Docket #0039 Date Filed: 6/18/2024

Case No. 24-10267

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In the Matter of: Highland Capital Management, L.P.,

Debtor.

NexPoint Advisors, L.P.; Highland Capital Management Fund Advisors, L.P.,

Appellants,

v.

Highland Capital Management, L.P.,

Appellee.

APPELLANTS' OPENING BRIEF

Appeal from the United States District Court for the Northern District of Texas, the Honorable Karen Gren Scholer

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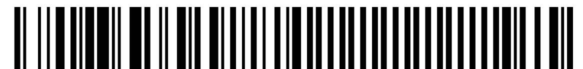
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CERTIFICATE OF INTERESTED PERSONS

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

1. Appellants filing this brief:

NexPoint Advisors, L.P.
Owned by:
The Dugaboy Investment Trust
NexPoint Advisors GP, LLC
Owned by:
James Dondero

Highland Capital Management Fund Advisors, L.P., now known as NexPoint Asset Management, L.P.

Owned by:

Highland Capital Management Services, Inc.
Strand Advisors XVI, Inc.
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STATEMENT REGARDING ORAL ARGUMENT

The Appellants respectfully request that the Court grant oral argument in this appeal. Given the lengthy trial record below and the various contracts and contractual provisions involved, the Appellants believe that oral argument may assist the Court in deciding this appeal.

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APPELLANTS' OPENING BRIEF

NexPoint Advisors, L.P. ("NexPoint") and Highland Capital Management Fund Advisors, L.P., now known as NexPoint Asset Management, L.P. ("HCMFA"), the appellants in this bankruptcy appeal (collectively, the "Advisors" or the "Appellants"), hereby submit this *Opening Brief*, in support of which they would respectfully state as follows:

I. STATEMENT OF JURISDICTION

The Bankruptcy Court entered a final judgment against the Appellants, which judgment the District Court affirmed, also by final order and mandate. Accordingly, this Court has jurisdiction over this appeal under 28 U.S.C. § 158(d)(1).

II. STATEMENT OF THE ISSUES

1. Whether the Bankruptcy Court erred, as a matter of law, in construing the Payroll Reimbursement Agreements as flat fee agreements, as opposed to reimbursement agreements for actual Dual Employees of Highland and the Advisors.

2. Whether the Bankruptcy Court erred, as a matter of law, in denying the Advisors' Administrative Claim for overpayments under the Payroll Reimbursement Agreements and the Shared Services Agreements, including for payments the Advisors made for employees who were no longer there and for services which were no longer being provided by Highland.

3. Whether the Bankruptcy Court erred, either as a matter of law or a question of fact, in finding that the Advisors' December 2020 requests to renegotiate the amounts payable under the Payroll Reimbursement Agreements and the Shared Services Agreements did not trigger an obligation on the part of Highland to renegotiate such amounts as a condition precedent to any future payments under those agreements?

4. Whether the Bankruptcy Court erred, either as a matter of law or a question of fact, in awarding Highland money damages for breach of contract for amounts unpaid under the Payroll Reimbursement Agreements and the Shared Services Agreements, given that Highland refused to negotiate a modification to the amounts payable by the Advisors in good faith as required by the contracts, and given that Highland was not providing the employees or the services required by the contracts.

III. STATEMENT OF THE CASE

A. THE PARTIES

The Advisors are two registered investment advisors under the Investment Advisors Act of 1940.[1] Together, they manage approximately $11 billion of assets and investments for various clients and they advise those clients (such as various funds) on investments.[2] However, the Advisors have very few direct employees and,

[1] ROA.323.

[2] ROA.323.

as relevant to this Appeal, they contracted with Highland to provide most of their employees and most services that companies of their size and in their business need.

Highland, in turn, was an investment firm that managed billions of dollars of assets and managed and advised publicly traded funds. Highland housed the various employees that the Advisors and other affiliates of Highland needed to operate their businesses and, as discussed below, it provided its employees and its services to the Advisors in exchange for certain reimbursements and other payment rights. Those underlying contracts are at the core of this Appeal.

Prior to Highland's bankruptcy, the Advisors and Highland were closely aligned "sister" companies under the common control of James Dondero. Highland filed its Chapter 11 bankruptcy petition on October 16, 2019, thereby initiating its bankruptcy case (the "Bankruptcy Case"), which was ultimately transferred to the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court"). Thereafter, Mr. Dondero was removed as the manager of Highland, and the relationship between the Advisors and Highland became far more adversarial and, for Highland, unfairly profitable at the Advisors' expense.

B. THE PRAS AND THE SSAS

Highland provided employees and services to the Advisors through two contracts with each Advisor. First, to provide so-called "front office" services in the nature of officers, managers, and investment professionals, each of the Advisors

entered into a *Payroll Reimbursement Agreement* with Highland (the "PRAs").[3] Specifically, NexPoint and Highland were parties to that certain *Payroll Reimbursement Agreement* dated May 1, 2018.[4] HCMFA and Highland were parties to that certain *Payroll Reimbursement Agreement* also dated May 1, 2018.[5] For purposes of this Appeal, each of the PRAs is identical, except that the preset monthly amounts the Advisors were to pay under the PRAs was different for each Advisor.

Pursuant to the RPAs, the Advisors agreed to "reimburse" Highland for the "Actual Cost" of "Dual Employees."[6] A "Dual Employee" is defined as an employee of Highland and an Advisor who advises investment companies registered under the 1940 Act pursuant to an investment advisory agreement between the Advisor and a third party.[7] "Actual Cost" is defined as "the actual costs and expenses" of each Dual Employee.[8] And, of relevance to this Appeal, the definition of "Actual Cost" contains the following sentence: "Absent any changes to employee reimbursement, as set forth in Section 2.02, such costs and expenses are equal to $416,000 per month" in the case of HCMFA, and $252,000 in the case of NexPoint.[9]

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[3] ROA.323.

[4] ROA.481, 2358.

[5] ROA.492, 2338.

[6] ROA.493, 2339 (PRAs at § 2.01).

[7] ROA.493, 2339 (PRAs at § 2.01).

[8] ROA.492, 2338 (PRAs at Definitions).

[9] ROA.492, 2338 and ROA.481, 2358 (PRAs at Definitions).

Each of the PRAs contains an exhibit listing the Dual Employees and specifying the portion of such employee's compensation for which the respective Advisor would be obligated to reimburse Highland.[10]

With respect to changing the preset amount of Actual Cost, two sections of the PRAs are relevant. First is section 2.02, which provides as follows:

> During the Term, the Parties may agree to modify the terms and conditions of [Advisor's] reimbursement to reflect new procedures or processes, including modifying the Allocation Percentage [] applicable to such Dual Employee to reflect the then fair market value of such Dual Employee's employment. The Parties will negotiate in good faith the terms of such modification.[11]

Section 4.02 of the PRAs provides the following with respect to any modification:

> [Advisor] shall promptly make payment of the Actual Cost within ten (10) days of the end of each calendar month. Should either Party determine that a change to employee reimbursement is appropriate, as set forth in Section 2.02, the Party requesting the modification shall notify the other Party on or before the last business day of the calendar month.[12]

Thus, the PRAs provided for the Advisors to reimburse Highland for its actual costs for the Dual Employees. What that monthly amount was (before modification) is stated in the PRAs, and the parties may change that monthly amount by a request

[10] ROA.498, 2344 and ROA.487, 2364.

[11] ROA.482, 2359 (PRAs at § 2.02).

[12] ROA.482, 2359 (PRAs at § 4.02).

of either the Advisors or Highland, in which case the parties are required to negotiate in good faith.

The PRAs have a term of one year.[13] However, they automatically renew for successive one-year periods unless terminated sooner, which termination may be for cause or without cause.[14]

Highland also provided so-called "middle office" and "back office" services to the Advisors.[15] These services included such things as legal, accounting, regulatory, human resources, and information technology services.[16] Highland provided these services pursuant to Shared Services Agreements (the "SSAs"). Specifically, NexPoint and Highland were parties to that certain *Amended and Restated Shared Services Agreement* dated January 1, 2018.[17] HCMFA and Highland were parties to that certain *Second Amended and Restated Shared Services Agreement* dated February 8, 2013.[18] That agreement contains Annex "A," which specifies the services that Highland was to provide.[19]

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[13] ROA.483, 2360 (PRAs at § 5.01).

[14] *See id*.

[15] ROA.323.

[16] ROA.323.

[17] ROA.438, 2386.

[18] ROA.424, 2373.

[19] ROA.435, 2384.

C. HIGHLAND PROVIDED ACCOUNTING AND PAYABLES SERVICES UNDER THE SSAS

Highland's responsibilities under the SSAs included administering the SSAs and PRAs themselves. Mr. Dustin Norris, HCMFA's Executive Vice President and NexPoint's Head of Distribution/Chief Product Strategist, testified the Advisors relied on the Debtor to analyze whether the parties should adjust fees payable under the PRAs on account of dual employees because of attrition or similar issues.[20] Only Highland's employees had access to critical payroll info necessary to analyze this issue.[21]

Highland was also responsible for ensuring the Advisors met their financial obligations under the PRAs. The Advisors "outsourced agreement review, payments, payment processing to [the Debtor] …."[22] Highland even had access to the Advisors' bank accounts. In fact, Highland used that access, consistent with its role under the SSAs, to pay itself fees from the Advisors' accounts under both the SSAs and PRAs.[23]

Mr. Norris testified the advisors "didn't have a separate team saying well, let's shadow everything [Highland] is doing, for contracts. That is what they were doing.

[20] *See* ROA.2841-2843 (98:21 – 100:2).

[21] ROA.2843 (100:11-15).

[22] ROA.2870 (127:12-14).

[23] *See* ROA.2871-72 (128:19 – 129:9) (discussing payments from Advisors to Debtor in connection with Advisors' damage model); 2722-23 (144:2 – 145:17).

That was their function."[24] Mr. Dondero, who ultimately controls the Advisors,[25] likewise testified:

> A. There – There's almost nobody at the Advisors, period. The advisors were paid a fee for Highland to administer the contracts. Highland had all the accountants, compliance, and lawyers. The Advisors had either no employees or they had a portfolio manager or trader or somebody who is front office focused on the investor funds. So there wouldn't have been anybody to make sure or double check or be persistent if Highland wasn't doing it.[26]
>
> * * *
>
> Q. Okay. And did you ever take any steps to make sure that when dual employees left, there was a reduction in the amount of money that NexPoint was paying to Highland?
>
> A. We relied on Highland for that in the fees we were paying Highland. We didn't have the staff to do it in our entities.[27]

The Advisors' limited personnel simply were not involved in these processes, so it makes little sense to suggest the Advisors, as opposed to their hired Highland representatives, failed to act. The fact of the matter is Highland failed to administer the PRAs fairly, choosing instead to continue collecting fees for shared employees who no longer existed. By the time Highland tor filed bankruptcy, 15 of 25 the dual employees listed on Exhibit A to the PRAs had left Highland's employment.[28]

---

[24] ROA.2844 (101:11-14).

[25] *See* ROA.326 (finding it "[i]s undisputed that, at all relevant times, both Defendants (i.e., the Advisors) were controlled by Mr. Dondero").

[26] ROA.2753 (10:4-11).

[27] ROA.2790 (47:5-9).

[28] *Compare* ROA.322 (noting petition date of October 16, 2019) *with* ROA.2427-28 (Debtor's response to Advisors' Interrogatory 1).

D. OVERPAYMENTS UNDER THE PRAS

As noted, each of the PRAs contains an exhibit listing the twenty-five (25) Dual Employees and the portion of each employee's compensation the Advisors would pay. Over time, however, many of these employees left Highland's employment, but the parties failed to ever update that original list of Dual Employees. This accelerated after Highland's bankruptcy, as it reduced its operations and its staffing.

Thus, when the PRAs were terminated, twenty of the original twenty-five Dual Employees listed on the exhibits to the PRAs were no longer employed by Highland and, therefore, no longer Dual Employees.[29] However, Highland continued billing the Advisors for these employees, and the Advisors continued paying Highland for these non-existent employees, month after month, until December, 2020, when the Advisors stopped paying Highland once their senior management learned of the overpayments.

E. PROCEEDINGS BELOW

Once the Advisors learned about the overpayments, they filed an application for the allowance of an administrative claim in the Bankruptcy Case, seeking to recover the amount of post-bankruptcy overpayments on the RPAs and the SSAs for non-existing employees and services that were no longer being provided, amounting

[29] ROA.2427.

to approximately $7.7 million.[30] Highland objected to the administrative claim and filed an adversary proceeding seeking to recover allegedly unpaid amounts under the PRAs and the SSAs.[31] The administrative claim was consolidated with the adversary proceeding, and the Bankruptcy Court held a trial on all claims in April 2022.[32]

The Bankruptcy Court entered its detailed findings of fact and conclusions of law on August 30, 2022.[33] The Bankruptcy Court denied the Advisors' administrative claim based not on the requirements of the Bankruptcy Code, but instead concluded that there had been no "overpayments" on the PRAs and that Highland provided to the Advisors all services specified by the SSAs. The Bankruptcy Court found in favor of Highland on its breach of contract claims against the Advisors, and awarded Highland: (i) $924,000 against HCMFA for unpaid amounts under the SSA allegedly arising in November and December 2020 and January 2021; (ii) $832,000 against HCMFA for unpaid amounts under the PRA allegedly arising in December 2020 and January 2021; (iii) $336,000 against NexPoint for unpaid amounts under the SSA allegedly arising in December 2020

[30] ROA.324. An "administrative" claim in bankruptcy is a priority claim that one who has transacted with the debtor or the estate post-bankruptcy may claim and that must be paid in full, subject to various requirements as to allowance, as opposed to a pre-bankruptcy claim that may be treated under a plan. *See* 11 U.S.C. §§ 503(b) and 507(a)(2).

[31] ROA.324.

[32] ROA.325.

[33] ROA.321.

and January 2021; and (iv) $504,000 against NexPoint for unpaid amounts under the PRA allegedly arising in December 2020 and January 2021.

The Bankruptcy Court entered its *Judgment* (the "Judgment") in favor of Highland on September 13, 2022.[34] The Advisors posted supersedeas bonds and appealed the Judgment to the United States District Court for the Northern District of Texas, Dallas Division (the "District Court"). The District Court entered its *Memorandum Opinion and Order* on February 28, 2024, affirming the Judgment in full.[35] This Appeal followed.

IV. SUMMARY OF THE ARGUMENT

The Advisors paid Highland millions of dollars, after Highland filed bankruptcy, for the services of Highland employees who were no longer there, and for services that Highland was no longer providing. Twenty out of the twenty-five employees for whom the Advisors were paying were no longer there, in some cases for years. Yet Highland continued to bill and pay itself from the Advisors' funds for these non-existing employees and non-existing services, even while under a duty to the Advisors to manage their payables and accounting processes, and even while a fiduciary to its own creditors as a debtor-in-possession.

Month after month, non-existing employee after non-existing employee, Highland would bill the Advisors, and Highland would pay itself, to the tune of

[34] ROA.20.

[35] ROA.4340.

approximately $7.7 million in overpayments in the end. And then, Highland had the audacity to blame the Advisors for the overpayments, arguing the Advisors could and should have caught them sooner and done something about it, conveniently forgetting that one of the services that the Advisors were paying Highland to perform was to monitor the Advisors' payables and cause the Advisors only to pay appropriate bills. It is Highland who, by failing to properly perform these services, caused the Advisors to overpay by millions.

The Bankruptcy Court denied the Advisors' bankruptcy administrative claim to recover these overpayments, and it awarded Highland millions of dollars in breach-of-contract damages for the period when the Advisors stopped overpaying Highland. In order to achieve this inequitable result, the Bankruptcy Court incorrectly interpreted the agreements as providing for flat monthly fees irrespective of whether there were actually employees to pay and services being provided. The Bankruptcy Court read the oft-repeated and operative term "reimburse" out of the contracts, instead concluding that the Advisors agreed to pay Highland $668,000 per month under the PRAs (payroll reimbursement agreements) and $476,000 per month under the SSAs (shared services agreements), indefinitely into the future, and regardless of return consideration. Indeed, according to the Bankruptcy Court's logic and interpretation, the Advisors agreed to pay Highland more than $1 million per month even if there were no employees and no services, an absurd result.

For the reasons argued below, this Court should reserve the Bankruptcy Court's Judgment, render judgment for the Advisors in part, and remand to the Bankruptcy Court for further proceedings:

(i) First, by concluding that the PRAs provided for the reimbursement of *actual* employees and *actual* employee costs, as opposed to a flat-fee agreement, and that the SSAs likewise provided for reimbursement for services *actually* provided.

(ii) Second, by concluding that, even if the Advisors are wrong about the foregoing point, the Advisors triggered the process in the PRAs and SSAs to renegotiate the reimbursement amounts, which process Highland refused to participate in such that it cannot recover damages for nonpayment at the preset amounts in the contracts.

(iii) Third that, as a result, Highland was required to present evidence of actual costs that it incurred for reimbursement, which it failed to do, meaning that its breach of contract claims fail for want of evidence and proof.

(iv) Fourth, by concluding that the SSAs imposed on Highland an express duty to handle the Advisors' payables pursuant to a standard of care that Highland breached, by billing the Advisors and paying itself millions of dollars in overpayments, which negligence estops or otherwise prohibits Highland from asserting its alleged contractual rights against the Advisors.

A Chapter 11 debtor-in-possession, with all the fiduciary, transparency, and other duties the law imposes on it, paid itself millions of dollars for non-existing

employees and services during the Chapter 11 case itself while protected by the bankruptcy laws. A court of equity did not find some appropriate remedy for this, instead blaming the Advisors for the result. This simply cannot be. The Advisors urge the Court not to permit so inequitable a result and such a windfall to a debtor. All that is required is to correctly interpret and apply the underlying contracts as their language, as well as logic and common sense, dictate: the Advisors were required to reimburse Highland for *actual* employee costs and *actual* services and certainly not for non-existing employees or for services that Highland stopped providing.

V. ARGUMENT

A. STANDARD OF REVIEW

"In the bankruptcy appellate process, [the Court of Appeals] perform[s] the same function as did the district court: Fact findings of the bankruptcy court are reviewed under a clearly erroneous standard and issues of law are reviewed de novo." *Nationwide Mut. Ins. Co v. Berryman Prods., Inc. (In re Berryman Prods., Inc.)*, 159 F.3d 941, 943 (5th Cir. 1998) (footnote omitted). "Mixed questions of fact and law, and questions concerning the application of law to the facts, are reviewed de novo." *Bass v. Denney (In re Bass)*, 171 F.3d 1016, 1021 (5th Cir. 1999) (citing *Southmark Corp. v. Marley*, 62 F.3d 104, 106 (5th Cir. 1995)).

B. <u>THE PAYROLL REIMBURSEMENT AGREEMENTS REQUIRED REIMBURSEMENT OF ACTUAL EMPLOYEE COSTS</u>

There is no question of fact that, for the time period involved in this Appeal, most of the employees that Highland agreed to provide under the PRAs were no longer there, and had not been for months or years. Thus, the Advisors paid Highland millions of dollars for non-existing employees. There is also no question of fact that the PRAs suddenly became highly profitable for Highland as a result of the Advisors paying for employees who no longer existed, even though the agreements are reimbursement agreements on which the parties did not intend for there to be any profit or markup.

The courts below seem not to have been concerned with these facts, which, as they construed the PRAs, turns the contract on its head. The Advisors submit that this Court's analysis should begin with the foregoing facts as it studies the contracts to determine the intent of the parties: nowhere can it be argued from the contractual provisions themselves that there was any intention by anyone that the Advisors pay Highland for employees who no longer existed and were not providing any benefit or value to the Advisors.

Each of the PRAs provides Highland "will seek <u>**reimbursement**</u> from [the Advisors] for the cost of certain employees who are dual employees of [Highland] and [the Advisors] and who provide advice to registered investment companies

…."[36] They also provide the Advisors "shall **reimburse** [Highland] for the Actual Cost to [Highland] of certain employees who (i) are dual employees … and (ii) provide advice to any investment company …."[37] The PRAs are even expressly named the payroll *reimbursement* agreements. And, even though the PRAs do not define the phrase "reimburse," this word has a well understood and unambiguous meaning: to compensate someone for his or her actual expenses. Lest there be any doubt, each of the PRAs included an attached exhibit, Exhibit "A," listing twenty-five employees of Highland by name and the percentage of each such employee's compensation that would be reimbursed by each of the Advisors.[38]

The following are the operative provisions of the PRAs.

First, the PRAs define "dual employee" as "(i) are dual employees of HCMLP and [Advisor] and (ii) provide advice to any investment company registered under the Investment Company Act of 1940 . . . pursuant to an investment advisory agreement between HCMLP and such investment company under the direction and supervision of HCMFA."[39]

Second, the PRAs provide that, "[d]uring the Term, [Advisor] shall reimburse HCMLP for the Actual Cost to HCMLP of [Dual Employees]."[40] Third, "Actual

[36] ROA.481, 492 (emphasis added).

[37] ROA.482, 493 (emphasis added).

[38] ROA.487, 498.

[39] ROA.482, 493 (PRAs at § 2.01).

[40] ROA.482, 493 (PRAs at § 2.01).

Cost" is defined as "the actual costs and expenses caused by, incurred or otherwise arising from or relating to each Dual Employee, in each case during such period."[41]

Were the analysis to stop here, there would be no question that the Advisors are obligated to reimburse Highland only for actual employees then being employed, as opposed to the fixed price construction urged by Highland and adopted by the Bankruptcy Court. The problem arises with the following sentence following the definition of "Actual Cost": "[a]bsent any changes to employee reimbursement, as set forth in Section 2.02, such costs and expenses are equal to $416,000 per month," in the case of HCMFA, and "$252,000 per month" in the case of NexPoint.[42]

Section 2.02 of the PRAs, labeled "Changes to Employee Reimbursement," provides that:

> the Parties may agree to modify the terms and conditions of [Advisor's] reimbursement to reflect new procedures or processes, including modifying the Allocation Percentage [] applicable to such Dual Employee to reflect the then fair market value of such Dual Employee's employment. The Parties will negotiate in good faith the terms of such modification.[43]

The final operative section is 4.02, labeled "Determination and Payment of Cost," provides that:

> [Advisor] shall promptly make payment of the Actual Cost within ten (10) days of the end of each calendar month. Should either Party determine that a change to employee reimbursement is appropriate, as

[41] ROA.481, 492 (PRAs at Definitions).

[42] ROA.481, 492 (PRAs at Definitions).

[43] ROA.482, 493 (PRAs at § 2.02).

> set forth in Section 2.02, the Party requesting the modification shall notify the other Party on or before the last business day of the calendar month.[44]

The PRAs otherwise provide no particular form or mode of making any such request to change the amount of "Actual Cost" being reimbursed, and do not even require that any such request be in writing. In other words, any request to change the pricing under the PRAs could be informal and could be made orally. In any event, as will be discussed separately below, the Advisors made precisely such a request, multiple times, the most relevant one of which is their December 11, 2020 letter[45] to Highland, which the Bankruptcy Court could not discredit, as it otherwise could and did find with respect to prior, oral requests from the Advisors.

The question then is whether the PRAs obligate the Advisors to pay Highland the set monthly amounts each month as fixed fees irrespective of whether there were any Dual Employees, as the Bankruptcy Court concluded, or whether the Advisors were required to pay only for those Dual Employees actually in existence, as urged by the Advisors. Again, taking a step back, the PRAs are labeled reimbursement agreements and the word "reimburse" is used many times throughout them, and it defies logic and common sense that the Advisors would agree to pay Highland for employees who no longer existed or that they would simply agree to pay Highland hundreds of thousands of dollars each month, for years, for nothing. Yet that is how

[44] ROA.482, 493 (PRAs at § 4.02).

[45] ROA.3245-46 (74:6 – 75:18).

the Bankruptcy Court construed the PRAs by relying on impermissible extraneous evidence that directly contradicts the express language of the contracts.

As quoted above, the PRAs provide that "such costs and expenses are equal to" a set monthly amount for each of the Advisors. What are the "costs and expenses" that are referenced? That appears immediately before this sentence and is "the actual costs and expenses caused by, incurred or otherwise arising from or relating to each Dual Employee."[46] And, as also pointed out above, "Dual Employee" must be someone who is then an actual employee. In other words, "Dual Employee" is not necessarily someone who appears on Exhibit "A" to the PRAs or is a hypothetical employee, but rather an actual employee at the time of the reimbursement. Indeed, even the defined term "Actual Cost" contemplates an "actual" cost to Highland of the Dual Employee.

The Advisors' argument is therefore a simple one: the Advisors obligation is to reimburse Highland only for actual employees then in existence and providing services to the Advisors and to Highland. Only then is the predicate requirement met such that the set monthly price can even be considered. If there are no "Dual Employees," then there are no "costs and expenses" subject to the preset monthly payment amounts.

[46] ROA.481, 492.

The Court's primary role in interpreting a contract is "to determine the parties' intent as reflected in the [contract's] terms." *Chrysler Ins. Co. v. Greenspoint Dodge of Houston Inc.*, 297 S.W.3d 248, 252 (Tex. 2009). "Contract language that can be given a certain or definite meaning is not ambiguous and is construed as a matter of law." *Id*.

This Court should conduct an independent, *do novo* analysis to determine what the PRAs mean and whether they are ambiguous. *See McLane Foodservice, Inc. v. Table Rock Restaurants, LLC*, 736 F.3d 375, 377 (5th Cir. 2013) ("The interpretation of a contract—including whether the contract is ambiguous, is a question of law, which we review *de novo*."). "If the contract is capable of being given a definite legal meaning, parol evidence is generally not admissible to create an ambiguity." *Kendziorski v. Saunders*, 191 S.W.3d 395, 405 (Tex. App. – Austin 2006). The only evidence the Court should consider, at least to start, are the PRAs themselves. *See McLane Foodservice*, 736 F.3d at 377 ("Our first task is to determine whether the contract is enforceable as written, without resort to parol evidence.").

"A contract is unambiguous if it can be given a definite or certain legal meaning." *Id.* at 378. "Ambiguity does not arise because of a 'simple lack of clarity,' or because the parties proffer different interpretations of the contract." *Id.* (quoting *DeWitt Cnty. Elec. Coop. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999)). "Rather, a contract is ambiguous only if it is subject to two or more reasonable interpretations

after applying the pertinent canons of construction." *Id.* (citing *Davidson v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003)) (emphasis added).

The parties and the Bankruptcy Court agreed the PRAs are not ambiguous, yet they disagree about what the PRAs mean. The Bankruptcy Court construed the PRAs as requiring the Advisors to pay hundreds of thousands of dollar each month regardless of whether there were any employees at all, at least until the Advisors triggered the process specified to renegotiate the reimbursement amounts. As the primary purpose and goal of contractual interpretation is to determine the parties' intent, it simply defies any logic or common sense that the Advisors would agree to pay Highland more than $8 million per year for nothing.[47]

The Bankruptcy Court interpreted the PRAs as fixed-fee contracts, with fees payable regardless of services actually rendered or costs actually incurred. This interpretation violates at least four canons of construction: (1) the ordinary-meaning canon; (2) the general/specific cannon; (3) the surplusage canon; and (4) the harmonious-reading canon. These canonical violations not only render the Bankruptcy Court's decision erroneous; they also mean the Bankruptcy Court's interpretation does not create any ambiguity. Nor does the Bankruptcy Court's interpretation pass the smell test for reasonableness, as it effectively eliminates the Debtor's obligation to provide return consideration.

[47] The Advisors are not suggesting that Highland did not provide them with any Dual Employees; only that the Bankruptcy Court's conclusion leads to an absurd result.

i. <u>The Ordinary Meaning Canon</u>

"Under Texas law, words not defined in a contract are to be given their 'plain and ordinary meaning.'" *McLane Foodservice*, 736 F.3d at 378 (quoting *Certain Underwriters at Lloyds, London v. Law*, 570 F.3d 574, 577 (5th Cir. 2009)). The PRAs provide the Debtor "will seek **reimbursement** from [the Advisors] …." They also provide the Advisors "shall **reimburse** [the Debtor] …."

"Black's Law Dictionary defines 'reimbursement' as 'repayment' or 'indemnification'." *Foulston Siefkin LLP v. Wells Fargo Bank of Texas N.A.*, 465 F.3d 211, 215 (5th Cir. 2006) (quoting Black's Law Dictionary 1312 (8th ed. 2004)). Black's has also "defined 'reimburse' as '[t]o pay back, to make restoration, to repay that expended; to indemnify; to make whole'." *Id.* (quoting Black's Law Dictionary 1157 (5th ed. 1979)).[48] "The American Heritage Dictionary's second definition of 'reimburse' [is] 'To pay back or compensate (another party) for money spent or losses incurred.'" *Id.* (quoting The American Heritage Dictionary (4th ed. 2000)).

This Court has held, "[r]eimbursement necessarily implies that something has been paid which requires compensation for money spent." *United States v. Upton*, 91 F.3d 677, 682 n.8 (5th Cir. 1996) (citing Webster's II New Riverside University Dictionary 991 (1984)); *Foulston Siefkin*, 465 F.3d at 215 (citing *U.S. v. Upton*).

[48] "Texas courts have cited Black's Law dictionary when interpreting defined terms in a contract." *McLane Foodservice*, 736 F.3d at 379 n.3 (citing, *e.g.*, *Gray & Co. Realtors, Inc. v. Atl. Hous. Found., Inc.*, 228 S.W.3d 431, 434-35 (Tex. App. 2007)).

Merriam Webster's online dictionary likewise defines "reimburse" as "to pay back someone: repay" and "to make restoration or payment of an equivalent to". *Merriam-Webster.com Dictionary*, s.v. "reimburse," accessed January 10, 2023, https://www.merriam-webster.com/dictionary/reimburse.

The Bankruptcy Court, however, interpreted the PRAs—payroll *reimbursement* agreements—to require the Advisors to pay Highland more than their reimbursable costs. This interpretation violated the ordinary-meaning canon because it writes the word "reimburse" out of the many places it appears in the contract.

ii. <u>The General/Specific Canon</u>

"It is a maxim of interpretation that when two provisions of a contract conflict, the specific trumps the general." *E.g.*, *Millgard Corp. v. McKee/Mays*, 49 F.3d 1070, 1073 (5th Cir. 1995). Section 2.01 of the PRAs provides the Advisors "shall reimburse" Highland for "Actual Cost," whereas section 4.02 provides the Advisors "shall promptly make payment of the Actual Cost …." The obligation to "reimburse" is more specific than the obligation to "pay" because all reimbursements are payments, but not all payments are reimbursements.

"Pay" can mean, among other things, "to make due return to for services rendered or property delivered"; "to engage for money: hire"; "to give in return for goods or service"; "to discharge indebtedness for: settle"; and "to make a disposal or transfer or (money) …." Merriam-Webster.com Dictionary, s.v. "pay," accessed

January 10, 2023, https://www.merriam-webster.com/dictionary/pay. Some but not all of these definitions mirror the definitions of "reimburse" and "reimbursement" discussed above. The obligation to "reimburse" therefore controls as the more specific obligation. Reading "make payment" to mean the same thing as "reimburse" gives meaning to both provisions, whereas reading the contract to require payment regardless of cost eviscerates the provision for reimbursement. *See Millgard Corp. v. McKee/Mays*, 49 F.3d at 1073 (one party's interpretation would give effect to both allegedly contradictory provisions, whereas the other party's would "eviscerate" one provision).

By elevating the obligation to "make payment" in section 4.2 of the PRAs above the obligation to "reimburse" in section 2.1, the Bankruptcy Court violated the specific/general canon of contract construction.

iii. <u>The Surplusage Canon</u>

Under Texas law, courts should construe contracts "as a whole so as to give each part effect and avoid rendering any portion superfluous." *Tolar v. Allstate Texas Lloyd's Company*, 772 F. Supp. 2d 825, 830 (N.D. Tex. 2011). But the Bankruptcy Court's interpretation renders both the recitals and section 2.01 of the PRAs superfluous. If the PRAs merely reflect an obligation to pay a fixed amount, as the Bankruptcy Court held they do under section 4.02 and the definition of "Actual Cost," then there was no need for the parties to recite that the Debtor "will seek reimbursement", nor to include an obligation to "reimburse." The contracts would

have been called fixed-fee contracts and there would have been some recitation of what the return benefit for the fixes fees was.

iv. The Harmonious Reading Canon

Finally, "courts should examine and consider *the entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (emphasis original). "No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Id.* "In harmonizing these provisions, terms stated earlier in an agreement must be favored over subsequent terms." *Id.*

The Bankruptcy Court violated the harmonious-reading canon in two ways. First, it gave controlling effect to section 4.02 without harmonizing the recital and section 2.01, thereby rendering the latter two provisions meaningless. Second, the recital and section 2.01—reflecting an agreement to *reimburse*—comes first in the PRAs, and section 4.02's obligation "to make payment" comes later. The only way to harmonize these provisions, and to honor the definition of "reimburse," is to hold the Debtor must actually incur the "Actual Cost" referenced in the PRAs before the Advisors must provide reimbursement.

C. Highland Breached the PRAs By Not Negotiating Reimbursement

The Bankruptcy Court awarded Highland damages for breach of contract for the Advisors' failure to pay under the PRAs for December 2020 and January 2021:

$832,000 against HCMFA, and $504,000 against NexPoint. If the Court agrees with the Advisors as to the proper interpretation of the PRAs, then the Court should necessarily reverse the Bankruptcy Court's money judgment. However, even if the Court disagrees with the Advisors' interpretation of the PRAs, the Court should still reverse the Bankruptcy Court's money judgment. This is because the Advisors *did* request a modification of the PRAs' reimbursement amounts, which request Highland wholly ignored.

Section 4.02 of the PRAs provides that, "[s]hould either Party determine that a change to employee reimbursement is appropriate . . . the Party requesting such modification shall notify the other Party on or before the last business day of the calendar month."[49] Section 2.02 of the PRAs then provides that "[t]he Parties will negotiate in good faith the terms of such modification."[50]

The Advisors presented the Bankruptcy Court with evidence that they had orally requested a modification beginning in early 2020. The Bankruptcy Court did not find this testimony credible, however, and the Advisors do not seek to overturn that finding. However, there are two written communications, including one from the Advisors' attorneys, both made in 2020, that requested a modification because many of the supposed employees were no longer there. In particular, the Advisors' December 11, 2020 letter sent by their outside counsel noted the overpayments and

[49] ROA.482, 493.

[50] *Id.*

requested a modification of the reimbursable amounts.[51] And, Highland (through its CEO, James Seery) admitted to having received this letter.[52]

In response, Highland did nothing. It engaged in no negotiations regarding the reimbursement amounts, even though the contract requires "good faith" negotiations. From this follow two consequences. First, the preset amounts no longer applied, because the modification provision was triggered. Second, Highland breached the PRAs by not negotiating, meaning that it could not then seek to recover damages for breach of contract when the Advisors failed to pay Highland under the PRAs for periods covered by the requested modification.

The Bankruptcy Court did not make a fact finding regarding these requests, or, if it did as part of its overall finding that the Advisors failed to trigger the modification procedure in the contracts, then any such implied finding is clearly erroneous because these black-and-white communications exist, they say what they say, and they cannot be ignored nor found to lack credibility. Furthermore, on that issue, the Bankruptcy Court found the Advisors "failed to provide sufficient evidence that they made a <u>formal</u> request [ ] to modify the fixed monthly amount."[53] As noted above, however, nowhere is there any requirement for any request to be "formal." All that is required is *some* request, which these documents conclusively

[51] ROA.4334.

[52] ROA.3245-46 (74:6 – 75:18).

[53] ROA.366 (p. 46) (emphasis added).

establish the Advisors made as of early December 2020. And, in no event is a letter from outside counsel anything other than a "formal" request.

More significantly, the District Court concluded that the December 11 letter "triggered [Highland's] obligation to negotiate the terms of the PRAs."[54] Yet the District Court ruled against the Appellants by improperly reversing the burden of negotiation and imposing some "bad faith" requirement: "[Advisors] did not prove that [Highland] breached its obligation because there is no evidence that [Highland] acted in bad faith by not responding to the letter prior to the termination of the PRAs in January, 2021."[55] Respectfully, the obligation is to negotiate in good faith, which Highland certainly never did for the simple reason that it wholly ignored the letter; the obligation is not to avoid acting in bad faith.

The District Court also concluded that Highland's refusal to negotiate was not material.[56] The Advisors cannot imagine how, given the way that the Bankruptcy Court construed the PRAs as flat fee agreements, the sole provision in them to modify the present amount would not be "material." Nor was it for the Advisors to prove the lack of good faith negotiations by Highland, even though they did so. But the District Court erred as a matter of law anyway, for it was Highland's burden to

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[54] ROA.4353.

[55] ROA.4353.

[56] ROA.4353.

demonstrate its own compliance with the PRAs as part of its breach of contract claims.

This is because, for a plaintiff to recover damages for breach of contract, *the plaintiff* must prove that all conditions precedent to the recovery were satisfied and that *the plaintiff* was in compliance with its own obligations. And, even if that were not the law, it is fundamental Texas law that one in material breach of a contract cannot enforce the contract prospectively because the counterparty is discharged or excused from further performance. *See, e.g., Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004).

Here, the December 11 letter triggered the renegotiation process, and it was submitted before the end of December, in compliance with section 4.02 of the PRAs, meaning that amounts payable for December and thereafter were no longer the preset amounts but rather the true actual cost of the Dual Employees (or such other flat amount as may be agreed to). Highland wholly refused to negotiate, instead ignoring the Advisors' repeated requests. Therefore: (i) the preset monthly amount for December 2020 and January 2021 no longer applied; (ii) thus reverting to the issue of "Actual Cost" based on actual reimbursement; (iii) on which Highland presented no evidence even though it was its burden to do so to prove its damages which, in this case, would have been some reasonable allocated amount for the few employees, if any, still there at that time. Highland simply failed to prove its own case, at least with respect to its affirmative claim to money damages, relying exclusively on the

preset amounts in the PRAs which, under no reasonable scenario, continued to apply once the Advisors requested the modification.

This Court should therefore reverse the award of money damages and render judgment that Highland take nothing on its claims for unpaid amounts for December 2020 and January 2021 under the PRAs.

D. HIGHLAND CANNOT RECOVER FOR SERVICES IT DID NOT PROVIDE UNDER THE SSAS

The Bankruptcy Court awarded Highland breach of contract damages against the Advisors for amounts unpaid under the SSAs: in the case of HCMFA, $924,000 for unpaid amounts for November and December 2020 and January 2021, and $336,000 against NexPoint for December 2020 and January 2021. The Bankruptcy Court held the Advisors failed to meet their burden to prove the Debtor breached the SSAs by withholding allegedly adverse services.[57] But the Bankruptcy Court ignored overwhelming evidence:

- Mr. Seery testified that he recalled Judge Jernigan admonishing him in open court that "you better make sure you have your house in order regarding people with conflicts what they are doing, especially lawyers, who claim to be wearing multiple fiduciary hats and forsaking their duties to the debtor."[58]

- He took this "very, very seriously"[59] and he convened a meeting of the Debtor's legal department.[60] He instructed them to bring any potential

[57] ROA.373.

[58] *See* ROA.3906-07 (54:5 – 55:14).

[59] ROA.3908 (56:9-10).

[60] ROA.3907 (55:17-18).

conflict to his attention immediately, under penalty of termination for cause.[61] He was "very clear" and thought "it had the desired effect."[62]

- And it did have the desired effect. The advisors no longer received the legal services the Debtor was obligated to provide under the SSAs.[63] Instead they procured those services elsewhere resulting in cover damages.[64]

- When Mr. Norris attempted to address the issue of overpayments with Mr. Klos and Mr. Waterhouse, "they had been warned that if they did anything that was – that would harm or be adverse to the Debtor that they would be fired on the spot, and that they would be held personally liable."[65]

- When Mr. Klos received a request for information, he questioned whether it was being sought for any allegedly adverse purpose.[66]

The first item on this list is conclusive. The Bankruptcy Court effectively ordered the Debtor not to provide services to the Advisors if those service could adversely impact the estate. Of course the Debtor complied with that order. And given the increasing adversity between the Debtor and the Advisors, of course the Debtor did not provide legal services it would have provided in different circumstances. How could the Debtor provide litigation support or direct outside counsel for its eventual opponent? Indeed, how could the Debtors' counsel continue

[61] ROA.3907-08 (55:23 – 56:20).

[62] ROA.3908 (56:20-21).

[63] ROA.2858 (115:8-14).

[64] *See* ROA.2916 (173:13-14).

[65] ROA.2880 (137:7-22); 2893 (150:18-20) ("He said we're being—he didn't say threatened, warned, almost daily that we can't do anything to damage or provide something that would hurt the Debtor.").

[66] ROA.3156 (140:9-25).

representing either party? The fact that the Debtor continues to deny such patent realities defies reason and belief.

Rather than address these facts, the Bankruptcy Court relied exclusively on irrelevant statements the Advisors made to third parties: "Based on their own representations to the Retail Board, the court finds and concludes that the Advisors have failed to meet their burden for proving the element of breach by [the Debtor] for a lack of services provided under the SSAs."[67] Some of the statements on which the Bankruptcy Court relied are:

- He noted the regular updates provided to the Board and also discussed how the level and quality of services are being monitored and confirmed that he is not aware of any disruptions in the service levels provided **to the Funds**.[68]

- He indicated that at this time it was business as usual with respect to the services provided **to the Funds**.[69]

- This will help ensure that there is no disruption in services **to the Funds**.[70]

- Mr. Norris discussed the morale employees [sic] and noted that all operations continued in the normal course there [sic] had been no material impact on the day-to-day operations **of the Funds**.[71]

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[67] ROA.373.

[68] ROA.345-46 (emphasis revised).

[69] ROA.347 (emphasis revised).

[70] ROA.347 (emphasis revised).

[71] ROA.348 (emphasis revised).

- … the Advisers do not expect any interruption to the services **to the Funds** that are currently being provided by [the Debtor] pursuant to the Shared Services Agreement.[72]

- Mr. Norris then noted that there has not been any disruption to the services provided **to the Funds** ….[73]

There are more,[74] but these sufficiently illustrate the point. The Advisors are not the Funds. The Advisors manage the Funds, but that constitutes less than one-fourth of the Advisors' business. As the Bankruptcy Court correctly noted, "the retail investor funds constitute about $3 billion of the $11 billion of assets under management[]."[75] In the Advisors' reports to Retail Board, it makes sense they would discuss whether the Debtor's bankruptcy impacted the Advisors' ability to perform their obligations to the Funds. But the Bankruptcy Court extrapolated from this evidence—and this evidence alone—that if the Advisors were performing their obligations to the Funds then the Debtor must have been performing 100% under the SSAs with respect to the Advisors' other business. That does not logically follow, particularly in light of all the other contrary evidence.

While the burden to overturn a fact finding on appeal is admittedly high—clear error—these gaps in the Bankruptcy Court's reasoning should leave this Court with "the definite and firm conviction, in light of the entire record, that a mistake

[72] ROA.348 (emphasis revised).

[73] ROA.349 (emphasis revised).

[74] ROA.345-53.

[75] ROA.323.

has been made." *See In re MBS Mgmt. Servs., Inc.*, 690 F.3d 352, 354 (5th Cir. 2012) (noting that a bankruptcy's court's findings of fact are reviewed for clear error, and that "[t]his court will only reverse fact findings for clear error if we are left with the definite and firm conviction, in light of the entire record, that a mistake has been made.").

E. HIGHLAND BREACHED THE SSAS BY OVERPAYING ITSELF UNDER THE PRAS AND BY NOT TRIGGERING A MODIFICATION

The question may well be asked why the Advisors were paying Highland for months and years for employees who obviously were no longer there. The answer to that question implicates the Advisors' final argument as to why the Bankruptcy Court committed reversible error with respect to both the Advisors' overpayment claims and Highland's breach of contract claims: the Advisors contracted to Highland, pursuant to the SSAs, to monitor the Advisors' payables and to pay them to the extent appropriate, from the Advisors' own funds of course.[76] Highland breached the SSAs by not conducting itself to the specified standards of care with respect to the Advisors' gross overpayments under the PRAs and, as a result of that negligence, it is liable for the resulting damages and cannot exploit its own negligence to obtain a money recovery against the Advisors.

[76] Highland is fond of ridiculing the Advisors' claims by making the false argument that the Advisors claim that Highland should have paid the Advisors' payables from Highland's funds. The Advisors make no such argument and never have: Highland had access to and control over the Advisors' bank accounts, and Highland paid the Advisors' payables from these funds and accounts.

Here, the SSA with HCMFA required Highland to provide the following services, among others: "book keeping", "cash management", "cash forecasting", "financial reporting", "accounts payable", "expense reimbursement", "vendor management", "and document review." [77] The SSA with NexPoint required Highland to provide "assistance and advice" for following services: "finance and accounting, payments . . . accounts payable . . . vendor management."[78]

These services included monitoring the Advisors' payables and ensuring that only proper payables were paid, and negotiating with the Advisors' vendors regarding the same. Thus, Highland employees would decide which of the Advisors' payables were properly payable and then Highland employees, who had access to the Advisors' accounts, would pay those payables with the Advisors' funds. Mr. Norris testified the advisors "didn't have a separate team saying well, let's shadow everything [the Debtor] is doing, for contracts. That is what they were doing. That was their function."[79] Mr. Dondero likewise testified:

> A. There – There's almost nobody at the Advisors, period. The advisors were paid a fee for [the Debtor] to administer the contracts. [The Debtor] had all the accountants, compliance, and lawyers. The Advisors had either no employees or they had a portfolio manager or trader or somebody who is front office focused on the investor funds.

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[77] ROA.435.

[78] ROA.441, 2389 (§ 2.02(a)).

[79] ROA.2844 (101:11-14).

> So there wouldn't have been anybody to make sure or double check or be persistent if Highland wasn't doing it.[80]
>
> * * *
>
> Q. Okay. And did you ever take any steps to make sure that when dual employees left, there was a reduction in the amount of money that NexPoint was paying to [the Debtor]?
>
> A. We relied on [the Debtor] for that in the fees we were paying [the Debtor]. We didn't have the staff to do it in our entities.[81]

Furthermore, the SSAs imposed a standard of care by which Highland had to provide services. For HCMFA, the SSA defines "Service Standards" and requires Highland to "conduct its duties hereunder . . . in accordance with the Service Standards."[82] "Service Standards" is defined as providing the "Shared Services and the Shared Assets in the same manner as if it were providing such services and assets on its own account." *Id.* For NexPoint, the SSA provides that Highland "shall discharge its duties under this Agreement with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use . . ."[83]

Thus, the SSAs prescribed the services that Highland was to provide, including accounting, bookkeeping, accounts payable, payables, and vendor relations, and they even set forth a standard of care. Highland, therefore, was

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[80] ROA.2753 (10:4-11).

[81] ROA.2790 (47:5-9).

[82] ROA.429, 2378. (§ 6.01).

[83] ROA.448, 2396 (§ 6.01).

obligated, pursuant to the SSAs, to trigger any modification or negotiation process under the PRAs or SSAs regarding the amounts payable thereunder. It failed to do so, instead causing the Advisors to pay for many employees who were no longer there, month after month, and causing the Advisors to pay for services no longer being provided under the SSAs. Paying accounts payable that are not properly calculated or billed, or that could be modified and negotiated, is the essence of negligence by Highland in the provision of its services, resulting in a breach of contract by Highland under the SSAs.

"It is settled law that one may not take advantage of, nor recover damages for, delays for which he is himself responsible, and that the time for performance is excused and a corresponding extension of time given where the delay is occasioned by the act or default of the party claiming the damages." *Szanto v. Pagel,* 47 S.W.2d 632, 635 (Tex. Civ. App. – Austin 1932). Here, Highland caused the Advisors' overpayments and its own alleged damages for nonpayment under the PRAs and SSAs, and it cannot now seek to exploit that failure and breach. Or, stated differently, one in material breach of a contract cannot sue to enforce the contract. Highland, therefore, could not sue to recover amounts unpaid under the PRAs and SSAs based on preset amounts that it did nothing to correct or update.

The Bankruptcy Court evidently misapprehended this argument, because it wrote:

> The Advisors seems to argue that Sections 2.02 and 4.02 imposed an affirmative obligation on [the Debtor] to update the list of Dual Employees and their respective Allocation Percentages, or to unilaterally adjust the "Actual Costs." Under the Advisors' interpretation of the PRA, [the Debtor] would have been obligated to invoke Section 4.02 … on the Advisors' behalf ….[84]

But this synopsis just misses the mark. It fails to account for Highland's separate obligations under the SSAs, as opposed to the PRAs. The Bankruptcy Court never addressed those obligations.

The District Court did address the argument, ultimately rejected the argument because it concluded that the "SSAs do not contain provisions that required [Highland] to monitor the status of the Dual Employees."[85] That there is no such express provision in the SSAs is true, but it is clear, both by logic and common sense *and* from the evidence at trial, that the SSAs' services regarding accounts payable and accounting included scrubbing all of the Advisors' payables for whether they were proper and whether things could be negotiated." Thus, the District Court erred as a matter of law either by construing the SSAs to exclude any responsibility for the PRAs, or as a question of fact by ignoring the sole evidence (in the form of several witnesses, including Highland's CFO) on the issue, which confirmed that Highland was to review the Advisors' payables payable to itself the same as all other payables.

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[84] ROA.363.

[85] ROA.4349.

This Court should therefore reverse the conclusions below that the SSAs did not impose on Highland a duty to review, advise, and potentially trigger on behalf of the Advisors a modification to the amounts payable under the PRAs and the SSAs, and remand to the Bankruptcy Court for further proceedings consistent with such holding.

F. THE ADVISORS DID NOT WAIVE THEIR RIGHTS

The Bankruptcy Court held that, even if the Advisors established a claim for overpayments under the PRAs or SSAs, they waived those claims through their conduct. But the Bankruptcy Court had admonished the Debtor's in-house counsel not to assist the Advisors in this regard. Furthermore, those agreements contain non-waiver provisions. The PRAs, for example, provide:

> No waiver of any provision nor consent to any exception to the terms of this Agreement or any agreement contemplated hereby will be effective unless in writing and signed by all of the Parties affected and then only to the specific purpose, extent and instance so provided. No failure on the part of any Party to exercise or delay in exercising any right hereunder will be deemed a waiver thereof, nor will any single or partial exercise preclude any further or other exercise of such or any other right.[86]

The Texas Supreme Court addressed non-waiver clauses in *Shields Limited P'ship v. Bradberry*, 526 S.W.3d 471 (Tex. 2017).

The Bankruptcy Court cited *Shields* for the proposition that "[a] nonwaiver provision in a contract that purports to absolutely bar waiver in the most general of

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[86] ROA.483, 494.

terms might be wholly ineffective and itself can be waived."[87] But that statement does not begin to scratch the surface of the Texas Supreme Court's analysis and holding. It completely ignores, for example, the Supreme Court's statement that, "[g]iven Texas's strong public policy favoring freedom of contract, there can be no doubt that, as a general proposition, nonwaiver provisions are binding and enforceable." *Shields*, 526 S.W.3d at 481.

In *Shields*, the Supreme Court enforced a non-waiver clause not all too different from the ones at issue here:

> All waivers must be in writing and signed by the waiving party. Landlord's failure to enforce any provisions of this Lease or its acceptance of late installments of Rent shall not be a waiver and shall not estop Landlord from enforcing that provision or any other provision of this Lease in the future.

Id. at 481. In a more recent opinion, the Court of Appeals in Austin clarified the language on which the Bankruptcy Court relied:

> The Supreme Court has stated that 'a nonwaiver provision absolutely barring waiver in the most general of terms might be wholly ineffective,' [*Shields*, 526 S.W.3d at 484], but that is not the case here—this contract allows for waiver of or change to the nonwaiver provision, as long as the alteration or waiver is in writing.

In re United Svcs. Automobile Ass'n, 03-19-00292-CV, 2020 WL 7640145, *2 n.1 (Tex. App.—Austin Dec. 23, 2020). And the same distinction applies here. The

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nonwaiver provisions in the PRAs do not absolutely bar waiver. They permit written waivers.

The Bankruptcy Court committed reversible error by misapplying applicable precedent. *See Weaver v. Aquila Energy Mktg. Corp.*, 196 B.R. 945 (S.D. Tex. 1996) (When bankruptcy court's factual finding is premised on improper legal standard, or when proper legal standard is improperly applied, finding loses insulation of clearly erroneous rule and standard of review changes to de novo.)

VI. CONCLUSION

The Bankruptcy Court erred in numerous ways. It construed a reimbursement agreement to require payment of a fixed fee regardless of actual cost. It absolved the Debtor of numerous breaches. It imposed extra-contractual obligations on the Advisors. It refused to enforce contractual non-waiver provisions in violation of clear precedent. Ultimately, the Bankruptcy Court entered a judgment against the advisors requiring them to pay more than two and a half million dollars for services they did not receive, rendered in most cases by employees who did not exist.

The Court may review nearly all of these issues *do novo*, because they turn on the interpretation of written contracts. After conducting such review, the Court should reverse the Bankruptcy Court's and the District Court's decisions.

RESPECTFULLY SUBMITTED this 18th day of June, 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 18th day of June, 2024, a true and a correct copy of the foregoing document was served on the counsel of record listed below via electronic service.

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Dated: June 18, 2024.

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