Case No. 24-10267

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Debtor.

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

Appellants,

v.

Highland Capital Management, L.P.,

Appellee.

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

APPELLEE'S BRIEF

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz
John A. Morris
Gregory V. Demo
Hayley R. Winograd
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
(310) 277-6910

HAYWARD PLLC
Melissa S. Hayward
(Texas Bar No. 24044908)
Zachery Z. Annable
(Texas Bar No. 24053075)
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
(972) 755-7100

Counsel for Appellee

1934054240816000000000001

CERTIFICATE OF INTERESTED PERSONS

Appellee 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 disqualifications or recusal:

1. Appellee:

   Highland Capital Management, L.P.

2. Counsel for Appellee:

   Jeffrey N. Pomerantz (CA Bar No. 143717)
   John A. Morris (NY Bar No. 2405397)
   Gregory V. Demo (NY Bar No. 5371992)
   Hayley R. Winograd (NY Bar No. 5612569)
   PACHULSKI STANG ZIEHL & JONES LLP
   10100 Santa Monica Blvd., 13th Floor
   Los Angeles, CA 90067

   -and-

   Melissa S. Hayward (Texas Bar No. 24044908)
   Zachery Z. Annable (Texas Bar No. 24053075)
   HAYWARD PLLC
   10501 N. Central Expy., Ste. 106
   Dallas, Texas 75231

3. Appellants:

   NexPoint Asset Management, L.P., formerly known as Highland Capital Management Fund Advisors, L.P.; and

   NexPoint Advisors, L.P.

4. Counsel for Appellants:

Davor Rukavina
MUNSCH HARDT KOPF & HARR, P.C.
500 N. Akard Street, Suite 3800
Dallas, Texas 75202-2790

By: */s/ Zachery Z. Annable*
Zachery Z. Annable

STATEMENT REGARDING ORAL ARGUMENT

Appellee respectfully submits that oral argument is unlikely to aid the Court in resolving the questions presented because (a) the appeal plainly lacks merit, (b) no novel or unusual issues are raised, and (c) the parties' briefs adequately argue the parties' positions.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

ISSUES PRESENTED[1]

1. Whether the Bankruptcy Court properly found that the PRAs clearly and unambiguously required the Advisors to pay Highland fixed monthly fees?

2. Whether the Bankruptcy Court's finding that Highland complied with its obligations under the PRAs is not clearly erroneous?

3. Whether the Bankruptcy Court properly found that Highland had no obligation to unilaterally modify the PRAs on the Advisors' behalf?

4. Whether the Bankruptcy Court's finding that Highland did not materially breach the SSAs is not clearly erroneous?

5. Whether the Bankruptcy Court properly found that the Advisors waived their claims under the Agreements?

6. Whether the Bankruptcy Court's finding that Highland proved its breach of contract claims under the Agreements is not clearly erroneous?

[1] Capitalized terms used but not defined herein have the meanings ascribed thereto below.

I. SUMMARY OF ARGUMENT

Based on the testimonial and documentary evidence adduced at trial, the Bankruptcy Court properly denied the Advisors' administrative claim and granted Highland's breach of contract claims. The Advisors failed to show (a) overpayments under the PRAs or (b) that Highland breached its obligations under the SSAs. Highland proved its breach of contract claims against the Advisors for failure to pay amounts due and owing under both Agreements.

First, the Bankruptcy Court properly found that there were no overpayments under the PRAs since the PRAs unambiguously required the Advisors to pay flat monthly fees in exchange for front-office services. The PRAs specifically defined "Actual Cost" as a fixed monthly dollar amount unless the parties agreed to modify this amount in writing (which they never did).

Second, the Bankruptcy Court's finding that Highland did not fail to negotiate in "good faith" to modify the expressly defined "Actual Costs" under the PRAs was not clearly erroneous. The evidence showed that the Advisors never requested a modification of the required payments under the PRAs before withholding payments starting in December 2020, less than 60 days prior to the contractually triggered expiration of the PRAs. In support of their argument that they requested to modify the PRAs, the Advisors rely on two self-serving communications they sent to Highland in December 2020 (a) after (i) Highland

gave written notice of termination of the Agreements, and (ii) the Advisors breached those Agreements by failing to timely pay the specified, monthly amounts due, and (b) in anticipation of litigation. These letters are insufficient to show that the Advisors ever requested to modify the last fixed monthly amounts due under the PRAs or that Highland failed to "negotiate in good faith." Moreover, as the District Court found, even if Highland failed to negotiate in "good faith" (which it did not), such breach would not have been "material."

Third, Highland had no obligation to unilaterally modify the fixed monthly amount (*i.e.*, "Actual Costs") set forth in the PRAs on the Advisors' behalf as Dual Employees were terminated. The Advisors' argument that Highland was unilaterally obligated to adjust the "Actual Costs" based on Dual Employees' departures (a) conflicts with the agreed-upon definition of "Actual Costs," and (b) would render meaningless several provisions of the PRAs. Neither the SSAs nor the PRAs imposed any such obligation on Highland.

Fourth, the Bankruptcy Court's finding that the Advisors failed to prove that Highland breached the SSAs is not clearly erroneous. The only assertion that Highland did not perform every service required by the SSAs related to a false claim concerning a minor conflict issue. The evidence clearly established that the parties consensually addressed this issue prior to the termination of the SSAs by: (a) transferring a compliance officer from Highland to NexPoint, and (b) having

Highland reduce the fees owed under the SSAs. Moreover, based on the Advisors' unqualified, contemporaneous, and repeated representations to the Retail Board that Highland performed its obligations under the SSAs, and the lack of any contrary evidence, the Advisors failed to prove that Highland breached those Agreements.

Fifth, the Bankruptcy Court properly found that, even if the Advisors had valid claims under the Agreements, the claims were waived. The Advisors' CFO approved the payment of fixed, flat, monthly fees for 35 consecutive months while expressly knowing of each Dual Employee's departure and the completion of the required work by other Highland employees. This intentional conduct was inconsistent with the Advisors' administrative claim.

Sixth, the Bankruptcy Court's finding that Highland proved its breach of contract claim against the Advisors for failure to pay amounts due and owing under the Agreements is not clearly erroneous. The Bankruptcy Court scrutinized the evidence in finding that Highland performed under the Agreements, and there is no dispute that the Advisors failed to make required payments thereunder in December 2020[2] and January 2021.

[2] Among the payments not made in December 2020 was a payment due under the HCMFA SSA for services performed in November 2020, since such payments were to be made in arrears.

II. STATEMENT OF THE CASE[3]

A. Case Background

1. Procedural Overview

This appeal concerns the clear and unambiguous terms of four service agreements entered into between Highland Capital Management, L.P. ("Highland"), and appellants NexPoint Advisors, L.P. ("NexPoint") and Highland Capital Management Fund Advisors, L.P. ("HCMFA," and with NexPoint, the "Advisors" or the "Appellants"), and Highland's performance under those agreements. The service agreements at issue include: (a) two Shared Services Agreements (one between Highland and each of the Advisors (the "SSAs")); and (b) two Payroll Reimbursement Agreements (one between Highland and each of the Advisors (the "PRAs," and with the SSAs, the "Agreements").

On January 24, 2021, the Advisors filed their *Application for Allowance of Administrative Claim* in Highland's Bankruptcy Case (the "Admin Claim"), asserting claims for (a) "overpayment" under the PRAs, (b) "overpayment" under the SSAs, and (c) breach of contract under the SSAs. ROA.510-521. Regarding their claims for "overpayment" under the PRAs, the Advisors contended they were wrongfully charged their allocable share for the cost of "Dual Employees" providing "front-office" services who were not employed by Highland at certain times between October 16, 2019 (the date Highland filed for bankruptcy) and the

[3] Citations to "ROA." are to the Record on Appeal.

end of 2020 (the "Relevant Period"). The Advisors also claimed that during October, November, and December 2020, Highland did not provide legal and compliance services under the SSAs.

On February 17, 2021, Highland filed its Complaint in Adv. Proc. No. 21-03010-sgj (the "Adversary Proceeding") asserting breach of contract claims (the "Contract Claims") against the Advisors arising from their failure to pay for services rendered under the Agreements from November 2020 through January 2021. ROA.81-168. In August 2021, the Admin Claim and Contract Claims (together, the "Claims") were consolidated in the Adversary Proceeding. ROA.176-186.

The Claims were tried on April 12 and April 13, 2022, with closing arguments on April 27, 2022 (the "Trial"). ROA.2579-2924, ROA.3017-3255. At Trial, the Bankruptcy Court admitted nearly 200 exhibits, (ROA.3022 at 6:14-20; ROA.416), and heard from six witnesses: (1) James Dondero ("Dondero"), Highland's co-founder and former Chief Executive Officer ("CEO") who controls the Advisors; (2) Frank Waterhouse ("Waterhouse"), who simultaneously served as Highland's Chief Financial Officer ("CFO") and Treasurer of each Advisor, (ROA.2644-2646 at 66:10-68:3); (3) David Klos ("Klos"), Highland's Controller and Chief Accounting Officer during the Relevant Period who reported to Waterhouse, (ROA.3080-3081 at 64:2-65:12); (4) James P. Seery, Jr. ("Seery"), a

member of the Independent Board and Highland's Bankruptcy Court-appointed CEO since July 2020 (ROA.3207 at 36:5-13); (5) Dustin Norris ("Norris"), an officer of HCMFA and an employee of NexPoint, (ROA.2827-2828 at 84:5-85:1); and (6) Ethan Powell ("Powell"), a member of the Board of Trustees that oversaw the retail funds advised by the Advisors (the "Retail Board"), (ROA.3175 at 4:22-24; ROA.1801).

Waterhouse and Klos were most directly involved with the execution and implementation of the Agreements. ROA.327. Waterhouse was no longer employed by Highland when he testified, but still served as an officer the Advisors. ROA.2798 at 55:3-21. Klos is now Highland's CFO. ROA.327.

On August 30, 2022, after discovery and the evidentiary Trial, the Bankruptcy Court issued its order (the "Order") granting Highland's Contract Claims and denying the Advisors' Admin Claim. ROA.321-380. The Bankruptcy Court found: (a) the PRAs clearly and unambiguously required the Advisors to pay Highland fixed monthly fees in exchange for front-office services, regardless of which individual Dual Employees were employed at a given time, (ROA.377); (b) Highland had no obligation to unilaterally modify the fixed monthly amount (*i.e.*, "Actual Costs") on the Advisors' behalf as Dual Employees were terminated or replaced, (ROA.366); (c) the Advisors never requested to modify the PRAs, (ROA.366); (d) Highland performed all of its obligations under the Agreements,

(ROA.377); (e) even if the Advisors had claims under the Agreements, the claims were waived, (ROA.375); and (f) the Advisors breached the Agreements by failing to pay Highland amounts due and owing thereunder, (ROA.375). The Bankruptcy Court awarded Highland $2.596 million in damages. ROA.380.

The Advisors appealed the Order to the United States District Court for the Northern District of Texas (the "District Court"). ROA.50-52. Oral argument was held on January 30, 2024, (ROA.4417-4513), and on February 28, 2024, the District Court entered its detailed *Memorandum Opinion and Order* (the "District Court Order") in which it affirmed the Bankruptcy Court's findings of fact and conclusions of law in all respects, (ROA.4340-4357). This appeal followed.

2. The Bankruptcy Case

On October 16, 2019 (the "Petition Date"), Dondero caused Highland to file a voluntary petition for bankruptcy under chapter 11 of the Bankruptcy Code (the "Bankruptcy Case"). ROA.322. Soon thereafter, tensions grew between Dondero and Highland's Official Committee of Unsecured Creditors (the "Committee") because the Committee did not believe Dondero could act as an estate fiduciary based on his history of self-dealing. To avoid the appointment of a chapter 11 trustee, on January 9, 2020, Highland, the Committee, and Dondero agreed to a corporate governance settlement pursuant to which Dondero relinquished control of Highland. ROA.323 n.3; ROA.308-310 ¶¶ 21, 31. Three independent directors unaffiliated with Highland or the creditors were appointed by the Bankruptcy

Court to govern Highland (the "Independent Board"), including Seery. ROA.310 ¶ 31. In July 2020, Seery was also appointed Highland's CEO and Chief Restructuring Officer. *Id.* ¶ 32.

By the end of November 2020, Highland (a) filed an asset-monetization plan; (b) reached settlements with some of Highland's largest creditors over Dondero's objections; (c) gave notice of termination of the Agreements to the Advisors; and (d) was nearing confirmation of its proposed plan. ROA.308-309 ¶ 21. Around this same time, Dondero began engaging in conduct adverse to Highland, leading to the imposition of a temporary restraining order against him in December 2020 (the "TRO"). *Id.*; ROA.351.[4] One month later, in January 2021, the Advisors filed their Admin Claim. ROA.510-521.

Highland's plan of reorganization was confirmed in February 2021 (the "Plan") and went effective on August 11, 2021. ROA.322. On August 19, 2022, the Fifth Circuit affirmed Highland's confirmation order in substantial part.[5]

3. The Advisors

The Advisors are non-debtor entities owned and controlled by Dondero that were part of the massive Highland complex. ROA.311 ¶ 35; ROA.2757 at 14:19-

[4] The Bankruptcy Court later held Dondero in contempt for violating the TRO. The Fifth Circuit affirmed, finding, among other things, that Dondero engaged in "bad-faith" conduct during the bankruptcy case that he attempted to justify with "untruthful" explanations. *In re Highland Cap. Mgmt., L.P.*, 105 F.4th 830, 838 (5th Cir. 2024).

[5] *See Nexpoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.*), 48 F.4th 419, 440 (5th Cir. 2022), *cert. denied*, No. 22-631, 2024 WL 3259692 (U.S. July 2, 2024), *and cert. denied*, No. 22-669, 2024 WL 3259697 (U.S. July 2, 2024).

20.[6] The Advisors are registered investment advisors that manage assets on behalf of their clients, including certain retail funds (the "Funds"). ROA.311 ¶ 36. The Advisors provide investment advisory services to the Funds pursuant to written investment advisory agreements (the "Investment Advisory Agreements"). ROA.311 ¶ 37. The Investment Advisory Agreements are the Advisors' principal source of revenue. The Advisors had few employees of their own, (ROA.323-324, 331), and obtained "front-office" and "back- and middle-office services" from the Highland mothership pursuant to the Agreements. This outsourcing to Highland enabled the Advisors to fulfill their obligations to the Funds under the Investment Advisory Agreements. ROA.312 ¶ 40.

B. The Shared Services Agreements

1. The HCMFA SSA

As relevant here, Highland and HCMFA entered into the *Second Amended and Restated Shared Services Agreement*, effective as of February 8, 2013 (the "HCMFA SSA"), pursuant to which Highland provided certain "back- and middle-office" services to HCMFA. ROA.426 § 2.01. The HCMFA SSA is one of the SSAs at issue. ROA.423-436.

By its terms, the HCMFA SSA was a variable rate contract with payments based on HCMFA's allocable share of the "Actual Cost" of "Shared Services" and

[6] HCMFA's predecessor, Pyxis Capital, L.P. ("Pyxis"), was formed in or around February 2009, and NexPoint was formed in or around March 2012. ROA.312 ¶¶ 38-39; ROA.2757 at 14:19-20.

"Shared Assets" as those terms are defined in the HCFMA SSA. ROA.427 § 4.01. In practice, invoiced amounts tightly ranged from $300,000 to $310,000 each month. ROA.331.

2. The NexPoint SSA

As relevant here, Highland and NexPoint entered into the *Amended and Restated Shared Services Agreement*, effective as of January 1, 2018 (the "NexPoint SSA"), which is the other SSA at issue. ROA.436-456. Unlike the HCMFA SSA, the NexPoint SSA was a fixed "flat fee" arrangement whereby NexPoint agreed to pay Highland a flat monthly fee of $168,000 in exchange for the shared services provided by Highland. ROA.446 § 3.01; ROA.3091-3095 at 75:3-79:7.

Waterhouse signed the NexPoint SSA on behalf of ***both*** Highland (in his capacity as Treasurer of Strand Advisors, Inc., the general partner of Highland) and NexPoint (in his capacity as Treasurer of NexPoint Advisors GP, LLC, NexPoint's general partner). ROA.456.

C. The Payroll Reimbursement Agreements

Highland and each of the Advisors were also parties to two Payroll Reimbursement Agreements pursuant to which Highland provided "front-office" investment advisory services to the Advisors in exchange for flat monthly fees. ROA.481-487; ROA.492-498.

From approximately 2012 until the PRAs were executed, Highland provided "front-office" services to the Advisors for free without any written agreement. By early 2018, Highland urgently needed cash, so Dondero directed NexPoint to begin paying Highland for "front-office" services through a "sub-advisory" agreement. As described below, because Highland's need for cash continued to grow and a "sub-advisory" agreement proved unworkable, ***both*** Advisors ultimately formalized the arrangement, agreed to fixed monthly payments for service, and executed PRAs with Highland.

1. Events Leading up to the PRAs: The Sub-Advisory Agreements

From approximately 2012 to 2018, Highland provided "front-office" services to the Advisors for free. ROA.3085-3087 at 69:1-71:19. By late 2017, Highland was operating at a loss, and those losses were expected to increase in 2018. ROA.3081 at 65:13-22. To address Highland's mounting operating losses, and to reduce NexPoint's taxable income, Dondero instructed Highland's team to create a framework to prospectively increase to $6 million NexPoint's aggregate annual payments to Highland for services to be rendered. ROA.3081-3087 at 65:23-71:19. The Advisors and Highland, operating under the same Dondero-controlled Highland umbrella, formulated three agreements to achieve Dondero's objective. *See* ROA.3082-3083 at 66:1-67:13; ROA.2203-2207.

First, Waterhouse executed a *Sub-Advisory Agreement*, effective as of January 1, 2018 (the "Sub-Advisory Agreement"), on behalf of Highland and NexPoint, pursuant to which Highland would provide "front-office" services, (ROA.313 ¶ 48; ROA.461-479), in exchange for a flat monthly fee of $252,000. (ROA.464 § 2(a)-(b)).[7]

Second, Waterhouse executed the NexPoint SSA, also effective as of January 1, 2018, pursuant to which Highland would provide certain "back and middle office" services in exchange for a flat monthly fee of $168,000. ROA.446 § 3.01.

Third, a NexPoint subsidiary, NexPoint Real Estate Advisors ("NREA"), agreed to pay Highland a flat monthly fee of $80,000 for "back and middle office" services pursuant to a separate shared services agreement (the "NREA SSA", and together with the NexPoint SSA and the NexPoint Sub-Advisory Agreement, the "NexPoint Agreements"). *See* ROA.2292 (email discussing the amounts to be paid by NREA and the Advisors); ROA.2648 at 70:13-17 (Waterhouse testimony concerning the same); ROA.3096 at 80:10-20 (Klos testimony concerning the same).

Together, NexPoint's flat monthly payments of (a) $252,000 under the Sub-Advisory Agreement, (b) $168,000 under the NexPoint SSA, and (c) $80,000

[7] For reasons discussed below, despite being signed, the NexPoint Sub-Advisory Agreement proved to be unworkable and was later abandoned and replaced by the NexPoint PRA.

under the NREA SSA equaled $500,000 per month, or $6 million per year, just as Dondero directed. ROA.3084 at 68:4-25; ROA.2203-2207. This contractual framework was expressly explained to Dondero. ROA.3083-3085 at 67:20-69:21.

Each January, Waterhouse and Klos prepared a report of Highland's past and projected financial performance (each, an "Annual Review") that they presented to Dondero and Mark Okada (Highland's co-founder). ROA.1976-2026 (2017/2018 Annual Review); ROA.2257-2273 (2018/2019 Annual Review); ROA.2274-2286 (2019/2020 Annual Review); ROA.3096-3098 at 80:21-82:11.

The 2017/2018 Annual Review disclosed that: (a) Highland was projected to incur operating losses of $12 million in 2018, (ROA.1978); (b) the $6 million in aggregate annual payments due to Highland under the NexPoint Agreements was projected to remain fixed and unchanged over time, (ROA.2012, ROA.2022); and (c) the Highland platform faced significant operating and financial changes relating to new hires, internal transfers, and terminations. (ROA.2005-2009, ROA.2024; ROA.3098-3108 at 82:12-92:17).[8]

2. The Parties Learn That the Sub-Advisory Agreements Cannot Accomplish Their Intended Goals

In addition to the projected challenges, Highland faced new, unexpected threats to its operating cash flow immediately after the Annual Review was

[8] The 2017/2018 Annual Review ***did not*** contemplate that HCMFA would pay for "front office" sub-advisory services; that decision was not made until early in the spring. ROA.3107-3108 at 91:24-92:1.

presented. ROA.3111 at 95:2-23. As Klos testified, on January 30, 2018, within days of this presentation, a former Highland employee (Joshua Terry) commenced an involuntary bankruptcy case against Acis Capital Management, L.P. ("Acis"), a Highland affiliate that paid fees to Highland. (Terry had obtained a large arbitration award against Acis but was unable to collect because fraudulent transfers effectuated at Dondero's direction left Acis judgment-proof). *Id.*

At that time, Acis was a Highland affiliate that managed certain collateralized loan obligations ("CLOs") and had its own sub-advisory and shared services agreements with Highland (the "Acis Agreements"). ROA.3102-3103 at 86:17-87:11. The Acis Agreements were a vital source of Highland's revenue, (ROA.3103-3105 at 87:18-89:8), with Highland projected to generate almost $10 million in Acis revenue in 2018 alone—Highland's second largest source of revenue representing nearly 12% of the total. *See* ROA.2011 ("Highland 2.0 CLOs" refers to the CLOs managed by Acis); ROA.3104 at 88:2-13. The Acis bankruptcy threatened Highland with the aggregate loss of over $20 million in projected revenue and exacerbated Highland's urgent need for cash. *See* ROA.2196 (Waterhouse emailing Klos in March 2018 about Highland's "urgency to create liquidity").

To address these immediate and enormous cash flow issues, Klos and his team were directed in early March to create another inter-company agreement, this

time adopting a Sub-Advisory Agreement for HCMFA with a flat monthly fee of $450,000, retroactive to January 1, 2018. ROA.3111-3112 at 95:2-96:20. According to Klos, this additional fee would "mitigate[] some of the loss that [Highland] would be experiencing." ROA.3111-3112 at 95:24-96:4. A week later, a draft Sub-Advisory Agreement modeled after the NexPoint Sub-Advisory Agreement was prepared for HCMFA. *See* ROA.2027-2030.

After Klos and Dondero discussed "duplicating that NexPoint subadvisory agreement for HCMFA," Highland learned that the Sub-Advisory Agreement structure was "not a viable option" for paying a flat fee for "front office" services because (a) the Retail Board was required to approve the Sub-Advisory Agreements during an in-person meeting but was not scheduled to meet until June 2018; and (b) the Sub-Advisory Agreements could not be retroactive to January 1, 2018. (ROA.2027-2029) (e-mails from Lauren Thedford, a Highland attorney who simultaneously served as Secretary of the Advisors); (ROA.3113-3114) at 97:4-98:20 (Klos testifying to what he learned from Thedford).

According to Klos, these issues were problematic because Highland urgently needed cash, could not wait until June, and needed the cash flow to be retroactive to January. ROA.3115-3116 at 99:18-100:5. As Klos testified, the contemplated transactions would be under the Dondero-controlled Highland umbrella: "this is all in the spirit of one big happy family, one complex, so the whole exercise itself

seems somewhat silly, for someone who just wants to move money from his right pocket to his left pocket, to have to go through all this brain damage…." *Id.* Ultimately, the parties concluded that the contemplated Sub-Advisory Agreement could not serve the intended purpose of promptly getting substantial cash flow to Highland. *See id.* Another method was needed to overcome these obstacles—and the PRAs were born. *See* ROA.3115-3116 at 99:16-100:13.

3. The PRAs Are Adopted

In April 2018, Highland drafted a PRA (a) that did not require the Retail Board's approval, and (b) could be made retroactive to the beginning of the year. *See* ROA.2197-2202. After reviewing the draft PRA, Klos expressed concerns about tying the Advisors' payments to an assessment of "actual costs" for "Dual Employees" who would be working for both Highland and the Advisors. Klos wrote to Thedford about the cumbersomeness of such a process:

> Does it have to be framed as reimbursement of actual costs? ***We'd much rather it be characterized as just an agreed upon amount between the two entities***. It's not a small task and involves subjective assumptions to allocate individual employees, so as it's written, ***it would be creating a ton of internal work that isn't adding any value to the overall complex***.

Id. (Klos e-mail sent on April 17, 2018 at 10:48 a.m.) (emphases added); ROA.3116-3117 at 100:10-101:25.

Thedford was "open" to changing the "definition of Actual Costs" but observed that there "need[ed] to be some method of determining the amounts" and

that it was "important" to treat the agreement as one for "reimbursement." ROA.2201-2202 (Thedford email sent on April 17, 2018 at 10:49 a.m.). Klos replied:

> Could we say that Actual Cost is being determined ***at the outset of the agreement, have a schedule as of Jan 1, 2018 and say that Actual Cost shall be as set out in that schedule and shall be paid in monthly installments for the term of the agreement . . . that way the exercise is only performed once.***

ROA.2201 (Klos email sent on April 17, 2018, at 10:56 a.m.) (emphasis added); *see also* ROA.3118-3122 at 102:1-106:16. Thedford thought Klos' approach was "workable" and asked Klos if he had a "methodology for the outset determination." ROA.2201 (April 17 email from Thedford to Klos at 5:23 p.m.).

In response, Klos created a list ("Exhibit A") that allocated the time and cost of certain "dual employees" as of January 1, 2018, in a manner intended to generate a dollar amount equal to the same flat monthly fee contemplated under NexPoint's discarded Sub-Advisory Agreement (*i.e.*, $252,000 per month) so as to fit within Dondero's previous mandate. ROA.336 (citing evidence); ROA.3120-3122 at 104:9-106:16; ROA.2197-2202.

With these issues resolved and the parties' intent clear, on May 1, 2018, Highland entered into a *Payroll Reimbursement Agreement*, effective as of January 1, 2018, with NexPoint (the "NexPoint PRA") and HCMFA (the "HCMFA PRA"), respectively. ROA.480-487 (NexPoint PRA); ROA.491-498 (HCMFA PRA).

4. The PRAs Clearly and Unambiguously Required Payment of Fixed Monthly Fees Unless the Parties Agreed Otherwise

As the Bankruptcy Court found and the District Court expressly affirmed, the "clear and unambiguous language of the definition of 'Actual Cost' in the PRAs indicates that these were intended to be fixed amount contracts." ROA.338-339; ROA. 4344-4348.

The PRAs were identical except for the (a) names of the parties, (b) the monthly fees due thereunder, and (c) the list of Dual Employees and their respective allocations "as of January 1, 2018" set forth in Exhibit A. As Klos and Thedford agreed, pursuant to Section 2.01 of the PRAs, the Advisors were required to pay Highland the "Actual Cost" to HCMLP for Dual Employees as those terms were defined in the PRAs. ROA.482 (NexPoint PRA) §§ 2.01, 3.01; ROA.493 (HCMFA PRA) §§ 2.01, 3.01. "Actual Cost" was defined as:

> with respect to any period hereunder, the actual costs and expenses caused by, incurred, or otherwise arising from or relating to each Dual Employee, in each case during such period. ***Absent any changes to employee reimbursement, as set forth in Section 2.02, such costs and expenses are equal to [$252,000 for NexPoint, and $416,000 for HCMFA] per month***.

ROA.481 (NexPoint monthly fee fixed at $252,000); ROA.492 (HCMFA monthly fee fixed at $416,000) (emphasis added).

Appellants admitted that four (4) Dual Employees listed on Exhibit A left Highland's employ before the PRAs were even executed. ROA.565-566 (response to interrogatory 3). Thus, although Exhibit A was prepared "as of January 1,

2018," it was never updated even though the Advisors knew that numerous Dual Employees were no longer employed by Highland when Waterhouse executed the PRAs. ROA.3122-3126 at 106:20-110-19; ROA.3130 at 114:4-25.

The PRAs permitted the parties to mutually agree to modify the amounts due. For example, Section 2.02 of the PRAs provided that "the parties could agree to modify the "Allocation Percentage (defined [in each PRA]) applicable to such Dual Employee to reflect the then current fair market value of such Dual Employee's employment." ROA.482 (NexPoint PRA); ROA.493 (HCMFA PRA). Section 4.02 provided that "[s]hould 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". ROA.482 (NexPoint PRA); ROA.493 (HCMFA PRA).

Notices under the PRAs had to be in writing. ROA.484 (NexPoint PRA) § 6.10; ROA.495) (HCMFA PRA) § 6.10. As the Bankruptcy Court determined based on the clear and unambiguous terms of the PRAs, "these provisions, taken together, leave no ambiguity or lack of clarity that the terms of the PRAs generally intended to set a fixed monthly amount for front-office services, for ease of implementation." ROA.339 (Order at 19).

5. Substantial Evidence Corroborated the PRAs' "Flat Fee" Requirement

The Bankruptcy Court also found that the PRAs' unambiguous "flat fee" arrangements were corroborated by a "plethora" of evidence. ROA.341-43.

In January 2020, Klos again confirmed that the PRAs contemplated fixed monthly fees regardless of which "Dual Employees" were employed at any given time. At that time (early in the Bankruptcy Case and the month Dondero ceded control of Highland to the Independent Board), in response to inquiries from the Retail Board, Thedford sought information concerning expense reimbursements and allocations under the PRAs. Klos reminded Thedford that the allocations in Exhibit A were:

> ***a point in time estimate as of 2018. Half the people are gone now and if you were to re-allocate them now, all the percentages would be different.*** On top of that, we don't have anything comprehensive that is comparable for back office people, so the only thing we can really provide is a stale percentage on a small subset of the overall population.
>
> Would be much more logical to do the yes/no and then as ***a blanket statement say that NPA/HCMFA pay $x/$y annually to HCMLP for these employees' services.***

ROA.2307-2309 (emphases added). Thedford responded, "Got it, thanks." ROA.2307.

Later in January 2020, Waterhouse requested information concerning the "monthly amount for each agreement." In response, Klos confirmed in an email the fixed amounts due under the Agreements (except the HCMFA variable rate SSA):

> "Monthly amounts below
>
> HCMFA
> $416k ***flat*** for investment support
> $290k-300k for shared services
>
> NPA
> $252k ***flat*** for investment support
> $248k ***flat*** for shared services ($168k from NPA directly; $80k from NREA, but assume you're looking for a consolidated number)"

ROA.2292 (emphases added). Waterhouse never questioned the fixed monthly amounts being charged, as they had been since the Agreements were executed; instead, he continued to approve payments in these amounts until December 2020, when Dondero instructed him to stop making any payments to Highland. *See infra* at Section II.E.

The Advisors' own actions and admissions further corroborate the PRAs' fixed-fee arrangement:

- The Advisors contemporaneously knew when each Dual Employee was terminated or departed, (ROA.566 (response to interrogatory 4));
- Waterhouse, who signed the PRAs on behalf of the Advisors, "understood that the [PRAs] included the compensation for every one of the employees on Exhibit A regardless of whether or not they were terminated," (ROA.2689-2690 at 111:22-112:5);
- Despite knowing that ***four Dual Employees included on Exhibit A were not employed by Highland as of May 1, 2018***, the Advisors signed the PRAs without seeking any adjustment of the "Actual Costs" under Section 2.02 (ROA.2689-2690 at 111:22-112:13); and
- In December 2018, despite knowing that ***nine of the original twenty-five Dual Employees listed in Exhibit A to the original PRAs were no longer employed by Highland, the Advisors agreed to pay Highland an additional***

$2.5 million (ROA.565-566) (Advisors' responses to Interrogatories 3 and 4).

The Advisors' contrived construction of the PRAs as requiring reimbursement of the "actual costs" of each individual Dual Employee would not have been feasible. ROA.2662-2663 at 84:16-85:25 (Waterhouse testified that the Dual Employees were never instructed to keep time records and he was unaware of any records that accurately show the time Dual Employees spent working on the Advisors' behalf); ROA.3121-3122 at 105:6-106:19 (Klos testified that any attempt to calculate "how much time [Dual Employees] spen[t]" on something would have been "incredibly subjective and fatally flawed.").

6. The PRAs Are Amended in December 2018

The PRAs were amended in late December 2018 to get ***more*** money to Highland to address its ongoing liquidity crisis, with the added benefit of reducing the Advisors' taxable income. As Klos testified, (a) by December 2018, Highland was operating at a "massive operating loss" and "losing money hand over fist"; (b) during a meeting with Dondero and Waterhouse, concerns were expressed regarding the high tax liability resulting from the Advisors' profitable operations; and (c) to address these concerns, a decision was made to amend the PRAs and have the Advisors make additional lump sum payments to Highland in the aggregate amount of $2.5 million. ROA.3127-3129 at 110:20-113:21.

On December 14, 2018, "[i]n accordance with Section 2.02," (a) Highland and NexPoint executed *Amendment Number One to Payroll Reimbursement Agreement* (the "NexPoint PRA Amendment"), pursuant to which NexPoint paid Highland an additional $1.3 million, and (b) Highland and HCMFA executed *Amendment Number One to Payroll Reimbursement Agreement* (the "HCMFA PRA Amendment", and with the NexPoint PRA Amendment, the "PRA Amendments"), pursuant to which HCMFA paid Highland an additional $1.2 million. ROA.488-490 (NexPoint PRA Amendment); ROA.499-501 (HCMFA PRA Amendment). Waterhouse executed the PRA Amendments on behalf of ***both*** the Advisors and Highland. ROA.490; ROA.501.

Klos testified that (a) the list of Dual Employees on Exhibit A of the PRAs was not amended as part of the PRA Amendments; (b) the additional payments under the PRA Amendments were not based on any analysis of Highland's "actual cost" of services; (c) no one "took any steps to try to determine [Highland's] actual costs of providing front office services before signing this;" and (d) the PRA Amendments were not based on any "true ups." ROA.3128-3129 at 112:1-113:21; ROA.3151-3152 at 135:22-136:2. Instead, the PRA Amendments were a "mechanism to send another $2-1/2 million of cash…from these Advisors" in a manner consistent with the general "view of who's making money and who's not making money," (ROA.3128-3129 at 112:18-113:14), and were only executed

because Highland was losing money rapidly and the Advisors had taxable income. (ROA.3129 at 113:4-21).[9]

As the Bankruptcy Court found, the evidence renders the concept of a "true up" implausible. ROA.340. By December 1, 2018 (two weeks before Waterhouse executed the PRA Amendments on the Advisors' behalf), the Advisors knew that ***nine of the original twenty-five Dual Employees listed on Exhibit A (or, more than one-third) were no longer employed by Highland.*** ROA.565-566 (Advisors' responses to Interrogatories 3 and 4). Yet, ***the Advisors agreed to pay Highland an additional 25% and 43%, respectively,*** under the PRA Amendments.[10] If, as Appellants contend, the PRA Amendments were the result of "true-ups," then the Advisors paid Highland $2.5 million more while knowing that over one-third of the Dual Employees were no longer employed by Highland. This was not plausible.

[9] Norris testified that the PRA Amendments were the result of a "true up," but he played no role in the drafting, administration, or decision-making concerning the PRA Amendments and had "no personal knowledge" as to how the amounts set forth in those Amendments were calculated. ROA.2831-2832 at 88:14-89:3. Klos disputed Norris' testimony, (ROA.3128-3129 at 112:11-113:21), and Waterhouse—the Advisors' Treasurer—could not corroborate it, (ROA.2718-2719 at 140:24-141:3).

[10] HCMFA's $1,200,000 payment under its PRA Amendment was approximately 25% of the $4,992,000 due each year under its PRA *(i.e.*, $416,000 per month for 12 months). NexPoint's $1,300,000 payment under its PRA Amendment was approximately 43% of the $3,024,000 due each year under its PRA (*i.e.*, $252,000 per month for 12 months).

7. The Advisors Knowingly Made All Payments Under the PRAs Until November 30, 2020

The PRAs were effective for just over three years. During the first two years (*i.e.*, January 1, 2018 through January 9, 2020), Dondero controlled Highland and the Advisors (the "Dondero Control Period"). From January 9, 2020 until the PRAs were terminated in early 2021, Dondero controlled the Advisors and the Independent Board controlled Highland. ***The indisputable evidence established that the Advisors made exactly the same monthly payments under the PRAs throughout the Dondero Control Period as they did after the Independent Board took control*** until December 2020 when—soon after Highland gave notice of termination of the Agreements—the Advisors abruptly contended that the three-year course of dealing was wrong. ROA.355-356; ROA.2658 at 80:6-10; ROA.3131-3132 at 115:1-116:8.[11]

The evidence established that the Advisors knew of the bases, timing, and amounts of payments being made under the PRAs. For example: (a) Waterhouse (the Advisors' Treasurer) signed the PRAs which specified the fixed monthly fees (ROA.446 § 3.01, ROA.481 (definition of "Actual Costs") and ROA.492 (same)); (b) Highland sought Waterhouse's permission before making payments under the PRAs (and the Agreements more generally), (*see*, *e.g.*, ROA.2294, ROA.2311

[11] Tellingly, the Advisors' Admin Claim was limited to the post-petition period; the Advisors never filed general unsecured claims for pre-petition damages even though the alleged "overpayments" made during the Dondero Control Period were the exact same; this undisputed fact further demonstrates the fabricated nature of the claim.

(emails showing Waterhouse approving payments); ROA.3079 at 63:2-22 (Klos testified that it was "Waterhouse's practice to approve each and every payment that was made on behalf of the Advisors pursuant to the [PRAs]")); (c) Waterhouse admitted that, as the Advisors' Treasurer, he was "responsible for making sure that the Advisors pay the proper amounts under the [Agreements]," (ROA.2647-2649 at 69:13-71:2); (d) Klos reminded Waterhouse in January 2020 of the "flat" monthly fees being charged under the PRAs, (ROA.2292); and (e) the Advisors represented to the Retail Board in October 2020 that all amounts due to Highland for shared services were paid (ROA.1000; response to Question 2).

8. The Advisors Knew When All Dual Employees Left Highland and Continued to Pay the Same Fees Under the PRAs

The Advisors continued making the same monthly flat fee payments under the PRAs for 35 months with contemporaneous knowledge of Dual Employees' departures. The undisputed evidence proved that:

- The Advisors knew when every Dual Employee left Highland's employ, (ROA.565-566 (Advisors' responses to Interrogatories 3 and 4));
- Throughout the contract period, Highland's Human Resources department gave the Advisors' officers (*i.e.*, Waterhouse, Thedford, and Norris) a "Monthly Headcount Report" (the "Monthly Headcount Reports") that listed every employee in the Highland complex and identified recent hires and departures, (ROA.2031-2190);
- Dondero was provided with information concerning hires, terminations, and employee compensation during the Annual

Reviews, (ROA.2005-2009; ROA.2263-2267), and made all employee compensation decisions until ceding control of Highland, (ROA.2679-2680 at 101:6-102:23);

- Waterhouse (a) knew when employees in the Highland complex were hired and departed, (b) received the Monthly Headcount Reports, and (c) discussed employee hirings, terminations, and compensation with Dondero, (ROA.2678-2680 at 100:17-102:24; ROA.2681-2683 at 103:2-105:12); and

- In early 2020, the Advisors provided detailed information concerning Highland's employees to the Retail Board, (ROA.1801-1804, ROA.1922-1926).

With this knowledge, the Advisors continued approving and making the same monthly payments under the PRAs, regardless of whether Dondero or the Independent Board controlled Highland. With full knowledge of the personnel performing services, the Advisors paid Highland "exactly the same amount per the agreements every single month" from the effective date of the PRAs (*i.e.*, January 1, 2018) through November 2020, a period of 35 months. ROA.3131 at 115:1-18.

9. The Advisors Never Sought to Modify the PRAs

Despite knowing of the Dual Employees' departures, the Advisors never asked to modify the PRAs during the Relevant Period before withholding payments starting in December 2020.[12] Although Waterhouse vaguely testified that he raised the alleged issue of "overpayments" with Fred Caruso, a former

[12] The only modification to the PRAs during the Relevant Period were the aforementioned amendments to ***increase*** fees paid to Highland on a one-time basis for $2.5 million in aggregate in December 2018.

employee of Development Specialists, Inc. ("DSI") (Highland's then restructuring advisors), in late 2019, (ROA.2887 at 144:2-16; ROA.2687-2689 at 109:12-111:3), the Advisors offered no corroborating evidence and Waterhouse admitted that he never addressed the alleged "overpayment" issue in writing. ROA.2697-2698 at 119:2-120:3.

The lack of a writing alone is fatal to the Advisors' contention that they gave notice of a request to modify in late 2019 because Section 6.10 of the PRAs requires notices to be in writing. ROA.483; ROA.494. More fundamentally, Waterhouse admitted that he could not recall asking Caruso to modify the PSAs:

> nothing came of the meeting [with Caruso]. There were no changes or anything. And I don't – ***I don't recall specifically talking about hey, you know, Highland needs to amend these agreements.***

ROA.2687-2688 at 109:18-110:4 (emphasis added).

Waterhouse also failed to inform the Independent Board of any alleged "overpayment" issue—even though Waterhouse met with them on a weekly basis to go over the 13-week forecasts that included the very payments at issue. ROA.2687-2697 at 109:18-119:1; ROA.3207-3210 at 36:10-39-11; ROA.3214 at 43:10-13. According to Waterhouse, he sat in silence because he "thought it was Mr. Caruso's responsibility." ROA.2694 at 116:22-25. Waterhouse also failed to

inform anyone affiliated with the Advisors that he had learned of alleged overpayments. ROA.2690-2691 at 112:18-113:4.[13]

As the Bankruptcy Court found, on the record as a whole, there is no evidence that the Advisors ever asked Highland to modify the PRAs.

D. Highland Fulfilled Its Obligations Under the Agreements

As the Bankruptcy Court found, Highland fully performed its obligations to the Advisors under the Agreements.

1. The Advisors Have Never Asserted That Highland Failed to Provide "Front Office Services" Under the PSAs

In their Admin Claim, ***the Advisors never asserted that Highland breached the PSAs by failing to provide "front office" advisory services***; rather, the Advisors asserted only that Highland breached the PSAs by charging the Advisors for their allocable "actual cost" (lower case "a" and "c" rather than the defined term "Actual Cost") of the Dual Employees identified on Exhibit A but who were no longer employed by Highland. *See* ROA.514 ¶ 18.[14]

[13] Although Norris testified that in January 2021, Waterhouse told him about the alleged conversation with Caruso in late 2019, (ROA.2911-2912 at 168:3-169:15), (a) Norris had no personal knowledge of the alleged conversation, (b) his contemporaneous notes failed to mention Caruso, (ROA.2564), and (c) except for this one alleged conversation, he had "no knowledge of any request to modify the amounts that were charged under the [PRAs] at any time prior to November 30, 2020." ROA.2913 at 170:2-7.

[14] While certain Dual Employees left Highland's employ before and after the PRAs were executed, Highland fulfilled its obligations under the PRAs by either hiring new employees who provided "front-office" advisory services or by expanding the responsibilities of existing employees. ROA.3158-3163 at 142:19-147:24; ROA.3137 at 121:2-6; ROA.2633 at 55:7-17.

In fact, the Advisors conceded during oral argument before the District Court that Highland satisfactorily provided the "front office" advisory services required under the PSAs. ROA.4350 n.3 (citing to the transcript).

2. Contemporaneous Evidence Proved That Highland Performed Its Obligations Under the SSAs

The Bankruptcy Court found that "there was extensive evidence at Trial that Highland performed at all times under the Agreements, and the Advisors made contemporaneous and repeated representations to their Retail Board that Highland was providing all services required under the Agreements." ROA.343. *See also* ROA.343-354 (citing to and quoting from the Advisors' unqualified representations to the Retail Board—both before and after Highland gave notice of termination—that Highland provided all services required under the Agreements).

The relevant representations concerning Highland's performance were made (a) to the Retail Board throughout 2020 and early 2021 when the Independent Board controlled Highland, and (b) for the purpose of obtaining the Retail Board's consent to extend the Advisors' Investment Advisory Agreements, a regulatory process known as the "15(c) Review." The Advisors provided this information to the Retail Board during formal meetings (the "Retail Board Meetings"). Minutes from these Retail Board Meetings (the "Retail Board Minutes")[15] were adopted only after the Advisors had an opportunity to review and edit them to assure their

[15] *See* ROA.1801-1919 (Retail Board Minutes from January 2020-February 2021).

accuracy. ROA.3180-3181 at 9:15-10:24. Powell testified that the Retail Board relied on the Advisors' statements made during Retail Board Meetings and believed they were made on an informed basis. ROA.3182-3184 at 11:22-12:6, 13:1-13.

Throughout 2020, the Advisors repeatedly reassured the Retail Board that the shared services were continuing as usual and that the parties were working together to ensure an orderly transition of services. *See* ROA.343-354 (citing extensive evidence). The Advisors' representations to the Retail Board included:

- In January 2020, the Advisors provided information concerning employees (including "Dual Employees") associated with Highland and the Advisors, such as "headcount" and staffing levels, (ROA.1802-1803; ROA.1922-1926);
- In June 2020, "the level and quality of services [provided by Highland] are being monitored" and there are no "disruptions in the service levels provided to the Funds," (ROA.1814);
- In August 2020, "***there had been no issues or disruptions in services as a result of the HCMLP bankruptcy matter***," (ROA.1821) (emphasis added);
- In September 2020, the Advisors were comfortable with "***the quality and level of services" under the shared services arrangements,*** "***it was business as usual*** with respect to the services provided to the Funds," and ***the level of services that Highland was providing were "consistent" with historical levels***, (ROA.1835-1836) (emphases added);
- In October 2020, "***the quality and level of services provided to the Funds by the Advisers and pursuant to the shared services arrangements had not been negatively impacted to date," and as of this time, there had been no "significant departures to date,***" (ROA.1851) (emphases added);
- In October 2020, contingency plans were being created to ensure that there would be "***no disruption in services***" if Highland's bankruptcy caused the

Advisors to seek services elsewhere, and such plans were "***in place to continue to provide the same level and quality of services to the Funds***," (ROA.1951; R1845) (emphases added);

- As of October 2020, ***the Advisors had paid Highland all amounts due under the shared services arrangements***, (ROA.1000);

- In November 2020, "***there has not been any disruption to the services provided to the Funds by HCMLP pursuant to the Shared Services Agreement and that [Norris] expects that such services will continue to be provided in normal course***," (ROA.1863) (emphasis added);

- In December 2020, after Highland exercised its contractual right to terminate the Agreements on 60 days' notice, an "***orderly transition" would be arranged to avoid any disruption in service***, (ROA.503) (emphasis added);

- In December 2020, (a) Norris reviewed the "current services provided under the shared services agreements with HCMLP and discussed the current plans for ***ensuring the continuation of those services*** after a plan of reorganization is approved," and (b) Sauter "noticed that there has been no material attrition to date with respect to employees," (ROA.1870-1871) (emphasis added);

- In January 2021, the ***Advisors were not "limited" by the TRO in place against Dondero and that this litigation had no "impact" on the Advisors' ability to obtain services they needed to serve the Retail Funds***, (ROA.1880-1881);

- In January 2021, counsel was "***reviewing potential legal remedies in the event HCM breaches the shared services*** by denying us access to our data held by [Highland] or otherwise attempts to cause harm to our shareholders," (ROA.1963) (emphasis added);[16]

The only issue that ever arose under the SSAs—potential conflicts—was addressed consensually. In the latter half of 2020, ***Seery, the Advisors, and the***

[16] *See also* ROA.1916-1917 (the Advisors informed the Retail Board "that there would be no impact" from the transition of services from Highland after the Agreements were terminated); ROA.1944 (in a report filed with the SEC, one of the Advisors' clients disclosed that "the level and quality of services to the Fund by [NexPoint] and its affiliates had not been materially impacted by the HCMLP bankruptcy….").

Retail Board cooperatively addressed potential conflicts of interest by transferring a compliance officer from Highland to the Advisors and reducing the amounts charged for compliance services to account for the fact that Highland would no longer be paying compensation to that employee:

- In July 2020, the Bankruptcy Court reminded Seery to be aware of conflicts among employees wearing "multiple hats," (ROA.3225-3227 at 54:5-56:25);

- Seery took the Court's comments seriously and instructed Highland's employees to notify him of all potential conflicts, (*id*.);

- On August 13, Seery informed the Retail Board that a "potential conflict of interest" arose with respect to one investment (*i.e.*, OmniMax) as a result of a "divergence of investment objectives," (ROA.1823);

- In mid-September, Seery discussed with the Retail Board "the process for addressing any conflicts of interest" and a "robust discussion" followed where "OmniMax" was identified as the recent transaction that presented conflict issues, (ROA.1831, ROA.1836); and

- On October 13, Ellington informed the Retail Board of "the Advisers' continued analysis of potential conflicts of interest for employees of HCMLP that provided services to the Advisors and the Funds," (ROA.1844).

Around the same time, the Advisors asked Seery to allow Jason Post to transfer from Highland (where he simultaneously served as the Advisors' Chief Compliance Officer) to NexPoint. Seery agreed. ROA.3228-3229 at 57:17-58:14. Brian Collins, Highland's Director of Human Resources, informed the Retail Board of this arrangement at the next Retail Board Meeting:

> In order to assist with any potential conflict of interests, Jason Post, the Funds' CCO, became an employee of NexPoint on October 14, 2020. He noted that Mr. Post, while formerly an HCMLP employee, had only been performing work for the Funds.

ROA.1851. ***Highland promptly reduced its monthly fee for compliance services under the SSA from $97,294 to $70,102*** (*i.e.*, a reduction of $27,192 per month, or $326,304 annualized) on account of Post's transfer.[17] No other conflicts ever arose.[18]

Had Highland failed to provide the requisite services under the Agreements, the Advisors would have been unable to perform their obligations under the Investment Management Agreements. As the Bankruptcy Court found based on the Advisors' repeated representations to the Retail Board, that was not the case.

E. The Advisors Breached the Agreements by Failing to Pay for Services Rendered

From January 1, 2018 through November 30, 2020, the Advisors paid all amounts due under the Agreements—including the fixed monthly fees under the PRAs—without objection. But Highland's proposed Plan provided, among other things, that Highland would end its contractual relationships with all Dondero-

[17] *Compare* ROA.2345, 2347-2355 (monthly invoices under HCMFA SSA (the "variable" contract) from December 2019 through October 2020 showing compliance service fee of $97,294) *with* ROA.2346, 2356-2357 (monthly invoices from November 2020 through January 2021 showing reduced compliance service fee of $70,102).

[18] *See* ROA.1863 ("Norris noted that there have been no issues with an HCMLP employee being conflicted out since the last update").

controlled entities. Consistent with that mandate, in late November 2020, Highland exercised its right to terminate the Agreements.

Specifically, on November 30, 2020, after the Bankruptcy Court approved Highland's disclosure statement, Highland gave written notice of termination of the Agreements as of January 31, 2021 (the "Termination Notice").[19] ROA.2312-2313. In response, Dondero instructed Waterhouse to stop making any payments to Highland. ROA.2698 at 120:8-20. As the Bankruptcy Court found, there was no dispute that the Advisors intentionally withheld payments under the Agreements for the months of December 2020 and January 2021 (and, in the case of the HCMFA SSA, the month of November 2020, because the HCMFA SSA was typically paid in arrears). ROA.357.

Thus, (a) HCMFA failed to pay for services rendered by Highland under (i) the HCMFA SSA during the months of November 2020, December 2020, and January 2021 in the aggregate amount of $924,000;[20] and (ii) the HCMFA PRA during the months of December 2020 and January 2021 in the aggregate amount of $832,000; and (b) NexPoint failed to pay for services rendered by Highland under

[19] Although the PRAs were not expressly identified in the Termination Notices, Seery viewed the PRAs as "one in the same" with the SSAs. Moreover, (a) the PRAs were executory contracts that were rejected under Highland's Plan, and (b) Highland could never have continued to provide "front office" advisory services because the employees providing those services were being terminated. *See* ROA.3233-3235 at 62:1-64:5.

[20] The HCMFA SSA was the only Agreement with a variable fee arrangement. Highland made this calculation by taking the most recent payment due in November of $308,000 and multiplying that number by three for the three months of nonpayment.

(i) the NexPoint SSA during the months of December 2020 and January 2021 in the aggregate amount of $336,000; and (ii) the NexPoint PRA during the months of December 2020 and January 2021 in the aggregate amount of $504,000. ROA.376.

In addition to withholding payments **after** receiving the Termination Notice, the Advisors sent Highland two written communications in anticipation of litigation. First, on December 1, 2020, the day after the Terminate Notice was sent, Norris sent Klos an email for the first time questioning the "change in headcount" of Dual Employees and asking to "discuss next steps" on the PRAs. ROA.2540-2541 (the "December 1 Email").

Then, on Saturday, December 11, 2020, the Advisors' counsel presented several concocted disputes to Highland's counsel, including supposed disputes over amounts the Advisors owed under a series of promissory notes and allegations that Highland breached the Agreements. ROA.4335-4337 (the "December 11 Letter," and together with the December 1 Email, the "December Litigation Letters"). The timing of the December Litigation Letters is not surprising. They were sent shortly after: (a) Highland sent the Termination Notice, (ROA.2312-2313); (b) Highland demanded payment of millions of dollars under certain promissory notes, (ROA.4334); (c) Highland secured the TRO against Dondero,

(ROA.309); and (d) Highland was nearing confirmation of its proposed plan, (ROA.308-309 ¶ 21, ROA.330).

III. ARGUMENT

A. Standard of Review

"[T]his court reviews a bankruptcy court's findings of fact for clear error, and its legal conclusions de novo." *Ingalls v. Thompson (In re Bradley)*, 588 F.3d 254, 261 (5th Cir. 2009). The "clearly erroneous" standard warrants reversal only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Butler Aviation Int'l v. Whyte (In re Fairchild Aircraft Corp.)*, 6 F.3d 1119, 1128 (5th Cir. 1993). "The clearly erroneous rule deserves strict application in this case where the district court has affirmed the bankruptcy court's findings." *In re Fabricators, Inc.*, 926 F.2d 1458, 1464 (5th Cir. 1991); *see also Placid Ref. Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.)*, 108 F.3d 609, 613 (5th Cir. 1997). Factual findings made during a bench trial deserve "great deference," and "even greater deference" when those findings are based on credibility determinations. *Hess Corp. v. Schlumberger Tech. Corp.*, 26 F.4th 229, 233 (5th Cir. 2022); *see also Guzman v. Hacienda Recs. & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015) (same).

B. The Bankruptcy Court Properly Determined That the PRAs Clearly and Unambiguously Required the Advisors to Pay Fixed Monthly Fees

The Bankruptcy Court properly concluded that, as a matter of law, the plain language of the PRAs mandated fixed monthly payments in exchange for "front office" services. ROA.361-364. The Advisors challenge this finding, contending that the PRAs required the Advisors to "reimburse Highland only for actual employees then in existence and providing services to the Advisors." Br. at 15-25.[21] The Advisors' contention is without merit.

"Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered into." *BCC Merch. Sols., Inc. v. Jet Pay, LLC*, 129 F. Supp. 3d 440, 476 (N.D. Tex. 2015); *see also Watkins v. Petro-Search, Inc.*, 689 F.2d 537, 538 (5th Cir. 1982) (same). "If, in the light of the surrounding circumstances, the language of the contract appears to be capable of only a single meaning, the court can then confine itself to the writing." *Watkins*, 689 F.2d at 538. A contract is unambiguous and will be enforced as written where it is "susceptible to only one reasonable construction." *BCC Merch. Sols.*, 129 F. Supp. 3d at 477. Courts must "ascertain and give effect to the parties' intentions as expressed in the writing itself." *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 805

[21] Citations to "Br." refer to *Appellants' Opening Brief* [Docket No. 39].

(Tex. 2012). Courts "must 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." *Id.* This analysis begins with the contract's express language." *Id* at 805-06.

The Bankruptcy Court thoroughly analyzed the relevant terms of the PRAs and properly concluded that, as a matter of law, the plain language of the PRAs required the payment of fixed monthly fees in exchange for "front office" services until the parties agreed otherwise. ROA.361-364. Section 2.01 of the PRAs provides that each of the Appellants were to pay Highland "for the ***Actual Costs*** … of certain … [Dual] [E]mployees …." ROA.482, ROA.493 (emphasis added).

Under the PRAs, "Actual Costs" is a term that was expressly and unambiguously defined as a fixed, flat monthly fee. ROA. 492, ROA.481 ("Actual Costs" were "equal to $416,000 per month" and "$252,000 per month" under the PRAs, respectively). As the Bankruptcy Court explained, the PRAs did not require "periodic reevaluation of the Actual Cost" or adjustments to Actual Cost "based on employee comings-and-goings …. The PRAs simply plugged in a decisive monthly amount" that could only be amended by written agreement. ROA.362-363. As the District Court explained, courts "'cannot interpret a contract to ignore clearly defined terms, and thus [the Court] must accord [Actual Cost] its due

meaning.'" ROA.4347 (quoting *FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, 426 S.W.3d 59, 64 (Tex. 2014)).

In support of their argument that the PRAs provide for payment of the allocable costs of each Dual Employee who was employed at a particular time, the Advisors focus on the term "reimburse." Br. at 22. But as the District Court found, the Advisors' "interpretation would be dependent on a rigid construction of the term 'reimburse' and would wholly ignore the parties' own definition of 'Actual Costs,' which specifies [] what '*such* costs and expenses are equal to." ROA.4347 (emphasis in original) (quoting Section 2.02 of PRAs). If, as the Advisors insist, "Actual Cost" means the "actual costs and expenses" incurred by the individual Dual Employees, then controlling provisions of the PRAs—including Sections 2.02 and 4.02—would be rendered meaningless. Taken as a whole, the only reasonable meaning of the term "Actual Cost" is the definition expressly given to it by the parties: a flat monthly fee that would remain fixed unless the Parties agreed otherwise in writing.

The Advisors' case cites do not support their argument: None address the meaning of a defined term in an agreement. *See McLane Foodservice, Inc. v. Table Rock Rests., L.L.C.*, 736 F.3d 375, 379 (5th Cir. 2013) (applying dictionary definition to an undefined term so that none of the provisions will be "rendered meaningless"); *Foulston Siefkin LLP v. Wells Fargo Bank of Tex. N.A.*, 465 F.3d

211 (5th Cir. 2006) (dealing with a trustee's claim for reimbursement of expenses that conflicted with the plain terms of the trust).[22]

The Advisors' conclusory assertion that the Bankruptcy Court relied on "impermissible extraneous evidence" in interpreting the PRAs, (Br. at 18-19), is equally meritless. The Bankruptcy Court did not look beyond the four corners of the PRAs when ruling, as a matter of law, that the PRAs unambiguously required the Advisors to pay flat monthly fees unless the parties agreed otherwise in writing. ROA.361-364 ("[T]he court begins its analysis by looking at ***the plain language of the PRAs***.") (emphasis added). The District Court expressly affirmed this finding. (ROA.4347).

The Bankruptcy Court examined the facts and circumstances surrounding the execution of the PRAs only in connection with its ***alternative*** ruling the PRAs were ambiguous. *See* ROA.364-366 (finding that "extrinsic evidence further supports a conclusion that the PRAs were fixed rate contracts, ***if the PRAs should be determined to be ambiguous***.") (emphasis added).[23] The Bankruptcy Court

---

[22] *See also United States v. Upton*, 91 F.3d 677, 682 n.8 (5th Cir. 1996); *Millgard Corp. v. McKee/Mays*, 49 F.3d 1070, 1073 (5th Cir. 1995); *Tolar v. Allstate Tex. Lloyd's Co.*, 772 F. Supp. 2d 825, 830 (N.D. Tex. 2011); *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983).

[23] This is in line with applicable law. *See Watkins*, 689 F.2d at 541 ("[E]ven if we were to construe the agreement to be ambiguous (so as to allow parol evidence to show not only the surrounding circumstances but also the intent of the parties) ….") . It is also worth noting that courts are permitted to consider the "surrounding circumstances" to aid in the construction of an unambiguous contract as long as that evidence "give[s] the words of a contract a meaning consistent with that to which they are reasonably susceptible." *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 765 (Tex. 2018).

specifically found that, even if the PRAs were ambiguous (which was not the case), the "plethora of evidence" established that the "parties always contemplated fixed amounts being used to pay Highland for providing front-office services." ROA.364-366 (citing to evidence discussed *supra* Section II.C.5). The District Court expressly affirmed this factual finding. ROA.4348.[24]

The Bankruptcy Court's finding that the PRAs clearly and unambiguously required fixed-fee monthly payments in exchange for Highland's front-office services gave effect to the express terms of the PRAs as a whole. This ruling properly harmonized each provision so as not to render others "meaningless," and it is the only "reasonable" interpretation of the PRAs based on the undisputed facts and circumstances surrounding the adoption of the PRAs. The Bankruptcy Court's finding should be affirmed.

C. The Bankruptcy Court's Finding That Highland Did Not Fail to Negotiate in "Good Faith" Under the PRAs Is Not Clearly Erroneous

The Advisors argue that, even if the PRAs were fixed-fee contracts, the Bankruptcy Court erred in finding that Highland did not fail to negotiate in "good faith" after the Advisors allegedly asked to modify the PRAs. Br. at 25-27. The Bankruptcy Court's finding that the Advisors "never made a request to modify the payments under the PRAs during the Relevant Period before payments were

[24] *See Watkins*, 689 F.2d at 538 (noting that "once the contract is found to be ambiguous, the determination of the parties' intent through the extrinsic evidence is a question of fact.")

withheld in November 2020," (ROA.358-359), was based on its ample factual findings and credibility determinations, including Waterhouse's testimony.

Moreover, as the District Court observed and as discussed below, even if Highland failed to "negotiate in good faith," such conduct would not constitute a "material" breach of the PRAs because (a) agreements to negotiate are unenforceable, and (b) the requirement to negotiate "in good faith" did not obligate Highland to reach an agreement with the Advisors.

As a threshold matter, after assessing Waterhouse's credibility and the substance of his testimony, the Bankruptcy Court found that the Advisors never asked Highland to modify the payments under the PRAs during the Relevant Period. ROA.358-359, ROA.366; ROA.2687-2688 at 109:18-110:4. Based on this credibility determination, the Bankruptcy Court's finding that Highland did not fail to negotiate in "good faith" should be affirmed. As the District Court concluded, "the Court does not have a 'definite and firm conviction that a mistake has been committed' in this respect." ROA.4352 (quoting *Robertson v. Dennis (In re Dennis)*, 330 F.3d 696, 701 (5th Cir. 2003).

The Advisors do not contest the Bankruptcy Court's credibility finding as to Waterhouse's testimony. Br. at 26. Instead, they rely solely on the December Litigation Letters. *Id.*; ROA.2540-2542, ROA.4334-4337. The Advisors sent the December Litigation Letters just (a) after Highland (i) demanded payment of

millions of dollars under a series of promissory notes, (ii) sent the Termination Notice, and (iii) obtained the TRO against Dondero, and (b) before the Advisors filed their Admin Claim. Substantively, on its face, and as the District Court found, the December 1 Email from Norris "fail[ed] in any specific terms to request a modification of the Agreements." ROA.4352.

Although the District Court found that the December 11 Letter triggered Highland's "obligation to negotiate the terms of the PRAs," it also found that "given the timing of the letter … Appellants 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***." ROA.4353 (emphasis added).

Finally, the District Court determined that even if Highland failed to negotiate in good faith (which it did not), such failure would not have constituted a material breach of the PRAs for two reasons. First, "agreements to negotiate toward a future contract are not legally enforceable." ROA.4353-4354 (collecting cases). "Second, the requirement to negotiate in good faith did not commit the parties to reach an agreement." ROA.4354. In light of Dondero's contentious relationship with Highland at this late stage in the bankruptcy, Appellants could not have reasonably anticipated that negotiations would have resulted in modifications to the PRAs. *Id.* Thus, Highland's alleged "failure" to respond to the

December 11 Letter could not have constituted a material breach of the PRAs because it did not deprive the Advisors "of the benefit they could have reasonably anticipated from full performance." *Id.* (citing *Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 378 (Tex. 2009)).

The Advisors' contention that Highland materially breached the PRAs by failing to negotiate in good faith is, as the Bankruptcy Court determined and the District Court affirmed, wrong on the facts and the law. The Advisors did not meet the high "clear error" threshold, and the Bankruptcy Court's finding should be affirmed.

D. The Bankruptcy Court Properly Found That Highland Had No Obligation to Unilaterally Modify the PRAs on the Advisors' Behalf

The Advisors contend that Highland was obligated to unilaterally modify the PRAs on the Advisors' behalf as each Dual Employee left. Br. at 34-39. As the District Court observed, this argument "misses the mark for three reasons." ROA.4348.

First, the Advisors' argument that Highland was responsible for adjusting the defined "Actual Costs" is premised on the faulty notion that such expenses reflect "actual costs" (again, lower case "a" and "c") incurred by Highland for Dual Employees employed at any given point in time. But again, the PRAs unambiguously mandated fixed monthly fees unless the parties agreed otherwise.

See supra at Section III.B. For this reason alone, the Advisors' argument should be rejected.

Second, as the Bankruptcy Court correctly found, the unambiguous terms of the PRAs imposed no duty on Highland to unilaterally modify the PRAs on behalf of the Advisors as Dual Employees come and go. To the contrary, Section 2.02 provides that the "Parties may agree to modify the terms," and Section 4.02 grants either "Party" the right to request modification in certain circumstances. Neither Section imposes any obligation solely on Highland. ROA.482; ROA.493.[25] These provisions would be meaningless if Highland had a unilateral obligation to adjust the payment amounts up or down depending on the departure or replacement of Dual Employees.

Third, Highland was not contractually obligated to amend the PRAs pursuant to Section 2.02 of the SSAs. The Advisors maintain that Section 2.02 of the SSAs required Highland to provide "assistance and advice" for "finance and accounting" and that such services somehow obligated Highland "to trigger any modification or negotiation process under the PRAs or SSAs regarding the amounts payable thereunder." Br. at 35-37 (citing ROA.435, ROA.441, ROA.2389 (§ 2.02(a))). As the District Court found, there is no evidence that the service standards under the SSAs imposed any requirement on Highland to monitor

[25] By contrast, other provisions of the PRA specify "HCMLP" when assigning obligations solely to Highland. *See* ROA.482 (specifying in Section 4.03 that "HCMLP will collect such Tax from NexPoint ….").

changes to the Dual Employees' status and make changes on the Advisors' behalf. ROA.4349. In fact, Section 2.06 of the NexPoint SSA clearly states that Highland "shall not have any duties or obligations to [NexPoint] unless those duties and obligations are specifically provided for in this Agreement …." ROA.2393. Moreover, the HCMFA SSA provides that "[e]xcept as specifically provided in this Agreement, [Appellee] makes no express or implied representations, warranties, or guarantees relating to its performance of the Shared Services." ROA.2379. The Advisors fail to point to any provision of the Agreements that obligated Highland to make unilateral changes to the amounts due under the PRAs. And, of course, the Advisors never demanded that Highland unilaterally act on their behalf during the Dondero Control Period, nor did they file a claim for damages arising from Highland's alleged failure to do so during that time.

Fourth, Highland had no ability to modify the PRAs on the Advisors' behalf based on how much time each Dual Employee worked. As discussed *supra*, the undisputed evidence shows no records existed to track employees' time, making any assessment of "actual costs" entirely subjective. *See* ROA.2565-2566 at 84:16-85:25; ROA.3009-3010 at 105:6-106:19.

The Advisors cite to Dondero's and Norris's conclusory testimony that the Advisors "relied on [Highland]" to monitor the amounts paid under the PRAs since the Advisors "didn't have the staff to do it." Br. at 35 (citing ROA.2753 at 10:4-11;

ROA.2844 at 101:11-14). This testimony was not credited for numerous reasons, including that Waterhouse (a) signed the PRAs on behalf of all parties; and (b) at all times (i) served as an officer of all parties; (ii) had access to information concerning the Dual Employees (including hiring, termination, and compensation); (iii) approved the Advisors' payments under the Agreements; and (iv) was the Advisors' fiduciary responsible for administering the Agreements and "making sure the [A]dvisors pa[id] the proper amounts due under" them. ROA.2748-2751 at 5:10-8:17; ROA.2647 at 69:13-25; ROA.2646-2648 at 68:21-70:5. The Bankruptcy Court's findings should be affirmed.

E. The Bankruptcy Court's Finding That the Advisors Failed to Prove That Highland Breached the SSAs Is Not Clearly Erroneous

The Advisors maintain that the Bankruptcy Court erred in finding that Highland did not breach the SSAs by withholding limited legal services "adverse" to Highland. Br. at 30-31. The Bankruptcy Court's finding that the Advisors failed to prove their breach of contract claim is not clearly erroneous.

Texas requires plaintiffs raising a claim for breach of contract to show that: "(1) a valid contract exists; (2) the plaintiff performed or tendered performance as contractually required; (3) the defendant breached the contract by failing to perform or tender performance as contractually required; and (4) the plaintiff sustained damages due to the breach." *MDK Sociedad De Responsabilidad*

Limitada v. Proplant Inc., 25 F.4th 360, 368 (5th Cir. 2022). As the Bankruptcy Court found, the Advisors failed to show there was any breach or damage.

First, the notion that Highland had a contractual obligation to provide services "adverse" to its own interests is, on its face, illogical and requires an unreasonable construction of the SSAs. *See Sojitz Energy Venture, Inc. v. Union Oil Co.*, 394 F. Supp. 3d 687, 701 (S.D. Tex. 2019) ("We will not construe contracts to produce an absurd result when a reasonable alternative construction exists.").

Second, the Advisors' argument that Highland breached the SSAs by failing to provide legal and compliance services is flatly contradicted by the record. As the Bankruptcy Court found, throughout the Relevant Period, the Advisors repeatedly and consistently represented to the Retail Board that Highland was providing all services required under the Agreements. *See supra* at Section II.D.2. The only issue that ever arose under the SSAs—potential conflicts—was addressed consensually. *See supra* at Section II.D.2 at 32-33. The Advisors' reliance on evidence concerning these consensually addressed conflicts issues does not support their argument, and in fact, contradicts the allegations. *See* Br. at 30 (citing ROA.3906-3907 at 54:5-55:14; ROA.3908 at 56:9-10; ROA.3907 at 55:17-18).

The Advisors also rely on Norris's testimony that the conflict issues caused the Advisors to procure certain legal services elsewhere, resulting in cover

damages for hiring two new employees. Br. at 31 (citing ROA.2858 at 115:8-14; ROA.2916 at 173:13-16).[26] As the Bankruptcy Court determined, the Advisors failed to show that any "loss" from employing two new employees was caused by Highland's failure to perform under the SSAs. And as the District Court found, "Norris's testimony alone does not leave the Court with the 'definite and firm conviction that a mistake has been committed.'" ROA.4356-4357.[27]

Based on the evidence as whole, the Advisors cannot meet the high "clear error" threshold." The Bankruptcy Court's finding that the Advisors failed to prove that Highland breached the SSAs should be affirmed as not clearly erroneous.

F. The Bankruptcy Court Properly Found That the Advisors Waived Any Claims Under the Agreements

The Bankruptcy Court correctly found that the Advisors waived any claims they may have had under the Agreements. The Advisors challenge this finding and rely on the PRAs' "non-waiver" provision. ROA.483; ROA.494 (Section 6.02 of the PRAs). This argument is unavailing.

"Under Texas case law, waiver is the intentional relinquishment of a known right or the intentional conduct inconsistent with claiming that right." *Sedona Contracting, Inc. v. Ford, Powell & Carson, Inc.*, 995 S.W.2d 192, 195 (Tex. App.

[26] Notably, the charges for "legal services" were immaterial relative to the overall monthly fees under the HCMFA SSA. *See*, *e.g.*, ROA.2345-2347 (invoices showing legal fees were $10,000 per month on a contract with a total monthly cost of $300,000-310,000).

[27] And, again, the documentary evidence proved that when Highland agreed to transfer Jason Post to the Advisors in the fall of 2020, Highland promptly reduced the charges for compliance services. *See supra* at Section II.D.2 at 33.

1999). The elements of waiver include: (1) an existing right, benefit, or advantage held by a party; (2) the party's actual or constructive knowledge of its existence; and (3) the party's actual intent to relinquish the right or intentional conduct inconsistent with the right (which can be inferred from the conduct). *Id.* Non-waiver provisions can be waived. *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 484 (Tex. 2017)); *EWB-I, LLC v. PlazAmericas Mall Tex., LLC*, 527 S.W.3d 447, 467 (Tex. App. 2017); *Bott v. J.F. Shea Co.*, 388 F.3d 530, 534 (5th Cir. 2004); *Musgrove v. Westridge St. Partners I, LLC*, No. 2-07-281-CV, 2009 WL 976010, at *4 (Tex. App. Apr. 9, 2009).

As the Bankruptcy Court found, the Advisors engaged in "intentional conduct inconsistent" with any rights they now claim to have had under Sections 2.02 and 4.02 of the PRAs. Specifically, with contemporaneous knowledge of the Dual Employees' departures, the Advisors paid the same flat monthly fee effective from January 2018 until November 2020 (35 months) without ever requesting modification. ROA.367-370.

The Advisors' reliance on *Shields* is misplaced. *Shields* holds that "a party's rights under a nonwaiver provision may indeed be waived expressly or impliedly" by "intentionally engag[ing] in conduct inconsistent with claiming the right to enforce the nonwaiver agreement." 526 S.W.3d at 482-85. The landlord's acceptance of late payments did not waive a non-waiver provision since the non-

waiver provision's plain terms explicitly permitted the landlord to rely on the contractual non-waiver clause and accept late rental payments without waiving its right to enforce the lease as written. "[E]ngaging in the very conduct disclaimed as a basis for waiver is insufficient as a matter of law to nullify the nonwaiver provision in the parties' lease agreement." *Id.* at 484-85.

The PRAs' non-waiver provision does not resemble the provision at issue in *Shields*. It does not "prevent waiver through conduct the parties explicitly agree will never give rise to waiver," but instead provides generally that "[n]o failure on the part of any Party to exercise or delay in exercising any right hereunder will be deemed a waiver thereof …." *Shields*, 526 S.W.3d at 484; ROA.494. As the Bankruptcy Court explained, "[n]othing in the general non-waiver provisions in the PRAs provided any specificity as to the above actions or nonactions of the Advisors regarding amendment to the PRAs that would prevent waiver." ROA.370. The Bankruptcy Court's finding that the Advisors' waived any claims is not foreclosed by *Shields*.

In re United Services Automobile Association, No. 03-19-00292-CV, 2020 WL 7640145 (Tex. App. Dec. 23, 2020), is also distinguishable. There, the court found that an insurance company did not waive its right to invoke an appraisal process where it simply delayed invoking the appraisal provision under the policy, and such delay was not inconsistent with the non-waiver provision. Here, the

Advisors did not simply "delay" in invoking their rights to modify the PRAs. ***They made flat fee payments as required under the PRAs for 35 consecutive months while knowing the status of every Dual Employee and receiving the full benefit of the Agreements***. This affirmative conduct was plainly inconsistent with the general non-waiver provision in the PRAs.

The Bankruptcy Court also correctly found the Advisors waived any claims resulting from the payments under the SSAs. The Advisors continued authorizing payments to Highland under the SSAs without notifying Highland of any breach and validated Highland's performance thereunder in their repeated representations to the Retail Board. This conduct was inconsistent with asserting the Admin Claim. The Bankruptcy Court's finding that the Advisors waived any claims under the Agreements should be affirmed.

G. The Bankruptcy Court's Finding That Highland Proved Its Breach of Contract Claims Against the Advisors Is Not Clearly Erroneous

The Advisors argue that Highland should not be entitled to recover for its breach of contract claim against the Advisors under the Agreements because Highland "cannot recover for services it did not provide" under the SSAs. Br. at 30. This argument is without merit. As the Bankruptcy Court found and the District Court affirmed based on the ample evidence at trial, Highland met its burden of proving its Contract Claims against the Advisors.

The first element for breach of contract—the validity of the Agreements—is undisputed. ROA.377. The second element for breach of contract—whether Highland performed under the Agreements—is also satisfied. As the District Court noted, the Bankruptcy Court "scrutinized the evidence presented at trial" in finding that Highland performed all services under the Agreements. ROA.4355. On the record as a whole—including the Advisors' contemporaneous, unqualified, and repeated representations to the Retail Board of Highland's satisfactory performance under the Agreements—the Bankruptcy Court did not clearly and erroneously conclude that Highland performed its obligations under the SSAs. *See Taylor-Travis v. Jackson State Univ.*, 984 F.3d 1107, 1116 (5th Cir. 2021) ("Under the clear error review, if the trial court's factual findings are 'plausible in light of the record viewed in its entirety, we must accept them ….'").

The third and fourth elements—whether the Advisors failed to perform and Highland sustained damages—are likewise met. There is no dispute that the Advisors breached the Agreements by failing to make any payments in December 2020 and January 2021 (which also included payments due under the HCMFA SSA for November 2020 since they were paid in arrears), and Highland sustained damages as a result of the Advisors' breaches. As the Bankruptcy Court found and the District Court affirmed, Highland was damaged as follows: (a) $924,000 for unpaid fees under the HCMFA SSA for November 2020, December 2020, and

January 2021; (b) $832,000 for unpaid amounts under the HCMFA PRA for December 2020 and January 2021; (c) $336,000 for unpaid fees under the NexPoint SSA for December 2020 and January 2021; and (d) $504,000 for unpaid amounts under the NexPoint PRA for December 2020 and January 2021. ROA.380. The Bankruptcy Court's ruling on this issue should be affirmed as not clearly erroneous.

IV. CONCLUSION

Appellee respectfully requests that this Court affirm the District Court's Order, which affirmed the Bankruptcy Court's Order.

Date: August 16, 2024

HAYWARD PLLC

/s/ Zachery Z. Annable
Melissa S. Hayward (Texas Bar No. 24044908)
Zachery Z. Annable (Texas Bar No. 24053075)
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Telephone: (972) 755-7100
Facsimile: (972) 755-7110
E-mail: MHayward@HaywardFirm.com
ZAnnable@HaywardFirm.com

-and-

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No.143717)
John Morris (NY Bar No. 2405397)
Gregory V. Demo (NY Bar No. 5371992)
Hayley R. Winograd (NY Bar No. 5612569)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
E-mail: jpomerantz@pszjlaw.com
jmorris@pszjlaw.com
gdemo@pszjlaw.com
hwinograd@pszjlaw.com

Counsel for the Appellee

CERTIFICATE OF COMPLIANCE WITH FRAP 32

1. This document complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, including footnotes and excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 12,812 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced serif (Times New Roman) typeface at 14-point type (12-point for footnotes).

3. Any required privacy redactions have been made under Circuit Rule 25.2.13, the electronic submission is an exact copy of the paper submission, and this document has been scanned for viruses and is free of them.

/s/ Zachery Z. Annable
Zachery Z. Annable

CERTIFICATE OF SERVICE

I certify that, on August 16, 2024, the foregoing Brief of Appellee was electronically filed using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

/s/ Zachery Z. Annable
Zachery Z. Annable