and for obeying the Court's order denying that relief), and attempted to prophylactically deny Mr. Dondero's access to the appellate courts through an additional threat of

[7] Not even the Debtor attempted to defend this portion of the Court's sanction award.

sanctions. This ruling along smacks of bias and animus and should be sufficient to require recusal of Judge Jernigan in future proceedings where Mr. Dondero is a defendant.

Additionally, Mr. Dondero sought to file a petition under Texas Rule of Civil Procedure 202 in state court to investigate how and why two funds that are known to associate with Mr. Seery were able to purchase bankruptcy claims at a steep discount and what those funds knew or were told by Mr. Seery about the estate.[8] Undoubtedly seeking to take advance of Judge Jernigan's known predilection against Mr. Dondero, the funds improperly removed the Rule 202 petition to Bankruptcy Court, despite dozens of cases stating that such actions are not removable because the federal courts lack subject matter jurisdiction. With obvious reluctance, Judge Jernigan was forced to remand the case. *See* Order Granting Motion to Remand, Adv. Pro. No. 21-03051, Dkt. 22 at 20-21 ("[W]hile remand appears to be the correct result under the law, it is done here with grave misgivings … Dondero's standing in filing the Rule 202 Proceeding would appear to be highly questionable and his motives highly suspect."). But she did not sanction the removing parties for the clearly frivolous removal. Instead, in a lengthy opinion, she chastised Mr. Dondero for deigning to ask questions and seek information. *Id.* at 5-6. The Judge's allegations against him clearly carried weight in the state court and poisoned the well for that judge, who denied the Rule 202 depositions.

In addition to these orders, Judge Jernigan has sanctioned Mr. Dondero on another occasion and repeatedly threatened his lawyers with sanctions. *See, e.g.*, Dkt. 2660; Ex. N, February 23, 2021 Hr'g Tr. at 232:7-234:19 ("But it just feels like sickening games. And again, if this keeps on, if this keeps on, one day, one day, there may be an enormous attorney fee-shifting order."). Again, notwithstanding questionable legal arguments made by other parties to the case and other dubious

[8] *See* 95th Judicial District Court of Dallas County, Texas Cause No. DC-21-09534.

motion practice by the Debtor, the UCC, and its constituents, no other party to these proceedings has been threatened with sanctions for any reason. There is a reason for that: Judge Jernigan seeks out opportunities to punish Mr. Dondero and his affiliates.

4. The Court's Actions Have Discouraged Movant From Invoking Legal Process, Even Where Legitimate And Necessary

Ultimately, and as set forth in detail in the accompanying affidavit of Mr. Dondero, the statements made and actions taken by Judge Jernigan against him, his entities, and his perceived affiliates has had a substantial prejudicial effect on Movant, in two critical respects. *See* Ex. A, Affidavit of James D. Dondero. First, the Court's bias has caused it to make decisions that are detrimental not just to Movant but to creditors and stakeholders more generally.

For example, the Court did not require the Debtor to file Rule 2015.3 reports in bankruptcy, notwithstanding that the Debtor had at its fingertips the information with which to populate those reports (and in fact provided similar reporting to the UCC). As a result, the Debtor has been permitted by Judge Jernigan to obfuscate the true value of the bankruptcy estate, disabling meaningful settlement discussions that could have resolved the estate long ago. Indeed, the Court itself remains ignorant of the true value of the estate to this day. And as has been posited in a recently filed adversary proceeding seeking an accounting and other information from the Claimant Trustee, the bankruptcy estate is and always has been solvent, meaning that the estate could pay all creditors in full now and dispense with all further proceedings before the Court. *See* Motion for Leave, Dkt. 3662. Put another way, the Court has allowed its desire to punish Mr. Dondero and his perceived affiliates to outweigh the Court's obligation to expedite the orderly and transparent reorganization of HCMLP.

Second and more significantly, the Court's bias has had a chilling effect on Movant and its counsel. Specifically, the Court's repeated threats, negative treatment, and sanctions orders have

left Movant and its counsel with the perception that they cannot succeed on any motion or objection filed with this Court. Worse still, Movants and its counsel must proceed with extreme caution out of legitimate concern that the Court will sanction them for attempting to protect their legal rights and positions.[9] That is precisely the type of problem that recusal is designed to prevent. No litigant should perceive that justice is impossible because of the predilections of the presiding judge.

C. Judge Jernigan Authors A Book Mirroring Her Perception of Highland And Mr. Dondero

Compounding matters, Movant recently became aware that Judge Jernigan wrote and published two novels while she was presiding over the Acis and HCMLP Bankruptcies.

Judge Jernigan's first novel, *He Watches All My Paths*, was released on January 3, 2019, just weeks before Judge Jernigan confirmed the joint bankruptcy plan of Acis Capital Management, L.P. and Acis Capital Management GP, LLC ("Acis")—companies for which Mr. Dondero served as CEO and for which HCMLP performed certain management services prior to Acis's bankruptcy. Against that backdrop, Judge Jernigan describes the financial industry as being dominated by "[h]igh flying hedge fund managers" that "suck up money like an i-robot vacuum" and seem to "make money no matter what" and who routinely show "outrageous amounts of hubris" as part of their "bro culture." Given that description, it is no wonder that the novel's central protagonist, a Dallas federal bankruptcy judge, wonders whether the death threats she is receiving come from a hedge fund manager that has previously appeared in her court.

Judge Jernigan's second novel, *Hedging Death*, was released in March 2022, less than a

[9] Debtor sought to have Movant and Nexpoint sanctioned and held in contempt for making a proffer of evidence to preserve the record for appeal in the Notes cases. *See* Adv. Pro. No. 21-3004, Dkt. 130 at 10-14. Although it was the Debtor's motions that were out of line (given that a making a proffer was the only means of preserving the record), and while Judge Jernigan denied the Debtor's motions, she still chastised Movant and Nexpoint for protecting their rights, calling the Debtor's motion "a close call." Ex. O, April 20, 2022 Hr'g Tr. at 51:14-21.

year after HCMLP's Plan was approved and while these bankruptcy proceedings were still ongoing.[10] In *Hedging Death*, Judge Jernigan repeatedly invokes detail from the ACIS and Highland Bankruptcies. Again, the central protagonist of the novel is a Dallas bankruptcy judge, along with her husband, a retired police officer (like Judge Jernigan's husband) and private investigator. The story involves a "high-flying, Dallas hedge fund manager" who, like Mr. Dondero, Judge Jernigan characterizes as a reckless investment manager and vexatious litigant. *Id.* at 10, 16. The investment firm in the novel is called Ranger Capital and is experiencing economic distress largely because of extensive litigation stemming from bad investments. *Id.* at 11, 74. This alone is astonishing: HCMLP's original name was Ranger Asset Management, as is prominently disclosed on the website of Mr. Dondero's investment firm NexPoint, and which has been mentioned in other filings in Judge Jernigan's court. And HCMLP, like the supposedly fictitious Ranger, initially sought chapter 11 protection because of investor litigation. The similarities do not stop there.

In the novel, Ranger, like HCMLP, is a "multi-billion dollar conglomerate, which manage[s] not just hedge funds but private equity funds, CLOs, REITs, life settlements, and all manner of complicated financial products." *Id.* at 11. In the novel, Judge Jernigan describes the life settlement industry—which she knows was an industry in which HCMLP and Mr. Dondero invested—as "creepy," "immoral," "unethical," and "should be illegal." *Id.* at 71-74. As Judge Jernigan is well aware, HCMLP and its affiliates managed hedge funds, private equity funds, CDOs, CLOs, REITs, life settlement portfolios, and private investment accounts for institutions around the world—exactly the same unusual mix of investments at issue in Judge Jernigan's second "fictional" novel.

[10] Stacey Jernigan, Hedging Death (2022).

There can be no question that Judge Jernigan learned about this mix of investments from her work on the Acis and Highland Bankruptcies. Indeed, even financial hubs such as New York and Los Angeles have only a limited number of firms with the mixture of products found at HCMLP. Given that and the books use of the name "Ranger," anyone in the industry would readily conclude that the author was writing about Mr. Dondero and his businesses.

Moreover, Judge Jernigan has repeatedly expressed her suspicion of international tax structures and off-shore transactions (something highly regular in finance), calling them "byzantine." *See, e.g.*, Ex. E, June 30, 2020 Hr'g Tr. at 86:16-87:15. And she expressed her suspicion in the book by setting forth how such structures are actually pretexts for hiding illegal activity and money laundering. *See, e.g.*, *Hedging Death* at 75, 127-128 ("Graham had kept all this information secret with his byzantine web of offshore companies."), 179. In short, Judge Jernigan's writings (both inside and outside the courtroom) suggest that she harbors exceedingly negative views about Mr. Dondero, and that she in fact patterned the antagonist in her books after Mr. Dondero, leading any reasonable observer to question Judge Jernigan's impartiality in these bankruptcy proceedings.

D. The Kirschner Litigation Opens The Door To Additional Abuse

Against this tortured backdrop, in September 2021, Marc S. Kirschner, as Trustee for the Litigation Sub-Trust, filed this Adversary Proceeding against Movant and numerous other defendants, claiming that various individuals and entities affiliated with HCMLP committed fraud, breached their fiduciary duties, and engaged in fraudulent transfers. *See Kirschner v. Dondero, et al.*, Adv. Proc. No. 21-03076-sgj (Bankr. N.D. Tex.) (the "Kirschner Litigation"), Dkt. 158 (Amended Complaint). The Kirschner Litigation seeks to impose on Movant and other defendants hundreds of millions of dollars of potential damages. *Id.*

To date, the Kirschner Litigation has progressed slowly. Movant and others filed motions

to withdraw the reference. On April 6, 2022, Judge Jernigan issued a Report and Recommendation in which she recommended that the reference be withdrawn but that she retain the case and preside over it as a magistrate judge until trial. Dkt. 151. Movant has objected to Judge Jernigan's Report and Recommendation (and urged that the reference be withdrawn immediately to allow this case to proceed in federal District Court), but the District Court has not yet ruled on that objection. In the interim, Movant and others have moved to dismiss the various causes of action asserted in the Kirschner Litigation. *See, e.g.*, Dkts. 182-183, 189-190. Briefing on those motions to dismiss is complete, but no oral argument has been set, and no decision on the motions has been made. Judge Jernigan has not been called upon to make any other decisions in the Adversary Proceeding to date.

Although a favorable ruling from the District Court on Movant's objection to Judge Jernigan's Report and Recommendation on the motions to withdraw the reference would moot this Motion to Recuse, in an abundance of caution and to avoid any argument about unnecessary delay, Movant decided to file the Motion now, so that it may be decided before any substantive decisions are made by Judge Jernigan in the Adversary Proceeding.

IV. RECUSAL IS WARRANTED

Based on the facts set forth above, and in the Dondero Affidavit, recusal of Judge Jernigan is mandatory in this Adversary Proceeding. The facts and accompanying evidence establish that the Court has both an actual "personal bias or prejudice," and that any reasonable and objective observer would "harbor doubts concerning the judge's impartiality." *Patterson*, 335 F.3d at 483-84 (quoting *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir.1997)).

A. Movant Has Met The Requirements Of Section 144, Mandating Recusal

The District Court should recuse Judge Jernigan in this Adversary Proceeding because Movant has met all the requirements of 28 U.S.C. § 144. Notably, there is no dispute that Judge

Jernigan already has recommended that the District Court withdraw the reference in this Adversary Proceeding. As a result, this proceeding is now a "proceeding in a district court," as contemplated under Section 144, with Judge Jernigan serving in her capacity as a magistrate judge for the District Court. As Judge Jernigan has previously insisted, once the reference is withdrawn, "the District rules apply." Ex. P, Hr'g Tr. dated Nov. 9, 2021, at 12:2-3, 13:9-20. Indeed, the Judge emphasized that "District Courts are very much sticklers for rules and procedures," such that she must "do what I think the District Judge would expect me to do on all future occasions and strictly apply the rules" while sitting as a magistrate for the District Court prior to trial. *Id.* at 14:4-8. Given this procedural posture, this adversary proceeding is no different from a case pending before a magistrate in the District Court, and section 144 applies with equal force.

In addition, Movant meets both of the procedural requirements of Section 144.

First, Movant's motion is timely. In assessing the timeliness of a Section 144 motion, "courts simply require exercise of reasonable diligence in filing an affidavit after discovering facts that show bias, or an explanation of good cause for failing to do so." *U.S. v. Olis*, 571 F. Supp. 2d 777, 781 (S.D. Tex. 2008). "For example, courts will often consider whether the affiant has participated in substantial pre-trial motions between the time he first learned of the asserted bias and the time he filed the § 144 request." *Smith v. Danyo*, 585 F.2d 83, 86 (3d Cir. 1978).

As explained above, if granted, Movant's pending motion to withdraw the reference would moot this motion, as would dismissal, obviously. However, since filing the motions, Movant became aware of Judge Jernigan's two novels. *See* Section III.C, supra. In light of this discovery, Movant is filing this motion now out of an abundance of caution, while this proceeding is still in its early stages and before Judge Jernigan has issued any substantive decisions in the case. Where, as here, the case is still in the preliminary stages and more than a year away from trial, there is no

risk of gamesmanship or the parties "waiting until the eve of trial and then resorting to a § 144 affidavit in order to obtain an adjournment." *Smith*, 585 F.2d at 86. Under these circumstances, Movant's motion is timely.

Second, Mr. Dondero has submitted a "sufficient affidavit" stating "the facts and the reasons for the belief that bias or prejudice exists[.]" 18 U.S.C. § 144. "If an affidavit filed under section 144 is timely and technically correct, its factual allegations must be taken as true for purposes of recusal. The judge must pass on the legal sufficiency of the affidavit, but he may not pass on the truth of the matters alleged." *Phillips v. Joint Legislative Committee*, 637 F.2d, 1019-20 (5th Cir. 1981); *see also Tillotson v. Esparza*, Cause No. EP-15-CV-178-KC, 2015 WL 13333823, *2 (W.D. Tex. June 19, 2015) (denying motion under Section 144 where plaintiff "failed to attach a supporting affidavit."); *Auf v. Howard Univ.*, Cause No. 19-22065-CIV-Smith, 2020 WL 10458573, *3 (S.D. Fla. Mar. 25, 2020) (denying motion denied where the plaintiff submitted only an unsworn statement that did not address the substance of the motion).

Here, Mr. Dondero has submitted an affidavit signed under penalty of perjury attesting to the specific facts and reasons supporting recusal, which are set forth above. *See* Ex. A, Dondero Affidavit. That affidavit is plainly legally sufficient and meets the requirements of the statute.

B. Recusal Is Required Because Judge Jernigan Harbors An Actual Personal Bias Against Mr. Dondero And, By Association, Movant

The facts described above and in the accompanying evidence establish beyond question that Judge Jernigan harbors an actual bias and animus against Mr. Dondero and his perceived affiliates (including Movant), making recusal mandatory. The Judge's consistent threats, admonitions, assumptions and findings contrary to or in the absence of evidence, and adverse treatment of Mr. Dondero and those entities that appear aligned with him (including Movant) are more than sufficient to demonstrate that the Judge's bias is "personal rather than judicial in nature."

Parrish v. Board of Comm'rs, 524 F.2d 98, 100 (5th Cir. 1975).

Notably, although "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion," the Supreme Court has also recognized that predispositions developed during the course of a trial can suffice to demonstrate the requisite bias or prejudice. *Liteky v. U.S.*, 510 U.S. 540, 555 (1994). In this regard, the words "bias" and "prejudice" mean a disposition or opinion that is somehow wrongful or inappropriate, either because: (a) it is undeserved; (b) it rests upon knowledge that the holder of the opinion ought not to possess; or (c) it is excessive in degree. *Id.* at 554. For example, the court's consideration of an extrajudicial source of information is a factor in favor of finding either an appearance of partiality under section 455(a) or bias or prejudice under section 455(b)(1). *Bell v. Johnson*, 404 F.3d 997, 1004 (6th Cir. 2005) (citations omitted).[11]

Moreover, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings," may evidence bias if the opinions reveal that they "derive from an extrajudicial source; and ***they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible***." *Liteky*, 510 U.S. at 555 (emphasis added).

Applying these standards, the federal courts have held that recusal (or reassignment to a new judge) is appropriate under several circumstances that mirror those at issue in this case. For example, the federal courts have found recusal or reassignment appropriate where (1) the judge made antagonistic statements to plaintiffs and manifested an "apparent distrust" of plaintiffs "early in the litigation,"[12] (2) the judge questioned one party's decision to pursue a course of action and

[11] Importantly, consideration of an extrajudicial source is not necessary to a finding of bias or prejudice. *Liteky*, 510 U.S. at 554-55.

[12] *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 904-05 (8th Cir. 2009) (reassigning case to a new judge on remand).

made comments that were critical of the party's position,[13] (3) the judge openly questioned the integrity of one party's counsel, suggested he was proceeding in "bad faith," and called certain decisions made by him "suspicious,"[14] (4) there was "immediate, continuing, and ever-increasing tension" between the judge and one party's counsel, the judge questioned in open court "the conduct of the lawyers" for one party, and the judge questioned one party's "good faith,"[15] (5) the judge's comments "evidenced his distrust of [one party's] lawyers and his generally poor view of [one party's] practices."[16] As set forth above, the Court has engaged in *all* of these practices in this case, each of which individually would mandate recusal. *Johnson v. Sawyer*, 120 F.3d at 1334.

In short, Movant, like all other litigants, are entitled to a full and fair opportunity to make their case in an impartial forum—regardless of their history with that forum. *Miller v. Sam Houston State Univ.*, 986 F.3d 880, 893 (5th Cir. 2021) (citing *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995)). Judge Jernigan's personal bias and animus toward Mr. Dondero and his perceived affiliates (including Movant) far exceeds what is permissible in any court proceeding.

C. Recusal Is Required Because, At The Very Least, Judge Jernigan Appears Biased

In the alternative, and at the very least, the numerous examples discussed above clearly establish that an objective observer would harbor doubts about Judge Jernigan's impartiality. This alone is grounds for mandatory recusal. As the Fifth Circuit has held, "fundamental to the judiciary

---

[13] *In re U.S.*, 572 F.3d 301, 311-12 (7th Cir. 1999) (on mandamus, reversing district judge's order denying motion to recuse and ordering that "all orders entered by the Judge after the motion for recusal was filed . . . be vacated").

[14] *U.S. v. Kennedy*, 682 F.3d 244, 258-260 (3d Cir. 2012) (ordering reassignment of the case to a different judge on remand).

[15] *Johnson v. Sawyer*, 120 F.3d 1307, 1334-1337 (5th Cir. 1997) (ordering reassignment of the case to a different judge on remand and explaining that "the loss of efficiency and economy pales in comparison" to "the necessity to preserve the appearance of impartiality, fairness, and justice").

[16] *U.S. v. Microsoft Corp.*, 56 F.3d 1448, 1465 (D.C. Cir. 1995) (where a reasonable observer could question whether the presiding judge "would have difficulty putting his previous views and findings aside" on remand, case should be assigned to a different judge).

is the public's confidence in the impartiality of [its] judges and the proceedings over which they preside." *Id.* Thus, "justice must satisfy the appearance of justice." *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). Indeed, Section 455 was "designed to promote public confidence in the impartiality of the judicial process." *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988) (quoting H.R. Rep. No. 1453); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859-60 (1988). Accordingly, recusal is warranted where a judge's comments would "cause a reasonable observer to question whether [the judge] 'would have difficulty putting his previous views and findings aside.'" *Microsoft Corp.*, 56 F.3d at 1465 (quoting *U.S. v. Torkington,* 874 F.2d 1441, 1447 (11th Cir.1989)).

Even if Judge Jernigan does not harbor actual bias—and all signs point to that being true—the facts as described and the accompanying evidence establish that a reasonable observer would question her impartiality. Allowing Judge Jernigan to continue to preside over this Adversary Proceeding despite the overwhelming evidence of bias would only serve to undermine the public confidence in the judiciary. Under these circumstances, federal statute requires recusal.

V. CONCLUSION

It is time for Judge Jernigan to step aside and allow a neutral judge to preside over this Adversary Proceeding. For more than four years, she has expressed overtly hostile opinions and sentiments about Mr. Dondero and Movant, and no reasonable observer could possibly believe that Movant can receive fair treatment at Judge Jernigan's hand. The federal recusal statutes exist to protect not just parties injured by biased judicial treatment, but to protect the public interest in a fair and rational judiciary. For all these reasons, and based on the argument and evidence presented, Movant respectfully requests that the Court grant this Motion to Recuse and assign this Adversary Proceeding to another magistrate judge pending trial.

Dated: February 27, 2023

Respectfully submitted,

STINSON LLP

/s/ Deborah Deitsch-Perez
Deborah Deitsch-Perez
Texas Bar No. 24036072
2200 Ross Avenue, Suite 2900
Dallas, Texas 75201
Telephone: (214) 560-2201
Facsimile: (214) 560-2203
Email: deborah.deitschperez@stinson.com

Counsel for Highland Capital Management Fund Advisors, L.P.

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that counsel for Highland Capital Management Fund Advisors, L.P. conferred with counsel for Plaintiff regarding the relief sought in this motion, and counsel for Plaintiff indicated that Plaintiff is unlikely to consent. Counsel for HCMFA will promptly inform the Court if counsel for Plaintiff indicates that it determines that it is not opposed to the relief sought in this motion.

/s/ Deborah Deitsch-Perez
Deborah Deitsch-Perez

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 27, 2023, a true and correct copy of this document was served electronically via the Court's CM/ECF system to the parties registered or otherwise entitled to receive electronic notices in this case.

/s/ Deborah Deitsch-Perez
Deborah Deitsch-Perez

EXHIBIT A

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P. Reorganized Debtor.	Chapter 11 Case No. 19-34054 (SGJ)
MARC S. KIRSCHNER, AS LITIGATION TRUSTEE OF THE LITIGATION SUB-TRUST, *Plaintiff* v. JAMES D. DONDERO; MARK A. OKADA; SCOTT ELLINGTON; ISAAC LEVENTON; GRANT JAMES SCOTT III; STRAND ADVISORS, INC.; NEXPOINT ADVISORS, L.P.; HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; DUGABOY INVESTMENT TRUST AND NANCY DONDERO, AS TRUSTEE OF DUGABOY INVESTMENT TRUST; GET GOOD TRUST AND GRANT JAMES SCOTT III, AS TRUSTEE OF GET GOOD TRUST; HUNTER MOUNTAIN INVESTMENT TRUST; MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #1 AND LAWRENCE TONOMURA AS TRUSTEE OF MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #1; MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #2 AND LAWRENCE TONOMURA IN HIS CAPACITY AS TRUSTEE OF MARK & PAMELA OKADA FAMILY TRUST – EXEMPT TRUST #2; CLO HOLDCO, LTD.; CHARITABLE DAF HOLDCO, LTD.; CHARITABLE DAF FUND, LP.; HIGHLAND DALLAS FOUNDATION; RAND PE FUND I, LP, SERIES 1; MASSAND CAPITAL, LLC;	Adv. Pro. No. 21-03076-sgj

MASSAND CAPITAL, INC.; AND SAS ASSET RECOVERY, LTD.,

Defendants.

AFFIDAVIT OF JAMES D. DONDERO IN SUPPORT OF MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 144

I, James D. Dondero, hereby declare as follows:

1. Previously, I served as Chief Executive Officer and director of Strand Advisors, Inc.—the general partner of Highland Capital Management, L.P. ("HCMLP")—from the time of HCMLP's founding until January 9, 2020. Thereafter, I remained employed as a portfolio manager (albeit without compensation) by HCMLP until October 2020.

2. I understand that this Affidavit is being submitted to the Court in connection with the motion of Defendant Highland Capital Management Fund Advisors, L.P. ("HCMFA") to recuse Judge Stacey G. Jernigan in the above-captioned matter (the "Motion"). I also am the sole stockholder and director of Strand Advisors XVI, Inc., the general partner of HCMFA. I have personal knowledge of the matters set forth in this declaration and if called as a witness, I could and would competently testify to these matters.

3. I believe that Judge Jernigan harbors a personal bias and prejudice against me and all the entities that Judge Jernigan perceives to be related, affiliated, or controlled by me, including HCMFA. This bias has been evident throughout the *In re Highland Capital Management, L.P.* bankruptcy proceeding ("HCMLP Bankruptcy"), and it is my belief it will continue in this adversary proceeding if Judge Jernigan is not recused or disqualified from serving as magistrate judge in the case.

4. Based on my prior experiences in her courtroom and based on what I know about Judge Jernigan's opinions of the financial industry (and in particular the mix of products and

assets owned and managed by me and my affiliates), I do not believe that Judge Jernigan can fairly adjudicate any matters involving me or any entity that she perceives to be connected to me. As set out in detail in the Motion, Judge Jernigan has repeatedly and openly expressed negative views about my character and motivations, singled out me, my lawyers, and other parties and their lawyers for unfair treatment based on their alleged connection to me, discouraged me and these other entities from fully participating in the HCMLP Bankruptcy and other adversary proceedings to protect our financial interests, threatened me and my attorneys with sanctions, and discredited my testimony while consistently crediting the testimony of HCMLP's witnesses. As a result of these experiences, I feel wrongfully targeted and have lost all confidence in the prospect of fair, unbiased decision-making by Judge Jernigan in this adversary proceeding.

5. In addition to the numerous examples set forth in the Motion, I recently became aware that Judge Jernigan wrote and published a novel that singles out the "hedge fund" industry and my business in particular. Prior to seeking chapter 11 protection in bankruptcy, HCMLP managed a unique mix of investments that included hedge funds, private equity funds, collateralized debt obligations ("CDOs"), collateralized loan obligations ("CLOs"), real estate investment trusts ("REITs"), life settlement portfolios, and private investment accounts. There are only a few investment firms in the whole country that manage this unusual mix of assets, and HCMLP was the only such firm in Dallas. This is precisely the mix of investment assets managed by the antagonist hedge fund magnate in Judge Jernigan's book, *Hedging Death.* Additionally, the firm in her book is called "Ranger Capital Management," which was the original name of HCMLP, and which can be easily ascertained by conducting a cursory search

on Defendant NexPoint Advisors, L.P.'s website. It is highly unlikely that these commonalities are mere coincidences, and I believe that Judge Jernigan based this book on me and my business.

6. The opinions expressed about me and my business in Judge Jernigan's novel is just one of many egregious examples of negative treatment that leads me to believe that Judge Jernigan has an animus against me and my entities and is incapable of impartiality in this adversary proceeding. Among other things, Judge Jernigan has engaged in procedural gamesmanship to ensure that entities connected to me cannot get relief in her Court. As but one example, when two trusts affiliated with me—The Dugaboy Investment Trust ("Dugaboy") and Get Good Trust ("Get Good")—filed a motion with the Court asking the Court to require the Debtor to make mandatory disclosures under Rule 2015.3 (disclosures that I understand the Debtor already was making to the Unsecured Creditors Committee and would have been easy to assemble for the benefit of other creditors and stakeholders), Judge Jernigan deliberately continued the motion hearing date until after the Plan's effective date to ensure the motion became moot and was never heard. In that decision, Judge Jernigan openly speculated that Dugaboy and Get Good were requesting that the Debtor prepare these reports—which are *required* by the Bankruptcy Rules—for nefarious purposes, simply because these trusts are connected to me and my family. Without those reports, and as a direct result of Judge Jernigan's unwillingness to grant relief requested by myself or any entity she perceives to be connected to me, no one knows the true value of the estate today. The dearth of real-world disclosures about that value have allowed adversary proceedings like this one to proliferate, even though there is good reason to believe that the estate has sufficient funds to pay all creditors in full, meaning that the only parties benefitting from the lawsuits are the Debtor's professionals.

7. Additionally, Judge Jernigan's treatment of me and my attorneys has had a chilling effect on my participation in the HCMLP Bankruptcy and related adversary proceedings. Judge Jernigan's repeated threats of sanctions and openly hostile remarks about my character, motivations, and business dealings have left me and my attorneys with the perception that I cannot succeed on *any* motion or filing in this Court. Indeed, the Court's willingness to sanction me and entities and lawyers the Judge believes are connected to or controlled by me has emboldened the Debtor's counsel to seek sanctions (including against counsel for HCMFA) even where none are warranted. This development has caused some of my attorneys to express reluctance to even file legitimate objections or motions out of fear of being sanctioned.

8. Judge Jernigan's incessant derogatory comments about me and my businesses feel deeply personal in nature, and her perception of me has clouded her perception of any entity that she believes to be connected to me. I believe that other entities' chances of success, including HCMFA, have been negatively impacted by Judge Jernigan's personal bias against me.

9. I have been named as a defendant in numerous lawsuits over the years in the course of running my business and have never experienced this kind of biased, unfair treatment in any other court or tribunal in the country. Prior to seeking Judge Jernigan's recusal in the HCMLP Bankruptcy, I had never sought to recuse any judge. Unfortunately, Judge Jernigan summarily denied the first recusal motion filed on my behalf in the HCMLP Bankruptcy and has still not ruled on the second recusal motion, necessitating the filing of this Motion.

10. In this adversary proceeding, the Litigation Trustee seeks to hold me, HCMFA, and several other defendants liable hundreds of millions of dollars in damages. The allegations of the 141-page Amended Complaint span over a decade and include thirty-six separate causes of action. The interests of 23 defendants are at stake, many of which have some connection to me

9. Judge Jernigan's incessant derogatory comments about me and my businesses feel deeply personal in nature, and her perception of me has clouded her perception of any entity that she believes to be connected to me. I believe that other entities' chances of success, including HCMFA, have been negatively impacted by Judge Jernigan's personal bias against me.

10. I have been named as a defendant in numerous lawsuits over the years in the course of running my business and have never experienced this kind of biased, unfair treatment in any other court or tribunal in the country. Unfortunately, Judge Jernigan summarily denied the first recusal motion filed on my behalf in the HCMLP Bankruptcy and has still not ruled on the second recusal motion, necessitating the filing of this Motion.

11. In this adversary proceeding, the Litigation Trustee seeks to hold me, HCMFA, and several other defendants liable hundreds of millions of dollars in damages. The allegations of the 141-page Amended Complaint span over a decade and include thirty-six separate causes of action. The interests of 23 defendants are at stake, many of which have some connection to me or have been deemed "controlled" by me, despite the dearth of evidentiary support for that conclusion. I have a right to defend myself in this adversary proceeding, as does HCMFA and all of the defendants sued, and I should perceive the presiding judge as impartial. I do not believe Judge Jernigan is impartial, nor do I believe she can set aside her personal animus against me to render fair decisions involving me or HCMFA in this proceeding. For these reasons, I believe HCMFA has no other option but to seek recusal.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: February 27, 2023

James D. Dondero

EXHIBIT B

EXHIBIT B

EXAMPLES OF BIAS FROM BANKRUPTCY TRANSCRIPTS

Legend of Bias Categories

A	Examples of Judge Jernigan reprimanding or making negative comments about Mr. Dondero or his perceived affiliates.
B	Examples of Judge Jernigan refusing to credit Mr. Dondero or his perceived affiliates' testimony, while crediting Highland witness' testimony.
C	Examples of Judge Jernigan making findings against Mr. Dondero or his perceived affiliates untethered to evidence
D	Examples of Judge Jernigan attempting to discourage Mr. Dondero or his perceived affiliates' legitimate exercise of judicial process by overt or veiled threats.
E	*Sua sponte* rulings issued against Mr. Dondero or his perceived affiliates.

Date	Motion at Issue	Transcript Citation	Bias Category	Transcript Excerpt (Statements by Judge Jernigan Unless Otherwise Noted)
02/19/20	Debtor's Motion to Employ/Retain Foley Gardere, Foley & Lardner LLP as Special Texas Counsel	177:7-178:17	A / C	"But I'm concerned that Dondero or certain in-house counsel has -- you know, they're smart, they're persuasive -- that -- what are the words I want to look for -- **they have exercised their powers of persuasion or whatever to make the Board and the professionals think that there is some valid prospect of benefit to Highland with these appeals, when it's really all about Neutra, HCLOF, and Mr. Dondero**. That's what I believe. I mean, this is awkward, right, because you want to defer to the debtor-in-possession, but I have this long history, and I can think through the scenarios. If this is reversed, here is how it will play out. If this is reversed, here is how it might play out. And I know, you know, there are multiple ways it might play out, but I cannot believe there is a chance in the world there is economic benefit to Highland if these things get reversed. Economic benefit to Neutra: Yeah, maybe. Economic benefit to HCLOF: Well, they'll get what they want. You know, whether it's an economic benefit, I don't know. But benefit to Highland? I just don't think the evidence has been there to convince

Date	Motion at Issue	Transcript Citation	Bias Category	Transcript Excerpt (Statements by Judge Jernigan Unless Otherwise Noted)
				me it's reasonable business judgment for Highland to pay the legal fees associated with the appeal. **And even more concerning to me is a valid point was made that Highland is in bankruptcy because of litigation, litigation, litigation. The past officers and directors and controls' propensity to fight about everything. This isn't a balance sheet restructuring, okay? It's not a Chapter 11 caused by operational problems or revenue disruption or who knows what kind of disruption. It's about years of litigation finally coming home to roost.** And this just appears to be more of the same, potentially. Okay. Parties have a right to appeal. I respect that. Neutra, go for it. HCLOF, go for it. But this estate and its creditors should not bear the burden of having Highland pay for that, when, again, I don't think there's any evidence to suggest they could benefit at the end of the day."
03/04/20	Motion of the Debtor for Entry of An Order Authorizing, but not Directing, the Debtor to Cause Distributions to Certain "Related Entities"	51:10-14	A / C	"But I – I'll want to hear that. I'll want to hear that this was all legitimate, independent, non-affiliated investors pressing for the wind-down of these funds, and we didn't have what I refer to as the Acis situation where – well –"
03/04/20	Motion of the Debtor for Entry of An Order Authorizing, but not Directing, the Debtor to Cause Distributions to Certain "Related Entities"	115:20-25	A	Mr. Pomerantz, counsel for Debtor, states: "Well, look, Your Honor, I certainly understand why you're concerned. **As you said at the first hearing, you have stuff in your head that you can't forget, and I understand**. I wasn't around but I understand the history and especially the history with **certainly similar things that may have happened in the Acis case**."
06/30/20	Motion for Remittance of Funds Held in Registry of Court	87:5-15	A	"So, **I'm not saying the Byzantine structure is in and of itself problematic, although one might wonder why a charitable organization needs to have three offshore entities** as part of its

Date	Motion at Issue	Transcript Citation	Bias Category	Transcript Excerpt (Statements by Judge Jernigan Unless Otherwise Noted)
	Filed by CLO Holdco, Ltd.			structure. I digress. **But we all know a Byzantine structure and ties to Dondero do not mean something is attackable in and of itself**, but we have had issues raised about the Dynamic Fund and the various transfers with regard to Dugaboy, the Dondero Family Trust, and Get Good Trust and the note. All of that is worthy of examination, and the Committee has not had all that long in this case to investigate it."
07/08/20	Motion to Extend Exclusivity Period; Motion to Extend Time to Remove Actions	42:12-20	C	"You know, I read the newspapers, the financial papers, just like everyone else, and I saw a headline that I wished almost I wouldn't have seen, and it was **a headline about Dondero or Highland affiliates getting three PPP loans**. And, you know, **I'm only supposed to consider evidence I hear in the courtroom, right, or things I hear in the courtroom, but I've got this extrajudicial knowledge right now thanks to just keeping up on current events. I decided I needed to ask about this**."
10/21/20	Motion to Compromise Controversy with Acis Capital Management	10:21-25	B	Mr. Morris, counsel for the Debtor, notes the Court's views on Mr. Dondero and his perceived affiliates: "the Court may not share our views on equities. The Court may not share. **The Court has a lot of experience with these particular litigants. The Court has already assessed the credibility of certain witnesses** in relation to the claims at issue in this matter."
10/21/20	Motion to Compromise Controversy with Acis Capital Management	34:1-5	B	"I'm going to turn for a moment to Mr. Seery's testimony. Just as I found his testimony to be very credible with regard to the Redeemer Committee settlement, I once again found it to be very credible and compelling in connection with the Acis and Terry settlements."
10/21/20	Motion to Compromise Controversy with Acis Capital Management	36:1-14	B	The Court discussing report of Professor Rapoport, submitted in support of Mr. Dondero's objection: "I respect her views tremendously -- I know she's been a fee examiner in many, many cases and really has some bona fides in speaking about fees in bankruptcy cases -- I tend to think that is an extremely low estimate. **And I can't separate from this analysis my own experience and**

Date	Motion at Issue	Transcript Citation	Bias Category	Transcript Excerpt (Statements by Judge Jernigan Unless Otherwise Noted)
				knowledge with how litigious and expensive things have historically been between Acis and Highland. I cannot remember the final fee application amounts of the Chapter 11 Trustee and his professionals, but I know that in a year-plus of the Acis case, the fees were much, much larger than this amount, and **I seem to remember that at least Foley Lardner had a very, very large unsecured claim in this case related to its fees** representing Highland v. Acis, millions of dollars."
10/28/20	Patrick Daugherty's Motion to Confirm Status of Automatic Stay [1099]	30:15-22	A	"Now we're looking at a plan that's still very contested, with some large litigation claims. **So, at this point, I would be hard-pressed to protect any nondebtor defendants who aren't ponying up something to the whole plan reorganization process.** So that's not an advisory opinion. That's just letting you know where I am at the moment on nondebtor defendants seeking some sort of extended stay to protect them or allegedly the Debtor."
12/10/20	Motion for Preliminary Injunction; Motion for Temporary Restraining Order	24:19-25	A / B	"I guess another thing is there was a little bit of a theme, Mr. Bonds, in your comments that Mr. Dondero is just concerned, more than anything else, about the way employees are being treated, or at least that's a major concern. **And I don't find that to be especially compelling. I mean, maybe if he was sworn under oath and testified, I would believe that, but it doesn't feel like what's really going on here."**
12/10/20	Motion for Preliminary Injunction; Motion for Temporary Restraining Order	39:10-25	E	"I understand what Mr. Lynn said, that this was his idea, he thought the January protocol order violated the Bankruptcy Code, blah, blah, blah**, but I am going to order that Mr. Dondero be present December 16th at 1:30 and testify."**
12/10/20	Motion for Preliminary Injunction; Motion for	41:2-8; 44:3-4	A	**"Your motion feels to me exactly like what we litigated ad nauseam in the Acis case.** Now, if any of the Acis lawyers are on the line or Mr. Terry is on the line, I wonder if they are chuckling.

Date	Motion at Issue	Transcript Citation	Bias Category	Transcript Excerpt (Statements by Judge Jernigan Unless Otherwise Noted)
	Temporary Restraining Order			And what I mean is -- I heard a chuckle. I don't know if that was Ms. Patel .... I read your motion yesterday with frustration."
12/10/20	Motion for Preliminary Injunction; Motion for Temporary Restraining Order	48:16-20; 49:22-50:5	E	Judge Jernigan appears to *sua sponte* requires a witness to testify on behalf of the NexPoint Parties because she believed Mr. Dondero was behind the NexPoint Parties' litigation strategy: "So, Mr. Wright, I am also going to **direct that you have a client witness to testify** about these things. And **I do want to understand, you know, who you're taking instructions from and who is on the board on these entities** .... Anyway, we had a discussion about my concerns about conflicts back around that time, but here's what I'm getting at. I'm worried all over again about do we have any human beings involved calling the shots for your client, Mr. Wright, that have fiduciary duties to the Debtor, and maybe this is getting in conflict with that. I just don't know."
12/16/20	Motion for Order Imposing Temporary Restrictions [1528]; Debtor's Emergency Motion to Quash Subpoena and for Entry of Protective Order [1564, 1565]; James Dondero's Motion for Entry of Order Requiring Notice and Hearing [1439]	63:14-64:13	A / C	"I'm utterly dumbfounded, really …. I agree with part of the theme, I think, asserted by the Debtor here today that this is Mr. Dondero, through different entities, through a different motion. **I feel like he sidestepped the requirement that I stated last week that if we had a contested hearing on his motion, Dondero's motion, that I was going to require Mr. Dondero to testify.** He apparently worked out an eleventh hour agreement with the Debtor on his motion to avoid that. But, again, these so-called CLO Motions very clearly, very clearly, in this Court's view, were pursued at his sole direction here**. This is almost Rule 11 frivolous to me.** You know, we're -- we didn't have a Rule 11 motion filed ... Bluntly, don't waste my time with this kind of thing again."
01/08/21	Preliminary Injunction Hearing	169:1-4	E	Jernigan *sua sponte* ordered Dondero to attend all future hearings: "**You didn't ask me for this, but I'm going to do it. I'm going to order you, Mr. Dondero, to attend all future hearings in this bankruptcy case** unless and until this Court orders otherwise."

Date	Motion at Issue	Transcript Citation	Bias Category	Transcript Excerpt (Statements by Judge Jernigan Unless Otherwise Noted)
01/08/21	Preliminary Injunction Hearing	171:5-17	E	"And next, I'm going to add -- and I think, Mr. Morris, you requested this at some point today in oral argument -- Mr. Ellington and Mr. Leventon shall not share any confidential information that they received ... without Debtor's counsel's explicit written permission .... And, you know, **that's a little awkward because they're not here, they weren't parties to the injunction, but they were Debtor employees until recently. If they want to risk violating that and come back to the Court and argue about whether they got notice and whatnot of that, they can argue that, but I want it in the order regardless**."
01/14/21	Motion to Prepay Loan; Motion to Compromise Controversy; Motion to Allow Claims of Harbourvest	153:24-154:6	C	"I'm very sympathetic to HarbourVest. It appears in all ways from the record, **not just the record before me today, but the record in the Acis case that I presided over, that Highland back then would have rather spent HarbourVest's investment for HCLOF legal fees than let Josh Terry get paid on his judgment.** They were perfectly happy to direct the spending of other people's money, is what the record suggested to me."
01/14/21	Motion to Prepay Loan; Motion to Compromise Controversy; Motion to Allow Claims of Harbourvest	154:7-19	C	"And then, you know, I have alluded to this very recently, as recently as last Friday: I can still remember Mr. Ellington sitting on the witness stand over here to my left and telling the Court, telling the parties under oath, that HarbourVest -- he didn't use its name back then, okay? **For the first phase of the Acis case, or most of the Acis case, we were told it was an investor from Boston. And at some point someone even said their name begins with H. I mean, it seemed almost humorous**. But Mr. Ellington said it was they, HarbourVest, the undisclosed investor, who was insistent that the Acis name was toxic, and so that's what all of this had been about: the rebranding, the wanting to extract or move things away from Acis."
02/08/21	Bench Ruling on Confirmation Hearing	22:15-21	A	"To be clear, the Court has allowed all of these objectors to fully present arguments and evidence in opposition to confirmation, even

Date	Motion at Issue	Transcript Citation	Bias Category	Transcript Excerpt (Statements by Judge Jernigan Unless Otherwise Noted)
	and Agreed Motion to Assume			though their economic interests in the Debtor appear to be extremely remote and the Court questions their good faith. Specifically on that latter point, **the Court considers them all to be marching pursuant to the orders of Mr. Dondero.**"
02/08/21	Bench Ruling on Confirmation Hearing and Agreed Motion to Assume	46:20-25	D	"Here, **although I have not been asked to declare Mr. Dondero and his affiliated entities as vexatious litigants per se, it is certainly not beyond the pale to find that his long history with regard to the major creditors in this case has strayed into that possible realm**, and thus this Court is justified in approving this provision."
02/23/21	Plaintiff's Motion for Order Requiring James Dondero to Show Cause Why He Should Not Be Held in Civil Contempt for Violating the TRO; Debtor's Emergency Motion for Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021	232:7-234:19	A / B / D	"I don't want you to think my calm demeanor means that I am a happy camper. I am not. I am beyond annoyed …. Mr. Rukavina, you said that I have formed opinions that you don't think are fair and made comments about vexatious litigation and whatnot. But while I continue, I promise you, to have an open mind, **it is days like this that make me come out with statements that Mr. Dondero, repeating his own words, apparently, he's going to burn the house down if he doesn't get his baby back. I mean, it seems so obviously transparent that he's just driving the legal fees up.** It's as though he doesn't want the creditors to get anything, is the way this looks. If he wants me to have a different impression, then he needs to start behaving differently .... And then Mr. Dondero acting like he had no clue what the K&L Gates lawyers were saying as far as we have a deal. And Mr. Norris distancing himself from having seen any of that, and I didn't have power. You know, I'm sure he had a cell phone, like the rest of us, that gets emails**. I'm making a supposition. I shouldn't make that. But it just feels like sickening games**. And again, if this keeps on, **if this keeps on, one day, one day, there may be an enormous attorney fee-shifting order**. And, of course, I would have to find bad faith, and I wouldn't be surprised at all if I get there. So I don't know if Mr. Dondero is

Date	Motion at Issue	Transcript Citation	Bias Category	Transcript Excerpt (Statements by Judge Jernigan Unless Otherwise Noted)
				listening. I suspect, if he is, he doesn't care much .... People need to get their eye on the ball. Well, certain people do have their eye on the ball, but certain people do not. Okay? So we're done. You've got your divorce now. Okay? And if the operating plan is all shored up, as Mr. Norris testified, it sounds like you're in good shape. All right?"
03/19/21	Motions to Stay Pending Appeal	68:22-25	A	"The four Objectors, the Court continues to believe, are following the **marching orders of Mr. Dondero, the company's former CEO, and are de facto controlled by him**, based on prior evidence this Court has heard."
05/10/21	Trial Docket Call; Defendant's Emergency Motion to Stay Proceedings Pending Resolution of Defendant's Petition for Writ of Mandamus	44:7-46:14; 52:6-23	A	"We're going to have to work something out. Okay? This is not efficient. It's not useful. I would think a person such as Mr. Dondero would want to rein in legal fees, but maybe not .... Is there a way you can streamline? I mean, I know -- I almost chuckle at myself at saying ad hoc committee of Dondero-controlled entities. I know that sort of sounds, I don't know, unworkable, maybe. Maybe not. I'm not going to read 14 different objections to the UBS settlement that say the very same thing**. I'm not going to read a different motion to withdraw the reference by every single defendant in every single adversary that gets filed. This is just not an efficient way to go forward .... I mean, it's my job.** I'm going to read everything that's put before me. That's what I do. That's what I'm supposed to do. But it's out of control."
05/10/21	Trial Docket Call; Defendant's Emergency Motion to Stay Proceedings Pending Resolution of Defendant's Petition for Writ of Mandamus	51:18-20; 52:17-19	A	**"I know you have all kinds of beefs, beefs about the settlement with Acis**, and probably UBS and the Redeemer Committee. I understand that …. You know, it -- a perception could exist that **you're trying to carpet-bomb us all with paper, the Court included**."

Date	Motion at Issue	Transcript Citation	Bias Category	Transcript Excerpt (Statements by Judge Jernigan Unless Otherwise Noted)
06/10/21	Motion to Compel Compliance with Bankruptcy Rule 2015.3	46:3-14	D	"But let me tell you something that is nagging very, very much at me, and I'll hear whatever response you want to give to this. I just had an all-day hearing a couple of days ago, and this involved the Charitable DAF entities and a contempt motion the Debtor filed because those entities went into the U.S. District Court upstairs in April and filed a lawsuit that was all about Mr. Seery's alleged mismanagement with regard to HarbourVest. **So what I'm really worried about is the idea that your client wants this information to cobble together a new adversary alleging mismanagement**. How can I not be worried about that?"
06/10/21	Motion to Compel Compliance with Bankruptcy Rule 2015.3	54:8-16	D / E	Judge Jernigan responds to a comment by Mr. Pomerantz, counsel for the Debtor, that Mr. Dondero has filed "close to a dozen appeals" and should not be allowed another opportunity to appeal: "That's exactly where my brain went, Mr. Draper. This is an order continuing your motion. Okay? And we'll have a status conference in early September on your motion. **And you know, again, I'm just letting you know my view it will be moot if the effective date has occurred, and then we'll get some sort of order to that effect issued at that time.** And then I guess you'll have your final order that you can appeal if you want at that point."
06/10/21	Motion to Compel Compliance with Bankruptcy Rule 2015.3	55:3-7	E	"I am now going to make the same requirement with regard to the trusts. **Any time the trusts file a pleading seeking relief, object to a pleading seeking relief, file any kind of position paper, I'm going to require a trust representative to be in court**."
10/12/21	Motion for Remand Filed by Plaintiff James Dondero; Status Conference re: Notice of Removal	40:12-14	C	Farallon counsel suggests Jernigan is unfavorable to Dondero: "And then I dug in, talked to counsel, and **understood why, why Mr. Dondero wouldn't want to file a 2004 motion, because Mr. Dondero did not want to be in front of this Court**."
03/01/22	Motion for Entry of An Order Approving	83:12-23	A / B	"I'm pretty exasperated with that attempt in this case. But this litigation is -- I'm going to call it the stalking lawsuit. Okay? Every

Date	Motion at Issue	Transcript Citation	Bias Category	Transcript Excerpt (Statements by Judge Jernigan Unless Otherwise Noted)
	Settlement with Patrick Daugherty			time -- I don't know how much longer it will be in my court, but as long as it's in my court I'm going to call it what it is, a stalking lawsuit. **It is one grown man accusing another grown man of stalking. You know, it's just embarrassing to me, and it should be embarrassing to those involved.** Now, I have read the lawsuit and I have read that Mr. Ellington accuses Mr. Daugherty of driving by his house, driving by his father's house, driving by his sister's house, driving by his office, 143 sightings, he's taking pictures. And you know, if that's true, again, that's embarrassing. If -- I don't even know what to say except this is embarrassing. **One grown man accusing another grown man of stalking. Okay? A statute, by the way, that was designed to protect, you know, ex-wives, girlfriends, battered women, from abusive men. You know, gender doesn't matter, but wow.** It's just -- I don't know what to say except people should be embarrassed, and so that's what I'm going to say."

EXHIBIT C

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

- -x

In the Matter of:

HIGHLAND CAPITAL MANAGEMENT, L.P., Case No.

Debtor. 19-12239(CSS)

- -x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

December 2, 2019

10:07 AM

B E F O R E:

HON. CHRISTOPHER S. SONTCHI

CHIEF U.S. BANKRUPTCY JUDGE

ECR OPERATOR: LESLIE MURIN

appoint a trustee after this hearing. The motion has not yet been filed, Your Honor, because they want Judge Jernigan to rule on that motion. And it's not because she's familiar with this debtor's business, this debtor's assets, or this debtor's liabilities, because she generally is not. It is because she formed negative views regarding certain members of the debtor's management that the committee and Acis hope will carry over to this case.

The convenience of the parties and the interests of justice and how this case is so unique are just a pretext. They want a trustee to run the debtor, and they want Judge Jernigan and not Your Honor to rule on that motion. That, Your Honor, is not a proper reason to transfer venue, but rather a transparent litigation ploy.

Similarly, Acis also wants the case to proceed in its home court where it has enjoyed success in litigating against the debtor. Your Honor mentioned the conflicts-of-interest theories. They're not just conflicts of interest between two jointly administered debtors. These go to the crux of what the Acis case is about and significant claims against the debtor.

The Court may ask, appropriately -- and the Court did -- why would the debtor file the case in Delaware? Chapter 11 is all about a fresh start. The debtor recognized concerns that the creditors had with certain aspects of its pre-petition conduct, and proactively appointed Brad Sharp as chief

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

I, Clara Rubin, certify that the foregoing transcript is a true and accurate record of the proceedings.

December 3, 2019

CLARA RUBIN DATE

eScribers, LLC
352 Seventh Avenue, Suite #604
New York, NY 10001
(973) 406-2250
operations@escribers.net

EXHIBIT D

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 9, 2020
	)	9:30 a.m. Docket
Debtor.	)	
	)	DEBTOR'S MOTION TO COMPROMISE CONTROVERSY WITH OFFICIAL COMMITTEE OF UNSECURED CREDITORS [281]

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

APPEARANCES:

For the Debtor:
Jeffrey N. Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

For the Debtors:
Ira D. Kharasch
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

For the Debtor:
John A. Morris
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

For the Debtors:
Melissa S. Hayward
Zachery Z. Annable
HAYWARD & ASSOCIATES, PLLC
10501 N. Central Expressway,
Suite 106
Dallas, TX 75231
(972) 755-7104

standard that this Court has to weigh today as being: Is the Debtor proposing something that is reflective of sound business judgment, reasonable business judgment? And to the extent this is a compromise of controversies with the Committee, is this fair and equitable and in the best interest of the estate?

And as Mr. Pomerantz has said, you know, a lot of this maybe doesn't even need Court approval. But to the extent there are aspects of this that are appropriate to seek Court approval on, you know, this is my task. I have to look at what's presented, and is this reflective of sound business judgment? Is this fair and equitable? Is it in the best interest?

So, assuming there are tons of bad facts here reflected in the arbitration award, reflected in other evidence, bad facts that might justify a trustee, a Chapter 11 trustee, is this nevertheless, what's proposed today, a reasonable compromise of, you know, the trustee arguments the Committee could make or, you know, is this a reasonable framework for going forward? Okay?

So I guess what I'm saying is I'm confused about, you know, do I need to look at the arbitration award? Do we need to have evidence of all of that? I can assume that there are terrible facts out there that might justify a trustee, but I'm looking at what's proposed. Is this a fair and equitable way

business justification for proposing the independent slate of directors at the GP level for the Debtor, the protocols, the negotiation with the Committee, the document sharing, the standing given to them? Does all of this reflect reasonable business judgment? And I find, quite clearly, it does. I find it to be a pragmatic solution to the Committee's concerns about existing management and control.

And I think I used the words "fair and equitable," not just Ms. Lambert, because it is also presented to the Court as a 9019 compromise of disputes with the Committee, and we traditionally use a fair and equitable and best interest of the estate analysis in this context. So, to the extent that applies, I do find this a fair and equitable way of resolving the disputes with the Committee, and I find this to be in the best interest of the estate. So I do approve this.

And by approving this motion, I'm approving the term sheet as it's been presented, the various terms therein, the exhibits thereto. I'm specifically approving the new independent directors, the document management and preservation process, the standing to the Committee over certain of the estate claims, the reporting requirements, the operating protocols, the whole bundle of provisions.

Now, there is one specific thing I want to say about the role of Mr. Dondero. When Ms. Patel got up and talked about the newest language that has been added to the term sheet, she

highlighted in particular the very last sentence on Page 2 of the term sheet, the sentence reading, "Mr. Dondero shall not cause any related entity to terminate any agreements with the Debtor." Her statement that that was important, it really resonated with me, because, you know, as I said earlier, I can't extract what I learned during the *Acis* case, it's in my brain, and we did have many moments during the *Acis* case where the Chapter 11 trustee came in and credibly testified that, whether it was Mr. Dondero personally or others at Highland, they were surreptitiously liquidating funds, they were changing agreements, assigning agreements to others. They were doing things behind the scenes that were impacting the value of the Debtor in a bad way.

So not only do I think that language is very important, but I am going to require that language to be put in the order. Okay? So we're not just going to have an order approving the term sheet that has that language. I want language specifically in the order. You know, you can figure out where the appropriate place to stick it in the order is, but I want specific language in here regarding Mr. Dondero's role. I also -- the language in there that his role as an employee of the Debtor will be subject at all times to the supervision, direction, and authority of the Debtors, I want that language in there as well. Let's go ahead and put the language in there that at any time, in any event, the

independent directors can determine he's no longer going to be retained. I want that in the order.

And I'm sure most of you can read my mind why, but I want it crystal clear that if he violates these terms, he's violated a federal court order, and contempt will be one of the tools available to the Court. He needs to understand that. Mr. Ellington needs to understand that. You know, if there are any games behind the scene, not only do I expect the Committee is going to come in and highlight that to the Court and file a motion for a trustee or whatever, but we're going to have a contempt of court issue.

So, anybody want to respond to that?

MR. POMERANTZ: Your Honor, Jeff Pomerantz; Pachulski Stang Ziehl & Jones.

We hear Your Honor. What I thought I'd do now is I have a clean redline of the order, of course not including the provision you just requested, --

THE COURT: Uh-huh.

MR. POMERANTZ: -- which we will go back and upload and hope to get an order signed by Your Honor today, if you're around. But to go over the other changes, the changes to Jefferies, the other language changes I discussed before. I gave a copy to Ms. Lambert and to the Committee. May I approach with a --

THE COURT: You may.

THE COURT: All right. Very good. I'll sign your order on the CRO, then.

MR. DEMO: Okay. Thank you, Your Honor.

THE COURT: All right. Well, if there's nothing else, I'll be on the lookout for your orders. And, again, if you could coordinate with Traci to make sure she's clear on everything you need set on the 21st.

MR. POMERANTZ: Thank you very much, Your Honor.

THE COURT: All right.

MR. CLEMENTE: Thank you, Your Honor.

MR. DEMO: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 11:54 a.m.)

--oOo--

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 **12/10/2020**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

EXHIBIT E

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

In Re:	**Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas June 30, 2020 9:30 a.m. Docket
Debtor.	MOTION FOR REMITTANCE OF FUNDS HELD IN REGISTRY OF COURT FILED BY CLO HOLDCO, LTD. (590)

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

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor:	Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067 (310) 277-6910
For the Debtor:	John A. Morris Greg Demo PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For CLO Holdco, Ltd., Movant:	John J. Kane Brian W. Clark KANE RUSSELL COLEMAN LOGAN, P.C. 901 Main Street, Suite 5200 Dallas, TX 75202 (214) 777-4261
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539

THE COURT: Okay. I'll take silence to mean he's probably not, but --

All right. I asked that question for, I guess, a couple of reasons. But the main reason I asked is -- and I'm going to say this as kindly as I can. They're not here to hear it anyway. But I feel like perhaps they are a little tone deaf, for lack of a better term, on how this all looks to the Court today. And what I mean by that is, obviously, I assume it was their decision to bring this motion, at least Mr. Scott's, and likely Mr. Dondero as well had some involvement in that decision. And the reason I say that it feels like they're a little tone deaf about how this looks is that we just had an extensive hearing and some very thorough pleadings, a lot of evidence uploaded, on a $2.5 million issue. And I don't -- you know, I appreciate that that is a significant sum of money, but we've used the word context a lot this morning: In the context of this reorganization, it seems like a very big deal was raised here, at the choice of Mr. Scott and Mr. Dondero, over a $2.5 million issue, in the context of a reorganization that involves at least hundreds of millions of dollars of debt, if not over a billion. UBS says they're owed a billion.

And I just asked my question a minute ago about the value of assets that the DAF or CLO Holdco or that sub-structure has managed, because while no one will commit, is it $225 million

brand new motion regarding whether these monies should be disbursed to CLO Holdco all over again, when that was the issue that was already before the Court in March.

I, again, fully recognize that everybody reserved their rights, but I focus on this context because, again, I wish Mr. Dondero and Mr. Scott were on the call to hear this: This almost feels like a good faith issue to me. You know, maybe I would feel slightly different if there had been a broad emphasis, heavy emphasis, CLO Holdco standing up through a lawyer that day saying, We're just letting you know, we're going to get together a motion in very short order and tee this up again. Because I would have probably said no. You know, if -- let's just hear it right now today, if this is only a three-week mandate or whatever. So, good faith is something that I can't help but scratch my head and be troubled by.

So, I want to emphasize that CLO Holdco's lawyer has made perfect arguments regarding the potential legal issues here. There are some valid arguments here about is this tantamount, holding the money in the registry of the Court that a non-debtor asserts is its property, is that tantamount to a prejudgment remedy? You know, did it require an adversary proceeding? Did it require the traditional four-prong prove-up for a preliminary injunction? And did the Court just give short shrift to those legal technicalities?

Again, these are compelling arguments, but I'm overruling the arguments because, again, I believe it ignores the context that CLO Holdco essentially consented, acquiesced, in this placeholder keep-the-status-quo solution. And I question its good faith in, so quickly after consenting, bringing this motion.

But moreover, I do find that in the unique context of the disputes before the Court on March 4th, I did have authority to issue a 105 injunction. 105, as we all know, at Subsection (a) gives a bankruptcy court authority to issue orders necessary or appropriate to carry out provisions of Title 11, and the last sentence even provides a mechanism for the Court to *sua sponte* take action to, among other things, prevent an abuse of process or just do what's necessary or appropriate to implement court orders or rules.

So I think, again, in the context before the Court, it was not only a consensual thing, but the Court had authority. And the backdrop of this, again, cannot be overstated. Again, to use Mr. Clemente's word, we have this Byzantine structure here. It's a lot for the Committee to get its arms around. And even the CLO Holdco structure -- again, I'm looking at my notes, my fancy chart -- we have CLO Holdco, a Cayman Island entity. Its parent is Charitable DAF Fund, LP, another Cayman Island entity. It, in turn, is owned by Charitable DAF Holdco, Ltd., yet another Cayman Island entity. Its general

partner happens to be a Delaware entity, Charitable DAF GP, LLC, but the beneficial owners of it are the three Highland Foundations, of which Dondero is president and director, and Mr. Scott the treasurer and director.

So, I'm not saying the Byzantine structure is in and of itself problematic, although one might wonder why a charitable organization needs to have three offshore entities as part of its structure. I digress. But we all know a Byzantine structure and ties to Dondero do not mean something is attackable in and of itself, but we have had issues raised about the Dynamic Fund and the various transfers with regard to Dugaboy, the Dondero Family Trust, and Get Good Trust and the note. All of that is worthy of examination, and the Committee has not had all that long in this case to investigate it.

So, I'm going to say a couple of more things. First, the motion is denied, but I'm going to put more strings on it than that. I'm denying the motion, but as part of this ruling I'm going to order that the Committee has 90 days, unless the Court happens to extend that on motion or agreement of the parties, to file an adversary proceeding against CLO Holdco or the money shall be released. Okay?

So, again, I intended it, as I think everybody did, to be a placeholder, to keep the status quo little bit. Again, Mr. Kane has raised good arguments that maybe an adversary

as I can to distance CLO Holdco from that taint, because understanding that it's in what has been alleged as a Byzantine web, we think it's important to separate CLO Holdco and its operations to ensure that things are done in an appropriate fashion with square corners.

That's all I have, Your Honor. We have no objection to the additional funds being pled into the registry of the Court. We can agree those funds would be adjudicated as part of this dispute. We understand that we did not prevail, and we appreciate your Court hearing our argument.

(Proceedings concluded at 12:06 p.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **07/02/2020**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

EXHIBIT F

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

In Re:	)	**Case No. 19-34054-sgj11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas July 8, 2020 1:30 p.m. Docket
Debtor.	)	- MOTION TO EXTEND EXCLUSIVITY PERIOD (737) - MOTION TO EXTEND TIME TO REMOVE ACTIONS (747)

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

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor:	Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067 (310) 277-6910
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539
For the Debtor:	Zachery Z. Annable Melissa S. Hayward HAYWARD & ASSOCIATES, PLLC 10501 N. Central Expressway, Suite 106 Dallas, TX 75231 (972) 755-7104
For Acis Capital Management GP, LLC:	Rakhee V. Patel Annmarie Antoinette Chiarello WINSTEAD, P.C. 2728 N. Harwood Street, Suite 500 Dallas, TX 75201 (214) 745-5250

pandemic disruption for sure. It would have been nice to have that resolved one way or another by now.

MS. PATEL: Agreed, Your Honor. We were trying to figure out, frankly, in the week to ten days that it took from the scheduling to how it was cancelled, exactly how our team was going to get down to New Orleans. And the -- I think the leading contender was to rent an RV and drive down so we could safely get there. So it certainly has been a casualty of the pandemic.

THE COURT: Okay. All right. Two more questions. And this one has been a bit of a tough one for me to decide whether I should broach this topic or not. You know, I read the newspapers, the financial papers, just like everyone else, and I saw a headline that I wished almost I wouldn't have seen, and it was a headline about Dondero or Highland affiliates getting three PPP loans. And, you know, I'm only supposed to consider evidence I hear in the courtroom, right, or things I hear in the courtroom, but I've got this extrajudicial knowledge right now thanks to just keeping up on current events. I decided I needed to ask about this.

What can you tell me about this, Mr. Pomerantz? I mean, I assumed, from less-than-clear reporting, that it wasn't Highland Capital Management, LP, but I'd like to hear anything you can report about this.

MR. POMERANTZ: So, look, Your Honor, the first I

could say is that, to my knowledge, Highland Capital, the Debtor, has not obtained a PPP loan. I know there have been discussions with certain funds that basically have certain assets, private operating companies, about obtaining PPP loans. I don't have the specifics for Your Honor. I'm happy to provide that.

Of course, to the extent Mr. Dondero, on any of his affiliated funds that are under the control of the Debtor, I would have no way of answering that, but I'm happy to follow up with that with the Board and report back to Your Honor in whatever appropriate manner you felt to obtain that information.

THE COURT: Okay. Well, let's have a report on that on the 14th when we come in. You know, maybe Mr. Seery or Mr. Sharp or some other person. But you can probably imagine the different things going through my brain. You know, well, first, let's see if it was -- you know, I don't -- again, I'm not expecting it to be Highland Capital Management, LP. I would be beyond shocked if, you know, that somehow happened when they're in bankruptcy. And, you know, I think it would require a 364 motion, just like any other borrowing, although I know it's kind of a forgivable loan. Strange bird.

But then if it's some affiliate of Highland, I still feel like we need some transparency and disclosure on that. I mean, I -- and who were the human beings behind it. It just

raises a lot of questions in my brain. Anything else?

MR. POMERANTZ: Your Honor, would you mind saying what newspaper you found it in? Because not everything one reads in the newspaper is accurate, but we will definitely --

THE COURT: Oh, yeah. I know --

MR. POMERANTZ: -- follow up on it and --

THE COURT: Fake news really is a thing.

MR. POMERANTZ: I didn't say fake news.

THE COURT: Oh, I know, I know. It's not really a good term. But *Business Insider*? Is that reputable? Or no? I thought I saw it in one of the local papers, too. I mean, someone tell me if that's, --

MR. POMERANTZ: We -- we --

THE COURT: -- you know, something unreliable.

MR. POMERANTZ: We will investigate it, Your Honor. I don't know what confidentiality restrictions would be on whether if any of those entities -- but we will get the information. If there's any concern on confidentiality, perhaps we could have an *in-camera* on that. But before we get ahead of ourselves, let me broach the issue with the Board and Mr. Sharp and then be in a position to act and respond more intelligently.

THE COURT: Okay. My last topic is to come back to mediation. I was surprised that Judge Jones' or Judge Isgur's staff expressed that they had availability. They are the

nothing else, we'll go ahead and adjourn for today. And I'll keep -- if there's anything worthwhile to report on the mediation front before we have our hearing on the 14th, I'll have my courtroom deputy reach out to all counsel by email and let you know. Okay? All right.

MR. POMERANTZ: Thank you very much, Your Honor.

MS. PATEL: Thank you, Your Honor.

THE COURT: Thank you. We stand adjourned.

THE CLERK: All rise.

(Proceedings concluded at 3:00 p.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **07/09/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT G

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
	Wednesday, December 16, 2020
	1:30 p.m. Docket
Debtor.	
	- MOTION FOR ORDER IMPOSING TEMPORARY RESTRICTIONS [1528]
	- DEBTOR'S EMERGENCY MOTION TO QUASH SUBPOENA AND FOR ENTRY OF PROTECTIVE ORDER [1564, 1565]
	- JAMES DONDERO'S MOTION FOR ENTRY OF ORDER REQUIRING NOTICE AND HEARING [1439]

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

WEBEX APPEARANCES:

For the Debtor:	Jeffrey N. Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtor:	John A. Morris Gregory V. Demo PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539

having to put on testimony to justify transactions that really aren't even being questioned, Your Honor.

So the Debtor would respectfully move for the denial of the motion and the relief sought therein.

THE COURT: All right. Your request for a directed verdict, something equivalent to a directed verdict here, is granted. I agree that the Movant has wholly failed to meet its burden of proof here today to show the Court, persuade the Court that, as Mr. Morris said, I should essentially tie the hands of the Debtor as a portfolio manager here, as stated. Nothing improper has been alleged. There has been no showing of a statutory right here, or a contractual right here, on the part of the Movants.

I am -- I'm utterly dumbfounded, really. I agree with the -- I was going to say innuendo; not really innuendo -- I agree with part of the theme, I think, asserted by the Debtor here today that this is Mr. Dondero, through different entities, through a different motion. I feel like he sidestepped the requirement that I stated last week that if we had a contested hearing on his motion, Dondero's motion, that I was going to require Mr. Dondero to testify. He apparently worked out an eleventh hour agreement with the Debtor on his motion to avoid that. But, again, these so-called CLO Motions very clearly, very clearly, in this Court's view, were pursued at his sole direction here.

This is almost Rule 11 frivolous to me. You know, we're -- we didn't have a Rule 11 motion filed, and, you know, I guess, frankly, I'm glad that a week before the holidays begin we don't have that, but that's how bad I think it was, Mr. Wright and Mr. Norris. This is a very, very frivolous motion. Again, no statutory basis for it. No contractual basis. You know, you didn't even walk me through the provisions of the contracts. I guess that would have been fruitless. But you haven't even shown something equitable, some lack of reasonable business judgment.

Bluntly, don't waste my time with this kind of thing again. You wasted my time. We have 70 people on the video. Utter waste of time.

All right. So, motion is denied. Mr. Morris, please upload an order.

MR. MORRIS: Thank you, Your Honor.

THE COURT: All right. Do we have any other business to accomplish today?

MR. POMERANTZ: I don't think so, Your Honor. I know we will see you tomorrow in connection with Mr. Daugherty's relief from stay motion.

THE COURT: Well, yeah, we do have that. Okay. We will see you tomorrow. We stand adjourned.

MR. CLEMENTE: Thank you, Your Honor.

MR. MORRIS: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 3:05 p.m.)

--oOo--

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 **12/17/2020**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT H

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
	Friday, January 8, 2021
	9:30 a.m. Docket
Debtor.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 20-3190-sgj**
Plaintiff,	PRELIMINARY INJUNCTION HEARING [#2]
v.	
JAMES D. DONDERO,	
Defendant.	

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

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor/Plaintiff: Jeffrey N. Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

For the Debtor/Plaintiff: John A. Morris
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

MR. MORRIS: I'm sorry, Your Honor. I had trouble hearing that question.

THE COURT: Please repeat.

MR. BONDS: Sure.

BY MR. BONDS:

Q Do you recall the questions Debtor's counsel had regarding the letters sent by K&L Gates to the clients of the Debtor -- to the Debtor?

A Yes.

Q You testified on direct that the letters were sent to do the right thing; is that correct?

A Yes.

Q What did you mean by that?

A I don't want to repeat too much of what I just said, but the Debtor has a contract to manage the CLOs, which in no way is it not in default of. It doesn't have the staff. It doesn't have the expertise. Seery has no historic knowledge on the investments. The investment staff of Highland has been gutted, with me being gone, with Mark Okada being gone, with Trey Parker being gone, with John Poglitsch being gone.

And there's -- there's a couple analysts that are a year or two out of school. The overall portfolio is in no way being understood, managed, or monitored. And for it to be amateur hour, incurring losses for no business purpose, when the investors have requested numerous times for their account

not to be traded, is crazy to me. Where the investors say, We just want our account left alone. We just want to keep the exposure. And Jim Seery decides no, there's -- I'm going to turn it into cash for no reason. I'm just going to sell your assets and turn them to cash and incur losses by doing it the week of Thanksgiving and the week of Christmas. I think it's -- it's shameful. I'm glad the compliance people and the general counsel at HFAM and NexPoint saw it the same way. I didn't edit their letters, proof their letters, tell them how to craft their letters. They did that themselves, with regulatory counsel and personal liability. They put forward those letters.

MR. MORRIS: Your Honor (garbled) the testimony that Mr. Dondero just gave about these people saw it. They're not here to testify how they saw it. We know that Mr. Dondero personally saw and approved the letters before they went out. He can testify what he thinks, what he believes. I have no problem with that. But there should be no evidence in the record of what the compliance people thought, believed, understood, anything like that. It's not right.

THE COURT: All right. That's essentially a --

MR. BONDS: Your Honor?

THE COURT: -- a hearsay objection, I would say, or lack of personal knowledge, perhaps. Mr. Bonds, what is your response?

MR. BONDS: Your Honor, my response would be that there are several exhibits the Debtor introduced today that stand for the proposition that the compliance officers were concerned. So I think there is ample evidence of that in the record.

THE COURT: I didn't --

MR. MORRIS: Your Honor, the letter --

THE COURT: I did not understand what you said is in the record. Say again.

MR. BONDS: Your Honor, I'm sorry. The -- there are -- there are references that are replete in the record that have to do with the compliance officers' understanding of the transactions.

THE COURT: I don't know what you're referring to.

THE WITNESS: Your Honor?

THE COURT: I've got a lot of exhibits. You're going to have to point out what you think --

THE WITNESS: Can I -- can I -- can I -- can I answer for -- that for a second? The letters that were signed by the compliance people or by the businesspeople at NexPoint and HFAM objecting to the transactions, those letters were their beliefs, their researched beliefs. They weren't --

THE COURT: Okay.

THE WITNESS: -- micromanaged by me. You know, they weren't -- I agree with them, but those weren't my beliefs

that they've stated. Those were their own beliefs and their own research, --

THE COURT: All right.

THE WITNESS: -- and the record should reflect --

THE COURT: This is clearly hearsay. I mean, it's one thing to have a letter, but to go behind the letter and say, you know, what the beliefs inherent in the words were is inadmissible. All right? So I strike that.

THE WITNESS: Maybe ask your question again.

BY MR. BONDS:

Q Yeah. What is your understanding of the rights that these parties had and what do you believe that was intended to be conveyed by the compliance officers?

MR. MORRIS: Objection. Calls -- calls for Mr. Dondero to divine the intent of third parties. Hearsay.

THE COURT: I sustain.

MR. BONDS: Your Honor, --

MR. MORRIS: No foundation.

MR. BONDS: -- I don't agree. I think that this is asking Mr. Dondero what he thinks.

MR. MORRIS: The letters speak for themselves, Your Honor.

THE COURT: Okay. I sustain --

MR. MORRIS: And Mr. --

THE COURT: I sustain the objection.

MR. BONDS: Thank you, Your Honor.

(Proceedings concluded at 4:09 p.m.)

--oOo--

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 **01/11/2021**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT I

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
	Tuesday, January 26, 2021
	9:30 a.m. Docket
Debtor.	
	MOTION FOR ENTRY OF ORDER AUTHORIZING DEBTOR TO IMPLEMENT KEY EMPLOYEE PLAN [1777]
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 21-3000-sjg**
Plaintiff,	
v.	PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AGAINST CERTAIN ENTITIES OWNED AND/OR CONTROLLED BY MR. JAMES DONDERO [5]
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.	
Defendants.	

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

WEBEX APPEARANCES:

For the Debtor: Jeffrey Nathan Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

For the Debtor: John A. Morris
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

Investment Advisers Act today. It was put on the screen. Mr. Post was asked what was unlawful as far as what had happened here, what was going on here, what was fraudulent, deceptive, or manipulative, in parsing through the words of the statute. And he said Mr. Seery engaged in deceptive acts because he wasn't trying to maximize value. Okay? I'm not an expert on the Investment Advisers Act, but I know that that was not a deceptive act.

And so I'll allow the plan to be filed under seal, but it's not going to be unsealed absent an order of the Court. Okay? So we'll just leave it at that for now. And while I still encourage good-faith negotiations here, I've said it umpteen times, where you're tired of the cliché, probably: The train is leaving the station. And if you want the Court to have patience in the process and if you want the parties to cooperate in good faith, it might help if we didn't have things like Dugaboy and Get Good Trust filing a motion for an examiner 15 months into the case.

I mean, it feels to me, Mr. Dondero, whether I'm right or wrong, that it's like you've got a twofold approach here: I either get the company back or I burn the house down. And I'm telling you right now, if we don't have agreements, --

MR. DONDERO: That's not true.

THE COURT: -- if we don't have agreements and we come back on the 5th for a continuation of this hearing and a

motion to hold you in contempt, you know, I'm leaning right now, based on what I've heard so far, and I know I haven't heard everything, but I'm leaning right now towards finding contempt and shifting a whole bundle of attorneys' fees. That, to me, seems like the likely place we're heading.

I mean, I commented at the December hearing on the preliminary injunction against you personally that it had been like a $250,000 hearing, I figured, okay, just guesstimating everybody's billable rate times the hours we spent. Well, here we were again, and I know we've got all this time outside the courtroom preparing, taking depositions. I mean, what else is a judge to think except, by God, let's drive up administrative expenses as much as we can; if we can't win, we're going to go down fighting? That's what this looks like. Okay? So if it's not really what's going on, then you've got to work hard to change my perceptions at this point.

MR. RUKAVINA: Your Honor, I hear everything what you're saying, and I'm going to discuss it very bluntly with my clients. But we're being asked not to exercise contract rights in the future. This is not a contempt hearing. And Your Honor, we did ask and offered the estate a million dollars, found money, plus to waive almost all our plan objections, if they would just put this case on pause for 30 days.

So we are trying. We are trying creative solutions here.

camper.

But upload your order on the motion to seal the plan. And, again, it's not going to be unsealed absent a further order of the Court. And if you all come to me next week and say, hey, we've got something in the works here, okay, I'll consider unsealing it and letting you go down a different path. But I'm not naïve. I feel like this is just more burning the house down, maybe. I don't know. I hope I'm wrong. I hope I'm wrong. But all right. So I guess we'll see you next week.

MR. POMERANTZ: Thank you, Your Honor.

MR. MORRIS: Thank you, Your Honor.

THE COURT: All right. We're adjourned.

MR. RUKAVINA: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 6:08 p.m.)

--oOo--

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 **01/28/2021**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

EXHIBIT J

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

In Re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	**Case No. 19-34054-sgj-11** Chapter 11 Dallas, Texas Thursday, June 10, 2021 9:30 a.m. Docket MOTION TO COMPEL COMPLIANCE WITH BANKRUPTCY RULE 2015.3 FILED BY GET GOOD TRUST AND THE DUGABOY INVESTMENT TRUST (2256)
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., Defendant.	**Adversary Proceeding 21-3006-sgj** DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND BRIEF IN SUPPORT [15]
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HCRE PARTNERS, LLC N/K/A NEXPOINT REAL ESTATE PARTNERS, LLC, Defendant.	**Adversary Proceeding 21-3007-sgj** DEFENDANT'S MOTION FOR LEAVE TO AMEND ANSWER TO PLAINTIFF'S COMPLAINT [16]

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

cost, $70 million of notes get forgiven? How is that possible? How is that possible? It doesn't pass the good faith test. The Court should deny the motion.

Thank you, Your Honor.

THE COURT: Mr. Morris, in all of your listing of allegedly problematic things, one trail my brain was going down is this: Is this adversary going to morph even further to add fraudulent transfer allegations? I mean, if notes --

MR. MORRIS: Here's the --

THE COURT: -- were forgiven or agreements were made --

MR. MORRIS: Yeah, I --

THE COURT: -- that they would be forgiven if, you know, assets are sold at a dollar more than cost, is the Debtor going to say, well, okay, if this is an agreement, there was a fraudulent transfer?

MR. MORRIS: Your Honor, that is an excellent question, one which I was discussing with my partners just this morning. You know, we have to -- we're balancing a number of things on our side, including the delay that that might entail; including, you know, what happens if we go down that path. You know, the benefit of suing under the notes, of course, is that he's contractually obligated to pay all of our fees.

And so we're balancing all of those things as these -- as

these defenses metastasize. But it's something that we're considering, and we reserve the right to do exactly that, as these defenses continue to get -- and it would be fraudulent transfer, it would be breach of fiduciary duty against Nancy Dondero, it would be breach of fiduciary duty against Jim Dondero. I'm sure that there are other claims, Your Honor. But if they want to -- if I'm forced to go down that path, I'm certainly going to use every tool that I have available to recover these amounts from the -- for the Debtor and their creditors. This is just an abuse of process.

How do you -- how does one enter into agreements of this type without telling your CFO, without telling your auditors, without putting it in writing? And I asked Mr. Dondero, what benefit did the Debtor get from all of this? And you know what his answer was, Your Honor? Because it's really -- it's appalling. It was going to give him heightened focus on getting the job done because of this agreement that he entered into with his sister, Nancy, acting on behalf of the Debtor, with no information, with no documents, with no notes, with no advice, with no corporate resolutions. The Debtor was going to get Mr. Dondero's heightened focus to sell MGM, Trussway, or Cornerstone for one dollar above cost.

I think the fraudulent transfer claim is probably a pretty solid one. But why do we have to do this? Why do we have to do this?

THE COURT: Please upload an order, Ms. Drawhorn, granting your motion with these specific requirements that I've orally worked in.

I think clients need to be careful what they ask for. I'm very concerned. And I know it was just argument and I'll hear evidence, but of all of the things that I guess -- well, I'm concerned about a lot of things, but do we have audited financial statements that didn't disclose these agreements with regard to --

MR. MORRIS: Yes, Your Honor.

THE COURT: I mean, that's -- I'm just -- you know, there's a lot to be concerned about on that point alone, I would think. But, all right. If there's nothing further, we are adjourned. Thank you.

THE CLERK: All rise.

(Proceedings concluded at 11:58 a.m.)

--oOo--

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 **06/12/2021**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

EXHIBIT K

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE THE HONORABLE STACEY G. JERNIGAN, JUDGE

In Re:	) Case No. 18-30264-SGJ-11
	) Case No. 18-30265-SGJ-11
	) (Jointly administered under
ACIS CAPITAL MANAGEMENT, L.P.	) Case No. 18-30264-SGJ-11)
and ACIS CAPITAL MANAGEMENT GP,	)
LLC,	) DEBTORS' MOTION to FILE
	) REDACTED QUARTERLY REPORTS
Debtors.	)
	) September 23, 2020
	) Dallas, Texas

Appearances via video and/or telephone:

For the Reorganized Debtors:	Annemarie Chiarello Rahkee V. Patel Winstead PC 500 Winstead Building 2728 North Harwood Street Dallas, Texas 75201
For James Dondero:	D. Michael Lynn, of Counsel Bonds Ellis Eppich Schafer Jones LLP 420 Throckmorton Street, Suite 1000 Forth Worth, Texas 76102
For William T. Neary, United States Trustee:	Lisa L. Lambert, Assistant U.S. Trustee Office of the U.S. Trustee, Region 6 1100 Commerce Street, Room 976 Dallas, Texas 75242-1496
Digital Court Reporter:	United States Bankruptcy Court Northern District of Texas Michael F. Edmond, Judicial Support Specialist Earle Cabell Building, U.S. Courthouse 1100 Commerce Street, Room 1254 Dallas, Texas 75242 (214) 753-2062, direct; 753-2072, fax
Certified Electronic Transcriber:	Palmer Reporting Services 1948 Diamond Oak Way Manteca, California 95336-9124

Proceedings recorded by digital recording;
transcript produced by federally-approved transcription service.

So it's very troubling to me that — well, I've said it before in Highland hearings, that these battles just continue on, but if it's impairing with a plan I confirmed, it's impairing a plan I confirmed, it's impairing the ability to perform under that plan, then that is a problem for the plaintiffs.

Now I've heard there is no pending litigation in that regard, but I'm troubled by the April 2020 letter I saw that is essentially a suggestion we may start this up again, the litigation that we dismissed. It's just ridiculous, for lack of a better term, that Dondero and his entities would be doing some of the things it sounds like they're doing: Suing Moody's, for crying out loud, for not downgrading the Acis CLOs. If Mr. Dondero doesn't think that is so transparently vexatious litigation, yeah, I'm going out there and saying that. I haven't seen it, but, come on.

So, bottom line, I don't find the 107 standard here is met today, so I am denying entirely the motion. I haven't been convinced that this is commercial information that 107(b) justifies redacting or sealing. But, again, I am most troubled by what I've heard today.

I have found Mr. Terry to be a very credible witness today on these points. He's testified in this Court many times and I continue to find him a very credible witness.

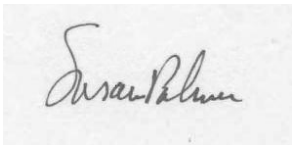
And so to the extent Mr. Dondero is listening or gets

State of California)
) SS.
County of San Joaquin)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

I am a Certified Electronic Reporter and Transcriber by the American Association of Electronic Reporters and Transcribers, Certificate Nos. CER-124 and CET-124. Palmer Reporting Services is approved by the Administrative Office of the United States Courts to officially prepare transcripts for the U.S. District and Bankruptcy Courts.



Susan Palmer
Palmer Reporting Services

Dated September 26, 2020

EXHIBIT L

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
	Monday, February 8, 2021
	9:00 a.m. Docket
Debtor.	
	BENCH RULING ON CONFIRMATION HEARING [1808] AND AGREED MOTION TO ASSUME [1624]

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

WEBEX APPEARANCES:

For the Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539
For James Dondero:	D. Michael Lynn John Y. Bonds, III Bryan C. Assink BONDS ELLIS EPPICH SCHAFER JONES, LLP 420 Throckmorton Street, Suite 1000 Fort Worth, TX 76102 (817) 405-6900
For Get Good Trust and Dugaboy Investment Trust:	Douglas S. Draper HELLER, DRAPER & HORN, LLC 650 Poydras Street, Suite 2500 New Orleans, LA 70130 (504) 299-3300

under the All Writs Act, 28 U.S.C. § 1651. And additionally, under the Bankruptcy Code, a bankruptcy court can issue any order, including a civil contempt order, necessary or appropriate to carry out the provisions of the Code, citing, of course, 105 of the Bankruptcy Code.

The Fifth Circuit stated that, when considering whether to enjoin future filings against a vexatious litigant, a bankruptcy court must consider the circumstances of the case, including four factors: (1) the party's history of litigation; in particular, whether he has filed vexatious, harassing, or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing the litigation, or perhaps intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party's filings; and (4) the adequacy of alternatives.

In the *Baum* case, the Fifth Circuit stated that the traditional standards for injunctive relief -- *i.e.*, irreparable harm and inadequate remedy at law -- do not apply to the issuance of an injunction against a vexatious litigant.

Here, although I have not been asked to declare Mr. Dondero and his affiliated entities as vexatious litigants *per se*, it is certainly not beyond the pale to find that his long history with regard to the major creditors in this case has strayed into that possible realm, and thus this Court is justified in approving this provision.

to win, I turned it off.

I'm sorry. That's terrible. You know, my law clerk, my law clerk that you can't see, Nate, he is from Ann Arbor, Michigan, University of Michigan, and he almost cried when I said I didn't like Tom Brady the other day. So, I apologize.

MR. POMERANTZ: Your Honor, one other comment. We had our motion to assume our nonresidential real property lease that was also on. It got missed in all the fanfare, but it was -- it has been unopposed and essentially done pursuant to stipulation. So we'd like to submit an order on that as well.

THE COURT: Okay. I have seen that, and I approve it under 365. You may submit the order. Okay. Thank you.

MR. POMERANTZ: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 10:35 a.m.)

--oOo--

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 **02/09/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT M

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
	Friday, June 25, 2021
	9:30 a.m. Docket
Debtor.	
	EXCERPT: MOTION FOR MODIFICATION OF ORDER AUTHORIZING RETENTION OF JAMES P. SEERY, JR. DUE TO LACK OF SUBJECT MATTER JURISDICTION (2248)

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

WEBEX APPEARANCES:

For the Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtor:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For CLO Holdco, Ltd. and The Charitable DAF Fund, LP:	Jonathan E. Bridges Mazin Ahmad Sbaiti SBAITI & COMPANY, PLLC JP Morgan Chase Tower 2200 Ross Avenue, Suite 4900 W Dallas, TX 75201 (214) 432-2899
For Get Good Trust and Dugaboy Investment Trust:	Douglas S. Draper HELLER, DRAPER & HORN, LLC 650 Poydras Street, Suite 2500 New Orleans, LA 70130 (504) 299-3300

bring causes of action against persons, such as officers and directors or other third parties, if they first come to the Bankruptcy Court and show a colorable claim. They have to come to the Bankruptcy Court, show they have a colorable claim and they're the ones that should be able to pursue them. Not exactly on point, but it's just one of many cases that one could cite that certainly approve gatekeeper functions of various sorts of Bankruptcy Courts.

It doesn't matter which court might ultimately adjudicate the claims; the Bankruptcy Court can be the gatekeeper.

And the Court agrees with the many cases cited from outside this circuit, such as the case in Alabama, in the Eleventh Circuit, and there was another circuit-level case, at least one other, that have held that the *Barton* doctrine should be extended to other types of case fiduciaries, such as debtor-in-possession management, among others.

Finally, as I pointed out in my confirmation ruling in this case, gatekeeping provisions are commonplace for all types of courts, not just Bankruptcy Courts, when vexatious litigants are involved. I have commented before that we seem to have vexatious litigation behavior with regard to Mr. Dondero and his many controlled entities.

Now, as far as the Movants' argument that there was not just improper gatekeeping provisions but actually an improper discharge in the Seery retention order of negligence claims or

annoyance or anything like that. I guess what I'm trying to do is I don't want anyone to mistake the delay in ruling on the contempt motion to mean I'm just not that -- you know, I'm not prioritizing it, other things are more serious to me or important to me, or I'm going to take two months to get to it. It's literally been I've been in trial almost all day long every day since you were here. But trust me, I'm about as upset as upset can be about what I heard on June 8th, and I'm going to get to that ruling, and I know what I'm going to do. And, well, like I said, it's just a matter of figuring out dollars and whom, okay? There's going to be contempt. I just haven't put it on paper because I've been in court all day and I haven't come up with a dollar figure. Okay?

So I hope -- I don't know if that matters very much, but it should.

All right. We stand adjourned.

(Proceedings concluded at 3:35 p.m.)

--oOo--

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 **06/29/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT N

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

In Re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	**Case No. 19-34054-sgj-11** Chapter 11 Dallas, Texas Tuesday, February 23, 2021 9:00 a.m. Docket
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. JAMES D. DONDERO, Defendant.	**Adversary Proceeding 20-3190-sgj** PLAINTIFF'S MOTION FOR ORDER REQUIRING JAMES DONDERO TO SHOW CAUSE WHY HE SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING THE TRO [48]
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al., Defendants.	**Adversary Proceeding 21-3010-sgj** DEBTOR'S EMERGENCY MOTION FOR MANDATORY INJUNCTION REQUIRING THE ADVISORS TO ADOPT AND IMPLEMENT A PLAN FOR THE TRANSITION OF SERVICES BY FEBRUARY 28, 2021 [2]

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

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor/Plaintiff: Jeffrey N. Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

to really say anything lest I get myself in trouble. But I thank you for your time today.

THE COURT: All right. Well, they are what they are, and I hope we're not in an argument about that down the road. But it seems like my hopes are always dashed when I want things to be worked out.

I don't want you to think my calm demeanor means I am a happy camper. I am not. I am beyond annoyed. I mean, I can't even begin to guesstimate how many wasted hours were spent on the drafting Option A, Option B. Wait. Let me pull up the exact words. Mr. Norris confirming, We withdrew Option B after the Debtor accepted it.

I mentioned fee-shifting once before in a different context, and, of course, we haven't even gotten to the motion for a show cause order declaring Mr. Dondero in contempt. I don't know if the lawyers fully appreciate how this looks. Mr. Rukavina, you said that I have formed opinions that you don't think are fair and made comments about vexatious litigation and whatnot. But while I continue, I promise you, to have an open mind, it is days like this that make me come out with statements that Mr. Dondero, repeating his own words, apparently, he's going to burn the house down if he doesn't get his baby back.

I mean, it seems so obviously transparent that he's just driving the legal fees up. It's as though he doesn't want the

creditors to get anything, is the way this looks. If he wants me to have a different impression, then he needs to start behaving differently. I mean, I can't even imagine how many hundreds of thousands of dollars of legal fees were probably spent the past two weeks on Option A, Option B, and all the different sub-agreements and whatnot. And as recently as Friday afternoon, the K&L Gates lawyer saying we have a deal, and then, oh, wait, maybe not, maybe we do, maybe we don't. And then Mr. Dondero acting like he had no clue what the K&L Gates lawyers were saying as far as we have a deal. And Mr. Norris distancing himself from having seen any of that, and I didn't have power. You know, I'm sure he had a cell phone, like the rest of us, that gets emails. I'm making a supposition. I shouldn't make that. But it just feels like sickening games.

And again, if this keeps on, if this keeps on, one day, one day, there may be an enormous attorney fee-shifting order. And, of course, I would have to find bad faith, and I wouldn't be surprised at all if I get there.

So I don't know if Mr. Dondero is listening. I suspect, if he is, he doesn't care much. But I am --

MR. DONDERO: I'm on the line, Judge.

THE COURT: Okay.

MR. DONDERO: I'm on the line.

THE COURT: I'm glad you're on the line. I cannot

overstate how very annoyed I am by hearing all these hours of testimony and to feel like none of it was necessary. None of it was necessary. Okay? There could have been a consensual deal --

MR. DONDERO: Judge, you have to pay attention -- Judge, you have to pay attention to what's going on, okay?

THE COURT: I am --

MR. DONDERO: When I was president of Highland, --

THE COURT: -- razor-sharp focused on what is going on. Okay? I read every piece of paper. I listen to every sentence of testimony. And what is going on --

MR. DONDERO: Okay. How about this, Your Honor?

THE COURT: -- is an enormous waste of parties and lawyer time and resources. People need to get their eye on the ball. Well, certain people do have their eye on the ball, but certain people do not. Okay? So we're done. You've got your divorce now. Okay? And if the operating plan is all shored up, as Mr. Norris testified, it sounds like you're in good shape. All right?

Mr. Morris, I'll look for the order from you.

MR. MORRIS: Thank you, Your Honor.

THE CLERK: All rise.

(Pause.)

THE COURT: Oh, Michael?

(Court confers with Clerk.)

THE CLERK: All rise.

(Proceedings concluded at 4:23 p.m.)

--oOo--

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 **02/24/2021**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT O

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE THE HONORABLE STACEY G. JERNIGAN, JUDGE

In Re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. JAMES DONDERO, Defendant.	Adv. Proc. No. 21-03003-sgj MOTION for SUMMARY JUDGMENT and OMNIBUS MOTION to STRIKE
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS., L.P., et al., Defendants.	Adv. Proc. No. 21-03004-sgj MOTION for SUMMARY JUDGMENT and OMNIBUS MOTION to STRIKE
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. NEXPOINT ADVISORS, L.P., et al., Defendants.	Adv. Proc. No. 21-03005-sgj MOTION for SUMMARY JUDGMENT and OMNIBUS MOTION to STRIKE April 20, 2022 Dallas, Texas

Captions continue on next page;
appearances begin on next page.

What I'm telling Your Honor is if I had known that it was going to be a live hearing with live witnesses, instead of relying on what I thought was the Local Rule, then we would have subpoenaed Mr. Waterhouse. He was not there because we're trying to hide him or anyone is trying to him.

MR. MORRIS: Your Honor, just to be very clear as to what happened, I didn't — I served a subpoena on the person who submitted a declaration in support of the motion. I didn't call any other witnesses, okay, so and I think that that was the substance of Your Honor's ruling, was that if you — if you want to submit a declaration, you have to put — you know when somebody wants to cross-examine, you have to be able to do that. And that's all I did.

THE COURT: Okay. All right. Well, I'm going to grant the motion to strike, but I am going to deny a request to issue a contempt order or to impose any sanctions. I find the latter somewhat of a close call, I will tell you all. But if it's a close call on something as serious as contempt or sanctions, I think the better exercise of discretion is not to order contempt or sanctions. And let me be clear about a couple of things.

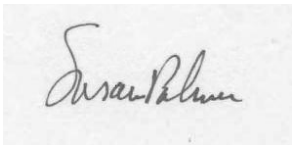
I feel like what we have had here has sounded a whole lot like the defendants rearguing motions that I've earlier denied. You know as I recall, and it's been a few weeks, with regard to the Steven Pully report, you know I had no doubt about

State of California)
) SS.
County of Stanislaus)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

I am a Certified Electronic Reporter and Transcriber by the American Association of Electronic Reporters and Transcribers, Certificate Nos. CER-124 and CET-124. Palmer Reporting Services is approved by the Administrative Office of the United States Courts to officially prepare transcripts for the U.S. District and Bankruptcy Courts.



Susan Palmer
Palmer Reporting Services
P.O. Box 4082
Modesto, California 95352
(209) 915-3065

Dated April 29, 2022

EXHIBIT P

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

In Re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	**Case No. 19-34054-sgj-11** Chapter 11 Dallas, Texas November 9, 2021 1:30 p.m. Docket
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. JAMES DONDERO, et al., Defendants.	**Adversary Proceeding 21-3003-sgj** - MOTION TO DISMISS (82) - MOTION TO COMPEL (80) - MOTION TO STAY (85)
HIGHLAND CAPITAL MANAGEMENT, L.P. Plaintiff, v. NEXPOINT ADVISORS, L.P., et al., Defendants.	**Adversary Proceeding 21-3005-sgj** - MOTION TO DISMISS (68) - MOTION TO STAY (69) - MOTION TO COMPEL (66)
HIGHLAND CAPITAL MANAGEMENT, L.P. Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., et al., Defendants.	**Adversary Proceeding 21-3006-sgj** - MOTION TO COMPEL (70) - MOTION TO DISMISS (72) - MOTION TO STAY (74)

MS. DEITSCH-PEREZ: Uh-huh.

THE COURT: And adversary proceedings are a different creature altogether. And so if you're talking about someone filed a reply the day before a hearing in connection with, I don't know, a sale motion, a motion to compromise, particularly if it was set on an expedited basis, that's an altogether different context than this. So what did you mean when you said the Court has allowed this plenty of times?

MS. DEITSCH-PEREZ: Because, as I understand it, the Bankruptcy -- the Local Rules, the Bankruptcy Court Rules, do not provide a deadline for reply briefs. And so throughout these adversary proceedings replies have been filed on less than 14 days because we're not following the District Court rule.

And just today Mr. Morris acknowledged that by asking to set a specific schedule on a motion that's set to be heard on December 13th so they have more time.

And certainly, had they asked us for more time for their response, we would have given it to them. In fact, when they did ask, we gave it to them. When the day they supposedly thought the reply was due came and went, they didn't inquire about it. And we could have set a different schedule, but because there was no -- there is no rule in the Bankruptcy Court for the reply, we followed the practice that I have observed from the time I've been here, and consulted with

people who -- I am both a litigator and a bankruptcy practitioner, so I also consulted with my bankruptcy colleagues in this case and was told there was no particular deadline for a reply, just a reasonable time in advance of the hearing.

THE COURT: Okay. Well, next time you might consult with your adversaries in this adversary proceeding, or perhaps send an email to the courtroom deputy.

But here's what I'm going to say for purposes of going forward. You should apply the District Court rules in these adversary proceedings. I think that is especially appropriate considering the motion to withdraw the reference that the Defendants have filed and which the Court has said, yes, District Court, you should adjudicate this, but I'm just going to be acting as the magistrate. Okay?

Those rules are always subject to the parties agreeing to something different or, you know, doing mini scheduling orders, alternative scheduling orders, letter agreements, whatever. But absent agreements, assume the District Court rules apply from now on.

It does seem -- well, Mr. Kroop used the word cavalier. It just doesn't seem at all reasonable that you would file a reply 37 days after what would have been the District Court deadline if you thought it applied and two days before the hearing. But we'll let it stand for now. Mr. Kroop said he

oral agreement that was made that provided that these notes did not have to be repaid under circumstances *x*, *y*, *z*, but there's either going to be evidence of that or not. And I don't view it as complicated just because there are four adversary proceedings and a lot of dollars involved.

So that is my view of things. We're going to have to adjourn. But my courtroom deputy will reaching out to you, again, I anticipate Friday before the middle of the --

(Proceedings concluded at 4:49 p.m.)

--oOo--

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 **11/16/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber