



## I. INTRODUCTION

Defendants James Dondero, NexPoint Asset Management, L.P. (f/k/a Highland Capital Management Fund Advisors, L.P.) (“NAM”), NexPoint Advisors, L.P. (“NPA”), NexPoint Real Estate Partners, LLC (f/k/a HCRE Partners, LLC) (“HCRE”), and Highland Capital Management Services, Inc. (“HCMS”) (collectively the “Judgment Debtors”) submit this amended response in partial opposition to Highland Capital Management, L.P.’s (“Highland”) Motion for an Order of Withdrawal Pursuant to 28 U.S.C. § 2042 with Respect to the Judgments Entered against Defendants (“Motion”) [Dkt 223]. In its Motion, Highland asks the Court for an order directing the Clerk of the United States District Court for the Northern District of Texas (“Clerk”) to release all cash deposited into the Treasury Registry (“Registry”) pursuant to the Court’s Order Granting Agreed Emergency Motion for an Order Approving Stipulation for the Bonding of Judgments and Stays of Executions Pending Appeals (“Bonding Order”) [Dkt. 149], plus all accrued interest, in *partial* satisfaction of the final judgments (hereinafter, the “Final Judgments”) entered against Defendants. Motion at 1-2.

The Judgment Debtors previously responded to the Motion on November 26, 2024. Because Judgment Debtors provided a spreadsheet showing the totals owed, Highland was able to discern, correctly, that there were errors in the spreadsheet. In fact, the formula in several cells was corrupted, causing inaccuracy. When Highland pointed out that the spreadsheet could not be correct, Judgment Debtors did a more detailed analysis, which consistent with the analyses it used for the last year to provide top-up interest, used the Binding Bonding Agreement and the timing of the deposits into the registry of the Court. Using that more detailed analysis that also did not have spreadsheet cell corruption, the excess in the registry of the Court was less than asserted in the November 26, 2024 Response.

As demonstrated below and by the evidence submitted by Highland, however, there is still more than enough money in the Registry to satisfy the Final Judgments. Thus, the Court's order should release only enough to satisfy the Judgments and not recite that the release is "in partial satisfaction."

## **II. RESPONSE**

1. On January 22, 2021, Highland commenced five adversary proceedings against each Defendant respectively in the United States Bankruptcy Court for the Northern District of Texas. On November 9, 2021, Highland commenced a sixth adversary proceeding against NAM. The six adversary proceedings are collectively called the "Note Actions." Each of the Note Actions were brought to collect amounts under promissory notes executed by Highland.

2. On July 6, 2023, the Court entered Orders Adopting Report and Recommendation and Final Judgment, pursuant to which the Court accepted the bankruptcy court's recommendation that summary judgment be entered against Defendants in the Notes Actions.

3. On August 3, 2023, the Court entered the Bonding Order and the Final Judgments against Defendants [Dkts. 142-149]. Subsequently, pursuant to the Bonding Order, Defendants deposited cash into the Registry in the total amount of \$68,902,707.24. Motion at ¶ 10. Defendants also made additional deposits into the Registry in the amount of \$73,709.12 to comply with top-up interest requirements, making up the difference between the interest earned on the deposits in the Registry and the judgment rate applicable to the Final Judgments as of the date of each of the deposits. Motion at ¶ 11. As of October 31, 2024, \$4,457,434.44 in interest has accrued on the cash deposited in the Registry.

4. Defendants appealed the Final Judgments, and the Fifth Circuit issued an opinion affirming the Final Judgments. On November 5, 2024, the mandate was issued with respect to the appeal. Motion at ¶ 19.

5. Also on November 5, 2024, Highland filed its Motion, asking the Court to direct the Clerk to pay to Highland all the funds in the Registry “in partial satisfaction of the Final Judgments, with such Total Cash Security being credited against the respective Final Judgments....” Motion at ¶ 20.

6. Highland’s Motion provides no calculations as to how much it believes is owed and fails to explain how the funds in the Registry are insufficient. Highland submitted a Declaration of David Klos (“Klos Declaration”) in support of the Motion, which supposedly provided “the reasons ... that the Total Cash Security [] is insufficient to fully satisfy the Final Judgments, plus interest.” Motion at ¶ 2. The Klos Declaration, however, does no such thing.

7. The only explanation in the Klos Declaration with respect to how the amounts in the Registry are not sufficient to satisfy the Final Judgments is the following conclusory paragraph:

Highland disputes that Defendants paid the proper amount of Top Up Interest for several reasons. For example, (a) Top Up Interest should have been determined based on postjudgment interest accruing from July 31, 2023 (the date of the Final Judgments) rather than from the date Defendants chose to post the Cash Security (which are the dates Defendants improperly used to calculate Top Up Interest), and (b) Defendants have not paid any Top Up Interest since February 2, 2024 [Docket No. 187].

Klos Declaration at ¶ 15.

8. The flaws in Highland and Mr. Klos’s calculations derive from Highland’s claim that it is entitled to (1) benefit from Judgment Debtors posting cash earlier than required under the Binding Bonding Agreement, (2) interest starting on July 31, 2023, (3) more than annual compounding interest, and (4) cumulative interest above 5.35%. Specifically, Highland claims that it is entitled to interest on all amounts in the Registry, including interest on funds paid earlier than required by the Bonding Schedule in the Binding Bonding Agreement, the top-up payments made by Defendants, compounding interest, and any interest earned above 5.35% annually. *See* Klos

Declaration at ¶¶ 14-15. In other words, although Defendants do not have access to Highland's calculations (which were not provided), it is clear that Highland is not calculating interest in accordance with the specific terms of the Final Judgments and the Binding Bonding Agreement and Order. Highland incorrectly calculated how much it is owed, not from the bond amounts and on the starting dates set forth in the Bonding Schedule, but instead from the bond amounts plus the additional top-up payments made by Defendants in accordance with the Court's Bonding Order and without consideration of cumulative interest over "5.35% compounded annually."

9. As the calculations in **Exhibit 1**—which correctly calculates interest from the terms set forth in the Binding Bonding Agreement concerning the Final Judgments, as approved and entered by the Court—demonstrate:

- a. The total interest that has been paid into the Registry by Defendants and the investment vehicles utilized by the Court is \$4,531,143.57 as of October 31, 2024, and the total amount of interest owed to Highland as of that date is \$4,373,126.31, leaving a surplus in the Registry of \$158,017.26.<sup>1</sup>
- b. The cumulative average interest rate earned within the Court Registry on both the principal bond amounts and the top-up interest payments made by Defendants was approximately 5.44% as of October 31, 2024. Per the Final Judgments and the Binding Bonding Agreement, Highland is not entitled to interest above 5.35% compounded annually. Top-up interest payments were required to provide security in the event interest earned in the registry of the court was lower than 5.35% annually. Because top up payments were calculated monthly, in some months, payments were required. But in many months, the

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<sup>1</sup> If interest were calculated using the dates of deposit of principal amounts, instead of the dates the Binding Bonding Agreement allowed for, ironically, the surplus would only be \$95,317.98, penalizing the early deposits. Only if the Binding Bonding agreement were completely ignored would there be a small deficit in the registry of the Court.

money earned on the deposited funds exceeded the post-judgment interest rate of 5.35%, either because the rate was higher or because interest was accruing on amounts higher than the Final Judgment amounts because of the presence of earned interest and top-up interest payments in the registry of the court and bond payments made earlier than required by the Bonding Schedule set forth in the Binding Bonding Agreement.

10. The per diem amounts Highland provides in its motion for interest to accrue after October 31, 2024 are also inflated. Because of the above factors. Again, while Defendants do not have access to the calculations made by Highland to compute the per diem amounts in ¶ 20 of the Motion, it is clear that Highland's calculations include compounding interest, including on funds that do not belong to Highland, which would unjustly enrich Highland with funds that belong to Defendants. *See Exhibit 2.*<sup>2</sup>

11. Accordingly, Highland has failed to properly calculate the interest and failed to demonstrate why the amounts in the Registry are not sufficient to satisfy the Final Judgments. The Court should not release more than the amount it determines is properly owed given the August 3, 2023 Judgments, the Binding Bonding Agreement and the order approving same, and the deposits into the registry of the Court.

### III. CONCLUSION

WHEREFORE, Defendants respectfully request that the Court only grant that part of the motion as is warranted and grant Defendants any further relief as the Court deems just and proper.

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<sup>2</sup> The correct per diem amounts for each Judgment are set forth in Exhibit 2 and the total amounts by Judgment Debtor are in the second chart in Exhibit 1.

Respectfully submitted,

**STINSON LLP**

*/s/ Deborah Deitsch-Perez*

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on November 29, 2024, a true and correct copy of this document was served electronically via the Court's CM/ECF system to the parties registered or otherwise entitled to receive electronic notices in this case.

*/s/ Deborah Deitsch-Perez*

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Deborah Deitsch-Perez

**Exhibit 1**  
**Interest Calculations**



Binding Bonding Agreement Deposit Deadline	Bond Amount to be Deposited on that Date	Per diem ((bond amount *5.35%)/365)	Start Date	Through	Number of Days	Correct Interest Total (per diem * number of days)	Bond Amount plus Correct Interest Total
8/11/2023	\$ 30,000,000.00	\$4,397.26	8/11/2023	10/31/2024	448	\$ 1,969,972.60	\$ 31,969,972.60
8/18/2023	\$ 10,000,000.00	\$1,465.75	8/18/2023	10/31/2024	441	\$ 646,397.26	\$ 10,646,397.26
8/25/2023	\$ 10,000,000.00	\$1,465.75	8/25/2023	10/31/2024	434	\$ 636,136.99	\$ 10,636,136.99
9/8/2023	\$ 10,000,000.00	\$1,465.75	9/8/2023	10/31/2024	420	\$ 615,616.44	\$ 10,615,616.44
10/11/2023	\$ 8,902,707.24	\$1,304.92	10/11/2023	10/31/2024	387	\$ 505,003.02	\$ 9,407,710.26
	\$ 68,902,707.24	\$10,099.44				\$ 4,373,126.31	\$ 73,275,833.55
						Amount in Registry Minus Bond Amounts	\$ 4,531,143.57
						Difference	\$ (158,017.26)

Party	Principal Bond Amount	% of Bond Amount total	Correct Interest Total by Party
Dondero	\$10,152,391.87	15%	\$644,353.38
NREP (HCRE)	\$13,251,661.00	19%	\$841,058.21
NPAM (HCMFA)	\$12,070,217.02	18%	\$766,074.16
NPA	\$25,849,816.94	38%	\$1,640,639.66
HCMS	\$7,578,620.41	11%	\$481,000.90
	\$68,902,707.24	100%	\$4,373,126.31

**Exhibit 2**  
**Per Diem Chart**

Party and Source	Judgment Amount	Per diem (Judgment Amount*5.35%)/365	Subtotal Per Diem by Party (correct per diem)	Highland's Per Diem (Motion ¶ 20)
NPAM (HCMFA) [Dkt. 143 ¶ 1]	\$2,617,415.34	\$383.65		
NPAM (HCMFA) [Dkt. 143 ¶ 2]	\$5,452,960.55	\$799.27		
NPAM (HCMFA) [Dkt. 143 ¶ 3]	\$ 371,148.76	\$54.40		
NPAM (HCMFA) [Dkt. 144 ¶ 1]	\$2,206,160.24	\$323.37		
NPAM (HCMFA) [Dkt. 144 ¶ 2]	\$1,034,106.08	\$151.57	<b>NPAM (HCMFA)</b>	
NPAM (HCMFA) [Dkt. 144 ¶ 3]	\$388,426.05	\$56.93	\$1,769.20	\$1,864.11
NPA [Dkt 145 ¶ 1]	\$24,746,838.07	\$3,627.28	<b>NPA</b>	
NPA [Dkt 145 ¶ 2]	\$1,102,978.87	\$161.67	\$3,788.95	\$3,992.21
NREP (HCRE) [Dkt 146 ¶ 1]	\$210,395.08	\$30.84		
NREP (HCRE) [Dkt 146 ¶ 2]	\$3,822,585.00	\$560.30		
NREP (HCRE) [Dkt 146 ¶ 3]	\$1,061,829.42	\$155.64		
NREP (HCRE) [Dkt 146 ¶ 4]	\$932,827.77	\$136.73		
NREP (HCRE) [Dkt 146 ¶ 5]	\$6,667,744.06	\$977.33	<b>NREP (HCRE)</b>	
NREP (HCRE) [Dkt 146 ¶ 6]	\$556,279.67	\$81.54	\$1,942.37	\$2,046.57
HCMS [Dkt 147 ¶ 1]	\$171,155.61	\$25.09		
HCMS [Dkt 147 ¶ 2]	\$229,906.25	\$33.70		
HCMS [Dkt 147 ¶ 3]	\$436,232.03	\$63.94		
HCMS [Dkt 147 ¶ 4]	\$163,470.17	\$23.96		
HCMS [Dkt 147 ¶ 5]	\$6,245,606.57	\$915.45	<b>HCMS</b>	
HCMS [Dkt 147 ¶ 6]	\$332,249.78	\$48.70	\$1,110.84	\$1,170.43
Dondero [Dkt 148 ¶ 1]	\$3,981,474.95	\$583.59		
Dondero [Dkt 148 ¶ 1]	\$2,863,095.74	\$419.66		
Dondero [Dkt 148 ¶ 1]	\$2,863,123.24	\$419.66	<b>Dondero</b>	
Dondero [Dkt 148 ¶ 1]	\$444,697.94	\$65.18	\$1,488.09	\$1,567.92