Docket #0055 Date Filed: 9/6/2024

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' REPLY BRIEF

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

Davor Rukavina, Esq.
MUNSCH HARDT KOPF & HARR, P.C.
500 North Akard St., Ste. 4000
Dallas, Texas 75201-6659
Telephone: (214) 855-7500
Facsimile: (214) 855-7584

ATTORNEY FOR NEXPOINT ADVISORS, L.P. AND HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.

1934054240906000000000007

TABLE OF CONTENTS

I. SUMMARY OF REPLY 1

II. REPLY 2

A. HIGHLAND'S INTERPRETATION OF "ACTUAL COST" DOES NOT PROPERLY CONSIDER ALL RELEVANT CONTRACTUAL PROVISIONS AND REQUIRES RELIANCE ON PAROL EVIDENCE. 2

i. Highland improperly focuses on only half of the definition of "Actual Cost." 4

ii. Highland relies on parol evidence. 11

B. HIGHLAND BREACHED THE PRAS BY FAILING TO MODIFY ON THE ADVISORS' DEMAND. 14

i. The District Court applied the wrong legal standard to the PRAs. 15

ii. The PRAs' requirement to modify the agreement is enforceable. 16

C. HIGHLAND BREACHED THE SSAS BY REFUSING TO PROVIDE LEGAL SERVICES 20

i. The fact that the Advisors provided legal services to their clients does not mean Highland provided legal services under the SSAs. 21

ii. Highland does not have an excuse from performance under the SSAs. 23

D. THE ADVISORS DID NOT WAIVE THEIR BREACH OF CONTRACT CLAIMS. 26

III. CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Coker v. Coker,
650 S.W.2d 391 (Tex. 1983)....................5

Cmty. Health Sys. Pro. Servs. Corp. v. Hansen,
525 S.W.3d 671 (Tex. 2017)....................12

Dallas/Fort Worth Int'l Airport Bd. v. Vizant Techs., LLC,
576 S.W.3d 362 (Tex. 2019)....................17

Fischer v. CTMI, LLC,
479 S.W.3d 231 (Tex. 2016)....................18

Hernandez v. Gulf Grp. Lloyds,
875 S.W.2d 691 (Tex. 1994)....................21

John Wood Grp. USA, Inc. v. ICO, Inc.,
26 S.W.3d 12 (Tex. App.–Houston [1st Dist.] 2000, pet. denied)....................17–18

In re Fabricators, Inc.,
926 F.2d 1458 (5th Cir. 1991)....................16

In re TransAmerican Nat. Gas Corp.,
978 F.2d 1409 (5th Cir. 1992)....................16

In re United Servs. Automobile Ass'n,
03-19-00292-CV, 2020 WL 7640145, at *2 n.1 (Tex. App.–Austin Dec. 23, 2020, no pet.).27

McCalla v. Baker's Campground Inc.,
416 S.W.3d 416 (Tex. 2013)....................18

Nat'l Union Fire Ins. V. CBI Indus., Inc.,
907 S.W.2d 517 (Tex. 1995)....................13

FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.
426 S.W.3d 59 (Tex. 2014)....................3

Shields Ltd. P'ship v. Bradberry,
526 S.W.3d 471 (Tex. 2017)....................27

Sojitz Energy Venture, Inc. v. Union Oil Co.,
394 F. Supp. 3d 687 (S.D. Tex. 2019)....................23–25

Sundown Energy LP v. HJSA No. 3, Ltd. P'ship,
622 S.W.3d 884 (Tex. 2021)....................2–3

Sun Oil Co. v. Madeley,
626 S.W.2d 726 (Tex. 1981)....................13

Transocean Offshore Deepwater Drilling Inc. v. Noble Corp. Plc,
451 F. Supp. 3d 690 (S.D. Tex. 2020)....................3

URI, Inc. v. Kleberg Cnty.,
543 S.W.3d 755 (Tex. 2018)....................3, 12–13

APPELLANTS' REPLY BRIEF

NexPoint Advisors, L.P. ("NexPoint") and Highland Capital Management Fund Advisors, L.P. ("HCMFA," together with NexPoint, the "Advisors") hereby submit their *Appellants' Reply Brief*, in reply to *Appellee's Brief* (the "Brief in Response"), filed by Highland Capital Management, L.P. (the "Debtor" or "Highland," together with the Advisors, the "Parties"), and in support of their Reply, the Advisors respectfully state as follows:

I. SUMMARY OF REPLY

This appeal comes down to a simple question: would a reasonable, sophisticated commercial entity agree to pay millions of dollars in perpetuity for services it did not receive? The answer is no.

A proper construction of the PRAs, based on the contract as a whole, leads to the conclusion that the PRAs are reimbursement agreements and did not entitle Highland to payment for services it did not provide—exactly as their title states. Even if Highland were entitled to a flat fee, it cannot recover under the PRAs because Highland did not comply with the modification procedures upon proper demand.

As to the SSAs, Highland failed to provide legal services, which resulted in a material breach. Highland cannot use the Bankruptcy Court's admonition as an excuse from performance. The SSAs required Highland to provide legal services,

without exception. Accordingly, Highland also breached the SSAs and cannot recover damages.

Lastly, the Advisors did not waive their claims for breach of the PRAs. The PRAs contain a non-waiver provision that requires any waiver to be signed in writing. The Advisors never delivered a written waiver, and as a result they did not waive their rights to enforce those contracts.

II. REPLY

A. HIGHLAND'S INTERPRETATION OF "ACTUAL COST" DOES NOT PROPERLY CONSIDER ALL RELEVANT CONTRACTUAL PROVISIONS AND REQUIRES RELIANCE ON PAROL EVIDENCE.

Highland argues "Actual Cost" is "a term that was expressly and unambiguously defined as a fixed, flat monthly fee" in the PRAs.[1] Highland asserts the Court cannot escape the meaning of "Actual Cost," and that it controls the PRAs' interpretation.[2] Highland also defends against the Advisors' case law by claiming the cases do not address the effect of a defined term.[3] Lastly, Highland contends the Bankruptcy Court did not rely on parol evidence to interpret the PRAs, but instead only relied on their plain language.[4]

Highland's argument misses the forest for the trees. It is true that "courts 'cannot interpret a contract to ignore *clearly* defined terms.'" *Sundown Energy LP*

---

[1] Appellee Br. 39.
[2] Appellee Br. 39–40.
[3] Appellee Br. 40.
[4] Appellee Br. 41.

v. HJSA No. 3, Ltd. P'ship, 622 S.W.3d 884, 888 (Tex. 2021) (quoting *FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, 426 S.W.3d 59, 64 (Tex. 2014)) (emphasis added). But this assumes the defined term is *clearly* defined. *See id*. The Parties reasonably dispute the meaning of "Actual Cost," so this is not a typical defined-term scenario. *See, e.g.*, *Transocean Offshore Deepwater Drilling Inc. v. Noble Corp. Plc*, 451 F. Supp. 3d 690, 698–99 (S.D. Tex. 2020) ("A term left poorly defined or altogether undefined by a contract can create an ambiguity in that contract.") (collecting cases).

The Parties agree the definition of "Actual Cost" is unambiguous, yet the Parties disagree on the proper interpretation of "Actual Cost." "A contract is not ambiguous merely because the parties disagree about its meaning and may be ambiguous even though the parties agree it is not." *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 763 (Tex. 2018). "Objective manifestations of intent control, not 'what one side or the other alleges they intended to say but did not.'" *Id*. at 763–64. Here, Highland narrows its focus only to part of the second sentence of the "Actual Cost" definition to conclude the definition must mean "a fixed, flat monthly fee."[5] But Highland's interpretation only takes into account part of that definition, which contains much more detail and nuance and spans more contractual provisions than Highland admits. The Advisors, on the other hand, offer a wholistic construction of the defined term "Actual Cost" that takes into account not only every clause within

[5] Appellee Br. 39.

the definition, but also related sections and exhibits, and does not require reliance on improper extrinsic evidence. For that reason, the Advisors' interpretation is the only reasonable interpretation of the PRAs, and the Advisors respectfully request this Court interpret the PRAs as reimbursement agreements as a matter of law.

i. Highland improperly focuses on only half of the definition of "Actual Cost."

Highland argues this Court should reduce the definition of "Actual Cost" to "'Actual Costs' were 'equal to $416,000 per month' and '$252,000 per month' under the PRAs, respectively."[6] Highland's interpretation oversimplifies the PRAs and disregards the first sentence of the definition. Reading the definition as a whole, the only reasonable interpretation is that "Actual Cost" means those costs and expenses actually incurred by employees and not a flat fee for services. The *full* definition of "Actual Cost" is as follows:

> "***Actual Cost***" means, 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 [or $416,000] per month.[7]

Under the PRAs, "Actual Cost" means "the actual costs and expenses caused by . . . each Dual Employee."[8] Section 2.01 defines "Dual Employee" as those who

---

[6] Appellee Br. 39.
[7] ROA.481 and ROA.492.
[8] *Id.*

work for Highland and the Advisors and "provide advice to any investment company."[9] Thus, the plain meaning of the first sentence in the definition of "Actual Cost" is that "Actual Cost" means actual costs and expenses that Highland incurs relating to an employee that provides advice to any investment company on one or both of the Advisors' behalf.

When interpreting a contract, "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 in original). "In harmonizing these provisions, *terms stated earlier in an agreement must be favored over subsequent terms*." *Id*. (emphasis added). For the Court, the challenge no doubt is to harmonize the second sentence of the definition of "Actual Cost" with the plain meaning of the first sentence. But it is important that under Texas law, the second sentence, as the subsequent provision, must work to harmonize itself with the first sentence, and where one provision must bend to bring the entire agreement into harmony, the second sentence must do so. *See id*.

The second sentence begins with the phrase "[a]bsent any changes to employee reimbursement, as set forth in Section 2.02 . . . ."[10] Highland ignores the

[9] ROA.482 and ROA.493.
[10] ROA.481 & ROA.492.

prefatory phrase in its briefing.[11] Section 2.02 is the "Changes to Employee Reimbursement" section, and it provides:

> During the Term, the Parties may agree to modify the terms and conditions of [the Advisors'] ***reimbursement*** in order to reflect new procedures or processes, including modifying the Allocation Percentage (defined below) applicable to such Dual Employee to ***reflect the then current fair market value of such Dual Employee's employment.*** The Parties will negotiate in good faith the terms of such modification.[12]

The "'Allocation Percentage' means the Parties' good faith determination of the percentage of each Dual Employee's aggregate hours worked during a quarter ***that were spent on*** [the Advisors'] ***matters***, as listed on Exhibit A."[13] The connection between these contractual provisions raises a few salient points. First, Section 2.02 focuses on reimbursement and the fair market value of the Dual Employee's services.[14] Nowhere does Section 2.02 suggest the Advisors' reimbursement to Highland should exceed the costs and expenses necessary to provide advice to the Advisors' clients.

Second, the "Allocation Percentage" similarly focuses on time actually spent on the Advisors' matters, and via its connection to Section 2.02, the fair market value of that time spent on the Advisors' matters.[15] Again, nowhere does the "Allocation

---

[11] *See generally* Appellee Br. 38–42.
[12] ROA.482 and ROA.493 (emphasis added).
[13] *Id*. (emphasis added).
[14] *Id*.
[15] *Id*.

Percentage" suggest Highland should receive *reimbursement* for an employee who cannot provide services to the Advisors because Highland terminated that employee. Third, the Parties intended for Exhibit A to represent an initial allocation of time between the Advisors and other companies, but that time was subject to change, especially in the event Highland terminated employment.[16] Obviously, at that point in time the allocation would be zero, so the resulting charge to the Advisors should also have been zero. Fourth, the "Allocation Percentage" is subject to change, and in the event it does change, the clause on which Highland relies is no longer effective because it only impacts the PRAs so long as the "Allocation Percentage" and Employee Reimbursement remain unchanged.[17]

All of these points taken together mean: (i) even in the second sentence the focus of the PRAs remains on reimbursement, (ii) Dual Employees must actually provide services before Highland is entitled to reimbursement, (iii) Exhibit A is a presumptive starting point, so long as the time allocations therein are followed, and (iv) in the event of any changes, such as the termination of an employee listed in Exhibit A, the rest of the second sentence in the definition of "Actual Cost" does not apply.

[16] ROA.487 and ROA.498.
[17] ROA.481–82 and ROA.492–93.

Highland considered none of these issues in its Brief in Response.[18] As a result, Highland argues, in conclusory fashion, that the phrase "such costs and expenses are equal to $252,000 [or $416,000] per month" transformed the "Payroll *Reimbursement* Agreement" into a flat fee agreement without regard to whether Highland provided 1 or 20 employees to the Advisors (although presumably Highland would take a different approach if it were providing 100 employees to the Advisors!).[19] When one properly reads the definition of "Actual Cost" in context, it becomes clear that "such costs and expenses are equal to $252,000 [or $416,000] per month" *only if* there have not been changes to employee reimbursement.[20] Thus, if Highland made changes that impacted the Dual Employees' services, then there should have been a concomitant change to the reimbursement amounts.

Here, it is undisputed that most of the employees listed on Exhibit A no longer worked at Highland, some for months or years, during the effective period of the PRAs. Yet, Highland continued to charge for these employees as if they never left. Highland argues the Advisors would agree to keep paying a flat fee for services they never received due to the fact that Highland terminated the majority of the employees on Exhibit A attached to each PRA. But in light of the correct contractual construction of the definition of "Actual Cost," Highland's argument makes no

[18] *See generally* Appellee Br. 38–42.
[19] Appellee Br. 39; ROA.481 and ROA.492.
[20] ROA.481 and ROA.492.

sense. The only reasonable way to interpret the PRAs is that the Parties agreed to set $252,000 and $416,000 as a presumptive baseline, but as soon as Highland began making changes to the Dual Employees providing advice, there should have also been a change in the Advisors' reimbursement.

It defies logic and common sense that two sophisticated entities would enter into a transaction worth millions of dollars where one would pay the other a set fee every month in perpetuity for services regardless of the existence, quantity, or cost of those services: *both* sides would want protection against being taken advantage of. Yet that is precisely what Highland seeks to do now, to take advantage of the situation—in reality its own inaction and negligence under the SSAs—and pocket millions of dollars for employees and services it simply and admittedly did not provide.

Indeed, Highland's own Controller and subsequent Chief Financial Officer calculated Highland's profit under the contracts, to the tune of between $3 million and $7.6 million per year, and even transmitted this detail to the Advisors, noting how profitable the contracts were for Highland now that they were no longer providing the employees and services that for which the Advisors were paying.[21] No logical or fair reading of the word "reimbursement" means "profit," yet that is what Highland was unabashedly taking, while itself under bankruptcy protection by a

[21] ROA.2543-44; ROA.2611-12 (33:14 – 34:10);

court of equity. It may be that the Advisors could have acted differently, or with greater diligence, but is Highland to be absolved of all responsibility? Is it to be allowed to keep millions in windfalls? If both sides are responsible to a degree, then is it not equity's role to do what should have been done and to avoid unfair forfeiture and unfair windfall? The matter arose below in the context of the Advisors' administrative claim filed under the Bankruptcy Code, which resolves such claims based on equitable principles, applied by a court of equity. This Court will forgive the Advisors for complaining that they received anything but equity below.

ii. Highland relies on parol evidence.

Highland contends the Advisors made a "conclusory assertion" when they argued that the Bankruptcy Court relied on parol evidence in interpreting the PRAs.[22] But a closer analysis of the Bankruptcy Court's Findings of Fact and Conclusions of Law reveals that the Bankruptcy Court did indeed rely on improper parol evidence, and that evidence led the Bankruptcy Court to interpret the PRAs as flat fee agreements. Likewise, the only way Highland's interpretation has any merit is by reference to parol evidence. For that reason, the Court should reject Highland's interpretation of the PRAs.

It is true, the Bankruptcy Court did state that "[w]ithout considering any extrinsic evidence, the court finds the clear and unambiguous language of the

[22]Appellee Br. 41.

definition of 'Actual Cost' in the PRAs indicates that these were intended to be fixed amount contracts . . . ."[23] The Advisors do not doubt the Bankruptcy Court's sincerity, but, respectfully, the damage had already been done: the Bankruptcy Court was not able to meaningfully separate extrinsic evidence from admissible evidence, the same as one cannot "unsee" a horrific traffic accident. The analysis immediately preceding the Bankruptcy Court's conclusion contains pages and pages of nothing but extrinsic evidence.[24] The discussion leads to the inescapable inference that the Bankruptcy Court not only considered the extrinsic evidence in interpreting the PRAs, but also found it persuasive enough to allow the Bankruptcy Court to come to the errant conclusion that the PRAs set up a fixed fee arrangement.

The Bankruptcy Court recognized that, at least initially, "payments to Highland would be based on 'actual costs' ***associated with specific employees.***"[25] This is the correct interpretation. But the Bankruptcy Court then went on to consider email communications between Klos and Thedford, where they discussed the nature of the agreements.[26] Klos expressed that Highland would rather have flat fee agreements, to which Thedford replied that it was important for the PRAs to be reimbursement agreements.[27] In response, Klos suggested the baseline schedule

[23] ROA.338–39.
[24] ROA.335–38.
[25] ROA.336.
[26] *Id.*
[27] *Id.*

which eventually became Exhibit A to both PRAs.[28] Further, the Bankruptcy Court relied on the performance of the PRAs and the fact that neither Party ever amended the PRAs, required the Exhibit to be amended, or asserted that employees had been terminated.[29] The Advisors are not sure what the performance of the PRAs has to do with the interpretation of them as of the date of their execution, but the Bankruptcy Court apparently considered these facts while constructing the definition of "Actual Cost."[30] After discussing the extrinsic evidence, the Bankruptcy Court then concluded the PRAs were flat fee agreements. The Bankruptcy Court's conclusion is far afield from its starting point, and indicates reliance on extrinsic evidence to reach the conclusion that the PRAs are flat fee contracts.[31]

The Bankruptcy Court cannot use extrinsic evidence to make the PRAs say what they do not say. "Surrounding facts and circumstances can inform the meaning of language but cannot be used to augment, alter, or contradict the terms of an unambiguous contract." *URI, Inc.*, 543 S.W.3d at 758. The parol evidence rule "prohibits a party to an integrated written contract from presenting extrinsic evidence 'for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports.'" *Id*. at 764 (quoting *Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 681 (Tex. 2017)). "The parol

[28] *Id.*
[29] ROA.338.
[30] *Id.*
[31] ROA.336.

evidence rule does not, however, prohibit courts from considering extrinsic evidence of the facts and circumstances surrounding the contract's execution as 'an aid in the construction of the contract's language,' but the evidence may only 'give the words of a contract meaning consistent with that to which they are reasonably susceptible, *i.e.*, to 'interpret' contractual terms.'" *Id*. at 765 (quoting *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 731 (Tex. 1981); *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 521 (Tex. 1995)). "This is true even if doing so reveals a latent ambiguity in a contract's terms." *Id*. The impact of the Texas Supreme Court's decision in *URI* is that courts cannot use extrinsic evidence to create an ambiguity, but may use it to support the proper interpretation of an unambiguous contract. Essentially, the parol evidence rule allows the court to bolster its interpretation, but it is not allowed to consider extrinsic evidence which conflicts with the plain language of the contract.

Here, the Bankruptcy Court considered extrinsic evidence which directly conflicted with the plain language of the PRAs. As set forth above, the definition of "Actual Cost" creates a reimbursement scheme based on costs incurred for work actually performed. The Bankruptcy Court should have disregarded any extrinsic evidence that conflicted with this scheme. The Advisors request that this Court reverse the Bankruptcy Court's interpretation and conclude the PRAs are reimbursement agreements based on actual costs and expenses.

B. HIGHLAND BREACHED THE PRAS BY FAILING TO MODIFY ON THE ADVISORS' DEMAND.

The Bankruptcy Court erred when it awarded Highland damages for the Advisors' purported breach of the PRAs. The Bankruptcy Court found the Advisors withheld payment under the PRAs for December 2020 and 2021 and awarded Highland $1,336,000 in damages.[32] The Bankruptcy Court erred in awarding these damages because Highland breached the PRAs by failing to modify the payment terms upon proper demand which entitled the Advisors to cease performance without incurring liability.

The District Court concluded that "the December 11, 2020, letter triggered [Highland's] obligation to negotiate the terms of the PRAs."[33] Under the PRAs, the Advisors did not incur their obligation to pay until "ten (10) days of the end of each calendar month."[34] Accordingly, the Advisors timely triggered Highland's obligation to modify the actual costs and expenses basis under the PRAs prior to incurring payment for December 2020 and January 2021, and Highland's failure to modify the PRAs resulted in a material breach and forfeiture of these amounts.

Even though the District Court concluded the Advisors timely triggered Highland's obligation to modify the PRAs, it went on to conclude "[the Advisors] did not prove that [Highland] breached its obligation because there is no evidence

[32] ROA.380.
[33] ROA.4353.
[34] ROA.482 and ROA.493.

that [Highland] *acted in bad faith by not responding to the letter* prior to termination of the PRAs in January 2021."[35] Highland seizes on this language to argue it did not breach its obligations under the PRAs and is entitled to payment for December 2020 and January 2021.[36] Further, Highland argues that even if it did breach its obligations, it is excused because agreements to negotiate are unenforceable, and the requirement to negotiate in good faith does not commit the Parties to reach an agreement.[37] Highland's arguments fail because (1) the District Court applied a bad faith standard as opposed to the good faith standard required by the PRAs, and (2) the PRAs contain all essential terms for the modification of an existing contract making those provisions enforceable, but Highland did not merely fail to negotiate in good faith, it failed to negotiate at all.

i. <u>The District Court applied the wrong legal standard to the PRAs.</u>

The Bankruptcy Court found the Advisors never triggered Highland's obligation to modify the PRAs under section 4.02.[38] The District Court reversed this finding by concluding the Advisors did in fact trigger Highland's obligation to modify the PRAs by sending Highland the December 11, 2020 letter.[39] But the District Court then applied a "bad faith" standard to Highland's subsequent failure

[35] ROA.4353 (emphasis added).
[36] Appellee Br. 44.
[37] Appellee Br. 44.
[38] ROA.366.
[39] ROA.4353.

to modify the PRAs.[40] "Bad faith" is the wrong legal standard under the PRAs.[41] The PRAs required the Parties to negotiate new payment allocations in *good faith*.[42] Here, the record is clear that Highland flatly refused to negotiate at all; it *a priori* breached this requirement. "[W]hen a finding of fact is premised on an improper legal standard, that finding loses the insulation of the clearly erroneous rule." *In re TransAmerican Natural Gas Corp.*, 978 F.2d 1409, 1415 (5th Cir. 1992) (citing *In re Fabricators, Inc.*, 926 F.2d 1458, 1464 (5th Cir. 1991)). Accordingly, this Court may engage in a *de novo* review to determine whether Highland breached its obligation to modify the PRAs.

ii. <u>The PRAs' requirement to modify the agreement is enforceable.</u>

Highland argues that even if the Advisors triggered its duty to modify the PRAs, the duty to modify is unenforceable as an agreement to negotiate a future contract.[43] Consider first the hypocrisy and absurdity of this argument. On the one hand, Highland argues the Advisors' remedy to avoid paying millions of dollars for employees who did not exist was to trigger the requirement to negotiate new payment allocations in good faith. On the other hand, Highland now argues there was no such requirement at all and any attempt to reset the reimbursement amounts would have been an unenforceable agreement to agree. However, the cases that

[40] ROA.4353.
[41] ROA.482 and ROA.493.
[42] *Id*. ("The Parties will negotiate in good faith the terms of such modification").
[43] Appellee Br. 44.

Highland uses to support its position either do not apply to the PRAs or show that the modification procedures in the PRAs are enforceable.

In *Dallas/Fort Worth International Airport Board v. Vizant Technologies, LLC* the Texas Supreme Court stated generally that "agreements to negotiate toward a future contract are not legally enforceable." 576 S.W.3d 362, 371 (Tex. 2019). But that decision hinged on the interpretation of Chapter 151 of the Government Code, and the Texas Supreme Court ultimately concluded the agreement "does not waive the Board's immunity." *Id*. Even though the Texas Supreme Court discussed whether the contract stated "essential terms of a legally enforceable agreement requiring the Board to make a good-faith effort to authorize a higher payment" the decision is ultimately about the Board's governmental immunity. *Id*. This decision is also inapplicable to the PRAs because the Texas Supreme Court based its decision on the lack of "essential terms." As set out more fully below, the PRAs did contain all "essential terms" at execution to determine how the Parties were required to modify the payment terms of the PRAs. Therefore, this case does not apply and did not bar the Advisors from seeking modification of payments under the PRAs.

Similarly, the case *John Wood Group USA, Inc. v. ICO, Inc.* does not apply to the PRAs because that decision also rested on the fact that "the terms of the 'good faith' clause in this case are too vague to be enforceable as a contractual obligation." 26 S.W.3d 12, 21 (Tex. App.–Houston [1st Dist.] 2000, pet. denied). The provision

required the parties to do "all acts and things as the other party . . . may reasonably require." *Id*. at 22. As the Houston Court of Appeals pointed out, there were no provisions governing what sort of acts or things the clause required, so the clause was too indefinite to support enforcement. *Id*. As with *Vizant*, *John Wood* does not apply because the PRAs are sufficiently definite since they include a calculation of costs once modification procedures are triggered. Thus, *John Wood* also does not bar the Advisors from enforcing Highland's obligation to modify the PRAs.

Fischer v. CTMI, LLC supports the Advisors' position. In that case, the Supreme Court of Texas analyzed a "pending-projects clause" which "contained a specific method or standard to determine the amount of the pending-projects payments . . . ." 479 S.W.3d 231, 243 (Tex. 2016). Language in the agreement providing that the completion percentages "will have to be mutually agreed upon" did not render the agreement unenforceable because the agreement contained "all material terms of the future contract." *Id*. at 244 (citing *McCalla v. Baker's Campground Inc.*, 416 S.W.3d 416, 417 (Tex. 2013). An agreement which "contains all the terms necessary for a court to enforce it" is not unenforceable simply because the calculation must happen at some point in the future. *See id*. The issue becomes whether the "clause is sufficiently definite to be enforceable even though the parties agreed to agree . . . ." *Id*. Here, as in *Fischer*, the Parties agreed to "negotiate in good faith the terms of such modification" but the terms of that modification are set

out in section 3.01 in the Actual Cost Allocation Formula.[44] Under the PRAs, the "Actual Cost of any Dual Employee . . . shall be allocated based on the Allocation Percentage" which means "the percentage of each Dual Employee's aggregate hours worked during a quarter that were spent on [the Advisors'] matters."[45] The PRAs set out a definite method for determining the amount that the Advisors were required to pay Highland as a result of advice provided under the agreements.[46] Essentially, the PRAs gave the Advisors the right to request an audit to adjust payment based on hours the Dual Employees actually worked for any given quarter. Accordingly, the terms of the modification were definite at the time the Parties executed the PRAs, and Highland was required to comply in good faith with these provisions to ensure the Advisors were only charged for work actually performed by Dual employees.

The modification procedures under the PRAs are enforceable because they are definite and clear. Accordingly, once the Advisors provided adequate notice, the PRAs required Highland to render the "aggregate hours worked during a quarter" for each Dual Employee.[47] Highland failed to do so. But even if there is an issue with respect to the enforceability of the modification provisions, the fact remains that, once the Advisors raised the issue, the preset reimbursement amounts in the PRAs no longer applied, according to the Bankruptcy Court's and Highland's own

[44] ROA.482 and ROA.493.
[45] *Id.*
[46] *Id.*
[47] *Id.*

logic. At that point in time, with Highland as the plaintiff seeking reimbursement for the limited employees it did provide during those few months, it had the burden of demonstrating its damages with actual proof and evidence. This it is utterly failed to do, instead relying entirely on the preset amounts. Thus, any award to Highland for breach of contract should be reversed, and judgment for the Advisors rendered, to the effect that Highland's claim is denied because it failed to evidence an element of its cause of action.

C. HIGHLAND BREACHED THE SSAS BY REFUSING TO PROVIDE LEGAL SERVICES.

Both the SSAs required Highland to provide legal services to the Advisors.[48] The Bankruptcy Court awarded Highland $1,260,000 against the Advisors for Highland's breach of contract claim under the SSAs.[49] Highland asks this Court to uphold the Bankruptcy Court's judgment because Highland did not have a contractual obligation to provide services adverse to Highland's interests and because the evidence proved the Advisors did in fact receive the services they bargained for.[50] The Advisors respectfully request that this Court find the

---

[48] ROA.441 (requiring Highland to provide "[a]ssistance and advice with respect to legal issues, litigation support, management of outside counsel, compliance support and implementation of general risk analysis.") ROA.426 (requiring Highland to provide "Shared Services, including without limitation, all of the . . . legal services . . . as requested by [the Advisor] and as described more fully on **Annex A** . . . .") ROA.435 (**Annex A** . . . Legal Corporate secretarial services, Document review and preparation, Litigation support, Management of outside counsel").
[49] ROA.380.
[50] Appellee Br. 49.

Bankruptcy Court's conclusion regarding Highland's performance under the SSAs was clearly erroneous because the SSAs required Highland to provide legal services, without limitation, and because the Bankruptcy Court improperly inferred that Highland performed under the SSAs from the fact that the Advisors did not breach their contractual duties to their own clients.

i. <u>The fact that the Advisors provided legal services to their clients does not mean Highland provided legal services under the SSAs.</u>

"A fundamental principle of contract law is that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from any obligation to perform." *Hernandez v. Gulf Grp. Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994). Highland says the record supports its argument that it did not materially breach the SSAs by failing to provide legal services.[51] But that assertion relies solely on the fact that the Advisors did not allow Highland's bankruptcy to affect the Advisors' services to its clients.

The evidence at trial showed not only that the Advisors continued to serve their clients without interruption, but also that Highland failed to provide legal services to the Advisors causing the Advisors to incur damages as a result of Highland's breach. Evidence of Highland's breach included:

[51] *Id.*

(1) The Bankruptcy Court's admonishment to Highland that it should cease providing legal services to the Advisors.[52]

(2) The fact that Highland instructed its employees that any provision of legal services in conflict with the bankruptcy case would result in termination for cause.[53]

(3) The fact that the Advisors stopped receiving legal services from Highland.[54]

(4) The fact that the Advisors then had to procure legal services on its own to continue providing services to their clients.[55]

(5) The fact that after the Advisors obtained legal services elsewhere, Highland continued to take the position that it could not provide legal services.[56]

(6) The fact that Highland remained uncooperative with basic requests for information in fear that Highland would incur liability by performing under the SSAs.[57]

The Bankruptcy Court effectively ordered Highland to cease performing legal services under the SSAs,[58] and Highland complied with that order.[59]

Despite the overwhelming evidence that Highland ceased providing legal services to the Advisors, the Bankruptcy Court found that Highland did not breach the SSAs because *the Advisors* were able to keep providing services to *their* clients.[60]

[52] ROA.3906–07 (54:5–55:14).
[53] ROA.3907–08 (55:23–56:20).
[54] ROA.2858 (115:8–14).
[55] ROA.2916 (173:13–14).
[56] ROA.2880 (137:7–22).
[57] ROA.3156 (140:9–25).
[58] ROA.3906–07 (54:5–55:14).
[59] ROA.3907–08 (55:23–56:20).
[60] ROA.373.

But this is *non sequitur*. During Highland's bankruptcy case, the Advisors reassured their clients and management that business would continue as usual due, in part, to the Advisors hiring their own chief risk officer, their own general counsel, and their own outside counsel, all to replace the legal services that Highland was no longer providing.[61] The evidence further showed and the Bankruptcy Court found that there was little to no interruption in the services the Advisors provided to their clients.[62] From that evidence, the Bankruptcy Court then went on to find that the fact that the Advisors could continue providing services to their clients must mean that Highland kept performing under the SSAs.[63] The Bankruptcy Court's conclusion is clearly erroneous because the evidence showed that the Advisors kept serving their clients *despite* the fact that Highland refused to provide legal services as it was required to do. Accordingly, Highland breached the SSAs and cannot assert a claim for damages under the SSAs.

ii. <u>**Highland does not have an excuse from performance under the SSAs.**</u>

Highland argues it was excused from providing legal services under the SSAs because it did not have a contractual obligation to provide services "adverse" to its own interests.[64] Highland cites to *Sojitz Energy Venture, Inc. v. Union Oil Co.*, 394

---

[61] ROA.345–48.
[62] ROA.353.
[63] ROA.353–54.
[64] Appellee Br. 49.

F. Supp. 3d 687, 701 (S.D. Tex. 2019) to argue the SSAs did not require it to provide legal services adverse to its own interests. In *Sojitz*, Union assigned oil and gas operating rights to ATP which in turn assigned part of those rights to Sojitz. *Id*. at 694–95. Some years later, Sojitz assigned the operating rights back to ATP in an agreement that released Sojitz from liability for plugging and abandonment. *Id*. at 695. ATP eventually filed for bankruptcy and notified the Bureau of Safety and Environmental Enforcement ("BSEE") that it would no longer perform maintenance or decommissioning services. *Id*. BSEE then contacted Sojitz and Union ordering them to decommission the wells that ATP failed to decommission. *Id*. Sojitz performed the decommissioning. *Id*. at 695–96. At the summary judgment stage, the court found that both Sojitz and Union incurred obligations to decommission the wells. *Id*. at 698–99. The critical issue was whether Sojitz, in its agreement with ATP, had agreed to assume all liability for decommissioning the wells such that Union did not have an obligation to pay its share of the costs. *Id*. at 699–700. The agreement between Union and ATP required ATP's assigns to assume all obligations to Union, and Union argued this language meant Sojitz had assumed all decommissioning costs when it obtained a 20% interest in the wells. *Id*. at 701. Sojitz argued it was only required to assume a proportionate share of liabilities under the assignment from ATP. *Id*. In construing the contract language the district court found the "contract did not go so far as Union contended." *Id*. "Union's

interpretation requires more explicit language for an assignee who acquired part of the operating rights to assume 100% of all liabilities, including for decommissioning." *Id*. In refusing to stretch the contract language the district court stated, "we will not construe contracts to produce an absurd result when a reasonable alternative construction exists." *Id*. Accordingly, the district court refused to find Sojitz was responsible for 100% of the decommissioning fees, but it did so *because the contract was not clear*. *See id.*

Sojitz is distinguishable from this case because the SSAs are clear that Highland must provide legal services to the Advisors. Further, the SSAs even provide examples of the type of legal services Highland must provide such as litigation support and managerial services.[65] Highland's obligations under the SSAs came as no surprise to Highland and in fact Highland performed these obligations up until its bankruptcy case. Further, *Sojitz* does not stand for the proposition that a party is excused from a contractual obligation where its interests become adverse to its counterparty. If this were the case corporate entities would be able to dodge bad deals regularly. Instead, *Sojitz* stands for the proposition that a court will not impose severe or absurd results where another reasonable alternative exists. That is not the case here because the SSAs are clear that Highland must provide legal services to the Advisors and there are no caveats on that obligation. Accordingly, Highland's

[65] ROA.435 & ROA.441.

argument that it was excused from performing under the SSAs has no merit, and this Court should reverse the decision below and hold Highland accountable for its breach under the SSAs.

D. THE ADVISORS DID NOT WAIVE THEIR BREACH OF CONTRACT CLAIMS.

Highland contends the Advisors waived their ability to assert breach of contract claims because the Advisors made payments under the PRAs.[66] But this is disingenuous. Highland conveniently left out the fact that under the SSAs Highland provided the Advisors with finance, accounting, book keeping, accounts payable, and accounts receivable services.[67] Highland had access to and control over the Advisors' bank accounts, and Highland used this access and control to pay itself under the PRAs and SSAs. Accordingly, Highland cannot claim the Advisors waived their rights by paying under the PRAs and SSAs because Highland was the entity controlling those payments.

Further, Highland's and the Advisors' arguments on the PRAs' non-waiver provisions are like ships passing in the night, but ultimately the Advisors' ship prevails. Highland cites to the non-waiver provision in section 6.12 of the PRAs which states 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 . . . ."[68] The

---

[66] Appellee Br. 53.
[67] ROA.435 & ROA.441
[68] Appellee Br. 52; ROA.485 and ROA.496

Advisors dispute that this provision leaves much to be desired, which is why the Advisors rely on the non-waiver provision in section 6.02

> 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.[69]

Where a contract's non-waiver provision requires a signed writing to effect a waiver, that provision will prevent the parties from waiving their rights under the agreement unless that waiver is signed in writing. *See Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 481 (Tex. 2017); *see also In re United Servs. Automobile Ass'n*, 03-19-00292-CV, 2020 WL 7640145, at *2 n.1 (Tex. App.–Austin Dec. 23, 2020, no pet.). The Advisors never waived their rights to assert claims against Highland in a signed writing, so the Bankruptcy Court clearly erred in finding waiver.

III. CONCLUSION

For these reasons, the Advisors respectfully request that the Bankruptcy Court interpret the PRAs as reimbursement agreements, render a judgment that Highland take nothing, and remand this case to the Bankruptcy Court for further proceedings consistent with this Court's decision.

[69] ROA.483 and ROA.494.

RESPECTFULLY SUBMITTED this 6th day of September, 2024.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina
Davor Rukavina, Esq.
Texas Bar No. 24030781
500 N. Akard St., Ste. 4000
Dallas, Texas 75201-6659
Telephone: (214) 855-7500
Facsimile: (214) 855-7584
Email: drukavina@munsch.com

ATTORNEYS FOR NEXPOINT ADVISORS, L.P. AND HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 6, 2024, a true and a correct copy of the foregoing document was served on the counsel of record listed below via electronic service.

- Mr. Zachery Z. Annable: zannable@haywardfirm.com
- Mr. Gregory Vincent Demo: gdemo@pszjlaw.com, lcanty@pszjlaw.com
- Ms. Melissa Sue Hayward: mhayward@haywardfirm.com
- Mr. John A. Morris: jmorris@pszjlaw.com, lcanty@pszjlaw.com
- Mr. Jeffrey N. Pomerantz: jpomerantz@pszjlaw.com
- Mr. Davor Rukavina: drukavina@munsch.com
- Mr. Julian Preston Vasek: jvasek@munsch.com, hvalentine@munsch.com, courtmail@munsch.com
- Ms. Hayley R. Winograd: hwinograd@pszjlaw.com, lcanty@pszjlaw.com

By: /s/ Davor Rukavina
Davor Rukavina, Esq.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)'s TYPE-VOLUME LIMITATION, TYPEFACE LIMITATION, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,282 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman, 14 pt. font.

Dated: September 6, 2024.

By: /s/ Davor Rukavina

Davor Rukavina, Esq.

.