Date Filed: 2/13/2025

No. _____

In the Supreme Court of the United States

NEXPOINT ASSET MANAGEMENT, L.P., FORMERLY KNOWN AS HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; NEXPOINT ADVISORS, L.P.; NEXPOINT REAL ESTATE PARTNERS, L.L.C., FORMERLY KNOWN AS HCRE PARTNERS L.L.C.; HIGHLAND CAPITAL MANAGEMENT SERVICES, INCORPORATED; JAMES DONDERO,
Petitioners,
v.
HIGHLAND CAPITAL MANAGEMENT, L.P.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

DEBORAH DEITSCH-PEREZ
MICHAEL AIGEN
STINSON LLP
2200 Ross Avenue
Suite 2900
Dallas, TX 75201
(214) 560-2201

ERIK S. JAFFE
Counsel of Record
Gene C. Schaerr
JOSHUA J. PRINCE
JUSTIN A. MILLER
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com

Counsel for Petitioners

19340542502200000000000012

QUESTION PRESENTED

On a motion for summary judgment—when deciding whether there is a "genuine dispute as to any material fact" that must be allowed to go to a jury, Fed. R. Civ. P. 56—courts must draw *all* inferences in favor of the non-moving party. *Scott* v. *Harris*, 550 U.S. 372, 378, 380 (2007). Furthermore, in deciding whether there is a triable factual question, the "evidence of the non-movant is to be believed," and courts are to leave credibility determinations and any weighing of evidence to the jury. *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). As the en banc Eleventh Circuit has explained, that general rule applies even to a non-moving party's self-serving testimony, for "a litigant's self-serving statements based on personal knowledge or observation can defeat summary judgment" under Rule 56's plain terms. *United States* v. *Stein*, 881 F.3d 853, 857 (11th Cir. 2018) (en banc). But diverging from multiple other circuits, the Fifth Circuit allowed the trial courts to scour a category of "self-serving" affidavits for reasons not to give that testimony to a jury and to draw inferences *against* the non-moving Petitioners rather than in their favor.

The question presented is:

Whether, contrary to the decisions of multiple other circuits that properly preserve the province of the jury to decide genuinely disputed issues of material fact, the Fifth Circuit erred in permitting trial courts to draw inferences and make credibility determinations against a party offering self-interested testimonial evidence in opposition to a motion for summary judgment?

PARTIES TO THE PROCEEDING

The case caption contains the names of all parties to the proceeding.

Petitioners were the Appellants in the Fifth Circuit and the Defendants in the district court.

Respondent Highland Capital Management, L.P., was the Appellee in the Fifth Circuit, the Plaintiff in the district court, and the Debtor in the underlying bankruptcy proceedings.

CORPORATE DISCLOSURE STATEMENT

James Dondero is an individual and accordingly, no disclosure is required.

NexPoint Asset Management, L.P.; NexPoint Advisors, L.P.; NexPoint Real Estate Partners, L.L.C.; and Highland Capital Management Services, Inc. state that they have no parent corporation and no publicly held company owns 10% or more of their stock. The Dugaboy Investment Trust is the majority owner of these entities.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are directly related to this case:

- *In re Highland Capital Management, L.P.*, Nos. 23-10911, 23-10921 (5th Cir.) (opinion entered Sept. 16, 2024; order denying en banc review Oct. 16, 2024);
- *In re Highland Capital Management, L.P.*, Nos. 3:21-cv-00881-X, 3:21-cv-00880-X, 3:21-cv-01010-X, 3:21-cv-01360-X, 3:21-cv-01362-X, 3:21-cv-01378-X, 3:21-cv-01379-X, 3:21-cv-03179-X, 3:21-cv-03207-X, 3:22-cv-00789-X (N.D. Tex.) (orders adopting reports and recommendations of Bankruptcy Court Judge; entered July 6, 2023);
- *In re Highland Capital Management, L.P.*, Nos. 3:21-cv-00881-X, 3:22-cv-00789-X (N.D. Tex.) (report and recommendation of Bankruptcy Court Judge; entered Oct. 12, 2022);
- *In re Highland Capital Management, L.P.*, Nos. 3:21-cv-00881-X, 3:21-cv-00880-X, 3:21-cv-01010-X, 3:21-cv-01378-X, 3:21-cv-01379-X (N.D. Tex.) (report and recommendation of Bankruptcy Court Judge; entered July 20, 2022).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provision

Statutes

Rules

Treatise

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Federal Rule of Civil Procedure 56(a) allows a court to enter judgment for a moving party only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." If, by contrast, there is a genuine factual dispute, the Constitution leaves it to a jury, where requested, to resolve that dispute. U.S. Const. amend. VII.

To protect the rights of litigants to a jury determination of any genuine and material factual disputes, this Court has established firm guardrails cabining judges' authority to grant summary judgment. Accordingly, "a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented," *Agosto* v. *Immigration & Naturalization Serv.*, 436 U.S. 748, 756 (1978), and juries alone have the power to make credibility determinations, weigh evidence, and draw inferences from the facts, *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

In this case, after Respondent Highland Capital Management, L.P. ("Highland") moved for summary judgment to enforce various Notes executed by Petitioners, Petitioners opposed by submitting sworn declarations and deposition testimony explaining that they had "entered into oral agreements with Highland whereby the notes would be forgiven if specific conditions subsequent occurred," which they eventually did. App. 8a; Record 74886, 74888. Those agreements were made approximately ten to twelve

months after each relevant Note was executed and were in lieu of other compensation for Petitioner James Dondero ("Dondero") when he was running Highland. App. 10a.

The declarations and testimony by Dondero and his sister Nancy Dondero ("Nancy")—who for much of the relevant period was the Trustee of The Dugaboy Investment Trust (Highland's controlling shareholder) and had authority to enter into agreements on Highland's behalf—were supported by additional fact and expert testimony. Such testimony at the summary judgment stage required the court to accept as facts and related inferences that Highland had used contingent loan forgiveness agreements in the past, that such agreements were common forms of compensation in the industry, and that Dondero had given notice to the bankruptcy court that the Notes might not be collectible. Appellants' Pet. for Reh'g En Banc at 15, 16 & nn.41, 42, Nos. 23-10911, 23-10921 (5th Cir. Sept. 30, 2024) (describing corroborating evidence and citing the relevant portions of the record).

Notwithstanding the declarations, testimony, and other evidence, the courts below recommended, entered, and affirmed summary judgment for Highland because of what the Fifth Circuit considered to be a "lack of detail" and "internal inconsistencies" in the offered affidavits. App. 14a. In doing so, the Fifth Circuit subjected affidavits it categorized as "self-serving" to heightened scrutiny, where a trial judge is empowered to evaluate such claimed weaknesses without drawing all inferences in favor of the non-moving party. Any reasonable jury could easily have

found the various claimed inconsistencies to be either illusory or simply explained by imperfect phrasing and memory regarding details years past. The rule adopted by the Fifth Circuit in this case is inconsistent with the rule in other circuits that have rejected efforts to create a special category of "self-serving" testimony or affidavits, with respect to which courts may draw inferences against the party opposing summary judgment.

Importantly, the Fifth Circuit expressly *declined* to invoke the evidentiary exclusion for sham or fraudulent testimony. But it nonetheless relied upon such cases to effectively invert ordinary summary judgment presumptions for testimony regarded as "self-serving," App. 9a, 14a, despite multiple other circuit courts recognizing that such testimony can defeat summary judgment. The court then imposed further requirements of corroboration, drew numerous adverse inferences, and reduced the weight of the admissible testimony to nothing. See App. 10a-11a (documenting perceived inconsistencies and ignoring reasonable explanations for each).

By imposing greater hurdles and heightened scrutiny for self-interested declarations and testimony, and by precluding that evidence from raising genuine factual issues for the jury, the Fifth Circuit departed from this Court's precedents regarding the standards of proof, the weighing of evidence, and the inferences to be drawn when considering a motion for summary judgment. And the Fifth Circuit also diverged from the legal standards applied in other circuits regarding the adequacy of self-interested testimony or less-than-perfect evidence

to raise a genuine issue of material fact that must be resolved by a jury, rather than the courts. Instead of following this Court's guidance that the "evidence of the non-movant is to be believed" and that courts must draw "all justifiable inferences" in the non-movant's favor, *Anderson*, 477 U.S. at 255 (citation omitted), the Fifth Circuit scrambled for reasons why the non-movants' evidence could *not* be credited.

The Fifth Circuit's special rule for testimony deemed "self-serving" expands summary judgment beyond this Court's precedents and weakens guardrails protecting the role of juries in our system of justice. This Court should grant the petition to resolve the conflict between courts of appeals deepened by the Fifth Circuit and return summary judgments to their necessarily limited role in resolving disputes.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 116 F.4th 422 (5th Cir. 2024). App.A, App. 1a.

The order denying the application for rehearing en banc is not reported and can be found at Nos. 23-10911, 23-10921 (5th Cir. Oct. 16, 2024), Doc. 126-1. App.K, App. 186a.

The district court's amended final judgment against NexPoint Asset Management L.P. (f/k/a Highland Capital Management Fund Advisors, L.P.) is not reported and can be found at No. 3:21-cv-00881-X (N.D. Tex. Aug. 3, 2023), Doc. 144. App.B, App. 28a.

The district court's amended final judgment against NexPoint Advisors, L.P. is not reported and

can be found at No. 3:21-cv-00881-X (N.D. Tex. Aug. 3, 2023), Doc. 145. App.C, App. 32a.

The district court's amended final judgment against NexPoint Real Estate Partners, L.L.C. (f/k/a HCRE Partners, L.L.C.) is not reported and can be found at No. 3:21-cv-00881-X (N.D. Tex. Aug. 3, 2023), Doc. 146. App.D, App. 36a.

The district court's amended final judgment against Highland Capital Management Services, Inc. is not reported and can be found at No. 3:21-cv-00881-X (N.D. Tex. Aug. 3, 2023), Doc. 147. App.E, App. 40a.

The district court's amended final judgment against James Dondero is not reported and can be found at No. 3:21-cv-00881-X (N.D. Tex. Aug. 3, 2023), Doc. 148. App.F, App. 44a.

The district court's order adopting the bankruptcy court's report and recommendation and final judgment [Doc. 50-1] is not reported and can be found at No. 3:21-cv-00881-X (N.D. Tex. July 6, 2023), Doc. 128. App.G, App. 48a.

The district court's order adopting the bankruptcy court's report and recommendation and final judgment [Doc. 71-1] is not reported and can be found at No. 3:21-cv-00881-X (N.D. Tex. July 6, 2023), Doc. 133. App.H, App. 57a.

The bankruptcy court's report and recommendation regarding Highland Capital Management, L.P.'s motion for summary judgment is not reported and can be found on the district court's docket at No. 3:21-cv-00881-X (N.D. Tex. Oct. 12, 2022), Doc. 71-1. App.I, App.60a.

The bankruptcy court's report and recommendation is not reported but can be found at No. 19-34054-sgj11, 2022 WL 2826903 (N.D. Tex. Bankr. July 19, 2022). It can also be found on the district court's docket at No. 3:21-cv-00881-X (N.D. Tex. July 20, 2022), Doc. 50-1. App.J, App.127a.

JURISDICTION

The Fifth Circuit's judgment and opinion were issued on September 16, 2024. App.A, App. 1a. A timely application for rehearing en banc was denied on October 16, 2024. App.K, App. 186a. The petition for a writ of certiorari thus would have been due on January 14, 2025. On January 13, 2025, Justice Alito granted a 30-day extension of time to file the petition. See No. 24A677. This Petition was thereafter timely filed on February 13, 2025. This Court has jurisdiction pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 56 provides, in relevant part:

> (a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

* * *

(c) Procedures.

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

> (4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.
>
> * * *
>
> (h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

STATEMENT OF THE CASE

A. Legal Background

Summary judgment allows a court to dispose of all or part of a case without trial only when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-323 (1986).

"[A] 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine

issue for trial.'" *Tolan* v. *Cotton*, 572 U.S. 650, 656 (2014) (per curiam) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Given that limited function, a trial court must "view the evidence in the light most favorable to the opposing party." *Id.* at 657 (cleaned up). It "may not make credibility determinations or weigh the evidence." *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (collecting cases). Instead, "[t]he evidence of the non-movant is to be believed[.]" *Anderson*, 477 U.S. at 255. Courts must draw "all justifiable inferences" in the non-movant's favor. *Ibid.*

In defending against a motion for summary judgment by asserting a genuine dispute of material fact, the non-movant may rely on all manner of competent evidence, including affidavits, declarations, and testimony from the litigant or others. Fed. R. Civ. P. 56(c)(1)(A) (providing that a party "asserting that a fact * * * is genuinely disputed" may rely on "affidavits or declarations"). The affidavit need only (1) be "made on personal knowledge"; (2) "set out facts that would be admissible in evidence"; and (3) "show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Any "facts asserted by the party opposing the motion, if supported by affidavits or other evidentiary material, are regarded as true." 10A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §2727 (4th ed. 2024); accord *Hunt* v. *Cromartie*, 526 U.S. 541, 549-552 (1999) (explaining that court must accept affidavit's "political motivation explanation" as true at summary judgment); *Fitzgerald* v. *Seamans*, 553 F.2d 220, 223 (D.C. Cir. 1977) ("The rule is that his

affidavits must be taken as true with all disputes resolved in favor of the party opposing summary judgment.").

Circuit courts have applied these standards to affidavits offered by a party to the case that are regarded as "self-serving," explaining that in evaluating those too all inferences must be drawn in favor of the non-moving party. *Santiago-Ramos* v. *Centennial P.R. Wireless Corp.*, 217 F.3d 46, 53 (1st Cir. 2000); accord *Danzer* v. *Norden Sys., Inc.*, 151 F.3d 50, 57 (2d Cir. 1998); *Kirleis* v. *Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156, 161-162 (3d Cir. 2009); *Jones* v. *Solomon*, 90 F.4th 198, 206-207 (4th Cir. 2024); *Harris* v. *J.B. Robinson Jewelers*, 627 F.3d 235, 239 (6th Cir. 2010); *Payne* v. *Pauley*, 337 F.3d 767, 773 (7th Cir. 2003); *In re Saige*, No. 24-4072, 2025 WL 369584, at *2 (9th Cir. Feb. 3, 2025); *Hall* v. *Bellmon,* 935 F.2d 1106, 1111 (10th Cir. 1991); *United States* v. *Stein,* 881 F.3d 853, 859 (11th Cir. 2018) (en banc). These courts have recognized a narrow exception—the so-called sham affidavit rule—strictly limited to affidavits that contradicted damaging deposition testimony by that witness. *Cleveland* v. *Pol'y Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999) (recognizing that lower courts "have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction").

B. Factual Background

Petitioner James Dondero served as Respondent Highland Capital Management's ("Highland") president and CEO for many years. App. 3a-4a. His family's trust, The Dugaboy Investment Trust, was Highland's majority and controlling owner. App. 3a-4a, 116a. During the relevant time-periods, first Dondero (briefly) and thereafter his sister, Nancy, were Dugaboy's trustees with authority to enter into agreements on behalf of Highland with respect to Dondero's compensation for his position as Highland's CEO. App. 3a-4a, 113a-114a.

Dondero also directly or indirectly owned and controlled several Highland corporate affiliates, including Petitioners NexPoint Asset Management, L.P., f/k/a Highland Capital Management Fund Advisors ("HCMFA"),[1] NexPoint Advisors, NexPoint Real Estate Partners, L.L.C., f/k/a HCRE Partners, L.L.C. ("HCRE"), and Highland Capital Management Services, Inc. ("HCMS"). App. 4a & nn.1, 2. "Highland loaned tens of millions of dollars to these companies and to Dondero through a series of demand and term notes" for various purposes over the years. App. 4a. And while the demand Notes each included a term that "accrued interest and principal of this Note shall be due and payable on demand of the Payee" and the term Notes required repayments "through thirty annual installments due, one each, on December 31 of each year," *ibid.*, Dondero and Nancy entered into subsequent oral agreements under which "the notes

[1] For the Court's ease, the Petition refers to these entities as they were referred to in the 5th Circuit's opinion.

would be forgiven if specific conditions subsequent occurred," App. 8a. The agreements "were intended to be [additional] compensation for [Dondero] as the chief executive of Highland" subject to the condition that certain Highland investments proved profitable. App. 9a.

Highland eventually filed for Chapter 11 bankruptcy in the United States District Court for the District of Delaware. App. 4a. The court appointed an unsecured creditors committee ("UCC") and transferred the case to the Northern District of Texas. App. 4a. "The bankruptcy provoked a nasty breakup between Highland Capital and * * * Dondero." App. 5a (alterations in original) (quoting *In re Highland Cap. Mgmt., L.P.*, 98 F.4th 170, 172 (5th Cir. 2024)). Highland (through Dondero) and the UCC reached a settlement where Dondero would relinquish control of Highland to a new court-approved board. App. 5a.

C. The Collection Action on the Promissory Notes and the Contingent Forgiveness Defense

Under the new board, Highland sought to collect on the promissory Notes executed by Petitioners and thereafter sued Petitioners in the bankruptcy court seeking "enforcement of sixteen promissory notes executed in favor of Highland, with more than $60 million of unpaid principal and interest alleged to be due and owing." App. 5a-6a. Dondero and the other Petitioners moved to withdraw the reference and demanded a jury trial. App. 131a. Highland later sought enforcement of "two [additional] pre-2019 notes issued by HCMFA in favor of Highland." App. 6a.

Petitioners defended themselves by testifying to the oral agreements under which Highland agreed that it would forgive the Notes if certain portfolio companies were "sold for greater than cost or on a basis outside of Dondero's control." App. 8a. The pleadings and supporting declarations and testimony recounted that these oral agreements were made some ten to twelve months after each of the Notes were executed as part of the year-end compensation negotiations between Dondero and Highland. App. 10a. The contingent forgiveness agreements were between Petitioners Dondero and the affiliated entities on one side and Respondent Highland on the other side. Highland entered into the agreements through the trustee of The Dugaboy Investment Trust, Highland's majority-owner with authority to act on Highland's behalf. For the earliest contingent forgiveness agreements at issue, Dugaboy's interim trustee was Dondero himself; Nancy was trustee for the later agreements. App. 8a-9a.[2] Dondero raised this defense in his original answer. App. 11a. The other defendants, except HCMFA on two later-executed Notes, adopted the same defense by amended pleading. App. 70a-71a.[3]

---

[2] While it may appear unusual for Dondero to be the operative negotiator on both sides of the *initial* agreement, the closely held nature of Highland and its affiliated entities led to some inevitable overlap. After Nancy became trustee for Dugaboy, she had the authority to speak for Highland's controlling owner, and hence for Highland, in negotiating the contingent forgiveness agreements with Dondero and the related entities.

[3] There were 16 pre-2019 Notes subject to the contingent forgiveness agreements, and two later Notes at issue in this case

1. *Summary Judgment.* Highland moved for summary judgment on its claims for breach of contract for nonpayment and turnover of funds under Bankruptcy Code Section 542(b), as to each of the Notes. App. 138a.

The bankruptcy court recommended that summary judgment be entered in Highland's favor on the sixteen term and demand notes. App. 6a, 138a.[4] The bankruptcy court rejected Petitioners' oral agreement defense after concluding that the proffered declarations, depositions, and other evidence "failed to create a ***genuine*** issue of material fact regarding their breaches" and "[t]here was an absence of evidence to support [their] affirmative defenses." App. 138a (emphasis in original). The court gave a variety of reasons for disbelieving the testimony regarding the agreements, all of which related to the lack of written corroboration or supposed inconsistencies in and lack of credibility of the testimony, doubts about Nancy's competence and authority, and the court's general

---

that Petitioners explained were mistakenly booked as such but were instead reimbursement for an error by Highland. Such "mistake" Notes thus would not have been proper subjects for the forgiveness agreements, and, in any event, Highland declared bankruptcy before such purported Notes would have been reviewed for compensation purposes and discovered as mistakes. HCMFA thus did not raise the defense as to the latter two mistake Notes it received shortly before Highland declared bankruptcy, but it did raise the defense for its pre-2019 Notes. App. 8a n.3. As to the later Notes, HCMFA raised the mistaken characterization of the payments as Notes as a defense. See App. 136a-137a.

[4] The court also recommended that summary judgment be entered in Highland's favor as to the mistake Notes. App. 21a, 181a-182a.

incredulity regarding the claimed agreements. App. 160a-164a.

Having itself weighed the evidence, questioned the credibility of the witnesses, and resolved all doubts and inferences against the non-movants, the bankruptcy court recommended holding that "there was a complete lack of evidence for" the oral agreements, and that such agreements were "only supported by conclusory statements" of Dondero and Nancy. App. 177a.

Petitioners objected to the bankruptcy court's reports and recommendations in the district court, but the district court nonetheless adopted the bankruptcy court's reports and recommendations and entered summary judgment in Highland's favor. App. 28a-47a (Amended Final Judgments); App. 48a-59a (orders adopting reports and recommendations). Petitioners appealed.

2. *Appellate Proceedings.* A panel of the Fifth Circuit affirmed. The panel held that the Donderos' affidavits and deposition testimony were "self-serving" and thus the lower court could discount them for their "lack of detail and internal inconsistencies." App. 9a. The Fifth Circuit so held even though the testimony of the Donderos, given their roles with respect to Highland, was the best evidence of any oral agreement to forgive the Notes. After weighing the testimony against other evidence for "inconsistencies," the panel determined that the evidence was "merely colorable" or "not significantly probative." App. 10a (quoting *Anderson*, 477 U.S. at 249).

The panel reached that conclusion by adopting a special rule of heightened scrutiny for "self-serving testimony" under which inferences could be drawn against the party opposing summary judgment. Despite nominally recognizing that "self-serving and/or uncorroborated" testimony is sufficient to create an issue of material fact, the court imposed a further hurdle that such affidavits need some unspecified level of "detail" and the absence of "internal inconsistencies" before they could be permissibly credited by a jury. App. 9a-10a (quoting *Stein,* 881 F.3d at 859). Reflecting the heightened demands it was imposing, the court later seemed to require that *oral* agreements be corroborated by other written means and drew an adverse inference from the absence of such writing. App. 13a ("if the agreements existed, it should be easy to prove through other means" such as by having been written down, conveyed to the auditor, or reflected in Highland's books).

The Fifth Circuit also relied on its own prior precedent regarding the "sham affidavit rule" to authorize lower courts to "decide that there are so many inconsistencies that the testimony does not need to be put before a jury." App. 12a (citing *Kennett-Murray Corp.* v. *Bone*, 622 F.2d 887, 894 (5th Cir. 1980)). Having improperly drawn numerous adverse inferences under its heightened scrutiny to find purported contradictions in the testimony, the Fifth Circuit then claimed that such contradictions were so severe as to destroy the evidentiary value of the testimony and to deny the jury a chance to evaluate the claimed inconsistencies for itself. And despite

insisting that it was "*not* entirely excluding the Dondero declarations from consideration under the sham-affidavit doctrine," App. 14a (emphasis added), the court nonetheless discounted their credibility by claiming that the supposed inconsistencies and lack of detail meant that "[n]o reasonable juror would believe them," App. 13a-14a. In doing so, the Fifth Circuit substantially extended the sham-affidavit doctrine beyond other courts' careful limitation of the doctrine to affidavits designed to counter a witness's own prior deposition testimony.

The panel "further note[d] that, even if the alleged oral agreements did exist, they would likely be unenforceable for lack of consideration." App. 15a. But again, the panel discounted the affidavits in reaching this conclusion. The affidavits showed that the consideration was Dondero's forbearance from increasing his base compensation and his incentive to increase the value of the companies whose profitable sale was the condition for forgiveness of the Notes. Record 74591-74594.

The Fifth Circuit denied rehearing en banc. App. 188a. This petition followed.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit adopted a special rule for testimony regarded as "self-serving," authorizing courts to weigh that testimony against other evidence and determine the significance of contradictions with that evidence—an approach the Eighth Circuit also embraces. That is a role this Court has reserved for the jury and forbidden to judges deciding summary judgment motions. And other circuits expressly have rejected special scrutiny for a category of "self-serving testimony." This Court should grant the petition, resolve the disagreement on approach deepened by the Fifth Circuit's decision, and course correct the federal courts' drift away from resolving genuine disputes of material fact at trial that is accelerated by the Fifth Circuit's new special approach for testimony regarded as "self-serving."

I. The Decision Below Adopted a Special Rule for Weighing Evidence against "Self-Serving" Testimony, Deepening a Disagreement with Other Circuits.

A. Even a non-movant's self-serving testimony defeats summary judgment.

Other courts of appeals expressly recognize that a party opposing summary judgment can prevent it by providing an affidavit based on the non-movant's personal knowledge, even if the affidavit serves his own interests and is uncorroborated. As the Eleventh Circuit has explained, "[n]othing in Rule 56 prohibits an otherwise admissible affidavit from being self-serving. And if there is any corroboration requirement for an affidavit, it must come from a source other than

Rule 56." *Stein*, 881 F.3d at 856. Other circuits agree. *E.g.*, *Santiago-Ramos*, 217 F.3d at 53 ("[A] party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment." (cleaned up)); accord *Danzer*, 151 F.3d at 57; *Kirleis*, 560 F.3d at 161-162; *Jones*, 90 F.4th at 206-207; *Harris*, 627 F.3d at 239; *Payne*, 337 F.3d at 773; *In re Saige*, No. 24-4072, 2025 WL 369584, at *2 (granting mandamus because "it is improper at summary judgment to disregard a document solely because it is 'self-serving'"); *Hall,* 935 F.2d at 1111.

In the decision below, the Fifth Circuit broke with the rule of other circuits that testimony or affidavits regarded as "self-serving" are not subject to weighing against other evidence because the non-movant is entitled to all favorable inferences. In doing so, the Fifth Circuit joined the Eighth Circuit in the minority position that classifying testimony as "self-serving" subjects it to trial-like scrutiny at the summary judgment stage. See *Gander Mountain Co.* v. *Cabela's, Inc.*, 540 F.3d 827, 831 (8th Cir. 2008) ("[A] properly supported motion for summary judgment is not defeated by self-serving affidavits." (citation omitted)).

Contrary to the Fifth Circuit's restrictive approach to such opposition evidence, the rule of most circuit courts that even an uncorroborated self-serving affidavit can defeat summary judgment implements this Court's requirement that, at summary judgment, the non-moving party's evidence "is to be believed." *Anderson,* 477 U.S. at 255. And while purely "conclusory" affidavits devoid of facts are insufficient to raise a genuine factual dispute, affidavits, like those

in this case, that allege specific facts *based on personal knowledge* are, by their very nature, not conclusory. As the Seventh Circuit has explained, where self-serving affidavits have failed, it is not because of their "self-serving nature," but rather the fact that "they are not based on personal knowledge." *Payne*, 337 F.3d at 772. The reason for this personal knowledge rule is simple—summary judgment was not designed "to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

This "personal knowledge" distinction is particularly salient in this case, as the parties offering the allegedly "self-serving" testimony are those with the most direct and personal knowledge of the asserted oral agreements and their terms.

Some courts have adopted a "sham affidavit" rule to discount certain affidavits offered by the party opposing summary judgment. But to protect the role of the trier of fact, those courts have strictly limited that rule to only allow rejection of "an affidavit submitted by an interested party in opposition to a motion for summary judgment * * * if it materially contradicts the affiant's prior deposition testimony." *Susie* v. *Family Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 340-342 (Iowa 2020) (Appel, J., dissenting) (collecting cases). And those courts have stressed the importance of limiting the sham affidavit exception, because if it is not properly cabined, it would swallow the traditional summary judgment rules. The Ninth Circuit, for example, has demanded that even inconsistencies between an affidavit and the

affiant's own prior deposition testimony be "clear and unambiguous." *Van Asdale* v. *International Game Tech.*, 577 F.3d 989, 998-999 (9th Cir. 2009).[5]

The Fifth Circuit here expressly held that the traditional sham affidavit rule did not apply and instead sought to weigh the testimony against evidence far beyond the witness's deposition. App. 14a. Other circuit courts—to protect the jury's prerogatives—have expressly rejected the Fifth Circuit's effort to expand the search for inconsistency to evidence other than the affiant's own prior deposition testimony. As the Seventh Circuit explained, "summary judgment would be

[5] That strict standard for preempting a jury's right to evaluate the evidence is mirrored by the strict rule applied in most courts for post-verdict attacks on evidence relied upon by a jury. See *United States* v. *Lara*, 181 F.3d 183, 204 (1st Cir. 1999) ("[J]urors are not required to discard testimony that appears to contain internal inconsistencies, but may credit some parts of a witness's testimony and disregard other potentially contradictory portions."); *United States* v. *Praddy*, 725 F.3d 147, 152 (2d Cir. 2013) ("The jury is free to believe part, and to disbelieve part, of any given witness's testimony."); *United States* v. *Boone*, 279 F.3d 163, 189 (3d Cir. 2002) ("A jury is free to believe part of a witness' testimony and disbelieve another part of it. Thus, a witness' testimony is not insufficient to establish a point simply because he or she later contradicts or alters it." (citation omitted)). Indeed, such courts will only disregard evidence credited by a jury if it is "inherently incredible" in that it is "at odds with ordinary common sense or physically impossible." *Wilcox* v. *Ford*, 813 F.2d 1140, 1146 (11th Cir. 1987); accord *United States* v. *Goodhouse*, 81 F.4th 786, 790 (8th Cir. 2023); *Tapia* v. *Tansy*, 926 F.2d 1554, 1562 (10th Cir. 1991). If courts faithful to the role of the jury will not second guess the jury's decision to credit inconsistent testimony unless such testimony is impossible, the Fifth Circuit should not be able to rob the jury of its constitutional role *ex ante* by applying a more skeptical standard for summary judgment.

inappropriate" in the case of a "conflict * * * between a deposition and an affidavit given by two separate individuals * * * because the district court may not weigh conflicting evidence." *Babrocky* v. *Jewel Food Co.*, 773 F.2d 857, 861 (7th Cir. 1985) (cleaned up) (citing *Simler* v. *Conner*, 372 U.S. 221, 222-223 (1963) (per curiam)); *Bank of Ill.* v. *Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 1168 (7th Cir. 1996) (same). District courts in the Seventh Circuit thus accept it as "established" that even an actual "conflict between statements given by two separate individuals precludes a court from granting summary judgment to a party since a district court may not weigh[] conflicting evidence on a summary judgment motion." *Escatel* v. *Cushman*, No. 96 C 0399, 1997 WL 159468, at *3 (N.D. Ill. Mar. 27, 1997) (citations omitted); *accord Servicios Especiales Al Comercio Exterior* v. *Johnson Controls, Inc.*, No. 08-CV-1117, 2011 WL 1304922, at *4 (E.D. Wis. Apr. 1, 2011).

Breaking with the Seventh Circuit, the Fifth Circuit parsed minor variations in phrasing between the testimony of two separate individuals—Dondero and Nancy.

B. The Fifth Circuit's special rule for scrutinizing "self-serving" testimony made a difference in this case.

In irreconcilable tension with the decisions of other circuits and this Court, the Fifth Circuit authorized and affirmed the weighing of evidence, the balancing of contradictions among evidence, and the determinations of credibility forbidden on summary

judgment when a non-movant's testimony is deemed "self-serving."

The Fifth Circuit held, for example, that the declarations could be discounted because they differed as to certain details regarding some of the agreements. App. 10a-11a. But the court refused to credit other testimony explaining such supposed differences; explanations that a jury could have easily and understandably accepted. App. 11a. Such a one-sided approach to the evidence—accepting the bad and ignoring the good to the detriment of the non-movant—would not be allowed in most other circuits and drove the result here.

Other purported inconsistencies, App. 8a-11a, were largely inconsequential and had a ready explanation that a jury could have credited. Compare App. 10a (questioning the timing of the agreements based on separate statements in different context), with Record 74941-74945, 74652 (not addressing the timing). Instead of resolving uncertainty in favor of the non-movants, the panel applied its new standard to draw repeated adverse inferences from the supposed "holes and contradictions and questions left unanswered." App. 13a.

The error of the panel's application of an improper standard and inversion of the burdens also can be seen in its citation to its own precedent for the claim that a "party cannot meet its summary judgment burden with an internally inconsistent, self-contradictory affidavit." App. 14a (quoting *Cooper Cameron Corp.* v. *United States Dep't of Labor*, 280 F.3d 539, 550 (5th Cir. 2002) (cleaned up)). But *Cooper* reversed the *grant*

of summary judgment because the *moving* party only presented an internally inconsistent affidavit. Of course, a party *seeking* summary judgment cannot carry its burden of negating all genuine disputes with a flawed affidavit—such evidence does not create the certainty required to grant summary judgment because the evidence is viewed in the light *least* favorable to the movant. For a non-movant, however, certainty is not required, all disputes and uncertainty must go to the jury, and the court must view the evidence in the light most favorable to her. By importing the strict standards applied to a summary judgment *movant* to deny the non-movant Petitioners their right to a jury trial, the Fifth Circuit got the legal standards exactly backwards.

Applying the proper standards here, there was no sound basis for the courts below to usurp the role of the jury in weighing the credibility of the testifying witnesses, evaluating and resolving any alleged inconsistencies, and drawing whatever inferences they would from potentially conflicting evidence.

Dondero and Nancy both swore that they orally agreed to forgive the relevant Notes on the occurrence of specific conditions subsequent that would greatly benefit Highland. They offered ample detail about the timing, parties, conditions, and rationale for such agreements. Record 74882-74886 (Dondero); *id.* 74949-74952 (Nancy). And despite the absence of written memorialization of such later-arising oral agreements (which is not required under Texas law, see *Garcia* v. *Karam*, 276 S.W.2d 255, 257 (Tex. 1955)), a jury could readily find that their testimony was corroborated by other evidence in and inferences from

the record. For example, the jury could credit the fact that Highland acted consistently with the existence of such agreements for years by not calling for fulfillment of the demand Notes. See App. 4a-5a (payment on the demand Notes was due "on demand of the Payee" but not called until December 2020). And a jury could find the same with respect to the term Notes, as Dondero testified that he only paid the annual installments on those Notes to keep the interest down until the condition subsequent occurred. Compare App. 4a-5a ("[E]ach of the Appellants subject to a term note * * * met its first three annual installment requirements"), with Record 74888 ("[M]aking periodic payments kept the Notes from becoming unreasonably large in the event the conditions for forgiveness did not come to pass.").[6]

A jury also could reasonably credit the factual and expert testimony that Highland had entered into such contingent forgiveness agreements before, that such agreements were a common means of compensation in the industry, and that Dondero had given notice to the bankruptcy court that the Notes might not be collectible. Appellants' Pet. for Reh'g En Banc 15-16 & nn.41, 42, Nos. 23-10911, 23-10921 (5th Cir. Sept. 30,

---

[6] Any lack of *written* corroboration of the described oral agreements goes to the credibility of the testimony but is hardly fatal in a state like Texas that allows written contracts to be "later modified by the parties by a new agreement, though oral." *David Berg & Co.* v. *Ravkind*, 375 S.W.2d 317, 321 (Tex. Civ. App. 1964). "Extrinsic evidence may always be offered to show a new agreement or that an existing written contract has been changed, waived, or abrogated in whole or in part." *Sheffield* v. *Gibson*, No. 14-06-00483-CV, 2008 WL 190049, at *3 (Tex. App. Jan. 22, 2008) (citation omitted).

2024), ECF No. 121 (describing corroborating evidence and citing the relevant portions of the record).

And apart from the baseline requirement that a non-movant's evidence should be believed, see *Anderson*, 477 U.S. at 255, the various objections the panel raised to the details and alleged inconsistencies of the declarations and testimony are precisely the type of determinations that, while certainly grist for cross examination and impeachment, are left to a jury to resolve. Only the special scrutiny the Fifth Circuit has adopted for self-serving testimony, in disagreement with the approaches more faithful to this Court's summary judgment precedents, permitted the Fifth Circuit to affirm here.

II. The Question Presented Is Important and Recurring and Warrants Review.

The question presented is an important and recurring one that should be decided by this Court.

A. The Fifth Circuit's special rule for scrutinizing self-serving testimony threatens constitutional and public interests in trials resolving genuine disputes of material fact.

The Fifth Circuit and Eighth Circuit's special rules for discounting testimony regarded as self-serving accelerate the federal courts' drift from trials resolving genuine disputes of material fact and encroach upon the credibility and conflict resolution functions that are uniquely the province of the fact finder. When the non-moving party has invoked its right to a jury trial, these practices strike at the very foundations of our legal system. The Court has long

recognized "that if a case did involve a common law action or its equivalent," such as when there were contract disputes between two parties like there are in this case, "a jury was required." *SEC* v. *Jarkesy*, 603 U.S. 109, 137-138 (2024) (discussing U.S. Const. amend. VII). This right is so fundamental that the "failure to guarantee the right to a jury trial in civil cases almost prevented the ratification of the Constitution." *Stein*, 881 F.3d at 860 (W. Pryor, J., concurring).

Given the central importance of the jury trial, the summary judgment procedure "must be construed with due regard * * * for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327 (1986). And that general concern is plainly implicated here given the Fifth Circuit's rejection of a defense supported by affidavits prepared by both of the parties to an agreement—affidavits which, by any metric, are adequately based in fact and should have been submitted to a jury.

Despite this Court's urging caution in granting summary judgment, commentators and litigants alike have recognized that many courts—including the Fifth Circuit here—treat Rule 56 as a justification to assume the role of a gatekeeping trier of fact, thereby preempting the jury's constitutional function.[7] The result is that what was once an "infrequently granted procedural device" has now become a primary means

[7] See, *e.g.*, Suja A. Thomas, Essay, *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 143-146 (2007).

of disposing of cases, notwithstanding the Seventh Amendment's guarantee of a right to a jury trial.[8] Other studies confirm that federal trial rates dropped precipitously once summary judgment was used more freely.[9] Now, only approximately one percent of federal civil cases are tried in court by juries.[10]

Although *Celotex* and *Anderson* each cautioned that summary judgment should only be granted when "the movant is entitled to judgment as a matter of law," *Anderson*, 477 U.S. at 247; *Celotex*, 477 U.S. at 322-323, commentators and litigants alike have criticized courts that treat Rule 56 as a mini-trial on paper, thereby preempting the jury's constitutional function.[11]

The question in this case thus ties into broader legal policy issues regarding the diminishing role of trials and live testimony before the trier of fact in resolving disputes in the federal court system. Given the Seventh Amendment, these legal policy questions are of a constitutional order. The Fifth and Eighth Circuits' adoption of an exception to the ordinary

---

[8] Arthur R. Miller, *The Pretrial Rush to Judgment*: *Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding our Day in Court and Jury Trial Commitments*, 78 N.Y.U. L. Rev. 982, 984 (2003).

[9] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Studs. 459, 460-464 (2004).

[10] Suja A. Thomas, *25th Anniversary of the Summary Judgment Trilogy: Reflections on Summary Judgment Sponsored by Seattle University School of Law: Keynote: Before and After the Summary Judgment Trilogy*, 43 Loy. U. Chi. L.J. 499, 503 (2012).

[11] Thomas, *supra* note 7, 93 Va. L. Rev. at 144-146.

summary judgment constraints, allowing courts to weigh and discount evidence deemed self-serving, only accelerates this overall trend towards supplanting juries in favor of judges as the triers of fact. Both constitutional and public interests call for a stop to that troubling trend, and resolving the conflict presented by this case is an excellent place to start.

B. This case is an excellent vehicle for resolving this important question.

This case presents an excellent vehicle to address the question presented. It is plain that the Fifth Circuit adopted a restrictive approach to evaluating a non-movant's supposedly self-serving evidence and testimony and played a more active role in drawing adverse inferences from minor or doubtful inconsistencies. Its aggressive approach led to summary judgment in circumstances where it would not otherwise have been granted under the more common and humble approach that defers to juries to resolve disputes notwithstanding the court's own view of the facts and witness credibility.

The issue was squarely raised below, where Petitioners argued that Dondero's and Nancy's declarations, deposition testimony, and other materials show that an oral agreement existed to forgive the Notes at issue. App. 8a-9a. It was only by discounting such testimony to near zero under its heightened and critical standard that the panel was able to declare the absence of a genuine issue of fact. App. 14a. Had such evidence been accepted at the summary judgment stage, it would have been up to a

jury to credit or reject it, as the Seventh Amendment and the federal rules require.

Only by applying the wrong standards when evaluating a movant's self-serving affidavit and other evidence did the Fifth Circuit reach a contrary conclusion in Respondent's favor. By correcting the Fifth Circuit's erroneously hostile standards for evaluating a non-movant's evidence, this Court can resolve what is a now-deepened inconsistency between the circuits, can fix that legal error for this and future cases, and can restore the jury's proper role here and going forward in the Fifth Circuit and elsewhere.

CONCLUSION

As this Court observed about another Fifth Circuit decision, "the opinion below reflects a clear misapprehension of summary judgment standards in light of [this Court's] precedents." *Tolan*, 572 U.S. at 659. The petition for certiorari should be granted.

Respectfully submitted,

ERIK S. JAFFE
Counsel of Record
GENE C. SCHAERR
JOSHUA J. PRINCE
JUSTIN A. MILLER
SCHAERR | JAFFE LLP
1717 K Street NW
Suite 900
Washington, DC 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com

DEBORAH DEITSCH-PEREZ
MICHAEL AIGEN
STINSON LLP
2200 Ross Avenue
Suite 2900
Dallas, TX 75201
(214) 560-2201

Counsel for Petitioners

February 13, 2025

APPENDIX

TABLE OF APPENDICES

Appendix A

Case: 23-10911 Document: 117-1
Date Filed: 09/16/2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10911

United States Court of Appeals
Fifth Circuit
FILED
September 16, 2024
Lyle W. Cayce
Clerk

IN THE MATTER OF HIGHLAND CAPITAL MANAGEMENT, L.P.

Debtor,

HIGHLAND CAPITAL MANAGEMENT,

Appellee,

versus

NEXPOINT ASSET MANAGEMENT, L.P., *formerly known as* HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; NEXPOINT ADVISORS, L.P.; NEXPOINT REAL ESTATE PARTNERS, L.L.C., *formerly known as* HCRE PARTNERS L.L.C.; HIGHLAND CAPITAL MANAGEMENT SERVICES, INCORPORATED; JAMES DONDERO,

Appellants,

IN THE MATTER OF HIGHLAND CAPITAL MANAGEMENT, L.P.

Debtor,

JAMES D. DONDERO;

Appellant,

versus

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee,

CONSOLIDATED WITH

No. 23-10921

IN THE MATTER OF HIGHLAND CAPITAL MANAGEMENT, L.P.

Debtor,

HIGHLAND CAPITAL MANAGEMENT,

Appellee,

versus

NEXPOINT ASSET MANAGEMENT, L.P., *formerly known as* HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.,

Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC Nos. 3:21-CV-1010, 3:21-CV-1378,
3:21-CV-1379, 3:21-CV-3160,
3:21-CV-3162, 3:21-CV-3179,
3:21-CV-3207, 3:21-CV-880,
3:21-CV-881, 3:22-CV-789,
3:21-CV-1010, 3:21-CV-1378,
3:21-CV-1379, 3:21-CV-3160,
3:21-CV-3162, 3:21-CV-3179,

3:21-CV-3207, 3:21-CV-880,
3:21-CV-881, 3:22-CV-789

Before WEINER, ELROD, and WILSON, *Circuit Judges*.

JACQUES L. WIENER, JR., *Circuit Judge:*

Defendant-Appellant James Dondero managed Plaintiff-Appellee Highland Capital Management ("Highland"), an investment fund with several subsidiaries. Highland had a practice of lending its subsidiaries—and Dondero personally—money to meet investment demands. Dondero was effectively on both sides of these promissory notes, acting on behalf of Highland and the relevant subsidiaries. The potential for litigation arising from that arrangement lay dormant until Dondero was removed from Highland during the company's bankruptcy proceedings. Highland, then managed by a court-appointed board, attempted to make good on the promissory notes executed in its favor by the subsidiaries and Dondero (hereafter referred to as "Appellants"). When Appellants refused to pay, Highland brought several adversary actions against them in the bankruptcy court. After consolidation and a joint motion to withdraw the reference, the district court entered judgment in favor of Highland on all claims. We AFFIRM.

I.

Dondero founded Highland, a Dallas-based investment firm, in 1993. He was the general partner of Highland, and his family's trust, Dugaboy Investment Trust, was a part-owner. Dondero served as the trustee of Dugaboy from October 2010 until August 2015, when, after a six-month period when the

trust was led by someone else, his sister, Nancy Dondero (hereinafter referred to as "Nancy" for clarity) became the trustee. She remains so today.

Dondero also managed a number of Highland's corporate affiliates, through which it did business, including Highland Capital Management Fund Advisors ("HCMFA"),[1] NexPoint Advisors, Highland Capital Real Estate Partners ("HCRE"),[2] and Highland Capital Management Services ("HCMS"). Highland loaned tens of millions of dollars to these companies and to Dondero through a series of demand and term notes, allegedly to enable them to make investments. Each of the demand notes had identical terms, which provided, *inter alia*, that the "accrued interest and principal of this Note shall be due and payable on demand of the Payee." Each of the term notes was also identical in requiring repayment through thirty annual installments due, one each, on December 31 of each year. As one employee testified, "it's all one big happy family, and whoever needed cash, the cash moved around."

On October 16, 2019, while Dondero was acting as its CEO and President, Highland filed for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. (No. 19-12239 (CSS)). The court appointed a committee and transferred the case to the Dallas Division of the Bankruptcy Court for the Northern District of Texas (No. 19-34054-sgj11). Dondero had a contentious relationship with the committee, which

---

[1] HCMFA is now known as NexPoint Asset Management, L.P.

[2] HCRE is now known as NexPoint Real Estate Partners, L.L.C.

had explored appointing a Chapter 11 trustee because of "its concerns over and distrust of Mr. Dondero, his numerous conflicts of interest, and his history of alleged mismanagement (and perhaps worse)." *See Matter of Highland Cap. Mgmt., L.P.*, 98 F.4th 170, 172 (5th Cir. 2024) ("The bankruptcy provoked a nasty breakup between Highland Capital and . . . Dondero." (internal quotation marks and citation omitted)). Highland (through Dondero) and the committee finally agreed on a settlement whereby Dondero would relinquish control of Highland to an independent board approved by the court. As of January 9, 2020, Dondero was "out."

In conjunction with its Chapter 11 proceedings, on December 3, 2020, Highland—now controlled by the independent board—made demands on the demand notes executed by Dondero, HCMFA, HCMS, and HCRE. Appellants did not reply or make payment. ***Id.*** Additionally, while each of the Appellants subject to a term note (NexPoint, HCMS, and HCRE) had met its first three annual installment requirements, each failed to make the payments that became due on December 31, 2020. ***Id.*** Those Appellants made belated payments in January of 2021, after Highland notified them of their defaults.

The Highland board filed a reorganization plan with the bankruptcy court on January 22, 2021. Part of the board's plan rested on the assumption that "[a]ll demand notes are collected in the year 2021." All Appellants were made aware of Highland's reorganization plan before it became effective on August 11, 2021. Although they contested certain aspects of the plan, Appellants did not take issue with

the assumption that Highland would recover on all notes that it was owed. *See In re Highland Cap.*, 48 F.4th at 439.

On January 22, 2021, Highland filed five adversary actions in the bankruptcy court, one each against Dondero (No. 21-3003), HCMFA (No. 21-3004), NexPoint (No. 21-3005), HCMS (No. 21-3006), and HCRE (No. 21-3007) (collectively, the "Main Notes Litigation," consolidated as No. 21-3003-sgj in the bankruptcy court). It sought enforcement of sixteen promissory notes executed in favor of Highland, with more than $60 million of unpaid principal and interest alleged to be due and owing. On November 9, 2021, Highland filed a second action against HCMFA that was specifically focused on the two pre-2019 notes issued by HCMFA in favor of Highland ("Second HCMFA Action," No. 21-3082-sgj in the bankruptcy court).

Highland moved for summary judgment in both cases, which were eventually consolidated into one before the district court (No. 21-881). After a joint motion to withdraw the reference, the bankruptcy court acted "essentially as a magistrate judge for the District Court prior to trial," and recommended that both of the motions for summary judgment be granted. The district court adopted the report and recommendations and entered judgment against all Appellants.

II.

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "An issue of

material fact is genuine if a reasonable jury could return a verdict for the nonmovant." *Nall v. BNSF Ry. Co.,* 917 F.3d 335, 340 (5th Cir. 2019) (citation omitted). We review orders granting summary judgment de novo, applying the same standards as the district court. *Miller v. Michaels Stores, Inc.,* 98 F.4th 211, 215–16 (5th Cir. 2024). "As a general rule, the admissibility of evidence on a motion for summary judgment is subject to the same rules that govern the admissibility of evidence at trial." *Lavespere v. Niagara Mach. & Tool Works, Inc.,* 910 F.2d 167, 175–76 (5th Cir. 1990) (footnote omitted), *abrogated on other grounds, Little v. Liquid Air Corp.,* 37 F.3d 1069 (5th Cir. 1994). Evidentiary determinations are reviewed for abuse of discretion. *Id.* at 176.

"Ordinarily, suits on promissory notes provide fit grist for the summary judgment mill." *Resol. Tr. Corp. v. Starkey,* 41 F.3d 1018, 1023 (5th Cir. 1995) (internal quotation marks and citation omitted). Under Texas law, to prevail on summary judgment in these types of cases, the movant must establish that (1) the note exists, (2) the non-movant signed the note, (3) the movant was the legal holder of the note, and (4) there was a balance due and owing on the note. *Id.* (citation omitted); *see also Zentech, Inc. v. Gunter,* 606 S. W. 3d 847, 852 (Tex. App.–Houston [14th Dist.] 2020, pet. denied). If the movant makes out a prima facie case, the burden shifts to the nonmovant to demonstrate the existence of a genuine dispute of material fact precluding summary judgment. *United States v. Lawrence,* 276 F.3d 193, 197 (5th Cir. 2001); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

III.

Highland established its prima facie case by showing that the notes were valid, due, and owing. The notes were (1) provided to Price Waterhouse Cooper ("PwC"), Highland's auditor; (2) included in all of Highland's financial statements, books, and records; (3) carried as assets on Highland's balance sheet with values equal to their accrued and unpaid principal and interest; and (4) incorporated into all of Highland's bankruptcy filings. Appellants, however, raise a series of defenses that they say preclude summary judgment.

A.

Appellants first assert that they entered into oral agreements with Highland whereby the notes would be forgiven if specific conditions subsequent occurred.[3] They say the parties agreed that if Highland's interest in three portfolio companies—Trussway, Cornerstone, MGM—was sold for greater than cost or on a basis outside of Dondero's control, the debts would be forgiven. Dugaboy purportedly entered into these agreements on behalf of Highland, and Dondero did so on behalf of each of the Appellants. Therefore, when Dondero was the trustee of Dugaboy, he entered into

---

[3] In the Main Notes Litigation, all Appellants *except* for HCMFA raised the oral agreement defense. This is likely because the original defense stated that the alleged agreements were entered into "sometime between December of the year in which each note was made and February of the following year." But the relevant notes were executed by HCMFA in May 2019 and Highland filed for bankruptcy in October 2019—so the agreements pertaining to those notes would not have yet existed. In the Second HCMFA Action, pertaining to the pre-2019 notes, HCMFA did assert the oral agreement defense.

these oral agreements with himself. When his sister Nancy became the trustee, she was the one who entered into the agreements on behalf of Highland, with Dondero acting on behalf of Appellants. No one other than Dondero and Nancy knew about these alleged oral agreements. Dondero testified that the agreements were intended to be compensation for him as the chief executive of Highland, a "common practice" at the firm.

The only evidence that Appellants offer to show the existence of a genuinely disputed material fact about whether there was an agreement to forgive these notes is declarations and depositions by the Donderos.[4] The fact that this testimony is self-serving is not, in and of itself, sufficient to defeat summary judgment. *See United States v. Stein,* 881 F.3d 853, 859 (11th Cir. 2018) (en banc) ("[T]he self-serving and/or uncorroborated nature of an affidavit cannot prevent it from creating an issue of material fact."); *McClendon v. United States*, 892 F.3d 775, 785 (5th Cir. 2018) (adopting *Stein*'s reasoning in a tax case). However, coupled with their lack of detail and internal inconsistencies, we hold that these statements are insufficient to "lead a rational jury to find for [Appellants]," as required to successfully oppose

[4] It is unclear whether the district court *excluded* the Dondero declarations, or merely found that they did not establish a dispute of fact. If the district court excluded the declarations from consideration entirely under the sham-affidavit rule, that would be an evidentiary determination which we would review for abuse of discretion. *See Lavespere*, 910 F.2d at 176. If it held that the declarations were not sufficient to establish a dispute of fact, then de novo review would apply. To be safe, we apply the more stringent level of review.

summary judgment. *See BMG Music v. Martinez,* 74 F.3d 87, 91 (5th Cir. 1996) (citation omitted). As the Supreme Court has explained, judgment is warranted when, as here, "the evidence is merely colorable[] or is not significantly probative." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986) (internal citations omitted).

The Dondero declarations are "not the type of significant probative evidence required to defeat summary judgment." *Lawrence,* 276 F.3d at 197 (internal quotation marks and citation omitted). They differ with respect to such vital information as who entered into the alleged agreements and when. For example, Dondero declared—and his Answer pled[5]—that the alleged agreements were entered into some ten to twelve months after each of the pre-2019 notes was issued by HCMFA. But that same declaration incorporated by reference two documents which state that the agreements to forgive the loans were made contemporaneously with the issuance of the notes, and were intended to be an option for compensation from the get-go. This further contrasts with an earlier interrogatory in which Dondero claimed that the only thing of value that Dondero received in exchange for these notes was the funds—not the potential for compensation via forgiveness. The evidence is thus inconsistent as to the date and intent of the agreements. Appellants have not "explain[ed] the

[5] "A party cannot present evidence contradicting admissions made in his pleadings for the purposes of defeating a summary judgment motion." *Jonibach Mgmt. Tr. v. Wartburg Enters., Inc.*, 136 F. Supp. 3d 792, 821 n.29 (S.D. Tex. 2015) (citing *Davis v. A.G. Edwards & Sons, Inc.*, 823 F.2d 105, 107–08 (5th Cir. 1987)).

contradiction[s] or attempt[ed] to resolve the disparit[ies]." *Cleveland v. Pol'y Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999).

The proffered evidence also contradicts itself as to whether it was Dondero or Nancy who entered into the agreements about the pre-2019 notes on behalf of Appellants. Dondero's Answer states that Nancy, as Dugaboy trustee, did so on HCMFA's behalf. But after Nancy testified that she could not have entered into the alleged agreement in 2014 since she was not yet the trustee of Dugaboy, Dondero filed another declaration in which he suddenly remembered that he was the one who entered into the 2014 agreement. As the district court pointed out, Appellants have "not sought leave to amend [their] Answer[s] in this Action, even though Mr. Dondero's declaration clearly contradicts the factual contentions in the Answer[s] as to who allegedly entered into the 2014 Alleged Oral Agreement." Because facts admitted in pleadings "are no longer at issue," the declarations contesting these facts are not probative of a factual dispute. *Davis*, 823 F.2d at 108 (citation omitted).

The evidence is not only inconsistent as to who acted on behalf of Appellants in agreeing to forgive the loans; it is also contradictory as to the *parties* to the agreement. Dondero testified that the 2016 agreement was between Highland and HCMFA. But Nancy's declaration states that that agreement was "between [Highland] and Jim Dondero." The only two people who Appellants claim know anything about that agreement, then, disagree as to who exactly entered into it, and on whose behalf.

It is true that "every discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence." *KennettMurray Corp. v. Bone,* 622 F.2d 887, 894 (5th Cir. 1980) (citation omitted). But a court may decide that there are so many inconsistencies that the testimony does not need to be put before a jury. *See id.* (citation omitted) (distinguishing between testimony that is "not a paradigm of cogency or persuasiveness" and testimony that is a "transparent sham"). Although Appellants characterize Dondero's later statements as an "elaboration" and "clarification" of his earlier declarations and pleadings, the level of contradiction here is a polar binary. *See id*. (citation omitted) (citing a case granting summary judgment where the affidavit testimony "departs so markedly from the prior deposition of defendants' key witness, . . . as to brand as bogus the factual issues sought to be raised"); *cf. Winzer v. Kaufman County,* 916 F.3d 464, 473 (5th Cir. 2019) (explaining that an affidavit that "supplements, rather than contradicts, an earlier statement" is competent evidence (internal quotation marks and citation omitted)). Who entered into the agreements, on behalf of whom, and when? These contradictions go to the heart of the oral-agreement defense. Because the only evidence Appellants rely on for this defense is internally inconsistent with respect to these key details, it is "not the type of significant probative evidence required to defeat summary judgment." *Lawrence,* 276 F.3d at 197 (internal quotation marks and citation omitted).

When we have found a party's single affidavit sufficient to preclude summary judgment, the

evidence is much more specific and consistent. For example, in *Lester v. Wells Fargo Bank, N.A.,* a case relied on by Appellants, we held that a single self-serving affidavit established a genuine dispute of material fact because "the veracity of [the non-movant's] allegations would be difficult to prove any other way, and there are few material factual details omitted." 805 F. App'x 288, 292–93 (5th Cir. 2020) (quorum opinion). Here, if the agreements existed, it should be easy to prove through other means: For example, someone would have written them down or told auditors about them, and they would be reflected in Highland's books and bankruptcy filings. Yet none of this occurred. Further, the Donderos' declarations were not the kind of fact-heavy testimony that suggests "veracity" per *Lester*. There were holes and contradictions and questions left unanswered. To find this testimony insufficient to defeat summary judgment is consistent with this court's decision in *Lester*.

Appellants further rely on *LegacyRG, Inc. v. Harter* for their contention that discrediting a defendant's affidavit on summary judgment is an improper credibility determination. 705 F. App'x 223, 240 (5th Cir. 2017) (per curiam). But in that case, the court wrongly credited one party's affidavit over the other's. That is not the case here; this is not a situation when the nonmovant's statement is "rejected merely because it is not supported by the movant's . . . divergent statements." *Heinsohn v. Carabin & Shaw, P.C.,* 832 F.3d 224, 245 (5th Cir. 2016). The Donderos' statements about the alleged oral agreements are not supported by *their own* divergent statements. No

reasonable juror would believe them, meaning that the issue is not "genuine" for the purposes of summary judgment. *See Anderson,* 477 U.S. at 248; *see also Hartsel v. Keys,* 87 F.3d 795, 799 (6th Cir. 1996) ("The mere possibility of a factual dispute is not enough." (internal quotation marks and citation omitted)).

To be clear, we are not entirely excluding the Dondero declarations from consideration under the sham-affidavit doctrine. *See Hacienda Recs., L.P. v. Ramos,* 718 F. App'x 223, 235 (5th Cir. 2018) (per curiam). We are instead holding that, because of their internal inconsistencies about the contract formation itself and lack of detail, these unsubstantiated statements are "not the type of significant probative evidence required to defeat summary judgment." *Lawrence,* 276 F.3d at 197 (internal quotation marks and citation omitted); *see also Cooper Cameron Corp. v. U.S. Dep't of Labor,* 280 F.3d 539, 550 (5th Cir. 2002) ("[A party] cannot meet its [summary judgment] burden with an internally inconsistent, self-contradictory affidavit."). The oral-agreement defense is entirely unsupported. *See Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.,* 530 F.3d 395, 399 (5th Cir. 2008) (holding that nonmovants cannot satisfy their burdens in opposing summary judgment with unsubstantiated assertions only); *Little,* 37 F.3d at 1075 (holding that a nonmovant's summary judgment burden is not satisfied with "some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence" (internal quotation marks and citations omitted)). The purpose of summary judgment is to prevent factually

unsupported claims and defenses from going to trial "with the attendant unwarranted consumption of public and private resources." *Celotex*, 477 U.S. at 327. Granting judgment in favor of Highland serves this purpose.

We further note that, even if the alleged oral agreements did exist, they would likely be unenforceable for lack of consideration. Appellants assert that the consideration given to Highland in exchange for forgiving the loans was (1) Dondero's forbearance from increasing his own base compensation, and (2) his incentive to increase the value of the portfolio companies in efforts to sell the companies above cost. There is no evidence that Highland knew or understood either of these alleged reasons for entering into the agreement. It is true that giving up a preexisting legal right, like the right to compensation, can constitute valid consideration. *See Bryant v. Cady*, 445 S. W. 3d 815, 820 (Tex. App.–Texarkana 2014, pet. denied) ("A promisee suffers a legal 'detriment' when, in return for a promise, the promisee surrenders a legal right that the promisee otherwise would have been entitled to exercise."). But just because loan forgiveness was allegedly part of Dondero's compensation does not mean that he would forgo any additional compensation outside of the agreements, which did not contain any formal relinquishment of claims. *Cf. City of New Orleans v. BellSouth Telecomms., Inc.,* 690 F.3d 312, 328 (5th Cir. 2012) (affirming that a settlement agreement was the "exclusive method" under which the plaintiff could receive compensation, since giving up further rights to additional compensation was expressly noted in the

agreement). Even if the oral agreements did exist, then, they would be unenforceable. The notes remain due and owing, and summary judgment was proper.

B.

HCMFA raises two unique defenses to contract formation in the Main Notes Litigation and on appeal. First, it asserts that Frank Waterhouse, HCMFA's Treasurer, either did not sign the 2019 notes or did so without authority. Second, it maintains that the creation of these notes was the result of a mutual mistake involving compensation for an alleged error made by Highland. We are not persuaded by either argument.

1.

HCMFA first contends that Waterhouse did not actually sign the 2019 notes executed by HCMFA in favor of Highland, meaning that they are not valid. The notes do bear Waterhouse's signature. The signature appears to be a .jpg image, which was affixed by Accounting Manager Kristin Hendrix.[6] Waterhouse testified that his electronic signature was "used from time to time." Hendrix swore that, although she could not specifically recall Waterhouse authorizing her to use his signature on those two

[6] After learning this from Hendrix's deposition, HCMFA filed a motion with the bankruptcy court to amend its answer and assert this defense, alleging that Highland had breached its discovery obligations by failing to produce the metadata for the notes as requested. The bankruptcy court denied that motion, and the district court affirmed. HCMFA "incorporates its objection to the District Court's decision overruling [its] objection" in its appeal. The district court acted within its discretion in determining that amendment would have been futile. *See Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993).

notes, she would not "have done that without authority and approval."

Failure to recall a particular event but testifying as to the usual course of dealing is not significantly probative of a fact issue. *See Anderson,* 477 U.S. at 248; *Rogers v. Bromac Title Servs., L.L.C.*, 755 F.3d 347, 350 (5th Cir. 2014) ("[S]ummary judgment may not be thwarted by conclusional allegations, unsupported assertions, or presentation of only a scintilla of evidence." (citation omitted)). Specifically, a plaintiff's inability to remember signing a particular contract is insufficient to raise a material dispute as to the validity of the agreement. *Batiste v. Island Recs., Inc.,* 179 F.3d 217, 223 (5th Cir. 1999). Therefore, Waterhouse's and Hendrix's testimony does not create a factual dispute about whether the notes were duly signed under Texas law and, without more, does not rebut Highland's prima facie case.

Next, HCMFA submits that Waterhouse was not authorized to sign the notes, also rendering them invalid. The district court found that Waterhouse had both actual and apparent authority to bind HCMFA in that way. Actual authority is that which "a principal intentionally confers upon an agent or intentionally allows the agent to believe himself to possess." *Polland & Cook v. Lehmann,* 832 S. W. 2d 729, 738 (Tex. App.–Houston [1st Dist.] 1992, writ denied). *Apparent* authority arises when "a principal either knowingly permit[s] an agent to hold himself out as having authority or show[s] such a lack of ordinary care as to clothe an agent with indicia of authority." *Coffey v. Fort Wayne Pools, Inc.,* 24 F. Supp. 2d 671, 680 (N.D.

Tex. 1998) (citing *NationsBank N.A. v. Dilling*, 922 S. W. 2d 950, 952–53 (Tex. 1996)).

At the time that the notes were signed, Waterhouse was Treasurer of HCMFA, which, per the company's signed Incumbency Certificate, authorized him to "execute any and all agreements on behalf of the General Partner [of HCMFA]." Such authorization is a clear grant of actual authority, not limited by the size of the agreement as alleged by HCMFA.[7] HCMFA contends further that Waterhouse knew that he did not have the authority to bind HCMFA to loans of this size without Dondero's approval—and he cannot have had actual authority if he knew subjectively that he lacked it. Waterhouse did testify that he would have needed Dondero's approval for Highland to lend that amount of money. But, Waterhouse believed that he did have that approval: Dondero was the one to direct him to transfer the money from Highland to HCMFA. There is nothing in the record to suggest that Waterhouse knew that he was acting outside the scope of his authority.

---

[7] Appellants further argue that the Incumbency Certificate cannot confer actual authority because it is not a "corporate governance document." They cite no support for that proposition. Any "written or spoken words or conduct by the principal to the agent" can create actual authority. *Cameron Cnty. Sav. Ass'n v. Stewart Title Guar. Co.*, 819 S. W. 2d 600, 603 (Tex. App.–Corpus Christi 1991, writ denied). This includes incumbency certificates. *See, e.g.*, *Krishnan v. JPMorgan Chase Bank, N.A.*, Civ. No. 4:15-CV-00632-RCKPJ, 2018 WL 7138385, at *4 (E.D. Tex. Dec. 18, 2018) (relying on certificate to determine authorization to execute documents).

HCMFA's arguments regarding Waterhouse's signature and authorization of the 2019 notes do not preclude summary judgment.

2.

HCMFA asserts alternatively that Dondero did not intend for the $7.4 million transferred from Highland to HCMFA in 2019 to be a loan, but rather compensation for an error made by Highland that allegedly caused HCMFA harm. In March 2019, Highland made an error in calculating the net asset value ("NAV") of securities that a fund managed by HCMFA held in a particular portfolio. With the help of the SEC, Highland and HCMFA determined that the losses to the fund from the NAV error amounted to approximately $7.5 million, which HCMFA paid to its client. Appellants assert that Highland then accepted responsibility for having caused the error and compensated HCMFA in that amount through two transfers in May 2019. Dondero testified that he instructed Waterhouse to transfer those funds, but not that they should be drawn up as loans. HCMFA asserts that Highland's interpretation of the transfer was a mistake: "[W]hen [Highland]'s accountants saw large transfers from [Highland] to [HCMFA], they simply assumed the transfers were loans and, pursuant to their historical practice . . . documented the transfers as loans." And this was reasonable, as it was the standard practice when "transferring funds to one of [Dondero's] affiliates that it should always be booked as a loan."

HCMFA must bear the burden of proving mutual mistake. *See Castrellon v. Ocwen Loan Servicing, L.L.C.,* 721 F. App'x 346, 349 (5th Cir. 2018) (citing

Texas law). A mutual mistake of fact occurs when "the parties to an agreement have a common intention, but the written contract does not reflect the intention of the parties due to a mutual mistake." *Okon v. MBank, N.A.,* 706 S. W. 2d 673, 675 (Tex. App.–Dallas 1986, writ ref'd n.r.e.). "In order for the affirmative defense of mutual mistake to be sustained on summary judgment, the defendant must raise fact issues showing that both parties were acting under the same misunderstanding of the same material fact." *Id.* "In determining the intent of the parties to a written contract, a court may consider 'the conduct of the parties and the information available to them at the time of signing' in addition to the written agreement itself." *Whitney Nat'l Bank v. Med. Plaza Surgical Ctr. L.L.P.,* No. H-06 1492, 2007 WL 3145798, at *6 (S.D. Tex. Oct. 25, 2007) (quoting *Williams v. Glash,* 789 S. W. 2d 261, 264 (Tex. 1990)). "The question of mutual mistake is determined not by self-serving subjective statements of the parties' intent, which would necessitate trial to a jury in all such cases, but rather solely by objective circumstances surrounding execution of the [contract.]" *Williams,* 789 S. W. 2d at 264.

Once again, essentially the only evidence that supports this defense is Dondero's own testimony. This is precisely the type of "self-serving subjective statement[]" that Texas law finds unreliable in this context. *See id.* Even if this evidence is considered to be competent, it merely establishes Highland's own assumption regarding the transfer, without suggesting that HCMFA "mutually held the mistake" at the time of contracting. *See Al Asher & Sons, Inc. v.*

Foreman Elec. Serv. Co., Inc., MO:19-CV-173-DC, 2021 WL 2772808, at *9 (W.D. Tex. Apr. 28, 2021). There is no evidence in the summary judgment record on which a reasonable juror could rely in finding that HCMFA believed the payment to be compensation rather than a loan. Instead, the evidence suggests the opposite. *See Whitney Nat'l Bank,* 2007 WL 3145798, at *7 (finding no mutual mistake where there was evidence of the other party's own intention regarding the agreement). HCMFA told its board that it caused the error itself, without ever mentioning Highland. HCMFA admits that it received $5 million in insurance proceeds to cover the error and paid $2.4 million out of pocket. But it now claims that Highland "compensated" HCMFA in the full amount of $7.4 million, despite already receiving $5 million from insurance. HCMFA never told its insurance carrier that Highland was at fault or that Highland would compensate HCMFA for the error. ***Id.*** There is no evidence (1) that HCMFA ever accused Highland of causing the error or requested compensation, or (2) that Highland accepted responsibility and agreed to pay. There was nothing in HCMFA's books to suggest that the payment from Highland was intended to be compensation rather than a loan.

Dondero's testimony is insufficient to establish a dispute of material fact as to the purpose of the transfer from Highland to HCMFA, because it is directly contradicted by all of the above. *See Lawrence,* 276 F.3d at 197 (citation omitted). The district court did not err in granting summary judgment in favor of Highland on HCMFA's two 2019 notes.

C.

Appellants raise the defense of prepayment on two of the term notes executed in favor of Highland. They assert that NexPoint and HCMS prepaid on these notes earlier in the year, meaning that they did not default when they failed to make their annual payments on December 31, 2020. is undisputed that these Appellants had the right to make prepayments, and that they did in fact do so. Section 3 of the term notes states: "Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note." But it goes on to state: "Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof." Thus, when NexPoint and HCMS paid on the loans earlier in 2020, Highland was meant to apply those amounts to accrued interest and principal, not to hold the payments in reserve for over a year to satisfy Appellants' future obligations.

Highland generally followed those terms. The notes required that, as of December 31 of each year, the accrued interest on the loan be $0. NexPoint met this requirement in 2017, 2018, and 2019, regardless of whether prepayments were made during those years. Such pre-litigation behavior shows that NexPoint understood that the notes required it to pay all accrued interest by the date on their term notes, regardless of prepayments and how they were applied. As Highland points out, "the parties gave effect to the Term Notes' unambiguous terms prior to the commencement of litigation." "The unrefuted evidence proves that . . . the Term Note Obligors *always* paid

their Annual Installment payment by December 31 *regardless* of how many millions they 'prepaid' during the prior calendar year." Thus, Appellants' argument that Highland "never once declared the Term Notes to be in default in years prior when Appellants made prepayments until 2020" is inapposite—they were not in default before that time.

NexPoint knew that it was required to pay all unaccrued interest and 1/30th of the outstanding principal amount of its term note, but it did not do so. Its knowledge is underscored by the fact that the 2020 annual installment was included in a thirteen-week forecast provided by Highland to Waterhouse, NexPoint's Treasurer. Further, the amortization schedule showed that Highland had not saved NexPoint's prepayments (not made for at least thirteen months) to apply to its December 31, 2020 required payment.[8] NexPoint and HCMS did make payments in January of 2021, seemingly attempting to "cure" their defaults after being advised of them by Highland. But the notes did not provide for a legal right to cure default. Objective evidence shows that both Appellants understood that they were required to make a payment on December 31, 2020, but did not do so.[9] No reasonable juror could find in favor of

---

[8] As Appellants point out, prepayments made by NexPoint on December 5, 2017 and May 9, 2018, were applied to future interest. These two exceptions are insufficient to engender NexPoint's reliance, especially given the fact that NexPoint subjectively knew that its 2020 payment was due.

[9] Appellants complain that the district court did not cite evidence about the HCMS note, relying only on evidence about NexPoint. This is incorrect. The R&R also independently cited the Dondero deposition where he was asked about HCMS and its

Appellants on the issue of prepayment. See Anderson, 477 U.S. at 248.

D.

Finally, NexPoint contends that Highland caused it to default on its term note on December 31, 2020, because it was Highland's responsibility to make the payment, which it failed to do. A Shared Services Agreement ("SSA") between NexPoint and Highland provided that Highland would manage "back- and middle-office" tasks for NexPoint.[10] Per the SSA, those tasks included "investment research, trade desk services, . . . finance and accounting, payments, operations, book keeping, cash management . . . accounts payable, [and] accounts receivable." NexPoint asserts that Highland had made NexPoint's

---

prepayments. And the court had access to a second Klos Declaration, which clarified his opinion about HCMS. No. 23-1003 (N.D. Tex. Bankr.), ECF No. 166 at 4. Accordingly, the district court had enough evidence to determine that there was no genuine dispute of material fact as to the effect of the prepayments on either note.

[10] NexPoint's Answer raised as an affirmative defense that "[Highland] was re-sponsible for making payments on behalf of [NexPoint] under that note. Any alleged default under the note was the result of [Highland's] own negligence, misconduct, breach of contract, etc." Appellants' briefing argues that the same applies to HCMS and HCRE. But unlike that of NexPoint, HCMS and HCRE's Answers do not specifically allege that it was Highland's job to make NexPoint's payments. Regardless, though, as the district court pointed out, there was no evidence that these defendants had SSAs with Highland. Appellants claim that they had SSAs "established by oral agreement and course of conduct." They again cite only a Dondero declaration in support. Why would there be a written SSA between Highland and NexPoint, but not between it and HCMS or HCRE? Appellants do not explain.

term note payments in 2017, 2018, and 2019, without being prompted, "lead[ing] any reasonable person to believe" that it would do the same in 2020. The record evidence that it cites for this proposition is (1) the NexPoint term note's amortization schedule, and (2) a declaration from Dondero. The amortization schedule does not show *who* made the payments on behalf of NexPoint. And, as it does for the oral-agreement defense, Dondero's affidavit contradicts other evidence on this point. The declaration states that "[Highland] made the NexPoint Term Note payments . . . on December 31 of 2017, 2018, and 2019, without any specific authorization or permission" but, in fact, no payments were made on the note on any of those particular dates. In fact, Dondero himself elsewhere (within the context of prepayment) highlighted that Highland accepted those annual payments earlier in the year. A party "cannot meet its [summary judgment] burden with an internally inconsistent, self-contradictory affidavit." *Cooper Cameron*, 280 F.3d at 550. Such evidence does not establish a *genuine* issue of fact. *See Anderson*, 477 U.S. at 248.

A dispute of fact is genuine when the evidence would allow a reasonable juror to find in favor of the nonmovant. *Id.* Dondero's declaration would not allow a reasonable juror to find that it was Highland's responsibility to make NexPoint's payments in 2020. First, as Highland points out, the bankruptcy court approved a settlement in 2020, removing Highland from Dondero's control and placing it in the hands of a court-appointed committee. Thus, there can be no "course of conduct" that reasonably predicted what would happen in 2020, as this was the first time that

Dondero was not in control when an annual installment payment became due. Second, Waterhouse testified that no one at Highland was "authorized to effectuate . . . payment on behalf of NexPoint" without approval. And, in December of 2020, not only did no one at Highland have specific approval to make that payment, but Dondero explicitly told Waterhouse that the payment should not be made, and Waterhouse advised Hendrix of the same. Appellants' argument, then, is that because Highland had made NexPoint's payments in the past, it was reasonable for NexPoint to rely on them to do the same in 2020, despite the fact that an Appellant (Dondero, as CEO of Highland) told the Treasurer of Highland who told the Assistant Controller of Highland *not* to make the payment. It is not as though that was happening "behind closed doors"; the person responsible for making the payments on behalf of NexPoint was the same person who was notified that Highland should not make the payment. Appellants are blaming Highland for failing to do something that they expressly told them not to do. In the context of the record as a whole, no reasonable juror could find that it was Highland's responsibility to make NexPoint's payments and thereby return a verdict in favor of Appellants. *See Anderson*, 477 U.S. at 248.

IV.

Highland presented a prima facie case of promissory note default, and Appellants failed to "set forth specific facts showing that there is a genuine issue for trial." *See Lawrence,* 276 F.3d at 197 (internal quotation marks and citation omitted). Therefore, the

district court did not err in granting summary judgment in favor of Highland.

AFFIRMED.

Appendix B

Case 3:21-cv-00881-X Document 144
Filed 08/03/23

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

HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 3:21-cv-00881-X
Plaintiff,	§	(Consolidated with
vs.	§	3:21-cv-00880-X;
	§	3:21-cv-01010-X;
NEXPOINT ASSET MANAGEMENT, L.P.	§	3:21-cv-01360-X;
(F/K/A HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.), et al.,	§	3:21-cv-01362-X;
	§	3:21-cv-01378-X;
	§	3:21-cv-01379-X;
	§	3:21-cv-03207-X;
	§	3:22-cv-0789-X)
Defendants.	§	

AMENDED FINAL JUDGMENT AGAINST NEXPOINT ASSET MANAGEMENT, L.P. (f/k/a HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.)

This matter having come before the Court on the *Motion for Summary Judgment* [Adv. Proc. No. 21-03082-sgj, Docket No. 45] (the "Motion") filed by Highland Capital Management, L.P. ("Highland"), the reorganized debtor in the chapter 11 case styled *In re Highland Capital Management, L.P.*, case no. 19-34054-sgj11 (the "Bankruptcy Case"), pending in the

United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court"), and plaintiff in the adversary proceeding styled *Highland Capital Management, L.P. vs. Highland Capital Management, Fund Advisors, L.P.,* adversary proceeding no. 21-03082-sgj (the "Adversary Proceeding"), filed in the Bankruptcy Court against NexPoint Asset Management, L.P. (f/k/a Highland Capital Management Fund Advisors, L.P.) ("HCMFA"); and reference of the Adversary Proceeding having been withdrawn from the Bankruptcy Court to this Court, subject to the Bankruptcy Court's retention of the Adversary Proceeding for administration of all pre-trial matters, including the consideration (but not determination) of any dispositive motions; and the Court having considered (a) Highland's Motion and all arguments and evidence admitted into the record in support of the Motion; (b) all responses and objections to the Motion and all arguments and evidence admitted into the record in support of such responses and objections, and the arguments presented by counsel during the hearing held on July 27, 2022, on the Motion; and (c) the *Report and Recommendation to District Court Regarding Highland Capital Management, L.P.'s Motion for Summary Judgment Against Highland Capital Management Fund Advisors, L.P.* [Adv. Proc. No. 21-03082-sgj, Docket No. 73] (the "R&R") filed by the Bankruptcy Court on October 12, 2022, and the *Supplement to the October 12, 2022 Report and Recommendation: Regarding Attorneys' Fees and Transmitting Proposed Form of Judgment* [Adv. Proc. No. 21-03082-sgj, Docket No. 84] filed by the Bankruptcy Court on January 17, 2023; and based on

the Court's *Order Adopting Report and Recommendation and Final Judgment* [Docket No. 133] entered on July 6, 2023; and pursuant to the terms of the *Stipulation Regarding Finality of Judgment* entered into by and between Highland and HCMFA, among others, and approved by this Court; the Court hereby enters the following amended final judgment (the "Final Judgment") against HCMFA. **IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that Highland recover the following:

1. HCMFA will owe Highland **$2,206,160.24** in accrued but unpaid principal and interest due under the 2014 Note[1] (issued on February 26, 2014) as of July 31, 2023. Interest will continue to accrue on the 2014 Note as set forth below.

2. HCMFA will owe Highland **$1,034,106.08** in accrued but unpaid principal and interest due under the 2016 Note (issued on February 26, 2016) as of July 31, 2023. Interest will continue to accrue on the 2016 Note as set forth below.

3. In addition to the forgoing, and pursuant to the terms of each applicable Note, HCMFA shall pay to Highland the amount of **$388,426.05**, which is the total actual expenses of collection, including attorneys' fees and costs, incurred by Highland, which also includes post-judgment interest accrued from July 6, 2023 through July 31, 2023.

4. The amounts set forth to be paid in this Final Judgment shall bear interest, pursuant to 28 U.S.C. § 1961, from the date of the entry of this Final

---

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in the R&R.

Judgment, at a rate of 5.35%. Interest shall be computed daily to the date of payment, except as provided in 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b), and shall be compounded annually.

IT IS SO ORDERED this 3rd day of August, 2023.

/s/ Brantley Starr
THE HONORABLE BRANTLEY STARR
UNITED STATES DISTRICT JUDGE

Appendix C

Case 3:21-cv-00881-X Document 145
Filed 08/03/23

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

HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 3:21-cv-00881-X
Plaintiff,	§	(Consolidated with
vs.	§	3:21-cv-00880-X;
	§	3:21-cv-01010-X;
NEXPOINT ASSET MANAGEMENT, L.P.	§	3:21-cv-01360-X;
(F/K/A HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.), et al.,	§	3:21-cv-01362-X;
	§	3:21-cv-01378-X;
	§	3:21-cv-01379-X;
	§	3:21-cv-03207-X;
	§	3:22-cv-0789-X)
Defendants.	§	

AMENDED FINAL JUDGMENT AGAINST
NEXPOINT ADVISORS, L.P.

This matter having come before the Court on the *Motion for Partial Summary Judgment in Notes Actions* [Adv. Proc. No. 21-03005-sgj, Docket No. 131] (the "Motion") filed by Highland Capital Management, L.P. ("Highland"), the reorganized debtor in the chapter 11 case styled *In re Highland Capital Management, L.P.*, case no. 19-34054-sgj11 (the "Bankruptcy Case"), pending in the United States

Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court"), and plaintiff in the adversary proceeding styled *Highland Capital Management, L.P. vs. NexPoint Advisors, L.P., et al.*, adversary proceeding no. 21-03005-sgj (the "Adversary Proceeding"), filed in the Bankruptcy Court against, among others, NexPoint Advisors, L.P. ("NPA"); and reference of the Adversary Proceeding having been withdrawn from the Bankruptcy Court to this Court, subject to the Bankruptcy Court's retention of the Adversary Proceeding for administration of all pre-trial matters, including the consideration (but not determination) of any dispositive motions; and the Court having considered (a) Highland's Motion and all arguments and evidence admitted into the record in support of the Motion; (b) all responses and objections to the Motion and all arguments and evidence admitted into the record in support of such responses and objections, and the arguments presented by counsel during the hearing held on April 20, 2022, on the Motion; and (c) the *Report and Recommendation to District Court: Court Should Grant Plaintiff's Motion for Partial Summary Judgment Against All Five Note Maker Defendants (With Respect to All Sixteen Promissory Notes) in the Above-Referenced Consolidated Note Actions* [Adv. Proc. No. 21-03005-sgj, Docket No. 207] (the "R&R") filed by the Bankruptcy Court on July 19, 2022, and the *Supplement to Report and Recommendation Dated July 19, 2022, Transmitting Proposed Forms of Judgment* [Adv. Proc. No. 21-03005-sgj, Docket No. 234] filed by the Bankruptcy Court on November 10, 2022; and based on the Court's *Order Adopting Report and Recommendation and Final Judgment* [Docket

No. 128] entered on July 6, 2023; and pursuant to the terms of the *Stipulation Regarding Finality of Judgment* entered into by and between Highland and NPA, among others, and approved by this Court; the Court hereby enters the following amended final judgment (the "Final Judgment") against NPA. **IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that Highland recover the following:

1. NPA will owe Highland **$24,746,838.07** in accrued but unpaid principal and interest due under the NexPoint Term Note[1] (issued on May 31, 2017) as of July 31, 2023. Interest will continue to accrue on the NexPoint Term Note as set forth below.

2. In addition to the forgoing, and pursuant to the terms of each applicable Note, NPA shall pay to Highland the amount of **$1,102,978.87**, which is its pro rata allocation (based on the ratio of the outstanding principal and interest owed by NPA to Highland as of August 8, 2022, to the total principal and interest owed by all Note Maker Defendants to Highland as of August 8, 2022) of the total allocable and actual expenses of collection, including attorneys' fees and costs, incurred by Highland, which also includes post-judgment interest accrued from July 6, 2023 through July 31, 2023. Interest will continue to accrue on these allocable and actual expenses of collection as set forth below.

3. The amounts set forth to be paid in this Final Judgment shall bear interest, pursuant to 28 U.S.C. § 1961, from the date of the entry of this Final

---

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in the R&R.

Judgment, at a rate of 5.35%. Interest shall be computed daily to the date of payment, except as provided in 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b), and shall be compounded annually.

IT IS SO ORDERED this 3rd day of August, 2023.

/s/ Brantley Starr
THE HONORABLE BRANTLEY STARR
UNITED STATES DISTRICT JUDGE

Appendix D

Case 3:21-cv-00881-X Document 146
Filed 08/03/23

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

HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 3:21-cv-00881-X
Plaintiff,	§	(Consolidated with
vs.	§	3:21-cv-00880-X;
NEXPOINT ASSET MANAGEMENT, L.P. (F/K/A HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.), et al.,	§	3:21-cv-01010-X;
	§	3:21-cv-01360-X;
	§	3:21-cv-01362-X;
	§	3:21-cv-01378-X;
	§	3:21-cv-01379-X;
	§	3:21-cv-03207-X;
Defendants.	§	3:22-cv-0789-X)

AMENDED FINAL JUDGMENT AGAINST NEXPOINT REAL ESTATE PARTNERS, LLC (f/k/a HCRE PARTNERS, LLC)

This matter having come before the Court on the *Motion for Partial Summary Judgment in Notes Actions* [Adv. Proc. No. 21-03007-sgj, Docket No. 124] (the "Motion") filed by Highland Capital Management, L.P. ("Highland"), the reorganized debtor in the chapter 11 case styled *In re Highland Capital Management, L.P.*, case no. 19-34054-sgj11 (the "Bankruptcy Case"), pending in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court"), and plaintiff in the adversary proceeding styled *Highland*

Capital Management, L.P. vs. HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC), et al., adversary proceeding no. 21-03007-sgj (the "Adversary Proceeding"), filed in the Bankruptcy Court against, among others, NexPoint Real Estate Partners, LLC (f/k/a HCRE partners, LLC) ("HCRE"); and reference of the Adversary Proceeding having been withdrawn from the Bankruptcy Court to this Court, subject to the Bankruptcy Court's retention of the Adversary Proceeding for administration of all pre-trial matters, including the consideration (but not determination) of any dispositive motions; and the Court having considered (a) Highland's Motion and all arguments and evidence admitted into the record in support of the Motion; (b) all responses and objections to the Motion and all arguments and evidence admitted into the record in support of such responses and objections, and the arguments presented by counsel during the hearing held on April 20, 2022, on the Motion; and (c) the *Report and Recommendation to District Court: Court Should Grant Plaintiff's Motion for Partial Summary Judgment Against All Five Note Maker Defendants (With Respect to All Sixteen Promissory Notes) in the Above-Referenced Consolidated Note Actions* [Adv. Proc. No. 21-03007-sgj, Docket No. 208] (the "R&R") filed by the Bankruptcy Court on July 19, 2022, and the *Supplement to Report and Recommendation Dated July 19, 2022, Transmitting Proposed Forms of Judgment* [Adv. Proc. No. 21-03007-sgj, Docket No. 234] filed by the Bankruptcy Court on November 10, 2022; and based on the Court's *Order Adopting Report and Recommendation and Final Judgment* [Docket No. 128] entered on July 6, 2023; and pursuant to the terms of the *Stipulation*

Regarding Finality of Judgment entered into by and between Highland and HCRE, among others, and approved by this Court; the Court hereby enters the following amended final judgment (the "Final Judgment") against HCRE. **IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that Highland recover the following:

1. HCRE will owe Highland **$210,395.08** in accrued but unpaid principal and interest due under HCRE's First Demand Note[1] (issued on November 27, 2013) as of July 31, 2023. Interest will continue to accrue on HCRE's First Demand Note as set forth below.

2. HCRE will owe Highland **$3,822,585.00** in accrued but unpaid principal and interest due under HCRE's Second Demand Note (issued on October 12, 2017) as of July 31, 2023. Interest will continue to accrue on HCRE's Second Demand Note as set forth below.

3. HCRE will owe Highland **$1,061,829.42** in accrued but unpaid principal and interest due under HCRE's Third Demand Note (issued on October 15, 2018) as of July 31, 2023. Interest will continue to accrue on HCRE's Third Demand Note as set forth below.

4. HCRE will owe Highland **$932,827.77** in accrued but unpaid principal and interest due under HCRE's Fourth Demand Note (issued on September 25, 2019) as of July 31, 2023. Interest will continue to accrue under HCRE's Fourth Demand Note as set

---

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in the R&R.

forth below.

5. HCRE will owe Highland **$6,667,744.06** in accrued but unpaid principal and interest due under the HCRE Term Note (issued on May 31, 2017) as of July 31, 2023. Interest will continue to accrue on the HCRE Term Note as set forth below.

6. In addition to the forgoing, and pursuant to the terms of each applicable Note, HCRE shall pay to Highland the amount of **$556,279.67**, which is its pro rata allocation (based on the ratio of the outstanding principal and interest owed by HCRE to Highland as of August 8, 2022, to the total principal and interest owed by all Note Maker Defendants to Highland as of August 8, 2022) of the total allocable and actual expenses of collection, including attorneys' fees and costs, incurred by Highland, which also includes post-judgment interest accrued from July 6, 2023 through July 31, 2023. Interest will continue to accrue on these allocable and actual expenses of collection as set forth below.

7. The amounts set forth to be paid in this Final Judgment shall bear interest, pursuant to 28 U.S.C. § 1961, from the date of the entry of this Final Judgment, at a rate of 5.35%. Interest shall be computed daily to the date of payment, except as provided in 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b), and shall be compounded annually.

IT IS SO ORDERED this 3rd day of August, 2023.

/s/ Brantley Starr
THE HONORABLE BRANTLEY STARR
UNITED STATES DISTRICT JUDGE

Appendix E

Case 3:21-cv-00881-X Document 147
Filed 08/03/23

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

HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 3:21-cv-0881-X
Plaintiff,	§	(Consolidated with
vs.	§	3:21-cv-0880-X;
NEXPOINT ASSET MANAGEMENT, L.P. (F/K/A HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.), et al.,	§	3:21-cv-01010-X; 3:21-cv-01360-X; 3:21-cv-01362-X; 3:21-cv-01378-X; 3:21-cv-01379-X; 3:21-cv-03207-X;
Defendants.	§	3:22-cv-0789-X)

AMENDED FINAL JUDGMENT AGAINST HIGHLAND CAPITAL MANAGEMENT SERVICES, INC.

This matter having come before the Court on the *Motion for Partial Summary Judgment in Notes Actions* [Adv. Proc. No. 21-03006-sgj, Docket No. 129] (the "Motion") filed by Highland Capital Management, L.P. ("Highland"), the reorganized debtor in the chapter 11 case styled *In re Highland Capital Management, L.P.*, case no. 19-34054-sgj11 (the "Bankruptcy Case"), pending in the United States Bankruptcy Court for the Northern District of Texas,

Dallas Division (the "Bankruptcy Court"), and plaintiff in the adversary proceeding styled *Highland Capital Management, L.P. vs. Highland Capital Management Services, Inc., et al.*, adversary proceeding no. 21-03006-sgj (the "Adversary Proceeding"), filed in the Bankruptcy Court against, among others, Highland Capital Management Services, Inc. ("HCMS"); and reference of the Adversary Proceeding having been withdrawn from the Bankruptcy Court to this Court, subject to the Bankruptcy Court's retention of the Adversary Proceeding for administration of all pre-trial matters, including the consideration (but not determination) of any dispositive motions; and the Court having considered (a) Highland's Motion and all arguments and evidence admitted into the record in support of the Motion; (b) all responses and objections to the Motion and all arguments and evidence admitted into the record in support of such responses and objections, and the arguments presented by counsel during the hearing held on April 20, 2022, on the Motion; and (c) the *Report and Recommendation to District Court: Court Should Grant Plaintiff's Motion for Partial Summary Judgment Against All Five Note Maker Defendants (With Respect to All Sixteen Promissory Notes) in the Above-Referenced Consolidated Note Actions* [Adv. Proc. No. 21-03006-sgj, Docket No. 213] (the "R&R") filed by the Bankruptcy Court on July 19, 2022, and the *Supplement to Report and Recommendation Dated July 19, 2022, Transmitting Proposed Forms of Judgment* [Adv. Proc. No. 21-03006-sgj, Docket No. 239] filed by the Bankruptcy Court on November 10, 2022; and based on the Court's *Order Adopting Report and Recommendation*

and Final Judgment [Docket No. 128] entered on July 6, 2023; and pursuant to the terms of the *Stipulation Regarding Finality of Judgment* entered into by and between Highland and HCMS, among others, and approved by this Court; the Court hereby enters the following amended final judgment (the "Final Judgment") against HCMS. **IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that Highland recover the following:

1. HCMS will owe Highland **$171,155.61** in accrued but unpaid principal and interest due under HCMSI's First Demand Note[1] (issued on March 28, 2018) as of July 31, 2023. Interest will continue to accrue on HCMS's First Demand Note as set forth below.

2. HCMS will owe Highland **$229,906.25** in accrued but unpaid principal and interest due under HCMS's Second Demand Note (issued on June 25, 2018) as of July 31, 2023. Interest will continue to accrue on HCMS's Second Demand Note as set forth below.

3. HCMS will owe Highland **$436,232.03** in accrued but unpaid principal and interest due under HCMS's Third Demand Note (issued on May 29, 2019) as of July 31, 2023. Interest will continue to accrue under HCMS's Third Demand Note as set forth below.

4. HCMS will owe Highland **$163,470.17** in accrued but unpaid principal and interest due under HCMS's Fourth Demand Note (issued on June 26, 2019) as of July 31, 2023. Interest will continue to

---

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in the R&R.

accrue on HCMS's Fourth Demand Note as set forth below.

5. HCMS will owe Highland **$6,245,606.57** in accrued but unpaid principal and interest due under the HCMS Term Note (issued on May 31, 2017) as of July 31, 2023. Interest will continue to accrue on the HCMS Term Note as set forth below.

6. In addition to the forgoing, and pursuant to the terms of each applicable Note, HCMS shall pay to Highland the amount of **$332,249.78**, which is its pro rata allocation (based on the ratio of the outstanding principal and interest owed by HCMS to Highland as of August 8, 2022, to the total principal and interest owed by all Note Maker Defendants to Highland as of August 8, 2022) of the total allocable and actual expenses of collection, including attorneys' fees and costs, incurred by Highland, which also includes post-judgment interest accrued from July 6, 2023 through July 31, 2023. Interest will continue to accrue on these allocable and actual expenses of collection as set forth below.

7. The amounts set forth to be paid in this Final Judgment shall bear interest, pursuant to 28 U.S.C. § 1961, from the date of the entry of this Final Judgment, at a rate of 5.35%. Interest shall be computed daily to the date of payment, except as provided in 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b), and shall be compounded annually.

IT IS SO ORDERED this 3rd day of August, 2023.

/s/ Brantley Starr
THE HONORABLE BRANTLEY STARR
UNITED STATES DISTRICT JUDGE

Appendix F

Case 3:21-cv-00881-X Document 148
Filed 08/03/23

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

HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No.
	§	3:21-cv-0881-X
Plaintiff,	§	
vs.	§	(Consolidated with
	§	3:21-cv-0880-X;
NEXPOINT ASSET MANAGEMENT, L.P. (F/K/A HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.), et al.,	§	3:21-cv-01010-X;
	§	3:21-cv-01360-X;
	§	3:21-cv-01362-X;
	§	3:21-cv-01378-X;
	§	3:21-cv-01379-X;
Defendants.	§	3:21-cv-03207-X;
	§	3:22-cv-0789-X)

AMENDED FINAL JUDGMENT AGAINST JAMES DONDERO

This matter having come before the Court on the *Motion for Partial Summary Judgment in Notes Actions* [Adv. Proc. No. 21-03003-sgj, Docket No. 132] (the "Motion") filed by Highland Capital Management, L.P. ("Highland"), the reorganized debtor in the chapter 11 case styled *In re Highland Capital Management, L.P.*, case no. 19-34054-sgj11 (the "Bankruptcy Case"), pending in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court"),

and plaintiff in the adversary proceeding styled *Highland Capital Management, L.P. vs. James Dondero et al.*, adversary proceeding no. 21- 03003-sgj (the "Adversary Proceeding"), filed in the Bankruptcy Court against, among others, James Dondero ("Dondero"); and reference of the Adversary Proceeding having been withdrawn from the Bankruptcy Court to this Court, subject to the Bankruptcy Court's retention of the Adversary Proceeding for administration of all pre-trial matters, including the consideration (but not determination) of any dispositive motions; and the Court having considered (a) Highland's Motion and all arguments and evidence admitted into the record in support of the Motion; (b) all responses and objections to the Motion and all arguments and evidence admitted into the record in support of such responses and objections, and the arguments presented by counsel during the hearing held on April 20, 2022, on the Motion; and (c) the *Report and Recommendation to District Court: Court Should Grant Plaintiff's Motion for Partial Summary Judgment Against All Five Note Maker Defendants (With Respect to All Sixteen Promissory Notes) in the Above-Referenced Consolidated Note Actions* [Adv. Proc. No. 21-03003-sgj, Docket No. 191] filed by the Bankruptcy Court on July 19, 2022, and the *Supplement to Report and Recommendation Dated July 19, 2022, Transmitting Proposed Forms of Judgment* [Adv. Proc. No. 21-03003-sgj, Docket No. 217] (the "R&R") filed by the Bankruptcy Court on November 10, 2022; and based on the Court's *Order Adopting Report and Recommendation and Final Judgment* [Docket No. 128] entered on July 6, 2023; and pursuant to the terms of the *Stipulation Regarding*

Finality of Judgment entered into by and between Highland and Dondero, among others, and approved by this Court; the Court hereby enters the following amended final judgment (the "Final Judgment") against Dondero. **IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that Highland recover the following:

1. Dondero will owe Highland **$3,981,474.95** in accrued but unpaid principal and interest due under Dondero's First Note[1] (issued on February 2, 2018) as of July 31, 2023. Interest will continue to accrue on the First Dondero Note as set forth below.

2. Dondero will owe Highland **$2,863,095.74** in accrued but unpaid principal and interest due under Dondero's Second Note (issued on August 1, 2018) as of July 31, 2023. Interest will continue to accrue on Dondero's Second Note as set forth below.

3. Dondero will owe Highland **$2,863,123.24** in accrued but unpaid principal and interest due under Dondero's Third Note (issued on August 13, 2018) as of July 31, 2023. Interest will continue to accrue on Dondero's Third Note as set forth below.

4. In addition to the forgoing, and pursuant to the terms of each applicable Note, Dondero shall pay to Highland the amount of **444,697.94**, which is his pro rata allocation (based on the ratio of the outstanding principal and interest owed by Dondero to Highland as of August 8, 2022, to the total principal and interest owed by all Note Maker Defendants to Highland as of August 8, 2022) of the total allocable and actual

---

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in the R&R.

expenses of collection, including attorneys' fees and costs, incurred by Highland, which also includes post-judgment interest accrued from July 6, 2023 through July 31, 2023. Interest will continue to accrue on these allocable and actual expenses of collection as set forth below.

5. The amounts set forth to be paid in this Final Judgment shall bear interest, pursuant to 28 U.S.C. § 1961, from the date of the entry of this Final Judgment, at a rate of 5.35%. Interest shall be computed daily to the date of payment, except as provided in 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b), and shall be compounded annually.

IT IS SO ORDERED this 3rd day of August, 2023.

/s/ Brantley Starr
THE HONORABLE BRANTLEY STARR
UNITED STATES DISTRICT JUDGE

Appendix G

Case 3:21-cv-00881-X Document 128
Filed 07/06/23

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

HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Civil Action No. 3:21-cv-0881-x
	§	
Plaintiff,	§	Consolidated with:
v.	§	3:21-cv-0880-x
	§	3:21-cv-1010-x
NEXPOINT ASSET MANAGEMENT, L.P. (F/K/A HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.), et al.,	§	3:21-cv-1378-x
	§	3:21-cv-1379-x
	§	3:21-cv-3160-x
	§	3:21-cv-3162-x
	§	3:21-cv-3179-x
	§	3:21-cv-3207-x
Defendants.	§	3:22-cv-0789-x

ORDER ADOPTING REPORT AND RECOMMENDATION AND FINAL JUDGMENT

Before the Court is the Bankruptcy Court's Report and Recommendation on Plaintiff Highland Capital Management, L.P.'s ("Highland") motion for partial summary judgment. [Doc. 50]. Having carefully considered (1) Highland's motion and all arguments and evidence admitted into the record in support of the motion, (2) all responses and objections to the motion and all arguments and evidence admitted into the record in support of such responses

and objections, and the arguments presented by counsel during the hearing held on April 20, 2022, on the motion, and for the reasons set forth in the Report and Recommendation (the "R&R") filed by the Bankruptcy Court on July 19, 2022, and the Supplement to the R&R filed December 5, 2022, the Court **ACCEPTS** the report and recommendation. The Court **OVERRULES** the objections to the report and recommendation and **OVERRULES** the objection to the supplement to the report and recommendation. [Docs. 63, 87].

In accordance with the report and recommendation, the Court **GRANTS** partial summary judgment for Highland and **ENTERS FINAL JUDGMENT** as follows.

IT IS ORDERED, ADJUDGED, AND DECREED that Highland recover the following from James Dondero:

1. Dondero will owe Highland $3,873,613.93 in accrued but unpaid principal and interest due under Dondero's First Note[1] (issued on February 2, 2018) as of August 8, 2022, after application of all payments to outstanding principal and interest. As of August 9, 2022, interest will continue to accrue on the First Dondero Note at the rate of $278.50 per day and will increase to $285.91 per day on February 2, 2023.

2. Dondero will owe Highland $2,778,356.23 in accrued but unpaid principal and interest due under Dondero's Second Note (issued on August 1, 2018) as of August 8, 2022, after application of all payments to

---

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in the R&R.

outstanding principal and interest. As of August 9, 2022, interest will continue to accrue on Dondero's Second Note at the rate of $224.43 per day and will increase to $231.05 per day on August 1, 2023.

3. Dondero will owe Highland $2,778,339.88 in accrued but unpaid principal and interest due under Dondero's Third Note (issued on August 13, 2018) as of August 8, 2022, after application of all payments to outstanding principal and interest. As of August 9, 2022, interest will continue to accrue on Dondero's Third Note at the rate of $218.20 per day and will increase to $224.64 per day on August 13, 2022.

4. In addition to the forgoing, and pursuant to the terms of each applicable Note, Dondero shall pay to Highland the amount of $443,074.35, which is his pro rata allocation (based on the ratio of the outstanding principal and interest owed by Dondero to Highland as of August 8, 2022, to the total principal and interest owed by all Note Maker Defendants to Highland as of August 8, 2022) of the total allocable and actual expenses of collection, including attorneys' fees and costs, incurred by Highland.

IT IS ORDERED, ADJUDGED, AND DECREED that Highland recover the following from NexPoint Asset Management, L.P. (f/k/a Highland Capital Management Fund Advisors, L.P.) ("NexPoint Asset Management"):

1. NexPoint Asset Management will owe Highland $2,552,628.61 in accrued but unpaid principal and interest due under NexPoint's First Note (issued on May 2, 2019), as of August 8, 2022, after application of all payments to outstanding principal and interest. As of August 9, 2022, interest will

continue to accrue on NexPoint's First Note at the rate of $166.08 per day and will increase to $170.05 per day on May 2, 2023.

2. NexPoint Asset Management will owe Highland $5,317,989.86 in accrued but unpaid principal and interest due under NexPoint's Second Note (issued on May 3, 2019), as of August 8, 2022, after application of all payments to outstanding principal and interest. As of August 9, 2022, interest will continue to accrue on NexPoint's Second Note at the rate of $346.02 per day and will increase to $354.29 per day on May 3, 2023.

3. In addition to the forgoing, and pursuant to the terms of each applicable Note, NexPoint Asset Management shall pay to Highland the amount of $369,793.69, which is its pro rata allocation (based on the ratio of the outstanding principal and interest owed by NexPoint Asset Management to Highland as of August 8, 2022, to the total principal and interest owed by all Note Maker Defendants to Highland as of August 8, 2022) of the total allocable and actual expenses of collection, including attorneys' fees and costs, incurred by Highland.

IT IS ORDERED, ADJUDGED, AND DECREED that Highland recover the following from NexPoint Advisors, L.P. ("NexPoint Advisors"):

1. NexPoint Advisors will owe Highland $23,389,882.79 in accrued but unpaid principal and interest due under the NexPoint Term Note (issued on May 31, 2017), as of August 8, 2022, after application of all payments to outstanding principal and interest. As of August 9, 2022, interest will continue to accrue on the NexPoint Term Note at the rate of $3,801.79

per day and will increase to $4,029.90 per day on May 31, 2023.

2. In addition to the forgoing, and pursuant to the terms of each the Note, NexPoint Advisors shall pay to Highland the amount of $1,098,951.89, which is its pro rata allocation (based on the ratio of the outstanding principal and interest owed by NexPoint Advisors to Highland as of August 8, 2022, to the total principal and interest owed by all Note Maker Defendants to Highland as of August 8, 2022) of the total allocable and actual expenses of collection, including attorneys' fees and costs, incurred by Highland.

IT IS ORDERED, ADJUDGED, AND DECREED that Highland recover the following from Highland Capital Management Services, Inc. ("HCMS"):

1. HCMS will owe Highland $166,196.60 in accrued but unpaid principal and interest due under HCMS's First Demand Note1 (issued on March 28, 2018), as of August 8, 2022, after application of all payments to outstanding principal and interest. As of August 9, 2022, interest will continue to accrue on HCMS's First Demand Note at the rate of $12.98 per day and will increase to $13.35 per day on March 26, 2023.

2. HCMS will owe Highland $222,917.23 in accrued but unpaid principal and interest due under HCMS's Second Demand Note (issued on June 25, 2018), as of August 8, 2022, after application of all payments to outstanding principal and interest. As of August 9, 2022, interest will continue to accrue on HCMS's Second Demand Note at the rate of $18.56 per

day and will increase to $19.13 per day on June 25, 2023.

3. HCMS will owe Highland $425,435.63 in accrued but unpaid principal and interest due under HCMS's Third Demand Note (issued on May 29, 2019), as of August 8, 2022, after application of all payments to outstanding principal and interest. As of August 9, 2022, interest will continue to accrue under HCMS's Third Demand Note at the rate of $27.73 per day and will increase to $28.39 per day on May 29, 2023.

4. HCMS will owe Highland $159,454.92 in accrued but unpaid principal and interest due under HCMS's Fourth Demand Note (issued on June 26, 2019), as of August 8, 2022, after application of all payments to outstanding principal and interest. As of August 9, 2022, interest will continue to accrue on HCMS's Fourth Demand Note at the rate of $10.32 per day and will increase to $10.57 per day on June 26, 2023.

5. HCMS will owe Highland $6,071,718.32 in accrued but unpaid principal and interest due under the HCMS Term Note (issued on May 31, 2017), as of August 8, 2022, after application of all payments to outstanding principal and interest. As of August 9, 2022, interest will continue to accrue on the HCMS Term Note at the rate of $455.09 per day and will increase to $467.61 per day on May 31, 2023.

6. In addition to the forgoing, and pursuant to the terms of each applicable Note, HCMS shall pay to Highland the amount of $331,036.73, which is its pro rata allocation (based on the ratio of the outstanding principal and interest owed by HCMS to Highland as of August 8, 2022, to the total principal and interest

owed by all Note Maker Defendants to Highland as of August 8, 2022) of the total allocable and actual expenses of collection, including attorneys' fees and costs, incurred by Highland.

IT IS ORDERED, ADJUDGED, AND DECREED that Highland recover the following from NexPoint Real Estate Partners, LLC (f/k/a HCRE Partners, LLC) ("NexPoint Real Estate"):

1. NexPoint Real Estate will owe Highland $195,476.70 in accrued but unpaid principal and interest due under HCRE's First Demand Note (issued on November 27, 2013), as of August 8, 2022, after application of all payments to outstanding principal and interest. As of August 9, 2022, interest will continue to accrue on HCRE's First Demand Note at the rate of $40.58 per day and will increase to $43.83 per day on November 27, 2022.

2. NexPoint Real Estate will owe Highland $3,551,285.37 in accrued but unpaid principal and interest due under HCRE's Second Demand Note (issued on October 12, 2017), as of August 8, 2022, after application of all payments to outstanding principal and interest. As of August 9, 2022, interest will continue to accrue on HCRE's Second Demand Note at the rate of $730.34 per day and will increase to $788.77 per day on October 12, 2022.

3. NexPoint Real Estate will owe Highland $986,472.32 in accrued but unpaid principal and interest due under HCRE's Third Demand Note (issued on October 15, 2018), as of August 8, 2022, after application of all payments to outstanding principal and interest. As of August 9, 2022, interest will continue to accrue on HCRE's Third Demand Note

at the rate of $203.00 per day and will increase to $219.24 per day on October 15, 2022.

4. NexPoint Real Estate will owe Highland $866,600.77 in accrued but unpaid principal and interest due under HCRE's Fourth Demand Note (issued on September 25, 2019), as of August 8, 2022, after application of all payments to outstanding principal and interest. As of August 9, 2022, interest will continue to accrue under HCRE's Fourth Demand Note at the rate of $177.60 per day and will increase to $191.81 per day on September 25, 2022.

5. NexPoint Real Estate will owe Highland $6,196,688.51 in accrued but unpaid principal and interest due under the HCRE Term Note (issued on May 31, 2017), as of August 8, 2022, after application of all payments to outstanding principal and interest. As of August 9, 2022, interest will continue to accrue on the HCRE Term Note at the rate of $1,337.94 per day and will increase to $1,444.98 per day on May 31, 2023.

6. In addition to the forgoing, and pursuant to the terms of each applicable Note, NexPoint Real Estate shall pay to Highland the amount of $554,248.69, which is its pro rata allocation (based on the ratio of the outstanding principal and interest owed by NexPoint Real Estate to Highland as of August 8, 2022, to the total principal and interest owed by all Note Maker Defendants to Highland as of August 8, 2022) of the total allocable and actual expenses of collection, including attorneys' fees and costs, incurred by Highland.

* * * * *

The amounts set forth to be paid in this Final Judgment shall bear interest, pursuant to 28 U.S.C. § 1961, from the date of the entry of this Final Judgment, at a rate of 5.35%. Interest shall be computed daily to the date of payment, except as provided in 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b), and shall be compounded annually.

IT IS SO ORDERED, this 6th day of July, 2023.

/s/ Brantley Starr
BRANTLEY STARR
UNITED STATES DISTRICT JUDGE

Appendix H

Case 3:21-cv-00881-X Document 133
Filed 07/06/23

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

HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Civil Action No. 3:21-cv-0881-x
	§	
Plaintiff,	§	Consolidated with:
v.	§	3:21-cv-0880-x
	§	3:21-cv-1010-x
NEXPOINT ASSET MANAGEMENT, L.P. (F/K/A HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.), et al.,	§	3:21-cv-1378-x
	§	3:21-cv-1379-x
	§	3:21-cv-3160-x
	§	3:21-cv-3162-x
	§	3:21-cv-3179-x
	§	3:21-cv-3207-x
Defendants.	§	3:22-cv-0789-x

ORDER ADOPTING REPORT AND RECOMMENDATION AND FINAL JUDGMENT

Before the Court is the Bankruptcy Court's Report and Recommendation on Plaintiff Highland Capital Management, L.P.'s ("Highland") motion for summary judgment. [Doc. 71]. Having carefully considered (1) Highland's motion and all arguments and evidence admitted into the record in support of the motion, (2) all responses and objections to the motion and all arguments and evidence admitted into the record in support of such responses and objections, and

(3) the arguments presented by counsel during the hearing held on July 27, 2022, on the motion, and for the reasons set forth in the Report and Recommendation (the "R&R") filed by the Bankruptcy Court on October 12, 2022, and the Supplement to the R&R filed January 17, 2023, the Court **ACCEPTS** the report and recommendation. The Court **OVERRULES** the objections to the report and recommendation and **OVERRULES** the objection to the supplement to the report and recommendation. [Docs. 78, 98].

In accordance with the report and recommendation, the Court **GRANTS** summary judgment for Highland and **ENTERS FINAL JUDGMENT** as follows.

IT IS ORDERED, ADJUDGED, AND DECREED that Highland recover the following from NexPoint Asset Management, L.P. (f/k/a Highland Capital Management Fund Advisors, L.P.) ("NexPoint"):

1. NexPoint will owe Highland $2,169,270.76 in accrued but unpaid principal and interest due under the 2014 Note[1] (issued on February 26, 2014) as of October 31, 2022, after application of all payments to outstanding principal and interest. As of October 31, 2022, interest will continue to accrue on the 2014 Note at the rate of $115.54 per day and will increase to $117.82 per day on February 26, 2023.

2. NexPoint will owe Highland $1,012,449.18 in accrued but unpaid principal and interest due under

---

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in the R&R.

the 2016 Note (issued on February 26, 2016) as of October 31, 2022, after application of all payments to outstanding principal and interest. As of October 31, 2022, interest will continue to accrue on the 2016 Note at the rate of $71.41 per day and will increase to $73.28 per day on February 26, 2023.

3. In addition to the forgoing, and pursuant to the terms of each applicable Note, NexPoint shall pay to Highland the amount of $387,007.90, which is the total actual expenses of collection, including attorneys' fees and costs, incurred by Highland.

4. The amounts set forth to be paid in this Final Judgment shall bear interest, pursuant to 28 U.S.C. § 1961, from the date of the entry of this Final Judgment, at a rate of 5.35%. Interest shall be computed daily to the date of payment, except as provided in 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b), and shall be compounded annually.

IT IS SO ORDERED, this 6th day of July, 2023.

/s/ Brantley Starr
BRANTLEY STARR
UNITED STATES DISTRICT JUDGE

Appendix I

Case 3:21-cv-00881-X Document 71-1
Filed 10/12/22

CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed October 11, 2022

/s/ Stacy G.C. Gonzalez
United States Bankruptcy Judge

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P. Reorganized Debtor.	Case No. 19-34054-sgj11 Chapter 11

HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., Defendant.	Adversary No. 21-03082-sgj Civ. Act. No. 3:22-cv-00789 **(Consolidated Under Civ. Act. No. 3:21-cv-00881)**

REPORT AND RECOMMENDATION TO DISTRICT COURT REGARDING HIGHLAND CAPITAL MANAGEMENT, L.P.'S MOTION FOR SUMMARY JUDGMENT AGAINST HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.

I. Introduction

This court submits this report and recommendation to the district court ("District Court") with respect to *Highland Capital Management, L.P.'s Motion for Summary Judgment* ("MSJ")[DE #45][1] filed on May 27, 2022, in the above-referenced adversary proceeding ("Action"). The Action is yet another lawsuit regarding promissory notes issued by the defendant, Highland Capital Management Fund

[1] Citations to docket entries in the instant adversary proceeding shall be notated as follows: [DE # __]. Citations to docket entries in the main bankruptcy case shall be notated as follows: [Bankr. DE # __].

Advisors, L.P. ("HCMFA" or "Defendant") in favor of Highland Capital Management, L.P. This Action emanates from the above-referenced bankruptcy case (the "Bankruptcy Case") of Highland Capital Management, L.P. ("Highland," "Plaintiff," or sometimes "Debtor" or "Reorganized Debtor"). For the reasons set forth herein, this court recommends that the District Court grant the MSJ and enter judgment against HCMFA.

II. Background and Procedural History

A. Highland and its Bankruptcy Case

Highland, a Dallas-based investment firm that managed billion-dollar investment portfolios and assets, was co-founded in 1993 by James D. Dondero ("Mr. Dondero") and Mark Okada ("Okada"). Highland's equity interest holders included Hunter Mountain Investment Trust (99.5%), The Dugaboy Investment Trust, Dondero's family trust ("Dugaboy") (0.1866%), Okada, personally and through trusts (0.0627%), and Strand Advisors, Inc. ("Strand"), which was wholly owned by Dondero (0.25%), the only general partner of Highland. Highland also managed assets and portfolios for other investment advisers and funds through two Dondero-controlled entities – HCMFA and NexPoint Advisors, L.P., pursuant to a Shared Services Agreement and Payroll Reimbursement Agreement. HCMFA had no employees of its own that provided investment advisory services to its clients or managed portfolios. Dondero was the President and Chief Executive Officer of Highland and also served as a high-level executive and controlling portfolio manager for HCMFA.

On October 16, 2019 (the "Petition Date"), with Mr. Dondero in control[2] and acting as Highland's CEO, president, and portfolio manager, facing a myriad of massive, business litigation claims – many of which had finally become liquidated (or were about to become liquidated) after a decade or more of contentious litigation in multiple forums all over the world, Highland filed for relief under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS). Neither HCMFA nor any of the other Dondero-controlled Highland affiliates joined in the bankruptcy filing as joint debtors.

On October 29, 2019, an official committee of unsecured creditors (the "Committee") was appointed in the bankruptcy case. Almost immediately from its appointment, the Committee's relationship with Highland, with Mr. Dondero in control, was contentious. First, the Committee moved for a change of venue to Dallas, which was granted over Highland's objections.[3] Second, the Committee (and later, the United States Trustee) expressed its then-desire for the appointment of a chapter 11 trustee due to its concerns over and distrust of Mr. Dondero, his numerous conflicts of interest, and his history of alleged mismanagement (and perhaps worse).

After many weeks under the threat of the appointment of a trustee, Highland and the

---

[2] Mark Okada resigned from his role with Highland prior to the Petition Date.

[3] The bankruptcy case was transferred to the Dallas Division of the Bankruptcy Court for the Northern District of Texas in December 2019.

Committee engaged in substantial and lengthy negotiations, resulting in a corporate governance settlement approved by this court on January 9, 2020.[4] As a result of this settlement, Mr. Dondero relinquished control of Highland and resigned his positions as officer or director of Highland and its general partner, Strand,[5] and three independent directors ("Independent Directors") were chosen to lead Highland through its chapter 11 case. James P. Seery, Jr. ("Mr. Seery"), one of the Independent Directors, was later appointed as Highland's Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative.[6] Mr. Dondero agreed to remain with Highland as an unpaid portfolio manager following his resignation.

Throughout the summer of 2020, Mr. Dondero informally proposed several reorganization plans, none of which were embraced by the Committee or the Independent Directors. When Mr. Dondero's plans failed to gain traction, he and some of the related entities under his control, including HCMFA, engaged in a "scorched earth" policy in the Bankruptcy Case

---

[4] Bankr. DE #339.

[5] Mr. Dondero agreed to this settlement pursuant to a stipulation he executed and that was filed in connection with Highland's motion to approve the settlement. *See Stipulation in Support of Motion of the Debtor for Approval of Settlement With the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in Ordinary Course [Bankr. DE #338].*

[6] See the June 16, 2020 order approving the retention by Highland of Mr. Seery as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative, *nunc pro tunc*, to March 15, 2020. [Bankr. DE #854].

that has resulted in substantial, costly, and time-consuming litigation for Highland.[7]

During this time, the Independent Directors and the Committee negotiated their own plan of reorganization which culminated in the filing by Highland of its *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* (the "Plan") [Bankr. DE #1808] on January 22, 2021. In its *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* filed on November 24, 2020 ("Disclosure Statement") [Bankr. DE 1473], Highland included the Debtor's Liquidation Analysis/Financial Projections (the "Projections") in support of the Plan. Pl. Ex. 90, Appx. 1497-1505. Among the assumptions supporting the Projections was that "[a]ll demand notes are collected in the year 2021." *Id.* at 173 of 178, Appx. 1500 (Assumption C). Thus, even though Highland had not yet demanded payment under the notes that are the subject of this Action, HCMFA was notified on November 24, 2020 that the Projections assumed that all demand notes that Highland was holding would be collected the following year. Yet, while HCMFA, specifically, joined with other Dondero-controlled funds (the "Funds") in the filing of an objection to confirmation of the Plan ("Funds Objection") [Bankr.

---

[7] According to Mr. Seery's credible testimony during the hearing on confirmation of the chapter 11 plan ultimately filed by Highland that had been negotiated between the Committee and the Independent Directors, Mr. Dondero had threatened to "burn the place down" if his proposed plan was not accepted. *See* Transcript of Confirmation Hearing dated February 3, 2021 at 105:10-20 [Bankr. DE #1894].

DE #1670], it did not object to the Projections or the assumptions that the notes that are the subject of this Action would be collected in 2021, and it did not disclose the existence of its alleged "oral agreement" defense to Highland's collection on the notes or suggest that the Projections were unreasonable in any way. *See* Bankr. DE #1670.

Although there were other objections to confirmation of the Plan, Highland had made certain amendments and modifications to the Plan that addressed those objections so that, by the time of the confirmation hearing that was held in February of 2021, the only remaining objections to confirmation of the Plan were those by Mr. Dondero and the Dondero-related entities (including HCMFA).[8] This court entered its order ("Confirmation Order")[Bankr. DE #1943] confirming the Plan, over the objections by Mr. Dondero and his related entities (including HCMFA), on February 22, 2021. The effective date of the Plan occurred on August 11, 2021, and Highland became the Reorganized Debtor under the Plan. On August 19, 2022, on direct appeal from this bankruptcy court by Mr. Dondero and his related entities, the Fifth Circuit entered its original order in which it "affirm[ed] the confirmation order in large part" and "revers[ed] only insofar as the plan exculpates certain non-debtors in violation of 11 U.S.C. § 524(e), strik[ing] those few

[8] In addition to the Funds Objection, objections to confirmation were filed by Mr. Dondero [Bankr. DE #1661] and entities controlled by him. [Bankr. DE ##1667, 1673, 1676, and 1677]

parties from the plan's exculpation, and affirm[ed] on all remaining grounds."[9]

B. This Action and the Other, Earlier-Filed Note Actions

The instant Action was initiated by Highland on November 9, 2021, by the filing of a complaint ("Complaint")[DE #1] in the bankruptcy court against HCMFA, seeking damages for HCMFA's breach of contract in failing to pay, upon demand, amounts due and owing under two demand promissory notes issued by HCMFA in favor of Highland and seeking turnover to the reorganized estate of amounts due and owing under those promissory notes equal to (i) the aggregate outstanding principal due under each note, (ii) all accrued and unpaid interest thereon until the date of payment, plus (iii) Highland's costs of collection (including all court costs and reasonable attorneys' fees and expenses as provided for under the Pre-2019

---

[9] *In re Highland Capital Management, L.P.*, No. 21-10449, 2021 WL 3571094, at *1 (5 Cir. Aug, 19, 2022). On September 7, 2022, following a petition for limited panel rehearing filed by certain appellants on September 2, 2022 "for the limited purpose of clarifying and confirming one part of its August 19, 2022, opinion," the Fifth Circuit withdrew its original opinion and replaced it with its opinion reported at *In re Highland Capital Management, L.P.*, No. 21-10449, 2021 WL 4093167 (5th Cir. Sept. 7, 2022). The substituted opinion differed from the original opinion only by the replacement of one sentence from section "IV(E)(2) – *Injunction and Gatekeeper Provisions*" of the original opinion: "The injunction and gatekeeper provisions are, on the other hand, perfectly lawful." was replaced with "We now turn to the Plan's injunction and gatekeeper provisions." In all other respects, the Fifth Circuit panel's original ruling remained unchanged.

Notes) for HCMFA's breach of its obligations under each of the Pre-2019 Notes. Complaint, ¶¶ 31 and 39.

The instant Action is a companion case to five earlier-filed note actions – each filed on January 22, 2021 – against Mr. Dondero and certain Dondero-controlled corporate affiliates of Highland that were makers of one or more of sixteen promissory notes in favor of Highland with more than $60 million of unpaid principal and interest alleged to be due and owing at the time the suits were filed ("Note Maker Defendants").[10] *See* Adv. Proc. No. 21-3004-sgj ("First HCMFA Note Action"); Adv. Proc. No. 21-3003 ("Dondero Note Action"); Adv. Proc. No. 21-3005 ("NexPoint Note Action"); Adv. Proc. No. 21-3006 ("HCMS Note Action"); Adv. Proc. No. 21-3007 ("HCRE Note Action") (collectively, the "Five Earlier-Filed Note Actions").[11] Highland did not bring this

---

[10] The Note Maker Defendants and their notes are as follows: (i) Dondero, in his individual capacity, is maker on three demand notes; (ii) HCMFA is maker on two demand notes; (iii) NexPoint Advisors, L.P. ("NexPoint") is maker on one term note; (iv) Highland Capital Management Services, Inc ("HCMS") is maker on five notes (four demand notes and one term note); and (v) HCRE Partners, LLC, n/k/a NexPoint Real Estate Partners, LLC ("HCRE") is maker on five notes (four demand notes and one term note).

[11] The defendants in these five Note Actions are: Mr. Dondero, Nancy Dondero ("Ms. Dondero"), and Dugaboy (Adv. No. 21-3003); HCMFA (Adv. No. 21-3004); NexPoint Advisors, L.P., Mr. Dondero, Ms. Dondero, and Dugaboy (Adv. No. 21-3005); Highland Capital Management Services, Inc. ("HCMS"), Mr. Dondero, Ms. Dondero, and Dugaboy (Adv. No. 21-3006); and HCRE Partners, LLC, n/k/a NexPoint Real Estate Partners, LLC ("HCRE"), Mr. Dondero, Ms. Dondero, and Dugaboy (Adv. No. 21-3007).

current Action against HCMFA as part of the Five Earlier-Filed Note Actions because Highland had agreed, prior to the Petition Date, that it would not demand payment under the notes in this Action before May 31, 2021.

C. The Alleged Oral Agreement Defense

As noted above, HCMFA is one of many entities affiliated with Highland and owned or controlled by Mr. Dondero. In Defendant's Original Answer ("Answer")[DE #5] filed on December 10, 2021, HCMFA asserted as its primary affirmative defense[12] that oral agreements ("Alleged Oral Agreements") exist pursuant to which Highland agreed that it would not collect the Pre-2019 Notes upon the fulfillment of certain "conditions subsequent" ("Alleged Oral Agreement Defense"). Answer, ¶ 41. HCMFA specifically represents in its Answer that:

> Plaintiff agreed that it would not collect the Notes upon fulfilment [sic] of conditions subsequent. Specifically, sometime between December of the year in which each Note was made and February of the following year, Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of Mr. Dondero's control. The purpose of this agreement was to provide compensation to

[12] HCMFA also pleaded the affirmative defenses of ambiguity, waiver, estoppel, failure of consideration, and prepayment. Answer, ¶¶ 42 and 43.

> Mr. Dondero, who was otherwise underpaid compared to reasonable compensation levels in the industry, through the use of forgivable loans, a practice that was standard at [Highland] and in the industry. This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant believes there may be testimony or email correspondence that discusses the existence of this agreement that may be uncovered through discovery in this Adversary Proceeding.

Answer, ¶ 41 (emphasis added).

The Alleged Oral Agreement Defense appears to be a "cut-and-paste" of the same alleged "oral agreement" defense that was ultimately asserted in the Five Earlier-Filed Note Actions by four of the five Note Maker Defendants (all but HCMFA). To be clear, the defense morphed as the Five Earlier-Filed Note Actions progressed. Only Mr. Dondero originally asserted that defense (somewhat vaguely, in his original answer—merely stating that "it was previously agreed that Plaintiff would not collect the Notes"),[13] and thereafter all of the Note Maker Defendants (except HCMFA) amended their pleadings to adopt the same affirmative defense. First, it was simply an alleged agreement by Highland not to collect on ***Mr. Dondero's*** Notes. Then, there were amended answers by each of the other Note Maker Defendants (except HCMFA) that obliquely referred to alleged

[13] Pl. Ex. 80, ¶ 40.

agreements by Highland not to collect on the Notes upon fulfillment of undisclosed conditions subsequent. Finally, the Alleged Oral Agreement Defense in the Five Earlier-Filed Note Actions was set up as follows:

> Plaintiff's claims are barred . . . because prior to the demands for payment Plaintiff agreed that it would not collect the Notes upon fulfillment of conditions subsequent. Specifically, sometime between December of the year in which each note was made and February of the following year, [] Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of James Dondero's control. The purpose of this agreement was to provide compensation to James Dondero, who was otherwise underpaid compared to reasonable compensation levels in the industry, through the use of forgivable loans, a practice that was standard at HCMLP [Highland] and in the industry.[14] This agreement setting forth the

---

[14] This statement in the amended answers appears to have been inaccurate according to Mr. Dondero's own executive compensation expert, Alan Johnson. During the deposition of Mr. Johnson, he testified that he reviewed Highland's audited financial statements for each year from 2008 through 2018 (Pl. Ex. 101 at 119:14-189:21, Appx. 1988-2005) and concluded that (a) Highland did not have a standard practice of forgiving loans and had not forgiven a loan to anyone in the world since 2009, (b) Highland had never forgiven a loan of more than $500,000, (c) Highland had not forgiven any loan to Mr. Dondero since at least

> conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant [ ] believes there may be testimony or email correspondence that discusses the existence of this agreement that may be uncovered through discovery in this Adversary Proceeding.

Pl. Ex. 31 ¶ 82, Appx. 655 ("Dondero's Answer"). *See also* Pl. Ex. 15 ¶ 83, Appx. 435-436 ("NexPoint's Answer"); Pl. Ex. 16 ¶ 97, Appx. 451-452 ("HCMS's Answer"); and Pl. Ex. 17 ¶ 99, Appx. 468 ("HCRE's Answer"). The factual allegations pleaded by HCMFA in its Answer with respect to its Alleged Oral Agreement Defense in the instant Action were pleaded with nearly identical language as were pleaded in the Five Earlier-Filed Note Actions by Dondero and the other Note Maker Defendants (except HCMFA).

D. Posture Before District Court

On January 18, 2022, the parties filed an agreed motion to withdraw the reference ("Agreed Motion to Withdraw Reference") in the instant Action. The bankruptcy clerk transmitted the motion to withdraw the reference to the District Court on April 6, 2022, resulting in the assignment of Civ. Action No. 3:22-cv-0789 before Judge Kinkeade, and, on April 7, 2022, the notice of this court's Report and Recommendation to the District Court with respect to the Agreed Motion to Withdraw Reference, recommending that the

---

2008, and (d) since at least 2008, Highland had never forgiven in whole or in part any loan that it extended to any affiliate. *Id.* at 189:24-192:10, Appx. 2005-2006. *See also* Pl. Ex. 98 at 422:18-428:14, Appx. 1776-1778.

District Court grant the Agreed Motion to Withdraw Reference, "***but only at such time as the Bankruptcy Court certifies to the District Court that the lawsuit is trial ready***" and further recommending that the District Court "***defer to the Bankruptcy Court the handling of all pretrial matters***." Judge Kinkeade thereafter entered an order reassigning this Action to this District Court (Judge Starr) on April 8, 2022.

On April 20, 2022, this District Court, *sua sponte*, issued an Order Consolidating Cases, consolidating this Action into District Court Civ. Act. No. 3:21-cv-881, such that this Action and the Five Earlier-Filed Note Actions are now consolidated into one action (the "Consolidated Notes Action").[15] Perhaps due to oversight, the District Court had not accepted the Report and Recommendation on the Agreed Motion to Withdraw Reference in this Action prior to consolidating it into the Consolidated Notes Action, and there are no indications on the docket of the consolidated case, after consolidation, that the District Court has accepted or adopted it.[16]

---

[15] The District Court entered its *Order Granting Defendant's Motion to Consolidate the Note Cases* [Consolidated Notes Action DE#24]. There also happen to be four appeal actions consolidated within the Consolidated Notes Action, regarding this bankruptcy court's orders denying motions to compel arbitration in four of the Note Actions.

[16] A motion to withdraw the reference was also filed in each of the Five Earlier-Filed Note Actions, and notices of transmittal of this court's Report and Recommendation thereon were transmitted to the District Court on July 7, 2021, with respect to Adv. No. 21-3003, on July 9, 2021, with respect to Adv. Nos. 21-3004 and 21-3005, and on July 15, 2021, with respect to Adv. No. 21-3006 and

E. The Current Motion for Summary Judgment

Highland filed its MSJ and supporting brief on May 27, 2022, seeking the entry of a judgment on its two claims for relief (breach of contract and turnover pursuant to Bankruptcy Code §542) that are set forth in its Complaint. [DE ## 45 and 46]. In support of its MSJ, Highland contemporaneously filed (1) a declaration of David Klos [DE #47],[17] the CFO of Highland, and (2) a 5,257-page appendix [DE #48].[18]

On July 1, 2022, HCMFA filed its *Opposition to Plaintiff's Motion For Summary Judgment* and *Memorandum of Law in Response to Plaintiff's Motion for Summary Judgment* ("Opposition")[DE ## 54 and 52] and a 441-page appendix in support of its

---

21-3007, resulting in the assignment of civil action numbers in the District Court of 3:21-cv-1010, 3:21-cv-0881, 3:21-cv-0880, 3:21-cv-1378, and 3:21-cv-1379, respectively. Prior to ordering the consolidation of the Five Earlier-Filed Note Actions, the District Court accepted this court's recommendations that the District Court withdraw the reference when this bankruptcy court certifies the actions as trial-ready, in all but one of the Five Earlier-Filed Note Actions: Adv. Proceeding No. 21-3003/Civ. Action No. 3:21-cv-1010 in which Dondero, N. Dondero, and Dugaboy Trust are defendants. The parties recently notified the District Court that the pending Report and Recommendation in Civ. Action No. 3:21-cv-1010 remains outstanding.

[17] When citing to this declaration in its briefing, Highland refers to it as the "Second Klos Dec." to distinguish it from the declaration of David Klos filed in each of the Five Earlier-Filed Note Actions. The court will do the same.

[18] Citations to Highland's MSJ appendix are notated as follows: Pl. Ex. #, Appx. #.

Opposition. [DE #53].[19] In its Opposition, HCMFA argues that is has submitted summary judgment evidence in support of its Alleged Oral Agreement Defense that creates a genuine dispute of a material fact that would require a denial of Highland's MSJ.[20]

Notably, in the middle of this current MSJ litigation, on July 19, 2022, this court issued, in the Five Earlier-Filed Note Actions, a *Report and Recommendation to District Court: Court Should Grant Plaintiff's Motion for Partial Summary Judgment Against All Five Note Maker Defendants (With Respect to all Sixteen Promissory Notes) in the Above-Referenced Consolidated Note Actions* ("MPSJ R&R"), which was docketed in each of the five earlier-filed underlying adversary proceedings.[21] On July 20, 2022, the clerk of the Bankruptcy Court transmitted a copy of the MPSJ R&R to the District Court for filing in the Consolidated Notes Action.[22] In the MPSJ R&R, this court recommended that the District Court grant Highland's motions for partial summary judgment against each of the Note Maker Defendants, holding them liable for (a) breach of contract and (b) turnover for all amounts due under the promissory notes

---

[19] Citations to HCMFA's Opposition appendix are notated as follows: Def. Ex. #, Appx. #.

[20] HCMFA does not present any summary judgment evidence or argument with respect to the other affirmative defenses asserted by it in its Answer.

[21] Adv. Proceeding No. 21-3003 (DE #191); Adv. Proceeding No. 21-3004 (DE#163); Adv. Proceeding No. 21-3005 (DE #207); Adv. Proceeding No. 21-3006 (DE #213); Adv. Proceeding No. 21-3007 (DE #208).

[22] Civ. Act. No. 3:21-cv-0881 (DE #50).

pursuant to Bankruptcy Code Section 542, including costs of collection and reasonable attorneys' fees in an amount to be determined. In so recommending, this court found that Highland had made its *prima facie* case for summary judgment for the Note Maker Defendants' breach of the promissory notes and for turnover and that the Note Maker Defendants failed to rebut Highland's *prima facie* case because they failed to show that there was a genuine dispute over a material fact with respect to their alleged defenses to the enforcement of the Notes, including, specifically, as to their Alleged Oral Agreement Defense.[23] This court found (in the MPSJ R&R) that, having considered the record as a whole, ***including*** the declarations of Mr. Dondero and his sister, Ms. Dondero, submitted in support of the Alleged Oral Agreement Defense, that (i) there was a "complete lack of evidence" supporting the Alleged Oral Agreement Defense other than the self-serving, conclusory, and uncorroborated Dondero declarations; and (ii) that the Note Maker Defendants' Alleged Oral Agreement Defense blatantly contradicted the summary judgment record; accordingly, "***no reasonable jury could find that there was truly an "oral***

[23] Although HCMFA was a Note Maker Defendant in one of the Five Earlier-Filed Note Actions, Highland brought the instant Note Action against HCMFA based on two demand promissory notes (defined, together, below as the "Pre-2019 Notes") different and distinct from the HCMFA Notes sued upon in the earlier Note Action against HCMFA. To be clear, HCMFA was the only one of the Note Maker Defendants in the Five Earlier-Filed Note Actions that did not raise the same Alleged Oral Agreement Defense as a defense to Highland's suit on the two demand notes issued by HCMFA in 2019 as it has raised in the instant Action.

agreement" to forgive these loans to the Alleged [Oral] Agreement Defendants." MPSJ R&R at 25.

The next day, on July 20, 2022, Highland filed its *Reply Memorandum of Law in Support of Motion for Summary Judgment* ("Reply")[DE #62] and a 49-page appendix in support of its Reply [DE #63][24], in which it argues that HCMFA has not submitted summary judgment evidence showing the existence of a genuine dispute of a material fact in this Action with respect to the Alleged Oral Agreement Defense or any other defenses, and, thus, Highland is entitled to judgment as a matter of law pursuant to Rule 56 of the Federal Rules of Civil Procedure.

On July 27, 2022, the court heard oral argument on the MSJ.

For the reasons set forth below, this court agrees with Highland that it is entitled to summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure and recommends that the District Court grant the MSJ and enter judgment in favor of Highland and against HCMFA as to the Pre-2019 Notes.

III. Undisputed Material Facts

A. The Pre-2019 Notes

On February 26, 2014, in exchange for a contemporaneous loan in the amount of $4,000,000 from Highland to HCMFA,[25] Mr. Dondero, on behalf of

---

[24] Citations to Highland's Reply appendix are notated as follows: Pl. Rep. Ex. #, Rep. Appx. #.

[25] It is undisputed that this note was tendered to Highland in exchange for a contemporaneous loan from Highland to HCMFA

HCMFA, as maker, executed a demand promissory note in favor of Highland, as payee, in the original principal amount of $4,000,000 (the "2014 Note"). Second Klos Dec.[26] ¶ 4, Exhibit A; *see also* Pl. Ex. 226, Appx. 5029-5031; Pl. Ex. 219, Appx. 5005-5007; Pl. Ex. 235, Appx. 5117-5120; Pl. Ex. 215 at 15:2017:11, 17:18-22, Appx. 4915-4917, 39:7-14, Appx. 4939; Pl. Ex. 234 ¶¶ 14-15, Appx. 5111; Pl. Ex. 220 (Responses to RFAs 1-2), Appx. 5017.

On February 26, 2016, in exchange for a contemporaneous loan in the amount of $2,300,000 from Highland to HCMFA,[27] Mr. Dondero, on behalf of HCMFA, as maker, executed a demand promissory note in favor of Highland, as payee, in the original principal amount of $2,300,000 (the "2016 Note" and together with the 2014 Note, the "Pre-2019 Notes").[28]

---

in the amount of $4,000,000. Def. Ex. 4 at p.2, ¶ 5 (Declaration of James Dondero dated June 30, 2022); Appx. 304.

[26] Citations to "Second Klos Dec." refer to the *Declaration of David Klos in Support of Highland Capital Management, L.P.'s Motion for Summary Judgment* filed by Highland in support of the MSJ in this adversary proceeding and are intended to distinguish it from the *Declaration of David Klos in Support of Highland Capital Management, L.P.'s Motion for Partial Summary Judgment in Notes Action* ("Klos Dec.") submitted in the Main Notes Action.

[27] It is undisputed that this note was tendered to Highland in exchange for a contemporaneous loan from Highland to HCMFA in the amount of $2,300,000. Def. Ex. 4 at p.2, ¶ 6; Appx. 304.

[28] The court uses the defined term "Pre-2019 Notes" (which was also used by Highland in its briefing) to refer to both of the two demand promissory notes issued by HCMFA that are the subject of this Action, together, as distinguished from the two promissory notes issued by HCMFA in 2019 that were the subject of the First

Second Klos Dec. ¶ 5, Exhibit B; *see also* Pl. Ex. 227, Appx. 5032-5034; Pl. Ex. 219, Appx. 5005-5007; Pl. Ex. 236, Appx. 5121-5127; Pl. Ex. 215 at 21:6-22:8, 22:9-23:11, Appx. 4921-4923; Pl. Ex. 234 ¶¶ 16-17, Appx. 5111; Pl. Ex. 220 (Responses to RFAs 3-4), Appx. 5017.

Except for the date, the amount, and the interest rate, the Pre-2019 Notes are identical and include the following relevant provisions:

> 2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.
>
> 3. Prepayment Allowed; Renegotiation Discretionary. Maker may prepay in whole or in part the unpaid principal or accrued interest of this Note. Any payments on this Note shall be applied first to unpaid accrued interest hereon, and then to unpaid principal hereof.
>
> 5. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or

---

HCMFA Note Action that was one of the Five Earlier-Filed Note Actions.

> delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.
>
> 6. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.
>
> 7. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

Pl. Ex. 226, Appx. 5029-5031; Pl. Ex. 227, Appx. 5032-5034.

B. The April 2019 Acknowledgement Letter

In a document titled "Acknowledgement from HCMLP" ("Acknowledgement Letter") dated April 15, 2019 (which was prior to the Petition Date), with reference being made to "certain outstanding amounts loaned from HIGHLAND CAPITAL MANAGEMENT, L.P. ("HCMLP") to HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P. ("HCMF") for funding of HCMF's ongoing operations, which are payable on demand and remained outstanding on December 31, 2018 and as of the date hereof," Highland acknowledged that "HCMF expects that it

may be unable to repay such amounts should they become due, for the period commencing today and continuing through May 31, 2021" and agreed "to not demand payment on amounts owed by HCMF prior to May 31, 2021." Pl. Ex. 217, Appx. 4989-4990; *see also* Second Klos Dec. ¶ 16; Pl. Ex. 215 49:8-50:7, Appx. 4949-4950, 55:15-22, Appx. 4955. Mr. Dondero executed the Acknowledgement Letter on behalf of both parties – for Highland, on behalf of "Strand Advisors, Inc., its general partner" and for HCMFA, on behalf of "Strand XVI, Inc., its general partner." Pl. Ex. 217, Appx. 4989-4990. Highland received no consideration in exchange for agreeing not to demand payment from HCMFA until May 31, 2021. Pl. Ex. 215 at 50:8-22, Appx. 4950. No reference was made in the Acknowledgement Letter to the Alleged Oral Agreements. Pl. Ex. 217, Appx. 4989-4990.

C. Demand for Payment by Highland and Non-payment by HCMFA

Highland did not demand payment of the outstanding obligations due under the Pre-2019 Notes until June 2, 2021. Second Klos Dec. ¶ 17; Pl. Ex. 218, Appx. 4991-5004 (the "Demand Letter"). In the Demand Letter, Highland made demand on HCMFA for payment, by June 4, 2021, of all principal and accrued interest due under the Pre-2019 Notes in the aggregate amount of $3,143,181.93, which represented all accrued and unpaid interest and principal through and including June 4, 2021.

Between May 2019 and December 2021, HCMFA made five separate payments against the 2014 Note, in the aggregate amount of approximately $2.4 million. Second Klos Dec., Exs. DH.

Between September 2016 and December 2021, HCMFA made three separate payments against the 2016 Note in the aggregate amount of approximately $1.5 million. Second Klos Dec., Exs. H-J.

After demand was made, other than the payments made by HCMFA in December 2021, HCMFA made no further payments against its obligations due under the Pre-2019 Notes and otherwise failed to satisfy its obligations under the Pre-2019 Notes. Pl. Ex. 215 at 58:4-6, Appx. 4958.

As of May 27, 2022, after giving effect to the payments made in December 2021 as well as the payments made against the Pre-2019 Notes prior to the Petition Date, the unpaid principal and accrued interest due under the 2014 Note is $2,151,130.84, and the unpaid principal and accrued interest due under the 2016 Note is $1,001,238.06. Second Klos. Dec. ¶ 18.

D. Undisputed Corroborating Evidence Regarding Validity and Enforceability of the Pre-2019 Notes

1. The Pre-2019 Notes Were Both Disclosed on Highland's Financial Statements Audited by the Outside Accounting Firm PwC

As set forth below, the undisputed evidence establishes that (a) both of the Pre-2019 Notes were provided to the accounting firm PwC, Highland's long-time outside auditors, and were described in Highland's audited financial statements; (b) both of the Pre-2019 Notes were carried as assets on Highland's balance sheet and were valued in amounts

equal to the accrued and unpaid principal and interest without any offset or reservation whatsoever; and (c) neither Highland nor Mr. Dondero disclosed to PwC the existence of an Alleged Oral Agreement that would provide HCMFA with a defense to the enforcement or collection of the Pre-2019 Notes, despite having an affirmative obligation to do so under generally accepted accounting principles ("GAAP").

Specifically, copies of the Pre-2019 Notes were and are maintained in Highland's books and records in the ordinary course of business and were provided to PwC in connection with its annual audits. Second Klos Dec. ¶¶ 3-5; Pl. Ex. 215 at 25:22-26:13, Appx. 4925-4926.

PwC's audit process was extensive and took months to complete. Pl. Ex. 94 at 9:24-12:14, Appx. 1554-1555. As part of the PwC audit process, Highland drafted the financial statements and accompanying notes, and management provided the information that PwC needed to conduct its audits. Pl. Ex 94 at 14:8-15:14, Appx. 1556; *see also* Pl. Ex. 94 at 49:11-50:22, Appx. 1564-1565.

All of Highland's employees who worked on the audit reported to Mr. Waterhouse (Highland's former CFO), and Mr. Waterhouse was ultimately responsible for making sure the audit was accurate before it was finalized. Pl. Ex. 105 at 87:25-89:10, Appx. 2071.

In connection with its audit, PwC required Highland to deliver "management representation letters" that included specific representations upon which PwC relied. Pl. Ex. 94 at 16:18-17:20, Appx. 1556, 23:4-9, Appx. 1558; s*ee also* Pl. Ex. 105 at 96:24-98:6, Appx. 2073-2074 (according to Mr. Waterhouse,

management representation letters are "required in an audit to help verify completeness."). For at least the fiscal years 2014, 2016, 2017 and 2018, Mr. Dondero and Mr. Waterhouse signed Highland's management representation letters; their representations were applicable through the date of the audit's completion so that all "material" subsequent events could be included and disclosed. Pl. Ex. 33, Appx. 729-740; Pl. Ex. 86, Appx. 1420-1431; Pl. Ex. 231, Appx. 5049-5062; Pl. Ex. 232, Appx. 5063-5073; Pl. Ex. 94 at 17:21-25, Appx. 1556, 19:2-22:6, Appx. 1557-1558; *see also* Pl. Ex. 105 at 92:4-8, Appx. 2072, 94:20-95:12, Appx. 2073.

Mr. Dondero and Mr. Waterhouse made the following representations to PwC, on May 19, 2016, in connection with PwC's audit of Highland's financial statements for the period ending December 31, 2016:

- The Affiliated Party Notes[29] represented bona fide claims against the makers, and all Affiliated Party Notes were current as of May 19, 2017. Pl. Ex. 232 ¶ 16, Appx. 5067.
- There were no "material" transactions or agreements that were not recorded in the financial statements. Pl. Ex. 232 ¶ 5, Appx. 5065.
- All relationships and transactions with, and amounts receivable or payable to or

[29] "Affiliated Party Notes" is the term used by PwC to refer to any and all notes payable to Highland and made by officers, employees, or affiliates of Highland. *See generally* Pl. Ex. 33, Appx. 729-740; Pl. Ex. 94, Appx. 1551-1585.

from, related parties were properly reported and disclosed in the consolidated financial statements. Pl. Ex. 232 ¶ 13(b), Appx. 5066.

- All related party relationships and transactions known to Mr. Dondero and Mr. Waterhouse were disclosed. Pl. Ex. 232 ¶ 12, Appx. 5066.
- All subsequent events were disclosed. Pl. Ex. 232 (signature page), Appx. 5071.

Under GAAP, Highland was required to disclose to PwC: (a) all "material" related party transactions; and (b) any circumstances that would call into question the collectability of any notes. Pl. Ex. 94 at 34:17-35:2, Appx. 1561, 51:17-52:5, Appx. 1565, 70:20-71:3, Appx. 1570. For purposes of the 2016 audit, the "materiality" threshold was $2 million. Pl. Ex. 232 at 1, Appx. 5064.[30]

Neither Mr. Dondero nor anyone at Highland ever disclosed to PwC the existence or terms of the Alleged Oral Agreements. Pl. Ex. 220 (Responses to RFAs 7-8), Appx. 5018.

For purposes of PwC's audit, "affiliate notes" were considered receivables of Highland and were carried on Highland's balance sheet under "Notes and other amounts due from affiliates." Pl. Ex. 34 at p. 2, Appx. 745; Pl. Ex. 72 at p. 2, Appx. 1291; Pl. Ex. 94 at 23:10-22, Appx. 1558, 31:11-33:20, Appx. 1560; Pl. Ex. 105 at

[30] For purposes of the 2018 audit, the "materiality" threshold was $1.7 million. Pl. Ex. 33 at 1, Appx. 730; Pl. Ex. 94 at 22:11-23:3, Appx. 1558. *See also* Pl. Ex. 105 at 91:14-93:6, Appx. 2072.

106:20-109:12, Appx. 2076.

For the 2016 fiscal year, Highland valued "Notes and other amounts due from affiliates" in the aggregate amount of approximately $172.6 million, which then constituted more than 12% of Highland's total assets. Pl. Ex. 71 at 2, Appx. 1240. For the 2017 fiscal year, Highland valued "Notes and other amounts due from affiliates" in the aggregate amount of approximately $163.4 million, which then constituted more than 10% of Highland's total assets; and, for the 2018 fiscal year, Highland valued "Notes and other amounts due from affiliates" in the aggregate amount of approximately $173.4 million, which then constituted more than 15% of Highland's total assets. Pl. Ex. 72 at 2, Appx. 1291; Pl. Ex. 34 at 2, Appx. 745; Pl. Ex. 94 at 33:21-34:2, Appx. 1560-1561, 51:2-16, Appx. 1565.

The notes to the financial statements described the "Affiliate Notes" that were carried on Highland's balance sheet; management calculated the amounts due and owing to Highland from each Affiliate. Pl. Ex. 72 at 30-31, Appx.1319-1320; Pl. Ex. 34 at 28-29, Appx. 771-772; Pl. Ex. 94 at 34:17-36:25, Appx. 1561, 51:17-53:12, Appx. 1565; Pl. Ex. 105 at 110:22-112:21, Appx. 2077.

The "fair value" of the Affiliate Notes was "equal to the principal and interest due under the notes." Pl. Ex. 72 at 30-31, Appx. 1319-1320; Pl. Ex. 34 at p. 28-29, Appx. 771-772; Pl. Ex. 94 at 37:11-39:12, Appx. 1561-1562; 53:19-25, Appx. 1565. No discounts were given to the Affiliate Notes, and PwC concluded that the obligors under each of the Affiliate Notes had the ability to pay all amounts outstanding. Pl. Ex. 92,

Appx. 1514-1530; Pl. Ex. 93, Appx. 1531-1550; Pl. Ex. 94 at 41:2-45:6, Appx. 1562-1563, 55:17-60:22, Appx. 1566-1567, 68:20-25, Appx. 1569.

Note 17 to Highland's 2015 audited financial statements disclosed the issuance of the 2016 Note as a "subsequent event" (*i.e.*, an event occurring after the December 31, 2015 end of Highland's fiscal year). Pl. Ex. 70 at 46, Appx. 1229; *see also*, Pl. Ex. 94 at 54:9-55:7, Appx. 1566.

2. In October 2020, HCMFA Informed Its Retail Board of Its Obligations Under the Pre-2019 Notes

HCMFA has contracts to manage certain funds (the "Fund Agreements"), which are among the most important contracts HCMFA has and are largely the reason for HCMFA's existence. Pl. Ex. 192 at 66:3-66:23, Appx. 3031. The funds themselves, in turn, are overseen to an extent by a board known as the "Retail Board," which must determine, on an annual basis, whether to renew the Fund Agreements with HCMFA, a process referred to as a "15(c) Review." As part of the 15(c) Review, the Retail Board requests information from HCMFA. Pl. Ex. 99 at 129:17-130:3, Appx. 1844-1845, Pl. Ex. 105 at 32:17-33:6, Appx. 2057, 168:9-12, Appx. 2091, 169:9-170:16, Appx. 2091-2092. Mr. Waterhouse, the Treasurer of HCMFA (in addition to being Highland's CFO) and Mr. Norris, HCMFA's Executive Vice President, participated in the annual 15(c) Review process with the Retail Board. Pl. Ex. 192 at 67:7-68:19, Appx. 3031; Pl. Ex. 105 at 168:13-169:8, Appx. 2091.

In October 2020, the Retail Board, as part of the annual 15(c) Review, asked HCMFA to provide

information regarding whether there were "any outstanding amounts currently payable or due in the future (e.g., notes) to [Highland] by HCMFA or . . . any other affiliate that provides services to the Funds." Pl. Ex. 36 at 3, Appx. 793.

The Pre-2019 Notes were recorded as liabilities in HCMFA's audited financial statements from the fiscal years 2014-2018. Pl. Exs. 221, 222, 224, and 225 at 2.[31]

HCMFA does not contend that its audited financial statements for the fiscal years 2014-2018 were inaccurate in any way with respect to the Pre-2019 Notes. *See* Pl. Ex. 215 at 28:5-9, Appx. 4928.

On October 23, 2020, HCMFA provided its formal responses to the questions posed by the Retail Board as to the issue of outstanding amounts currently payable or due by HCMFA to Highland or its affiliates:

> As of June 30, 2020, . . . $12,286,000 remains outstanding to HCMLP [Highland] from HCMFA. . . . The earliest the Note between HCMLP [Highland] and HCMFA could come due is in May 2021. All amounts owed by . . . HCMFA pursuant to the shared services arrangement with HCMLP [Highland] have been paid as of the date of this letter. The Advisor notes that both entities have the full faith and support of James Dondero.

Pl. Ex. 59 at p. 2, Appx. 885. The $12,286,000 amount included the amounts due under the Pre-2019 Notes. Pl. Ex. 215 at 26:14-17, Appx. 4926; 27:3-28:4,

---

[31] HCMFA's audited financial statements were filed under seal and therefore do not have "Appx." numbers.

Appx. 4927-4928; Pl. Ex. 192 at 54:6-9, 54:22-55:8, 55:23-56:3, Appx. 3028-3029; Pl. Ex. 194 at 117:16-122:15, Appx. 31563157; Pl. Ex. 195 at 120:23-122:13, Appx. 3211-3212.

3. Before and During the Bankruptcy Case, the Pre-2019 Notes Were Reflected on Highland's Books, Records, and In Its Bankruptcy Filings as Assets Owed to Highland, without Discounts

In addition to its PwC-audited financial statements, Highland's contemporaneous books and records—before and after the Petition Date—recorded the Pre-2019 Notes as valid debts due and owing by HCMFA to Highland, without discount.

After the Petition Date, but while Mr. Dondero was still in control, Highland, as the debtor-in-possession, filed its *Schedules of Assets and Liabilities* [Bankr. DE #247] (the "Debtor's Schedules"). The Debtor's Schedules included the Pre-2019 Notes among Highland's assets. Pl. Ex. 40, Appx. 812-815 (excerpts of the Debtor's Schedules showing that Highland (a) disclosed as assets of the estate "Notes Receivable" in the approximate amount of $150 million (Item 71), and (b) provided a description of the Pre-2019 Notes (Exhibit D)).

In every one of the Debtor's Monthly Operating Reports filed during the Highland Bankruptcy Case (including those filed while Mr. Dondero was still in control of the Debtor), Highland included as assets of the estate amounts "Due from affiliates" that included the Pre-2019 Notes. *See, e.g.*, Pl. Ex. 41, Appx. 816-825; Pl. Ex. 42, Appx. 826-835; Pl. Ex. 88, Appx. 1475-

1486; Pl. Ex. 89, Appx. 1487-1496. *See also* Bankr. DE # 405 (October 2019); Bankr. DE # 289 (November 2019); Bankr. DE # 418 (December 2019); Bankr. DE # 497 (January 2020); Bankr. DE # 558 (February 2020); Bankr. DE # 634 (March 2020); Bankr. DE # 686 (April 2020); Bankr. DE # 800 (May 2020), as amended in Bankr. DE # 905; Bankr. DE # 913 (June 2020); Bankr. DE # 1014 (July 2020); Bankr. DE # 1115 (August 2020); Bankr. DE # 1329 (September 2020); Bankr. DE # 1493 (October 2020); Bankr. DE # 1710 (November 2020); Bankr. DE # 1949 (December 2020); and Bankr. DE # 2030 (January 2021).

Highland's accounting group had a regular practice of creating, maintaining, and updating, on a monthly basis, "loan summaries" in the ordinary course of business (the "Loan Summaries"). Second Klos Dec. ¶ 6. The Loan Summaries identified amounts owed to Highland under affiliate notes and were created by updating underlying schedules for activity and reconciling with Highland's general ledger. *Id.*; Pl. Ex. 199, Appx. 3245-3246. The Loan Summaries identified each obligor under certain notes by reference to the "GL" number used in the general ledger. *See* Pl. Ex. 199, Appx. 3246 (HCMS ("GL 14530"), HCMFA ("GL 14531"), NexPoint ("GL 14532"), HCRE ("GL 14533"), and Mr. Dondero ("GL 14565")). *See* Second Klos Dec. ¶ 6. The 2014 Note is shown on the Loan Summary marked as Plaintiff's Exhibit 199 as "HCMFA #2," and the 2016 Note is shown on the Loan Summary as "HCMFA #5." Pl. Ex. 199, Appx. at 3246. Second Klos Dec. ¶ 8.

E. Undisputed Facts That Point to the Non-Existence of the Alleged Oral Agreements With Respect to the Pre-2019 Notes

No document was ever uncovered or produced in discovery to establish, memorialize, reflect, or recognize the existence or terms of the Alleged Oral Agreements. Neither Dugaboy nor Ms. Dondero (who were allegedly the ones who entered into the Alleged Oral Agreements, indirectly, on behalf of Highland) is aware of anything in writing that identifies the existence or terms of the Alleged Oral Agreements. Pl. Ex. 210 at 25:23-27:18, Appx. 4861-4863. HCMFA has admitted that the terms or existence of the Alleged Oral Agreements were never reduced to writing. Pl. Ex. 220 (Responses to RFAs 13-14), Appx. 5019.

Other than Mr. Dondero and Ms. Dondero, no one is alleged to have participated in the discussions that led to the Alleged Oral Agreement regarding the 2016 Note (the "2016 Alleged Oral Agreement"). Pl. Ex. 210 at 27:19-21, Appx. 4863. Ms. Dondero and Dugaboy have admitted that, prior to January 1, 2021, neither ever disclosed the existence or terms of the 2016 Alleged Oral Agreement to *anyone* at Highland or HCMFA (including Highland's auditors), other than Mr. Dondero. Pl. Ex. 210 at 25:6-22, Appx. 4861, 27:22-28:4, Appx. 4863-4864. HCMFA has admitted that, prior to February 1, 2021, it never disclosed the existence or terms of any of the Alleged Oral Agreements to PwC, Mr. Okada, the Bankruptcy Court, or any creditor of Highland, including in connection with any objection to the Plan or Disclosure

Statement.[32] Ex. 220 (Responses to RFAs 7-12, 15-21), Appx. 5018.

Between May 2019 and December 2021, HCMFA made five separate pre-payments in the aggregate amount of $2,410,477.45 against amounts due under the 2014 Note, and between September 2016 and December 2021, HCMFA made three (3) separate pre-payments in the aggregate amount of $1,487,336.87 against amounts due under the 2016 Note. Second Klos Dec. ¶¶ 10-14; Pl. Ex. 219, Appx. 5005-5007.

In addition to the Pre-2019 Notes, and the Notes at issue in the First HCMFA Action, HCMFA issued at least three other notes to Highland in exchange for loans – one before issuing the 2014 Note and two after issuing the 2014 Note but before issuing the 2016 Note (collectively, the "Paid-Off Notes") – as to which HCMFA, prior to the Petition Date, paid all principal and interest due in full. Second Klos Dec. ¶ 9.

In November 2019, Mr. Dondero (while still in control of Highland) caused the sale of a substantial interest in the company Metro Goldwyn Mayer, Inc. ("MGM") for $123.25 million, a portion of which was for the Debtor's interest in a fund (and which sale price

---

[32] As noted above, HCMFA filed an objection to confirmation of Highland's chapter 11 Plan (which Plan was based on the assumption that the Pre-2019 Notes would be collected in 2021), yet it failed to make any mention of the existence of the Alleged Oral Agreements or any claim HCMFA had against Highland relating to the potential forgiveness of the debt arising under the Pre-2019 Notes. HCMFA similarly failed to mention the existence of the Alleged Oral Agreements or any claim HCMFA had against Highland relating to the potential forgiveness of the debt arising under the Pre-2019 Notes in its two proofs of claim filed in the Bankruptcy Case on April 8, 2020. [Bankr. Claim ## 95 and 119].

was well above its original cost), but he (whether on behalf of himself, personally, or on behalf of HCMFA or any of the Note Maker Defendants) and Highland failed to declare all of the promissory notes forgiven and remained silent about the alleged "oral agreements" altogether. *See* Pl. Ex. 201 ¶¶ 29-30, Appx. 3270-3271; Pl. Ex. 202 ¶ 14, Appx. 4135; Pl. Ex. 203 ¶ 1, Appx. 4143; Pl. Ex. 204 at p. 5 n.5, Appx. 4156.

The use of "forgiveable loans" to a corporate affiliate as compensation to individual officers or employees of Highland was not a practice that was standard at Highland or in the industry. Mr. Alan Johnson, Mr. Dondero's own executive compensation expert, reviewed Highland's audited financial statements for each year from 2008 through 2018, Pl. Ex. 101 at 119:14-189:21, and concluded that (a) Highland has not forgiven a loan to anyone in the world since 2009, (b) the largest loan Highland has forgiven since 2008 was $500,000, (c) Highland has not forgiven any loan to Mr. Dondero since at least 2008, and (d) at least since 2008, ***Highland has never forgiven in whole or in part any loan that it extended to any affiliate***.[33] Pl. Ex. 101 at 189:24-

[33] In his Expert Report dated May 28, 2021, Mr. Johnson stated that loans provided ***to Mr. Dondero*** – ***not loans provided to corporate affiliates*** – should be considered "potential deferred compensation as they were similar to loans given to ***other professionals*** at the firm" Def. Ex. G to Def. Ex. 3 (Declaration of Michael P. Aigen dated January 20, 2022) at 16, Appx. 252 (emphasis added). Mr. Johnson further notes in his report that, between 2013 and 2019, (a) "[s]everal loans were made [by Highland] ***to Mr. Dondero***," Def. Ex. 3 at 8, Appx. 244, (b) "***[Mr. Dondero]*** received loans in lieu of additional current compensation," Def. Ex. 3 at 3, Appx. 239, and (c) "[c]onsistent with company practice, the loans were considered a form of

192-10, Appx. 2005-2006.

F. Undisputed Facts Relating to HCMFA's Defenses of Waiver, Estoppel, Failure of Consideration, Prepayment, and Ambiguity

Mr. Dondero, HCMFA's Rule 30(b)(6) witness, could not identify any relevant facts to support HCMFA's affirmative defenses of waiver (*see* Pl. Ex. 215 at 44:18-45:14, Appx. 49444945), estoppel (*id.* at 45:20-46:10, Appx. 4945-4946), lack of consideration (*id.* at 47:7-25, Appx. 4947), or prepayment (*id.* at 48:2-10, Appx. 4948). Mr. Dondero also could not identify a material provision of either of the Pre-2019 Notes that he believed was ambiguous. *Id.* at 20:9-23, Appx. 4920, 24:19-25:11, Appx. 4924-4925. Indeed, there is undisputed evidence contradicting these purported defenses. *See, e.g.*, Pl. Ex. 217, Appx. 4989-4990 (Acknowledgement Letter where HCMFA admits that loans from Highland were outstanding and payable on demand); Pl. Ex. 220, Appx. 5017 (responses to RFAs 1 through 4 in which HCMFA admits to tendering the Pre-2019 Notes in exchange for loans from Highland equal to the principal amount of the Pre-2019 Notes).

IV. Summary Judgment Standard

Rule 56(a) of the Federal Rules of Civil Procedure provides, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(A).

---

deferred compensation that could be realized over time as the loans were forgiven and the income ***recognized by the individuals***." *Id.* (emphasis added).

Although summary judgment used to be viewed in the Fifth Circuit as a "'disfavored procedural short cut,' applicable to a limited class of cases," that view was upended, beginning with the Supreme Court's trilogy of summary judgment opinions issued in 1986, that "made it clear that our earlier approach to Rule 56 was wrong-headed because it was simply inconsistent with the plain language of the rule." *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (quoting *Armstrong v. City of Dallas*, 997 F.2d 62, 66 (5th Cir.1993) and citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986);[34] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). Rather than being a disfavored rule, the Supreme Court instructs that Rule 56 "*mandates* the entry of summary judgment, after an adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* (quoting *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552 (emphasis added in original)). The Supreme Court explained that "[i]n such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving

---

[34] The Court in *Celotex* opined, "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" 477 U.S. at 327, 106 S.Ct. at 2555 (quoting Fed. R. Civ. P. 1) (other citations omitted).

party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322-23, 106 S.Ct. at 2552.

Under Rule 56, a movant meets its initial burden of showing there is no genuine issue for trial by "point[ing] out the absence of evidence supporting the nonmoving party's case." *Latimer v. Smithkline & French Lab'ys*, 919 F.2d 301, 303 (5th Cir. 1990); *see also In re Magna Cum Latte, Inc.,* Bankr. No. 07-31814, 2007 WL 3231633, at *3 (Bankr. S.D. Tex. Oct. 30, 2007) ("A party seeking summary judgment may demonstrate: (i) an absence of evidence to support the nonmoving party's claims or (ii) the absence of a genuine issue of material fact."). The movant "need not 'negate' the elements of the nonmovant's case." *Little*, 37 F.3d at 1075.

"If the moving party carries [its] initial burden, the burden then falls upon the nonmoving party to demonstrate the existence of genuine issue of material fact." *Latimer*, 919 F.2d at 303; *see also Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio, Tex.*, 40 F.3d 698, 712 (5th Cir. 1994) ("To withstand a properly supported motion for summary judgment, the nonmoving party must come forward with evidence to support the essential elements of its claim on which it bears the burden of proof at trial."). "[T]he nonmovant must go beyond the pleadings and designate specific facts showing there is a genuine issue for trial." *Little*, 37 F.3d at 1075; *see also Hall v. Branch Banking*, No. H-13-328, 2014 WL 12539728, at *1 (S.D. Tex. Apr. 30, 2014) ("[T]he nonmoving party's bare allegations, standing alone, are insufficient to create a material dispute of fact and defeat a motion for summary

judgment."). The court must view the facts "in the light most favorable to the nonmoving party" but "only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007); *see also Hacienda Records, L.P. v. Ramos*, 718 F.App'x 223, 234 (5th Cir. 2018) ("The court considers the record as a whole, and draws all justifiable inferences in favor of the non-movant[, b]ut the non-movant bears 'the burden of demonstrating by competent summary judgment proof that there is [a genuine dispute] of material fact warranting trial.'") (internal citations omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* (quoting *Anderson*, 477 U.S. at 247-248, 106 S.Ct. at 2510). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* (citing *Matsushita*, 475 U.S. at 586-587 (footnote omitted)). "In considering the summary-judgment record, and although the court may not weigh the evidence or make credibility determinations, it must, of course, decide what evidence may be considered." *Hacienda Records*, 718 F.App'x at 234.

"[A] party cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence." *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir.

2007) (internal quotations omitted); *see also Kennedy v. Allstate Texas Lloyd's*, 2020 WL 8300511, at *1 (N.D. Tex. Dec. 14, 2020) ("Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial.") (*citing Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993)). Nor may a party "present evidence contradicting admissions made in his pleadings for the purpose of defeating a summary judgment," *Jonibach Management Trust v. Wartburg Enterprises, Inc.*, 136 F.Supp. 792, 821 n.29 (S.D. Tex. 2015),[35] declaration evidence that

[35] The court in *Jonibach* cites *Davis v. A.G. Edwards and Sons, Inc.*, 823 F.2d 105, 107-108 (1987), where plaintiffs, in attempting to defeat a summary judgment motion by showing that there was a genuine issue of material fact, submitted an affidavit that clearly conflicted with earlier statements the plaintiffs had made in their complaints. The Fifth Circuit stated that "the factual dispute d[id] not render summary judgment inappropriate," because "[i]rrespective of which document contains the more accurate account, the [plaintiffs] are bound by the admissions in their pleadings, and thus no factual issue can be evoked by comparing their pleadings with [the] affidavit." *Id.* The court noted that the prohibition against the submission of affidavits or declarations that contradict the party's pleadings for the purposes of defeating summary judgment is based on the proposition that "Factual assertions in pleadings . . . are considered to be judicial admissions conclusively binding on the party who made them," *Jonibach*, 136 F.Supp. at 821 n.29 (quoting *White v. ARCO/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983)), while also noting that "[a]lthough facts in pleadings are not by themselves evidence, a judicial admission has the effect of withdrawing it from contention." *Id.* (citing *Martinez v. Bally's Louisiana, Inc.*, 244 F.3d 474, 476 (5th Cir. 2001)).

contradicts or impeaches, without a valid explanation, sworn deposition testimony, *Hacienda Records, L.P. v. Ramos*, 718 F. App'x at 234 ("[A party] is not entitled to use a declaration 'that impeaches, without explanation, sworn testimony' to defeat summary judgment.") (quoting *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir. 1996)),[36] or declaration evidence that is internally inconsistent and self-contradictory. *Cooper Cameron Corp. v. United States Dep't of Labor*, 280 F.3d 539, 550 (5th Cir. 2002) ("[A party] cannot meet its [summary judgment] burden with an internally inconsistent, self-contradictory affidavit."); *see also Freeman v. City of Fort Worth, Texas*, 2011 WL 2669111, at *3 (N.D. Tex. July 7, 2001) (where the district court concluded that the non-movant's internally inconsistent and self-contradictory affidavit was "insufficient to create a dispute of fact as to any material issues.") (citations omitted).

The Supreme Court admonishes that "[w]hen opposing parties tell two different stories, one of which

---

[36] This rule is known as the "sham-affidavit" rule, which provides a "party may not manufacture a dispute of fact merely to defeat a motion for summary judgment," *Hacienda Records*, 718 F. App'x at 235 (quoting *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 386 (5th Cir. 2000)). The Fifth Circuit, in *Hacienda Records*, noted that "so long as inconsistent statements were 'made by [the party] the deponent and [the party] the affiant,' the court may refuse to consider his declaration as competent evidence." *Id.*; *see also Free v. Wal-Mart Louisiana, L.L.C.,* 815 F. App'x 765, 767 (5th Cir. 2020) (where the Fifth Circuit concluded that the district court had not abused its discretion and "reasonably applied the sham affidavit doctrine" when it struck an affidavit that, without explanation, conflicted with prior deposition testimony).

is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott*, 550 U.S. at 380, 127 S.Ct. at 1776. "Summary judgment is appropriate where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant, or where it is so overwhelming that it mandates judgment in favor of the movant." *Armstrong v. City of Dallas*, 997 F.2d 62, 66 n.12 (5th Cir.1993) ("We no longer ask whether literally little evidence, i.e., a scintilla or less, exists but, whether the nonmovant could, on the strength of the record evidence, carry the burden of persuasion with a reasonable jury."); *see also*, *Anderson*, 477 U.S. at 251-252, 106 S.Ct. at 2512 (where the Court stated that the inquiry under a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."). If the nomoving party fails to meet its burden of submitting competent summary judgment evidence that there is a genuine dispute as to a material fact, "the motion for summary judgment ***must*** be granted." *Little*, 37 F.3d at 1076 (emphasis added) ("A plaintiff should not be required to wait indefinitely for a trial when the defendant has a meritless defense that can be resolved on motion for summary judgment.").

V. Legal Conclusions

A. Highland Has Met Its Burden of Showing Its Prima Facie Case That It Is Entitled to Summary Judgment

It has often been said that "suits on promissory notes provide 'fit grist for the summary judgment mill.'" *Resolution Tr. Corp. v. Starkey*, 41 F.3d 1018, 1023 (5th Cir. 1995) (quoting *FDIC v. Cardinal Oil Well Servicing Co.*, 837 F.2d 1369, 1371 (5th Cir. 1988)); *see also Looney v. Irvine Sensors Corp.*, Civ. Action No. 3:09-CV-0840-G, 2010 WL 532431, at *2 (N.D. Tex. Feb. 15, 2010) ("Suits on promissory notes are typically well-suited for resolution via summary judgment."). To prevail on summary judgment for breach of a promissory note under Texas law, the movant need not prove all essential elements of a breach of contract, but only must establish (i) the note in question, (ii) that the non-movant signed the note, (iii) that the movant was the legal owner and holder thereof, and (iv) that a certain balance was due and owing on the note. *See Resolution*, 41 F.3d at 1023; *Looney*, 2010 WL 532431, at *2-3; *Magna Cum Latte*, 2007 WL 3231633, at *15.

With regard to the Pre-2019 Notes, the evidence is that they are valid, signed by Mr. Dondero on behalf of HCMFA in Highland's favor, and, as of May 27, 2022, the total outstanding principal and accrued but unpaid interest due under the 2014 Note was $2,151,130.84, and the unpaid principal and accrued interest due under the 2016 Note was $1,001,238.06. Second Klos. Dec. ¶ 18. HCMFA breached its obligations under the Pre-2019 Notes by failing to pay Highland all amounts due and owing upon Highland's

demand. Highland has been damaged by HCMFA's breaches in the amounts set forth above, plus the interest that has accrued under the Pre-2019 Notes since those calculations, plus collection costs and attorneys' fees. Thus, Highland has made its prima facie showing that it's entitled to summary judgment on HCMFA's breach of each of the Pre-2019 Notes. *See Resolution*, 41 F.3d at 1023 (holding that where affidavit "describes the date of execution, maker, payee, principal amount, balance due, amount of accrued interest owed, and the date of default for each of the two promissory notes," movant "presented a prima facie case of default on the notes."); *Looney,* 2010 WL 532431, at *2-3 (where movant "has attached a copy of the note … to a sworn affidavit in which he states that the photocopy is a true and correct copy of the note, that he is the owner and holder of the note, and that there is a balance due on the note … [movant] has made a prima facie case that he is entitled to summary judgment on the note.").

B. HCMFA Has Failed to Rebut Highland's Prima Facie Case

Highland having met its initial burden, the burden shifts to HCMFA to demonstrate the existence of a genuine dispute of a material fact that would defeat the MSJ. *Latimer*, 919 F.2d at 303; *see also Nat'l Ass'n of Gov't Emps*, 40 F.3d at 712. HCMFA has failed its burden here.

With regard to HCMFA's Alleged Oral Agreement

Defense,[37] HCMFA has failed to point to a genuine dispute of material fact such that a reasonable jury would find that the Alleged Oral Agreements existed and that the Alleged Oral Agreements, if they existed, would be valid and enforceable agreements under state law. The only summary judgment evidence submitted by HCMFA in support of its Alleged Oral Agreement Defense is the conclusory, self-serving, unsubstantiated declarations of Mr. Dondero and his sister, Ms. Dondero, regarding the existence of the Alleged Oral Agreements. *See* Declaration of James Dondero, dated June 30, 2022, Def. Ex. 4, Appx. 301-369; Declaration of Nancy Dondero, dated June 30, 2022, Def. Ex. 5, Appx. 370-380.[38] The court will not consider the Dondero declarations, which contradict HCMFA's pleaded facts and prior deposition testimony, and which are internally inconsistent and self-contradictory, as providing competent summary judgment evidence regarding the existence of the Alleged Oral Agreements. Therefore, HCMFA has failed to present any genuine dispute of material fact that could defeat the MSJ.

1. The Dondero Declarations Contradict the Pleaded Facts in HCMFA's Answer

The Dondero declarations submitted by HCMFA in opposition to the MSJ contradict the pleaded facts

---

[37] HCMFA has failed to present any evidence whatsoever of a genuine dispute of a material fact with respect to its other affirmative defenses. *See infra* note 20.

[38] As noted above, HCMFA can point to no document or writing that was ever uncovered or produced in discovery to establish, memorialize, or reflect the existence or terms of the Alleged Oral Agreements.

in HCMFA's assertion of the Alleged Oral Agreement Defense in its Answer with respect to the 2014 Note,[39] and, therefore will not be considered as competent summary judgment evidence to defeat Highland's claims on the 2014 Note. *See Jonibach Management Trust v. Wartburg Enterprises, Inc.*, 136 F.Supp. at 821 n.29 ("A party cannot present evidence contradicting admissions made in his pleadings for the purpose of defeating a summary judgment). A review of the stated Alleged Oral Agreement Defense reveals that HCMFA claims that Highland is barred from collecting on the Pre-2019 Notes because "sometime between December of the year in which each Note was made and February of the following year" Highland, through the person of Ms. Dondero, as a representative for a majority of the Class A shareholders of Highland, entered into an oral agreement (without naming the other party to the oral agreement), whereby Highland "agreed that [it] would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of Mr. Dondero's control" and that "[t]he purpose of this agreement was to provide compensation to Mr. Dondero, who was otherwise underpaid compared to reasonable compensation levels in the industry, through the use of forgivable loans" -- loans to whom, again, HCMFA does not say. Answer, ¶ 41. What is clear is that HCMFA alleges that Ms. Dondero is the

---

[39] As noted, the Alleged Oral Agreement Defense is pleaded with nearly identical language to the same Alleged Oral Agreement Defense asserted in four of the Five Earlier-Filed Note Actions that significantly that morphed over time after the commencement of the Five Earlier-Filed Note Actions.

person who entered into the Alleged Oral Agreement ten to twelve months ***after*** each of the Pre-2019 Notes were issued in exchange for hard-cash loans from Highland to HCMFA, and that the Alleged Oral Agreement was entered into for the purpose of providing compensation ***to Mr. Dondero***. Answer, ¶¶ 1-2, 41.

Despite (a) having litigated the circumstances concerning the Alleged Oral Agreement Defense for over a year in the Consolidated Notes Action, and (b) reviewing and authorizing HCMFA's Answer before it was filed,[40] it was only under questioning that Mr. Dondero and Ms. Dondero realized that she could not have entered into the 2014 Alleged Oral Agreement because she had not been appointed the trustee of Dugaboy until October of 2015.[41] As a result, Mr. Dondero was forced to change HCMFA's assertions in its Answer regarding the formation of the 2014 Alleged Oral Agreement to assert that it was ***he who entered into the 2014 Alleged Oral Agreement with himself***. Dondero Declaration, ¶ 13 ("I – acting on behalf of Dugaboy for [Highland] and also on behalf of HCMFA – entered into an agreement (the "2014 Agreement") that [Highland] would not collect on the 2014 Note if certain events occurred.").[42] HCMFA has not sought leave to amend its Answer in this Action, even though Mr. Dondero's declaration clearly contradicts the factual contentions in the

---

[40] *See* Pl. Ex. 215 at 30:7-31:2, Appx. 4930-4931.

[41] *See* Pl. Ex. 210 at 16:6-18:24, Appx. 4852-4854; *see also*, Pl. Ex. 237, Appx. 5128-5133.

[42] *See* Pl. Ex. 215 at 31:3-25, 32:19-36:6, Appx. 4931-4936.

Answer as to who allegedly entered into the 2014 Alleged Oral Agreement.

Mr. Dondero's declaration also contradicts the allegation in the Answer as to ***when*** the agreement was made to potentially forgive the indebtedness under the Pre-2019 Notes as a means of deferred compensation to Mr. Dondero. In the Answer, HCMFA states that the Alleged Oral Agreements were entered into "sometime between December of the year in which each Note was made and February of the following year." Answer, ¶41. Both of the Pre-2019 Notes were issued in February of the year in which they were made, which means HCMFA alleges that the Alleged Oral Agreements were entered into ten to twelve months ***after*** each of the Pre-2019 Notes were issued in exchange for loans from Highland. Yet, Mr. Dondero, in his declaration,[43] points to, and incorporates as exhibits to his declaration, two documents that state that the agreements to potentially forgive the loans as compensation to Mr. Dondero were actually made ***contemporaneously*** with the making of the loans and the issuance of the notes:[44]

---

[43] Def. Ex. 4 at ¶¶ 18-19, Appx. 309.

[44] If the Alleged Oral Agreements were made contemporaneously with the issuance of the notes, HCMFA would be barred from submitting evidence of such agreements by the parole evidence rule. *See Faulkner v. Mikron Indus., Inc. (In re Heritage Organization, L.L.C.)*, 354 B.R. 407, 430 (N.D. Tex. Bankr. 2006) (where the court stated that "extrinsic evidence of a condition subsequent is not admissible to vary the terms of a valid and binding written agreement.") (citing, *Litton v. Hanley*, 823 S.W.2d 428, 430-31 (Tex.App.—Houston [1st Dist.] 1992), for its holding that "evidence of an alleged oral agreement that the note

- A letter from his counsel dated February 1, 2021 to opposing counsel (the "Letter") that Mr. Dondero alleges discloses "that one of the defenses in this litigation was that the Notes were subject to forgiveness as potential compensation," Dondero Declaration ¶18 (attaching a copy of the letter as Exhibit C to the declaration). The letter references the Debtor's "recently commenced suit to collect on certain notes payable to it executed by Mr. Dondero and certain of his affiliates," and states, "As you are aware, in addition to other defenses, Mr. Dondero views the notes in question as ***having been given in exchange for loans by Highland made in lieu of compensation to Mr. Dondero***." Def. Ex. 4 at Ex. C., Appx. 361 (emphasis added).
- Proof of Claim #188 filed by Mr. Dondero, individually, on May 26, 2020 ("Dondero POC") that Mr. Dondero avers "provided in 'Schedule A' [to the proof of claim] notice to the world that the Notes at issue in this and the other adversary proceedings concerning notes were potentially forgivable as compensation to me." Def. Ex. 4 at ¶19, Appx. 309. Exhibit A to the proof of claim included a table labeled "Schedule A (as of March 31, 2020)" that

---

would only be due if the business subsequently turned a profit was inadmissible.")

> listed various notes issued by Mr. Dondero and various affiliates (including HCMFA) to Highland, and stated that the claim was "a contingent claim asserted by James Dondero and is subject to any effort to collect on [the notes listed on Schedule]" and that "[i]n the event that collection efforts are made to collect the Notes, James Dondero asserts that ***the Notes were issued by him for funds advanced in lieu of compensation***." Def. Ex. 4 at Ex. D, Appx. 367.

Because these allegations in Mr. Dondero's declaration clearly contradict the allegations pleaded in the Answer – as to when the agreement to forgive the loans upon the occurrence of a condition subsequent -- the court will not consider his declaration in connection with its analysis of the MSJ.[45]

2. *Mr. Dondero's Declaration Contradicts His Prior Sworn Testimony Regarding the Alleged Oral Agreements*

Mr. Dondero's declaration evidence (the Letter

---

[45] Similarly, Ms. Dondero's declaration that, in late 2016 to early 2017, she caused Dugaboy Trust to cause Highland to enter into the 2016 Alleged Oral Agreement and that she was only told by her brother, Mr. Dondero, that "about the substantially the [sic] same agreement Dugaboy made with respect to the 2014 Note," contradicts the pleaded facts in the Answer that it was ***she*** who entered into both the 2014 and 2016 Alleged Oral Agreements, and, thus, will not be considered competent summary judgment evidence of a genuine issue of material fact regarding the existence of the 2014 Alleged Oral Agreement.

and the Dondero POC) that state that the Pre-2019 Notes were issued "in lieu of compensation" contradicts the prior deposition testimony of Mr. Dondero that (a) the Pre-2019 Notes were issued in exchange for loans made to HCMFA, and (b) the Alleged Oral Agreements were entered into ten to twelve months after each of the Pre-2019 Notes were issued. *See, e.g.*, Pl. Ex. 215 at 15:20-17:11, 17:18-22, Appx. 4915-4917, 39:714, Appx. 4939; Pl. Ex. 215 at 21:6-22:8, 22:9-23:11, Appx. 4921-4923; Pl. Ex. 215 at 29:15-37:8, Appx. 4929-4937.

In addition, Mr. Dondero's declaration – wherein Mr. Dondero recollects that the Alleged Oral Agreements were entered into specifically with respect to the 2014 Note and the 2016 Note – is inconsistent with and contradicts his November 4, 2022 and May 5, 2022 deposition testimony as to whether the Pre-2019 Notes were subject to an Alleged Oral Agreement. First, during his November 4, 2021 deposition, Mr. Dondero could not describe any material terms of the alleged "oral agreements" as relating to the notes that were the subject of the Consolidated Notes Action. Without a list prepared by counsel, Mr. Dondero could not identify any of the Notes subject to the alleged "oral agreement" nor could he recall (i) the number of Notes subject to each alleged "oral agreement," (ii) the maker of each Note subject to each alleged "oral agreement," (iii) the date of each Note subject to each alleged "oral agreement," or (iv) the principal amount of any Note subject to the alleged "oral agreement." Pl. Ex. 99 at 13:4-28:22, Appx. 1815-1819. When asked about the existence or terms of any promissory note, other than the promissory notes that were the subject

of the Consolidated Notes Action, that was the subject of an agreement with the Dugaboy trustee, Mr. Dondero could not identify a single promissory note or any terms of such a promissory note, such as the maker, the date, or the principal amount. Pl. Ex. 99 at 28:6-31:14, Appx. 1818-1820, 33:22-34:12, Appx. 1820-1821. When asked if he "was aware of any other Promissory Notes [other than the Promissory Notes that are the subject of the Consolidated Notes Action] that are the subject of any agreement that the Dugaboy trustee ever entered into as a representative of the majority of Class A shareholders," Mr. Dondero answered, "Not as I sit here today." Pl. Ex. 99 at 39:4-14, Appx. 1822. During his deposition taken on May 5, 2022 (less than two months prior to his July 1, 2022 declaration), Mr. Dondero could not recall the details of the 2016 Alleged Oral Agreement, including whether the 2016 Alleged Oral Agreement was with respect to both the 2014 Note and the 2016 Note or whether he had entered into an oral agreement with himself in 2014, when he was the Dugaboy trustee, with respect to the 2014 Note. Pl. Ex. 215 at 33:12-34:8.

Yet, just five days after the November deposition, after Mr. Dondero reviewed HCMFA's Answer before authorizing HCMFA's attorneys to file it, Pl. Ex. 215 at 30:7-31:2, Appx. 4930-4931, HCMFA was able to allege that both of the Pre-2019 Notes were specifically the subject of a separate Alleged Oral Agreement, and, less than two months after the May deposition, Mr. Dondero filed his declaration in which he suddenly recollects the specifics of oral agreements that occurred: (a) with respect to the 2014 Note, at the end

of 2014, beginning of 2015 (apparently between himself, as the Dugaboy trustee, acting on behalf of Highland, and himself, as a representative of HCMFA) and, (2) with respect to the 2016 Note, at the end of 2016, beginning of 2017 (between Ms. Dondero, as the Dugaboy trustee, acting on behalf of Highland, and himself, as a representative of HCMFA). This goes to the heart of the issue of whether the alleged conversations occurred in 2014/2015 and 2016/2017 or whether they happened at all because the ***only*** evidence submitted by HCMFA regarding the existence of these conversations are the Dondero declarations. Because Mr. Dondero's declaration contradicts Mr. Dondero's deposition testimony, the court will not consider his declaration as competent summary judgment evidence on the issue of the existence of the Alleged Oral Agreements. *See Hacienda Records*, 718 F. App'x at 234 ("[A party] is not entitled to use a declaration 'that impeaches, without explanation, sworn testimony' to defeat summary judgment.") (quoting *S.W.S. Erectors, Inc.*, 72 F.3d at 495).

3. *The Dondero Declarations Are Internally Inconsistent and SelfContradictory*

Furthermore, both of the Dondero declarations are internally inconsistent and selfcontradictory and, therefore, will not be considered as competent summary judgment evidence present by HCMFA that could defeat the MSJ. *See Cooper Cameron Corp.*, 280 F.3d at 550 ("[A party] cannot meet its [summary judgment] burden with an internally inconsistent, selfcontradictory affidavit."). Mr. Dondero's declaration is self-contradictory in several ways,

beginning with the statement that the Alleged Oral Agreements were entered into ten to twelve months after each of the Pre-2019 Notes were issued in exchange for loans, which contradicts the statement in the declaration (incorporating the Letter and Dondero POC) that the Pre-2019 Notes were issued "in lieu of compensation." *Compare* Def. Ex. 4 at ¶¶ 5-6, 13-15, Appx. 304-305, 308 *with id.*, Exhibits C and D, Appx. 361, 363-367. Mr. Dondero's declaration is also selfcontradictory on the issue of exactly who were the parties to the Alleged Oral Agreements – were the Alleged Oral Agreements entered into between Highland and HCMFA or between Highland and Mr. Dondero, in his individual capacity? Mr. Dondero, essentially, alleges that the 2014 Alleged Oral Agreement was entered into between "[himself] – acting on behalf of Dugaboy for [Highland] and also on behalf of HCMFA." Def. Ex. 4 at ¶ 13, Appx. 307. However, in describing the Alleged Oral Agreement, he alleges that the purpose of the agreement was for ***Highland*** to provide ***him, personally,*** with deferred compensation as a means of ***Highland*** incentivizing ***Mr. Dondero, personally***, to give his "utmost focus and attention [to the monetization of the portfolio companies and to "serve[ ] as an incentive for ***me*** to work particularly hard to make sure these assets were successful," providing ***Highland*** "the additional benefit . . . of not increasing ***my*** base salary" but instead making "***my compensation*** conditional on performance." Def. Ex. 4 at ¶ 13, Appx. 307 (emphasis added). Mr. Dondero further alleges that the Alleged Oral Agreement was in line with Highland's "common practice to compensate ***executives*** with forgivable loans" as supported by his professed knowledge that

"several other ***individuals*** may have received loans by [Highland] that were forgiven." Def. Ex. 4 at ¶ 11, Appx. 306 (emphasis added). If the conversations that led to the Alleged Oral Agreements happened at all, the conversations are alleged to have been between Highland and Mr. Dondero, personally, regarding his personal deferred compensation (which contradicts Mr. Dondero's allegation that he was acting on behalf of, and purporting to bind, HCMFA) when these alleged conversations occurred.

Ms. Dondero's declaration is similarly internally inconsistent and self-contradictory with respect to the issue of who the parties were to the Alleged Oral Agreements with respect to the Pre-2019 Notes. Ms. Dondero alleges in her declaration that she, as the family trustee of Dugaboy, "caused Dugaboy . . . to cause [Highland] to enter into [the Alleged Oral Agreement] with HCMFA." Def. Ex. 5 at ¶ 7, Appx. 373. But, like Mr. Dondero, she goes on to describe the circumstances surrounding the Alleged Oral Agreement," stating that she "knew and believed that ***Jim Dondero would be the person*** most involved in, and responsible for, the marketing and eventual sale of [the portfolio companies] ***by Highland***" and that "[t]he 2016 Agreement had two primary purposes . . . . First, the 2016 Agreement would provide additional incentive and motivation ***to Jim Dondero*** to attempt to maximize the value and return to [***Highland***] . . . and to remain in [***Highland's***] employment," and "[s]econd, the 2016 Agreement would allow [***Highland***] to make part of ***Jim's*** compensation contingent on performance, instead of paying ***him*** additional cash in 2016 or 2017 . . . ." *Id.* at ¶ 9, Appx.

373-374. Finally, Ms. Dondero alleges, "At the time I caused [Highland] to enter into the 2016 Agreement, I believed I had the authority, as the Dugaboy Family Trustee, to cause Dugaboy to cause [Highland] to enter into the 2016 Agreement" and that "I also intended, believed, and expected that the 2016 Agreement ***would be a binding and enforceable agreement between Highland and Jim Dondero***" – not between Highland and HCMFA. *Id.* at ¶ 12, Appx. 374. The court will not consider the internally inconsistent and self-contradictory declaration of Mr. Dondero as competent summary judgment evidence.

The Dondero declarations are the only summary judgment evidence presented by HCMFA in support of its Opposition to the MSJ. Thus, the court's finding that neither constitutes competent summary judgment evidence results in the conclusion that HCMFA has failed to meet its burden of rebutting Highland's *prima facie* case for summary judgment. Highland's MSJ should be granted.

4. Even If the Court Were to Consider the Dondero Declarations, HCMFA Has Failed to Point to a Genuine Dispute With Respect to a Material Fact That Would Defeat Highland's MSJ

Even if the court were to consider the Dondero declarations, when reviewed with the summary judgment record as a whole, HCMFA has not raised a genuine issue of material fact such that a reasonable jury might find the existence of the Alleged Oral Agreements. We have here a case of "opposing parties tell[ing] two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury

could believe it," such that "[the] court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott*, 550 U.S. at 380, 127 S.Ct. at 1776. HCMFA's version of the facts is "blatantly contradicted by the record, so that no reasonable jury could believe it" and so the court should adhere to the Supreme Court's admonition and not accept HCMFA's allegations of a fact for purposes of ruling on the MSJ.

a) Could the Alleged Oral Agreements, If Made, Even Be Valid?

HCMFA's opposition to the MSJ depends on HCMFA being able to submit competent summary judgment evidence that the Alleged Oral Agreements not only existed but are valid, binding contracts between Highland and HCMFA under Texas law. HCMFA cannot meet that burden here.

First, Ms. Dondero did not have authority to bind Highland to the Alleged Oral Agreements. HCMFA alleges that the Alleged Oral Agreements were between: (a) Mr. Dondero, acting on behalf of HCMFA; and (b) ***his sister, Ms. Dondero***, of Vero Beach, Florida, acting on behalf of Highland. Notably, Ms. Dondero was never an officer, manager, or held any role with Highland, but, HCMFA's position is that she nevertheless had authority to act for Highland, in connection with agreeing not to collect on the Pre-2019 Notes, because she was/is the Family Trustee of the

Dugaboy Investment Trust,[46] which was the holder of a majority of the ***limited partnership interests of Highland***. This, according to HCMFA, meant Dugaboy had authority, under the terms of Highland's limited partnership agreement (the "LPA"), to exert control over Highland and do things like release millions of dollars' worth of debt owed to Highland by a corporate affiliate, in order to provide compensation to Mr. Dondero as CEO, president, and controlling portfolio manager of Highland. Specifically, HCMFA makes the bizarre argument that the holder of a majority of the limited partnership interests of Highland "was entitled to approve the compensation of [Highland's] General Partner and any 'Affiliate' of the General Partner" and, thus, Ms. Dondero could cause Highland to release obligations on the Pre-2019 Notes as a form of "compensation" to Mr. Dondero. Def. Ex. 4 at ¶ 8, Appx. 305 (citing Pl. Ex. 30, Appx. 612, 622, 639, the Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.). HCMFA, through Mr. Dondero's declaration, points specifically to Section 3.10(a) as the section of the LPA that gave Dugaboy the authority to bind Highland to the Alleged Oral Agreements. *Id.*, Appx. 622. But Section 3.10(a) provides no such authority.

Section 3.10(a) is entitled "**Compensation and Reimbursement of the General Partner**." Note that the General Partner of Highland was Strand. Section 3.10(a) provides, in relevant part, "The

[46] Mr. Dondero was himself the trustee of Dugaboy until his resignation as such on August 26, 2015. Def. Ex. 4 at ¶ 9, Appx. 305-306.

General Partner and any Affiliate of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements unless approved by a Majority Interest." *Id.* The argument of HCMFA is that, since Mr. Dondero was an affiliate of Strand, this provision was relevant to his compensation. Even if one assumes that this provision pertains to compensation of Mr. Dondero, as CEO and president of Highland (as opposed to compensation while acting for Strand), the provision says nothing about the Majority Interest having the ***authority*** to act on behalf of Highland to enter into agreements with third parties regarding compensation. *Id.* Approval and authority are different concepts. In fact, Ms. Dondero testified that she had no meaningful knowledge, experience, or understanding of (a) Highland or its business, (b) the financial industry, (c) executive compensation matters, or (d) Mr. Dondero's compensation or whether he was "underpaid compared to reasonable compensation levels in the industry." Pl. Ex. 100 at 42:22-43:8, Appx. 1885, 48:7-61:9, Appx. 1886-1889; 211:8-216:21, Appx. 1927-1928.

The further undisputed evidence shows that Ms. Dondero never reviewed Highland's financial statements (including balance sheets, bank statements, profit and loss statements, and statements of operations), never asked to see them, and knew nothing about Highland's financial condition prior to the Petition Date. *Id.* at 61:25-63:13, Appx. 1889-1890. Ms. Dondero did not know of Highland's "portfolio companies" except for those her

brother identified, and as to those, she did not know the nature of Highland's interests in the portfolio companies, the price Highland paid to acquire those interests, or the value of the portfolio companies. *Id.* at 63:18-80-22, Appx. 1890-1894; 208:24-210:13, Appx. 1926-1927. Ms. Dondero never saw a promissory note signed by Mr. Dondero, nor any other officer or employee of Highland, nor any "affiliate" of Highland. *Id.* at 83:14-84:8, Appx. 1895; 95:3-16, Appx. 1898; 99:20-100:10, Appx. 1899; 115:11-116:4, Appx. 1903; 127:13-128:4, Appx. 1906; 140:15-141:22, Appx. 1909, 180:18-23, Appx. 1919. Ms. Dondero purportedly learned from her brother that Highland allegedly had a "common practice" of forgiving loans but had no actual knowledge or information concerning any loan that Highland made to an officer, employee, or affiliate that was actually forgiven and made no effort to verify her brother's statement. *Id.* 84:9-92:3, Appx. 1895-1897, 100:11-103:8, Appx. 1899-1900.

In summary, the undisputed evidence shows that Ms. Dondero's "approval" of any compensation to Mr. Dondero as an officer and employee of Highland had never been sought by Highland prior to the Alleged Oral Agreements. Moreover, Ms. Dondero, as the Family Trustee of Dugaboy, the holder of the majority limited partnership interests in Highland, did not have "authority," under Section 3.10(a) of the LPA or otherwise, to enter into any agreement with a third party regarding any compensation from Highland to anyone.

b) The Alleged Oral Agreements, If Any Were Made, Would Lack Enforceability Under Basic Contract Principles

Next, the Alleged Oral Agreements would be unenforceable as a matter of law for lack of: (a) consideration, (b) definiteness, and (c) a meeting of the minds. To be legally enforceable, a contract "must address all of its essential and material terms with a reasonable degree of certainty and definiteness." *Scott v. Wollney*, No. 3:20-CV-2825-M-BH, 2021 WL 4202169, at *7 (N.D. Tex Aug. 28, 2021) (internal quotations omitted); *In re Heritage Org., L.L.C.*, 354 B.R. 407, 431–32 (Bankr. N.D. Tex. 2006) (In order to prove existence of a valid and binding subsequent oral agreement binding upon parties, a party must prove that there was "(1) a meeting of the minds" and "(2) consideration to support such a subsequent oral agreement.") "Whether a contract contains all of the essential terms for it to be enforceable is a question of law." *Id.* (internal quotations omitted). "A contract must also be based on valid consideration." *Id.* "In determining the existence of an oral contract, courts look at the communications between the parties and the acts and circumstances surrounding those communications." *Melanson v. Navistar, Inc.*, 3:13-CV- 2018-D, 2014 WL 4375715, at *5 (N.D. Tex. Sept. 4, 2014). *See also id.* at *6 (finding that a reasonable trier of fact could not find that based on the oral conversation between the plaintiff and the defendant that there was an offer, an acceptance, and a meeting of the minds because the conversation did not contain all essential terms); *Wollney*, 2021 WL 4202169, at *8

(finding that "[w]hen, as here, 'an alleged agreement is so indefinite as to make it impossible for a court to 'fix' the legal obligations and liabilities of the parties, a court will not find an enforceable contract,'" finding that party "has not identified evidence of record that would allow a reasonable trier of fact to find that there was an offer, an acceptance, and a meeting of the minds between Plaintiff and Defendant.") (quoting *Crisalli v. ARX Holding Corp.*, 177 F. App'x 417, 419 (5th Cir. 2006) (citation omitted)); *Heritage*, 354 B.R. at 431–32 (finding a "subsequent oral amendment" defense fails where the summary judgment record does not support the existence of a subsequent agreement).

Here, HCMFA has not submitted competent summary judgment evidence of any of the essential elements for the formation of a valid and binding contract. Mr. Dondero could not identify any material terms of the Alleged Oral Agreements, such as: (a) when the Alleged Oral Agreements were entered into; (b) who – HCMFA or Mr. Dondero – was a party to the Alleged Oral Agreements; (c) whether the Pre-2019 Notes were the subject of an Alleged Oral Agreement (and whether the alleged oral conversations even occurred), (d) the number of notes subject to an Alleged Oral Agreement; or (e) the maker, the date, or the principal amount of any note that was subject to an Alleged Oral Agreement. HCMFA alleges, through Mr. Dondero's declaration, that the Alleged Oral Agreements were agreements between Highland and HCMFA while, at the same time, it alleges, through both Dondero declarations, that the oral conversations were between Highland

and Mr. Dondero, personally. HCMFA does not even allege that ***HCMFA*** gave any consideration to Highland in exchange for Highland's alleged agreement to forgive HCMFA's indebtedness under the Pre-2019 Notes upon the occurrence of a condition subsequent. Thus, the Alleged Oral Agreements would be unenforceable for lack of consideration. The record evidence clearly shows, as well, that HCMFA has failed to provide evidence of the essential and material terms of the Alleged Oral Agreements with any degree of certainty and definiteness that would allow a reasonable trier of fact to find that the Alleged Oral Agreements were valid, binding agreements between Highland and HCMFA. And, finally, the summary judgment record, as a whole, shows that there certainly was not a "meeting of the minds" between Highland and HCMFA with respect to the Alleged Oral Agreements.

c) Most Importantly, HCMFA Has Not Raised a Genuine Issue of Fact Regarding the Existence of the Alleged Oral Agreements That Would Defeat the MSJ

Finally, the court finds that HCMFA has simply failed to present any summary judgment evidence that would allow a reasonable jury to find that the Alleged Oral Agreements existed. Beyond the fact that there are only self-serving, uncorroborated, and contradictory declarations and testimony of the Donderos submitted on this defense, it is simply not credible that a multibillion-dollar enterprise, with sophisticated officers and directors, that was audited by one of the largest and most iconic public accounting

firms in the world (PwC), would have entered into Alleged Oral Agreements to forgive millions of dollars of debt unbeknownst to any of those officers, directors, or PwC and, further, not disclose the existence of the Alleged Oral Agreements to any of those officers, directors, or PwC in the years leading up to the bankruptcy filing or to the bankruptcy court after the Petition Date until the Alleged Oral Agreement Defense was first raised in the Con[s]olidated Notes Action. No reasonable trier of fact would believe that Mr. Dondero entered into an "oral agreement" between himself, as a representative of Highland, and himself, as a representative of HCMFA – that he had a verbal conversation with himself – with respect to the 2014 Alleged Oral Agreement. One would have to wonder just how that conversation would have played out.

HCMFA's (and Mr. Dondero's and Ms. Dondero's) actions before and after the Petition Date belie the existence of any Alleged Oral Agreement. The Alleged Oral Agreements were never disclosed to anyone by Mr. Dondero or Ms. Dondero. Other than Mr. Dondero and Ms. Dondero, no one participated in the discussions that led to the Alleged Oral Agreements (and, again, with respect to the 2014 Alleged Oral Agreement, HCMFA has alleged that Mr. Dondero had this discussion with himself). Pl. Ex. 210 at 27:19-21, Appx. 4863. Ms. Dondero and Dugaboy have admitted that neither ever disclosed the existence or terms of the 2016 Alleged Oral Agreement to ***anyone***, including PwC, Mr. Waterhouse (again, Highland's former CFO), or Highland's co-founder, Mark Okada. *Id.* at 25:6-22, Appx. 4861, 27:22-28:4, Appx. 4863-4864. Mr. Dondero has admitted that he: (1) never

disclosed the existence or terms of the alleged "oral agreement" to PwC, Mr. Okada, or the bankruptcy court prior to the commencement of this Action, Pl. Ex. 24 (Responses to RFAs 11 and 12), Appx. 523; and (2) never caused Highland to disclose the existence or terms of any Alleged Oral Agreement to the bankruptcy court in connection with the Bankruptcy Case. Pl. Ex. 24 (Responses to RFAs 13 and 14), Appx. 523. To be clear, Mr. Dondero represented that he did, indeed, inform Mr. Waterhouse about the Alleged Oral Agreements. Pl. Ex. 24 (Responses to RFAs 3 & 4), Appx. 21. However, Mr. Waterhouse— again, the CFO of Highland ***and an officer of HCMFA***—testified that he did not learn of the Alleged Oral Agreements until recently and only believes that they were subject to "milestones" that he cannot identify. Pl. Ex. 105 at 65:5-72:14, Appx. 2065-2067, 82:19-84:7, Appx. 2070.

More importantly in connection with HCMFA's assertion of its Alleged Oral Agreement Defense in this Action, HCMFA, itself, did not disclose the existence of the Alleged Oral Agreements when it was in its financial interests to do so during the Bankruptcy Case – either in its proofs of claim filed in the Bankruptcy Case or in its objection to confirmation of the Plan, even though the Plan's financial projections were based on the stated assumption that all of the affiliate notes payable to Highland (including the Pre-2019 Notes) would be collected in 2021.[47] In

[47] HCMFA has admitted that, prior to February 21, 2021, it never disclosed the existence or terms of the Alleged Oral Agreements to PwC, Mr. Okada, the bankruptcy court, or any creditor of Highland, including in connection with any objection to the Plan

addition, Mr. Dondero sold MGM stock in November 2019—an event that would trigger the alleged "condition subsequent" under the Alleged Oral Agreements—but failed to declare the notes forgiven, and otherwise remained silent about the alleged agreement. Ms. Dondero, the counter-party to the Alleged Oral Agreements (or, just to the 2016 Alleged Oral Agreement, depending upon which of the contradictory allegations of fact between HCMFA's pleadings and the Dondero declarations and testimony is to be believed), never saw a note signed by Mr. Dondero or any affiliate of Highland and ***had no authority to bind Highland to the Alleged Oral Agreements***. No document exists memorializing or otherwise reflecting the existence or terms of the Alleged Oral Agreements. There is no history of loans to affiliates being forgiven by Highland as a means of providing deferred compensation to Mr. Dondero. Thus, even if the court were to consider the Dondero declarations as competent summary judgment evidence, no reasonable finder of fact could conclude that the Alleged Oral Agreements exist.

In conclusion, the summary judgment evidence shows that the Pre-2019 Notes: (i) are valid, (ii) were executed by HCMFA in favor of Highland; and (iii) there is a balance due and owing under each of the Pre-2019 Notes. HCMFA failed to rebut Highland's prima facie case because it failed to present competent summary judgment evidence of a ***genuine*** dispute of material fact in connection with any of its affirmative

---

or Disclosure Statement. Pl. Ex. 220 (Responses to RFAs 7-12, 15-21), Appx. 5018).

defenses that would defeat Highland's MSJ. Where, as here, two versions of the story collide and the non-movant's version of the facts is "blatantly contradicted by the record, so that no reasonable jury could believe it," *Scott*, 550 U.S. at 380, 127 S.Ct. at 1776, and "where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant, or where it is so overwhelming," Rule 56 mandates judgment in favor of the movant. *Armstrong*, 997 F.2d at 66 n.12.

For the reasons set forth above, the bankruptcy court hereby recommends that the District Court grant summary judgment in favor of the Highland.

VI. Conclusion: Summary Judgment Recommended

Accordingly, summary judgment should be entered holding HCMFA liable for: (a) breach of contract with respect to the Pre-2019 Notes; and (b) turnover of all amounts due under the Pre2019 Notes, pursuant to Bankruptcy Code Section 542, including the costs of collection and reasonable attorneys' fees as provided for in the Pre-2019 Notes in an amount to be determined.

Specifically:

With regard to the 2014 Note, HCMFA should be liable on a Judgment for breach of contract and turnover in the amount of: (a) **$2,151,130.84**, the total outstanding principal and accrued but unpaid interest due under the 2014 Note as of May 27, 2022; plus (b) interest accrued since May 27, 2022; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

With regard to the 2016 Note, HCMFA should be liable on a Judgment for breach of contract and turnover in the amount of: (a) **$1,001,238.06**, the total outstanding principal and accrued but unpaid interest due under the HCMFA Notes as of May 27, 2022; plus (b) interest accrued since May 27, 2022; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

Submission of Judgment. The bankruptcy court directs Plaintiff to promptly submit a form of Judgment that calculates proper amounts due pursuant to this Report and Recommendation, including interest accrued to date (and continuing to accrue per diem), as well as costs and attorneys' fees incurred. The costs and attorneys' fees calculation shall be separately filed as a Notice with backup documentation attached. HCMFA shall have 21 days after the filing of such Notice to file an objection to the reasonableness of the attorneys' fees and costs. The bankruptcy court will thereafter determine the reasonableness in Chambers (unless the bankruptcy court determines that a hearing is necessary) and will promptly submit the form Judgment, along with appropriate attorneys' fees and costs amounts inserted into the form Judgment, to the District Court, to consider along with this Report and Recommendation. This Report and Recommendation is immediately being sent to the District Court.

End of Report and Recommendation

Appendix J

Case 3:21-cv-00881-X Document 50-1
Filed 07/20/22

CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed July 19, 2022

/s/ Stacy G.C. Gonzalez
United States Bankruptcy Judge

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P. Reorganized Debtor.	Case No. 19-34054-sgj11 Chapter 11

HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., Defendant.	Adversary No. 21-03004-sgj Civ. Act. No. 3:21-cv-00881
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.	Adversary No.: 21-03005-sgj Civ. Act. No. 3:21-cv-00880 **(Consolidated Under Civ. Act. No. 3:21-cv-00881)**
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. JAMES D. DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.	Adversary No.: 21-03003-sgj Civ. Act. No. 3:21-cv-01010 **(Consolidated Under Civ. Act. No. 3:21-cv-00881)**

HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.	Adversary No.: 21-03006-sgj Civ. Act. No. 3:21-cv-01378 **(Consolidated Under Civ. Act. No. 3:21-cv-00881)**
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HCRE PARTNERS, LLC (n/k/a NEXPOINT REAL ESTATE PARTNERS, LLC), JAMES DONDERO, NANCY DONDERO AND THE DUGABOY INVESTMENT TRUST, Defendants.	Adversary No.: 21-03007-sgj Civ. Act. No. 3:21-cv-01379 **(Consolidated Under Civ. Act. No. 3:21-cv-00881)**

REPORT AND RECOMMENDATION TO DISTRICT COURT: COURT SHOULD GRANT PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST ALL FIVE NOTE MAKER DEFENDANTS[1] (WITH RESPECT TO ALL SIXTEEN PROMISSORY NOTES) IN THE ABOVE-REFERENCED CONSOLIDATED NOTE ACTIONS

I. Introduction

The five above-referenced civil actions, emanating from the Chapter 11 bankruptcy case of Highland Capital Management, L.P. ("Highland," "Plaintiff," or, sometimes, the "Debtor"[2]) started out as what seemed like very simple lawsuits by a Chapter 11 debtor to collect on large promissory notes owed to it (collectively, the "Note Actions"). The Note Actions were initially filed in the bankruptcy court as adversary proceedings.

The Defendants soon filed motions to withdraw the reference in these Note Actions, arguing that the causes of action asserted against them are statutory non-core claims and the bankruptcy court also does

---

[1] The "Note Maker Defendants"—sometimes collectively referred to simply as the "Defendants"—are: James D. Dondero (Civ. Action No. 3:21-cv-01010); Highland Capital Management Fund Advisors, L.P. (Civ. Action No. 3:21cv-00881); NexPoint Advisors, L.P. (Civ. Action No. 3:21-cv-00880); Highland Capital Management Services, Inc (Civ. Action No. 3:21-cv-01378); and HCRE Partners, LLC, n/k/a NexPoint Real Estate Partners, LLC (Civ. Action No. 3:21-cv-01379).

[2] Highland is actually now a "Reorganized Debtor," having obtained confirmation of a Chapter 11 plan, which went "effective" in August 2021.

not have constitutional authority to enter final judgments. The bankruptcy court agreed that the litigation presents non-core, related-to matters—since there are no proofs of claims of the Note Maker Defendants still pending, the resolution of which might be intertwined with the underlying promissory notes.[3] Additionally, the Note Maker Defendants did not consent to final judgments being issued by the bankruptcy court, and they also demanded jury trials.[4] The District Court accepted a report and recommendation of the bankruptcy court that the reference should be withdrawn when these Note Actions are trial-ready, with the bankruptcy court acting essentially as a magistrate judge for the District Court prior to trial, presiding over all pretrial matters. The Plaintiff's motion for partial summary judgment, now pending, is the type of pretrial matter contemplated to be handled by the bankruptcy court (with submission to the District Court of a Report and Recommendation required—to the extent final disposition of any claim is proposed).

By way of further background, the five Note Actions were originally brought on January 22, 2021, by Plaintiff (before confirmation of its Chapter 11 plan), again, as simple suits on promissory notes—that is, alleging breach of contract (nonpayment of notes) and seeking turnover of amounts allegedly due and owing from the various Defendants. Each of the Note Maker Defendants are closely related to Highland's founder and former president, James

---

[3] *See Stern v. Marshall*, 131 S. Ct. 2594 (2011).

[4] 28 U.S.C. § 157(c) & (e).

Dondero ("Mr. Dondero), and collectively borrowed tens of millions of dollars from Highland prepetition. The indebtedness was memorialized in a series of demand and term notes (i.e., sixteen notes altogether: thirteen demand notes and three term notes). The indebtedness represented by these notes remains unpaid.

The five Note Actions were subsequently consolidated into one action before District Judge Brantley Starr, in the interest of judicial economy, under Civ. Action No. 3:21-cv-881, since there are overlapping facts and defenses.[5] As alluded to above, the consolidated litigation involves sixteen different promissory notes on which Highland is the payee. More than $60 million of unpaid principal and interest was alleged to be due and owing on the notes as of the time that the five Note Actions were filed. The Note Maker Defendants and their notes are as follows: (i) Mr. Dondero is maker on three demand notes; (ii) Highland Capital Management Fund Advisors, L.P. ("HCMFA") is maker on two demand notes; (iii) NexPoint Advisors, L.P. ("NexPoint") is maker on one term note; (iv) Highland Capital Management Services, Inc ("HCMS") is maker on five notes (four

[5] The typical procedure in consolidation actions is to consolidate under the lowest-numbered case, which here would have been Civ. Action No. 3:21-cv-880, previously assigned to Judge Sam Cummings. However, Judge Starr determined that judicial efficiency would be best served by consolidating under Civ. Action No. 3:21-cv-881, because Civ. Action Nos. 3:21-cv-880 and 3:21-cv-881 were actually filed in district court on the same day and due to certain other factors explained in Judge Starr's Order Granting Defendant's Motion to Consolidate the Note Cases, dated January 6, 2022.

demand notes and one term note); and (v) HCRE Partners, LLC, n/k/a NexPoint Real Estate Partners, LLC ("HCRE") is maker on five notes (four demand notes and one term note). Highland filed the five Note Actions—one against each of the Note Maker Defendants—to pursue payment on the notes to help fund distributions to creditors under its Chapter 11 plan. Mr. Dondero, while a maker on three of the sixteen notes, was the signatory on a total of twelve of the sixteen notes.

The Note Actions morphed, so to speak, when ***four*** of the five Note Maker Defendants defended the Note Actions by alleging that an ***oral agreement*** existed between Highland and each of them—the substance of which was allegedly that Highland would not pursue collection on their underlying notes if certain conditions subsequent occurred.[6]

The "Oral Agreement" Defense Asserted by Four of the Five Note Defendants. To be clear, the "oral agreement" defense was asserted by each of the Note Maker Defendants ***except*** HCMFA. The four Defendants who assert the oral agreement defense are sometimes collectively referred to by the Plaintiff as the ***"Alleged Agreement Defendants"*** and they are: Mr. Dondero; NexPoint; HCMS; and HCRE. To be further clear, these Alleged Agreement Defendants represent that:

> Plaintiff agreed that it would not collect the Notes upon fulfillment of conditions

[6] These Note Maker Defendants also pleaded the affirmative defenses of justification and/or repudiation; estoppel; waiver; and ambiguity.

> subsequent. Specifically, sometime between December of the year in which each Note was made and February of the following year, Defendant Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed that Plaintiff would forgive the Notes if certain portfolio companies were sold for greater than cost or on a basis outside of Defendant James Dondero's control. The purpose of this agreement was to provide compensation to Defendant James Dondero, who was otherwise underpaid compared to reasonable compensation levels in the industry, through the use of forgivable loans, a practice that was standard at [Highland] and in the industry. This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant James Dondero believes there may be testimony or email correspondence that discusses the existence of this agreement that may be uncovered through discovery in this [Action].

Paragraph 82 in Amended Answer of Mr. Dondero [DE # 83 & DE # 16 ¶ 40 in Adv. Proc. No. 21-3003]. *See also* Paragraph 42 in Amended Answer of NexPoint [DE # 50 & DE # 64 ¶ 83 in Adv. Proc. No. 21-3005]; Paragraph 56 in Amended Answer of HCMS [DE #34 & DE # 73 ¶ 97 in Adv. Proc. No. 21-3006]; Paragraph 58 in Amended Answer of HCRE [DE # 34 & DE # 68 ¶ 99 in Adv. Proc. No. 21-3007].

Somewhat shockingly for a multi-billion-dollar enterprise with sophisticated officers and directors—

which was audited by one of the largest and most iconic public accounting firms in the world (PwC)—the alleged "oral agreement" was supposedly made (unbeknownst to any of those officer, directors, and PwC) between: (a) Mr. Dondero, acting on behalf of each of the Alleged Agreement Defendants; and (b) ***his sister, Nancy Dondero***, of Vero Beach, Florida ("Sister Dondero"), acting on behalf of Highland. Notably, Sister Dondero was never an officer, manager, or held any role with Highland, but the position of the Alleged Agreement Defendants is that she nevertheless had authority to act for Highland, in connection with agreeing not to collect on the Notes, because she was/is the trustee of the Dugaboy Investment Trust ("Dugaboy"), which is a family trust of Mr. Dondero, of which Mr. Dondero is sole beneficiary during his lifetime (with his children as the future beneficiaries).[7] Here is the catch: Dugaboy happens to own a majority of the ***limited partnership interests of Highland***—which, according to the Alleged Agreement Defendants, means Dugaboy can exert control over Highland and do things like release millions of dollars' worth of debt owed to Highland.[8]

---

[7] Mr. Dondero was himself the trustee of Dugaboy until his resignation as such on August 26, 2015. James Dondero Dec., DE # 155, ¶ 21 in Adv. Proc. No. 21-3003.

[8] *See id.* ¶ 20 (more specifically, the Defendants make a bizarre argument that a majority of equity holders in Highland could approve "compensation" set for Highland's general partner, Strand Advisors, Inc. ("Strand") and Strand's affiliates; the further argument is that Mr. Dondero is an affiliate of Strand, and, thus, Sister Dondero could release obligations on the Notes as a form of "compensation" to Mr. Dondero).

When this "oral agreement" defense was articulated, the bankruptcy court granted Highland's request for leave to amend its original complaints in each of the four applicable Note Actions to allege alternative theories of liability and add Mr. Dondero,[9] Dugaboy, and Sister Dondero as additional defendants on new counts—the theories being that, if such an "oral agreement" was made, it may have given rise to other causes of action on the part of the actors involved. Highland amended its complaints in each of the four applicable Note Actions, adding new Counts III, IV, V, VI, and VII alleging, among other things, fraudulent transfers (Counts III and IV), declaratory judgment as to certain provisions of Highland's limited partnership agreement (Count V), breach of fiduciary duty (Count VI), and aiding and abetting breach of fiduciary duty (Count VII) (the "Amended Complaints").

The "Mutual Mistake" Defense of one sole Defendant: HCMFA. Another way in which the simple Note Actions morphed was with regard to the "mutual mistake" defense that was alleged only with regard to the ***two notes on which Defendant HCMFA was the maker***.

The "mutual mistake" defense was articulated as follows. First, the signature on the two notes on which HCMFA was the maker—that of Frank Waterhouse, who was the Treasurer of HCMFA and also the former Chief Financial Officer ("CFO") of Highland until February 2021 (when he went to work for entities now

[9] Mr. Dondero was, of course, already a Defendant in Adv. Proc. No. 21-3003, as he was a maker on three notes.

controlled by Mr. Dondero)—was allegedly not authorized. More pointedly, it was alleged that the creation of the notes was entirely a ***mistake*** because (a) even though funds were frequently transferred between Highland and affiliates such as HCMFA, and (b) even though the Debtor's in-house accountants usually papered these transfers as loans, and (c) even though $7.4 million was undisputedly transferred from Highland to HCMFA at the time of the preparation and execution of the HCMFA Notes, the transfers of $7.4 million of funds to HCMFA was allegedly not supposed to be treated as a loan or loans in this instance. The fund transfer was allegedly supposed to be treated as ***compensation*** to HCMFA from Highland, for certain harm Highland allegedly caused to HCMFA and its stakeholders through an error or negligence committed by Highland or its professionals. The HCMFA notes were allegedly not what ***Mr. Dondero***—the person in charge of both Highland and HCMFA[10]—intended, and no one consulted with him before creating the HCMFA Notes. *See* Paragraph 29, DE # 127, in Adv. Proc. No. 21-3004.

Manufacturing Chaos. In the Plaintiff's motion for partial summary judgment now pending before the court—again, filed as to all five Note Maker Defendants and as to all sixteen notes— the Plaintiff contends that these are simple suits on promissory notes, and the Note Maker Defendants are essentially trying to manufacture chaos by attempting to create fact issues with bizarre (if not preposterous) defenses.

---

[10] *See* James Dondero Dec. DE # 155, ¶¶ 3-4, in Adv. Proc. No. 21-3003.

The Plaintiff asserts that it is entitled to judgment as a matter of law on Counts I (breach of contract for nonpayment) and II (turnover of funds, pursuant to Bankruptcy Code Section 542(b)) in each of the five Note Actions.

The bankruptcy court agrees. The summary judgment evidence shows that the sixteen Notes: (i) are valid, (ii) were executed by the Note Maker Defendants and in favor of Highland; and (iii) there is a balance due and owing under each of the sixteen Notes. The Note Maker Defendants failed to rebut Plaintiff's prima facie case because the Note Maker Defendants failed to create a ***genuine*** issue of material fact regarding their breaches. There was an absence of evidence to support each of Note Maker Defendants' affirmative defenses. Interestingly, among other things, Mr. Dondero has referred to all of the Notes at issue here as "soft notes" that were "made between friendly affiliates," implying that this somehow makes them less collectible.[11] For the avoidance of doubt, a "soft note" is not a thing—not under the Bankruptcy Code, not in the world of commercial finance, and not as described in any evidence submitted to the court.[12] The bankruptcy

---

[11] *Id*. ¶¶ 5-18.

[12] For the sake of clarity, this court can take judicial notice that there are plenty of complex chapter 11 cases where there are intercompany loans among debtor-affiliates, and the intercompany loans are cancelled as part of a plan. However, this happens in ***very different circumstances from the Highland case***—i.e., when all affiliates file bankruptcy, and either a secured lender has liens on all the assets of all the affiliates and/or there is no benefit to the general creditor body of collecting on the intercompany loans.

court hereby recommends that the District Court grant summary judgment in favor of the Plaintiff/Reorganized Debtor on Counts I and II in all five consolidated Note Actions, for the reasons set forth below.

II. Undisputed Facts Regarding Each of the Thirteen Demand Notes

Of the sixteen notes at issue in the Notes Actions (sometimes collectively referred to as the "Notes"): (a) thirteen were demand notes; and (b) three were term notes. These notes were executed between 2013 and 2019 and are described below. These are the undisputed facts pertaining to the thirteen demand notes.

A. The Three Demand Notes on Which Mr. Dondero is Maker

On February 2, 2018, Mr. Dondero executed a promissory note in favor of Highland, as payee, in the original principal amount of $3,825,000 ("Dondero's First Note"). Klos Dec. ¶ 18, Ex. D;[13] Pl. Ex. 125 at p. 9, Appx. 2357; Pl. Ex. 188, Appx. 3001-3002; Pl. Ex. 189, Appx. 3003-3004; Pl. Ex. 74, Appx. 1338-1340; Pl. Ex. 81 (Responses to RFAs 1-3), Appx. 1387; *see also* Pl.

[13] This refers to the Declaration of David Klos—the current Chief Financial Officer ("CFO") of the Reorganized Debtor—and the Exhibits attached thereto, filed concurrently with Highland's Motion for Partial Summary Judgment, found at DE # 133 in Adv. Proc No. 21-3003. For convenience, the court will occasionally refer to the "Klos Declaration" at this same DE # 133 in Adv. Proc No. 21-3003 even when referring herein to the ***other*** Note Actions (i.e., the Note Actions involving the other Note Maker Defendants) since the very same Declaration was filed in each of the Note Actions.

Ex. 32 ¶ 20, Appx. 664; Pl. Ex. 31 ¶ 20, Appx. 647.[14]

On August 1, 2018, Mr. Dondero executed a promissory note in favor of Highland, as payee, in the original principal amount of $2,500,000 ("Dondero's Second Note"). Klos Dec. ¶ 19, Ex. E; Pl. Ex. 126 at p. 2, Appx. 2366; Pl. Ex. 190, Appx. 3005-3006; Pl. Ex. 76, Appx. 1354-1356; Pl. Ex. 81 (Responses to RFAs 5-7), Appx. 1387-1388; *see also* Pl. Ex. 32 ¶ 21, Appx. 664; Pl. Ex. 31 ¶ 21, Appx. 647.

On August 13, 2018, Mr. Dondero executed a promissory note in favor of Highland, as payee, in the original principal amount of $2,500,000 ("Dondero's Third Note" and collectively, with Dondero's First Note and Dondero's Second Note, the "Dondero Notes"). Klos Dec. ¶ 20, Ex. F; Pl. Ex. 126 at p. 2, Appx. 2366; Pl. Ex. 77, Appx. 1357-1359; Pl. Ex. 81 (Responses to RFAs 9-11), Appx. 1388; *see also* Pl. Ex. 32 ¶ 22, Appx. 664; Pl. Ex. 31 ¶ 22, Appx. 647.

B. The Two Demand Notes on Which HCMFA is Maker

On May 2, 2019, HCMFA executed[15] a promissory

---

[14] Concurrently with filing its Motions for Partial Summary Judgment, Highland filed an Appendix of Exhibits in Support (the "Appendix") at DE #135 in Adv. Proc No. 21-3003. Citations to the Appendix are notated as follows: Pl. Ex. #, Appx. #. For convenience, the court will occasionally refer to this Appendix at this same DE # 135 in Adv. Proc No. 21-3003 even when referring herein to the ***other*** Note Actions (i.e., the Note Actions involving the other Note Maker Defendants) since the very same Appendix was filed in each of the Note Actions.

[15] HCMFA disputes that the signature of HCMFA's Treasurer, Frank Waterhouse, on this document was genuine or authorized. This allegation will be addressed later herein.

note in favor of Highland, as payee, in the original principal amount of $2,400,000 ("HCMFA's First Note"). Klos Dec. ¶ 21, Ex. G; Pl. Ex. 147 at p. 7, Appx. 2526; Pl. Ex. 54, Appx. 870-873; Pl. Ex. 55, Appx. 874-875; Pl. Ex. 1 at Ex. 1, Appx. 9-11; Pl. Ex. 53, Appx. 866-869.

On May 3, 2019, HCMFA executed[16] a promissory note in favor of Highland, as payee, in the original principal amount of $5,000,000 ("HCMFA's Second Note," and together with HCMFA's First Note, the "HCMFA Notes"). Klos Dec. ¶ 22, Ex. H; Pl. Ex. 147 at p. 7, Appx. 2526; Pl. Ex. 56, Appx. 876-877; Pl. Ex. 1 at Ex. 2, Appx. 12-15; Pl. Ex. 57, Appx. 878-880.

C. Four Demand Notes on Which Highland Capital Management Services, Inc. ("HCMS") is Maker

On March 28, 2018, HCMS executed a demand note in favor of Highland, as payee, in the original principal amount of $150,000 ("HCMS's First Demand Note"). Klos Dec. ¶ 23, Ex. I; Pl. Ex. 143, Appx. 2487-2490; Pl. Ex. 3 at Ex. 1, Appx. 117-119.

On June 25, 2018, HCMS executed a demand note in favor of Highland, as payee, in the original principal amount of $200,000 ("HCMS's Second Demand Note"). Klos Dec. ¶ 24, Ex. J; Pl. Ex. 144, Appx. 2491-2494; Pl. Ex. 3 at Ex. 2, Appx. 120-122.

On May 29, 2019, HCMS executed a demand note in favor of Highland, as payee, in the original principal amount of $400,000 ("HCMS's Third Demand Note").

---

[16] HCMFA disputes that the signature of HCMFA's Treasurer on this document was genuine or authorized. This allegation will be addressed later herein.

Klos Dec. ¶ 25, Ex. K; Pl. Ex. 145 at p. 11, Appx. 2506; Pl. Ex. 3 at Ex. 3, Appx. 123-125.

On June 26, 2019, HCMS executed a demand note in favor of the Debtor, as payee, in the original principal amount of $150,000 ("HCMS's Fourth Demand Note," and collectively, with HCMS's First Demand Note, HCMS's Second Demand Note, and HCMS's Third Demand Note, the "HCMS Demand Notes"). Klos Dec. ¶ 26, Ex. L; Pl. Ex. 146 at p. 7, Appx. 2516; Pl. Ex. 3 at Ex. 4, Appx. 126-128.

D. Four Demand Notes on Which HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC) ("HCRE") is Maker

On November 27, 2013, HCRE executed a demand note in favor of Highland, as payee, in the original principal amount of $100,000 ("HCRE's First Demand Note"). Klos Dec. ¶ 27, Ex. M; Pl. Ex. 148, Appx. 2533-2536; Pl. Ex. 4 at Ex. 1, Appx. 201-203.

On October 12, 2017, HCRE executed a demand note in favor of Highland, as payee, in the original principal amount of $2,500,000 ("HCRE's Second Demand Note"). Klos Dec. ¶ 28, Ex. N; Pl. Ex. 154 at p. 7, Appx. 2575; Pl. Ex. 4 at Ex. 2, Appx. 204-206.

On October 15, 2018, 2017, HCRE executed a demand note in favor of Highland, as payee, in the original principal amount of $750,000 ("HCRE's Third Demand Note"). Klos Dec. ¶ 29, Ex. O; Pl. Ex. 155 at p. 5, Appx. 2585; Pl. Ex. 4 at Ex. 3, Appx. 207-209.

On September 25, 2019, HCRE executed a demand note in favor of Highland, as payee, in the original principal amount of $900,000 ("HCRE's Fourth Demand Note," and collectively, with HCRE's

First Demand Note, HCRE's Second Demand Note, and HCRE's Third Demand Note, the "HCRE Demand Notes"). Klos Dec. ¶ 30, Ex. P; Pl. Ex. 156 at p. 6, Appx. 2596; Pl. Ex. 4 at Ex. 4, Appx. 210-212.

E. The Identical Provisions in Each of the Demand Notes.

Except for the date, the amount, the maker, and the interest rate, each of the thirteen Demand Notes listed above is identical and includes the following provisions:

> 2. Payment of Principal and Interest. The accrued interest and principal of this Note shall be due and payable on demand of the Payee.
>
> 5. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.
>
> 6. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration

> and all other notices of any kind hereunder.
>
> 7. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

See Pl. Ex. 74, Appx. 1338-1340; Pl. Ex. 76, Appx. 1354-1356; Pl. Ex. 77, Appx. 1357-1359; Pl. Ex. 1 at Exs.1-2, Appx. 9-15; Pl. Ex. 3 at Exs. 1-4, Appx. 117-128; and Pl. Ex. 4 at Exs. 1-4, Appx. 201-212.

F. Demands by Plaintiff and Non-Payment.

The undisputed evidence is that on December 3, 2020, during its bankruptcy case—with its Chapter 11 plan coming up for confirmation and its need of funding to pay its millions of dollars' of debt owed to creditors—Highland made separate demands on Mr. Dondero, HCMFA, HCMS, and HCRE, respectively, for payment of all accrued principal and interest due under the Demand Notes by December 11, 2020. The demand letters also included a demand for all costs of collection, including attorneys' fees, as provided in the above-referenced Demand Notes. Pl. Ex. 79, Appx. 1370-1373; Pl. Ex. 1 at Ex. 3, Appx. 16-19; Pl. Ex. 3 at Ex. 5, Appx. 129-132; and Pl. Ex. 4 at Ex. 5, Appx. 213-216 (collectively, the "Demand Letters").

Furthermore, it is undisputed that none of these Note Maker Defendants made any payments on the

Demand Notes or otherwise replied to the Demand letters before Plaintiff commenced these Note Actions. Therefore, the Note Maker Defendants have breached Section 2 of the Demand Notes by their terms and are in default.

With regard to the three Dondero Demand Notes, as of December 17, 2021, the unpaid principal and accrued interest due under their terms was $9,263,365.05. Klos Dec. ¶ 37.

With regard to the two HCMFA Demand Notes, as of December 17, 2021, the unpaid principal and accrued interest due under their terms was $7,874,436.09. Klos Dec. ¶ 40.

With regard to the four HCMS Demand Notes, as of December 17, 2021, the unpaid principal and accrued interest due under the HCMS Demand Notes was $972,762.81. Klos Dec. ¶ 45.

With regard to the four HCRE Demand Notes, as of December 17, 2021, the unpaid principal and accrued interest due under the HCRE Demand Notes was $5,330,378.23. Klos Dec. ¶ 50.

III. Undisputed Facts Regarding Each of the Three Term Notes

Of the sixteen notes at issue in the Notes Actions, three were term notes (the "Term Notes"). These are the undisputed facts pertaining to the three Term Notes.

A. The Three Term Notes

The Term Notes were each executed by Mr. Dondero on May 31, 2017. They were each for 30-year terms. One was for NexPoint, one was for HCMS, and

one was for HCRE. Klos Dec. ¶¶ 27-29. Each of these three Term Notes rolled up obligations of the makers under prior notes.[17] Each Term Note is more fully described as follows:

A Term Note signed on NexPoint's behalf in the original principal amount of $30,746,812.23 (the "NexPoint Term Note"). Klos Dec. ¶ 31, Ex. A; Pl. Ex. 2 at Ex. 1, Appx. 4144; Pl. Ex. 2 ¶ 21, Appx. 28; Pl. Ex. 15 ¶ 21, Appx. 428.

A Term Note signed on HCMS's behalf in the original principal amount of $20,247,628.02 (the "HCMS Term Note" and together with the HCMS Demand Notes, the "HCMS Notes"). Klos Dec. ¶ 32, Ex. R; Pl. Ex. 3 at Ex. 6, Appx. 133-136.

A Term Note signed on HCRE's behalf in the original principal amount of $6,059,831.51 (the "HCRE Term Note" and together with the HCRE Demand Notes, the "HCRE Notes"). Klos Dec. ¶ 33, Ex. S; Pl. Ex. 4 at Ex. 6, Appx. 217-220.

According to Frank Waterhouse,[18] the former Highland CFO (who was also an officer of each of these three Note Maker Defendants), Highland loaned the money to NexPoint, HCMS, and HCRE to enable those

---

[17] Proof of the loans underlying the prior notes (as defined in each of the Term Notes) is found at Pl. Exs. 127-141, Appx. 2368-2481 (HCMS); Pl. Exs. 149-153, Appx. 2537-2567 (HCRE); Pl. Exs. 157-161, Appx. 2599-2636 (NexPoint (the July 22, 2015 prior note appears to have been backdated because the underlying loans were effectuated between July 2015 and May 2017 (see Pl. Ex. 161))).

[18] Frank Waterhouse was CFO of Highland until he left Highland in February 2021. He now works for entities controlled by Mr. Dondero.

entities to make investments. Pl. Ex. 105 at 126:21-129:3, Appx. 2081. Mr. Dondero claimed to have no personal knowledge of the purpose of the loans or the borrowers' use of the loan proceeds. Pl. Ex. 98 at 420:10-18, Appx. 1776, 435:17-25, Appx. 1779, 448:4-13, Appx. 1783, and 450:3-24, Appx. 1783.

B. *The Identical Provisions in Each of the Term Notes.*

Except for the date, the amount, the maker, the interest rate, and the identity of the Prior Notes (as that term is defined in each Term Notes), each of the Term Notes is identical and includes the following provisions:

> 2.1 Annual Payment Dates. During the term of this Note, Borrower shall pay the outstanding principal amount of the Note (and all unpaid accrued interest through the date of each such payment) in thirty (30) equal annual payments (the "Annual Installment") until the Note is paid in full. Borrower shall pay the Annual Installment on the 31st day of December of each calendar year during the term of this Note, commencing on the first such date to occur after the date of execution of this Note.
>
> 4. Acceleration Upon Default. Failure to pay this Note or any installment hereunder as it becomes due shall, at the election of the holder hereof, without notice, demand, presentment, notice of intent to accelerate, notice of acceleration, or any other notice of any kind which are hereby waived, mature the principal of this Note and all interest then

> accrued, if any, and the same shall at once become due and payable and subject to those remedies of the holder hereof. No failure or delay on the part of Payee in exercising any right, power or privilege hereunder shall operate as a waiver thereof.
>
> 5. Waiver. Maker hereby waives grace, demand, presentment for payment, notice of nonpayment, protest, notice of protest, notice of intent to accelerate, notice of acceleration and all other notices of any kind hereunder.
>
> 6. Attorneys' Fees. If this Note is not paid at maturity (whether by acceleration or otherwise) and is placed in the hands of an attorney for collection, or if it is collected through a bankruptcy court or any other court after maturity, the Maker shall pay, in addition to all other amounts owing hereunder, all actual expenses of collection, all court costs and reasonable attorneys' fees and expenses incurred by the holder hereof.

C. *Non-Payment/Defaults Under the Term Notes*.

NexPoint, HCMS, and HCRE each failed to timely make their Annual Installment payments that were due on December 31, 2020. Belatedly, NexPoint made a payment of $1,406,111.92, on January 14, 2021, which reduced the total principal and interest then-outstanding. Also, belatedly, HCMS made a payment of $181,226.83, on January 21, 2021, which reduced the total principal and interest then-outstanding. Finally, belatedly HCRE made a payment of $665,811.09, on January 21, 2021, which reduced the

total principal and interest then-outstanding. However, as set forth in Section 4 above, the Term Notes allowed Highland to declare a default without notice when the annual installments were not timely paid on December 31, 2020.

As of December 17, 2021, the unpaid principal and accrued interest due under the NexPoint Term Note was $24,383,877.27.12. Klos Dec. ¶ 51.

As of December 17, 2021, the unpaid principal and accrued interest due under the HCMS Term Note was $6,748,456.31.13. Klos Dec. ¶ 52.

As of December 17, 2021, the unpaid principal and accrued interest due under the HCRE Term Loan was $5,899,962.22.14. Klos Dec. ¶ 53.

IV. Undisputed Corroborating Evidence Regarding the Sixteen Notes

A. The Notes Were All Disclosed on Highland's Financial Statements Audited by the Outside Accounting Firm PwC

The undisputed evidence establishes that (a) all of the Notes were provided to the accounting firm PwC, Highland's long-time outside auditors, and were described in Highland's audited financial statements; (b) all of the Notes were carried as assets on Highland's balance sheet and were valued in amounts equal to the accrued and unpaid principal and interest without any offset or reservation whatsoever;[19] and

[19] As discussed below, the HCMFA Notes were executed in May 2019, and were fully described in the "Subsequent Events" section of Highland's audited financial statements for the period ending December 31, 2018. Pl. Ex. 34 at p. 39, Appx. 782. Because the HCMFA Notes were executed after the end of the fiscal year,

(c) neither Highland nor Mr. Dondero disclosed any potential defenses to PwC, despite having an affirmative obligation to do so under generally accepted accounting principles ("GAAP").

As part of the PwC audit process[20] (as is typical), Highland was the one who actually drafted the financial statements and accompanying notes, and management provided the information that PwC needed to conduct its audits. Pl. Ex. 94 at 14:8-15:14, Appx. 1556; *see also id.* at 49:11-50:22, Appx. 1564-1565. All of Highland's employees who worked on the audit reported to Mr. Waterhouse (Highland's CFO), and Mr. Waterhouse was ultimately responsible for making sure the audit was accurate before it was finalized. Pl. Ex. 105 at 87:25-89:10, Appx. 2071. As further part of the audit, PwC required Highland to deliver "management representation letters" that included specific representations that PwC relied upon. Pl. Ex. 94 at 16:18-17:20, Appx. 1556, 23:4-9, Appx. 1558. *See also* Pl. Ex. 105 at 96:24-98:6, Appx. 2073-2074 (according to Mr. Waterhouse, management representation letters are "required in an audit to help verify completeness."). For fiscal years 2017 and 2018, Mr. Dondero and Mr. Waterhouse signed Highland's management representation

---

they were not included as "assets" for 2018, and Highland never completed its 2019 audit. Nevertheless, the undisputed evidence also shows that HCMFA (a) disclosed the existence of the HCMFA Notes in the "Subsequent Events" section of its own 2018 audited financial statements, and (b) carried the HCMFA Notes as liabilities on its own balance sheet. Pl. Ex. 45 at p. 17; Pl. Ex. 192 at 54:6-9, 54:22-55:8, 55:23-56:3, Appx. 3028, 56:20-59:3, Appx. 3028-3029.

[20] Pl. Ex. 94 at 9:24-12:14, Appx. 1554-1555.

letters; their representations were applicable through the date of the audit's completion so that all "material" subsequent events could be included and disclosed. Pl. Ex. 33, Appx. 729-740, Pl. Ex. 86, Appx. 1420-1431, Pl. Ex. 94 at 17:21-25, Appx. 1556, 19:2-22:6, Appx. 1557-1558; *see also* Pl. Ex. 105 at 92:4-8, Appx. 2072, 94:20-95:12, Appx. 2073.

Mr. Dondero and Mr. Waterhouse made the following representations to PwC, on June 3, 2019, in connection with PwC's audit of Highland financial statements for the period ending December 31, 2018:

> The Affiliated Party Notes[21] represented bona fide claims against the makers, and all Affiliated Party Notes were current as of June 3, 2019. Pl. Ex. 33 ¶ 11, Appx. 732; Pl. Ex. 94 at 24:6-25:5, Appx. 1558.
>
> If there were any errors in Highland's financial statements, they were not "material." Pl. Ex. 33 ¶ 32, Appx. 735; Pl. Ex. 94 at 25:6-26:13, Appx. 1558-1559.
>
> There were no "material" transactions or agreements that were not recorded in the financial statements. Pl. Ex. 33 ¶ 34, Appx. 735; Pl. Ex. 94 at 26:14-27:11, Appx. 1559.
>
> All relationships and transactions with, and amounts receivable or payable to or from, related parties were properly reported and disclosed in the consolidated financial

[21] "Affiliated Party Notes" is the term used by PwC to refer to any and all notes payable to Highland and made by officers, employees, or affiliates of Highland. *See generally* Pl. Ex. 33, Appx. 729-740; Pl. Ex. 94, Appx. 1551-1585.

statements. Pl. Ex. 33 ¶ 35(d), Appx. 735; Pl. Ex. 94 at 27:12-28:11, Appx. 1559.

All related party relationships and transactions known to Mr. Dondero and Mr. Waterhouse were disclosed. Pl. Ex. 33 ¶ 36, Appx. 736; Pl. Ex. 94 at 28:1229:5, Appx. 1559.

All subsequent events were disclosed. Pl. Ex. 33 (signature page), Appx. 738; Pl. Ex. 94 at 29:6-30:2, Appx. 1559-1560.

Under GAAP, Highland was required to disclose to PwC: (a) all "material" related party transactions; and (b) any circumstances that would call into question the collectability of any of the Notes. Pl. Ex. 94 at 34:17-35:2, Appx. 1561, 51:17-52:5, Appx. 1565, 70:20-71:3, Appx. 1570. For purposes of the 2017 audit, the "materiality" threshold was $2 million. Pl. Ex. 86 at p. 1, Appx. 1421. For purposes of the 2018 audit, the "materiality" threshold was $1.7 million. Pl. Ex. 33 at p. 1, Appx. 730; Pl. Ex. 94 at p. 22:11-23:3, Appx. 1558. *See also* Pl. Ex. 105 at 91:14-93:6, Appx. 2072.

There is no evidence that Mr. Dondero nor anyone at Highland disclosed to PwC the existence of any defenses to the Notes (such as an "oral agreement or "mutual mistake"). Pl. Ex. 24 (Responses to RFAs 1-2), Appx. 521; Pl. Ex. 94 at 67:16-70:19, Appx. 1569-1570, 71:4-74-8, Appx. 1570-1571, 92:19-93:12, Appx. 1575; Pl. Ex. 105 at 102:2-5, Appx. 2075.

The Notes were carried on Highland's balance sheets as "Notes and other amounts due from affiliates." Pl. Ex. 34 at p. 2, Appx. 745; Pl. Ex. 72 at p.

2, Appx. 1291; Pl. Ex. 94 at 23:10-22, Appx. 1558, 31:11-33:20, Appx. 1560; Pl. Ex. 105 at 106:20-109:12, Appx. 2076.

The notes to the financial statements described the "Affiliate Notes" that were carried on Highland's balance sheet; management calculated the amounts due and owing to Highland from each Affiliate. Pl. Ex. 72 at p. 30-31; Pl. Ex. 34 at p. 28-29; Pl. Ex. 94 at 34:17-36:25; 51:17-53:12, Appx. 1565; Pl. Ex. 105 at 110:22-112:21, Appx. 2077. The "fair value" of the Affiliate Notes was "equal to the principal and interest due under the notes." Pl. Ex. 72 at p. 30-31, Appx. 1319-1320; Pl. Ex. 34 at p. 28-29, Appx. 771-772; Pl. Ex. 94 at 37:11-39:12, Appx. 1561-1562; 53:19-25, Appx. 1565. No discounts were given to the Notes, and PwC concluded that the obligors under each of the Affiliate Notes had the ability to pay all amounts outstanding. Pl. Ex. 92, Appx. 1514-1530; Pl. Ex. 93, Appx. 1531-1550; Pl. Ex. 94 at 41:2-45:6, Appx. 1562-1563, 55:17-60:22, Appx. 1566-1567, 68:20-25, Appx. 1569.

Finally, with regard to the two HCMFA Notes in particular (i.e., the ones allegedly subject to a "mutual mistake" defense—as further described below), a note to Highland's audited financial statements for year 2018 disclosed, as a "subsequent event" (i.e., an event occurring after the December 31, 2018 end of the fiscal year and on or before June 3, 2019, the date Mr. Dondero and Mr. Waterhouse signed the management representation letters and PwC completed its audit), the following: "Over the course of 2019, through the report date, HCMFA issued promissory notes to [Highland] in the aggregate amount of $7.4 million. The notes accrue interest at a rate of 2.39%." Pl. Ex.

34 at p. 39, Appx. 782. *See also* Pl. Ex. 94 at 54:9-55:7, Appx. 1566.

B. More Corroborating Evidence: During the Highland Bankruptcy Case (In Fact, Shortly Before the Note Actions Were Filed) HCMFA and NexPoint Informed Their Retail Board of their Obligations Under their Respective Notes

HCMFA and NexPoint are engaged in the business of managing certain funds, for the benefit of various investors in those funds. In fact, HCMFA and NexPoint have contracts to manage those funds (the "Fund Agreements"). Pl. Ex. 192 at 66:3-67:6, Appx. 3031. The funds themselves, in turn, are overseen to an extent by a board known as the "Retail Board." The Retail Board must determine on an annual basis whether to renew the Fund Agreements with HCMFA and NexPoint, a process referred to as a "15(c) Review." As part of the 15(c) Review, the Retail Board requests information from HCMFA and NexPoint. Pl. Ex. 99 at 129:17-130:3, Appx. 1844-1845, Pl. Ex. 105 at 32:17-33:6, Appx. 2057, 168:9-12, Appx. 2091, 169:9-170:16, Appx. 2091-2092. Mr. Waterhouse, the Treasurer of HCMFA and NexPoint (along with various other officers of HCMFA and NexPoint) participated in the annual 15(c) Review process with the Retail Board. Pl. Ex. 192 at 67:7-68:19, Appx. 3031; Pl. Ex. 105 at 168:13-169:8, Appx. 2091.

The Retail Board, as part of the annual 15(c) Review, asked HCMFA and NexPoint, in October 2020, to provide information regarding any outstanding amounts currently payable or due in the future (e.g., notes) to Highland by HCMFA or

NexPoint or to any other affiliate that provided services to the Funds." Pl. Ex. 36 at p. 3, Appx. 793.

On October 23, 2020, HCMFA and NexPoint provided their formal responses to the questions posed by the Retail Board. As to the issue of outstanding amounts currently payable or due to Highland or its affiliates, HCMFA and NexPoint reported as follows:

> As of June 30, 2020, $23,683,000 remains outstanding to HCMLP [Highland] and its affiliates from NexPoint and $12,286,000 remains outstanding to HCMLP [Highland] from HCMFA. The Note between HCMLP [Highland] and NexPoint comes due on December 31, 2047. The earliest the Note between HCMLP [Highland] and HCMFA could come due is in May 2021. All amounts owed by each of NexPoint and HCMFA pursuant to the shared services arrangement with HCMLP [Highland] have been paid as of the date of this letter. The Advisor notes that both entities have the full faith and support of James Dondero.

Pl. Ex. 59 at p. 2, Appx. 885.

C. More Corroborating Evidence: Before and During the Highland Bankruptcy Case, the Notes Were Reflected on Highland's Books, Records, and Bankruptcy Paperwork as Assets Owed to Highland, without Discounts

In addition to its PwC-audited financial statements, Highland's contemporaneous books and records—before and after the Petition Date—recorded the Notes as valid debts due and owing by each of the

Note Makers Defendants to Highland.

By way of example, the three Dondero Notes, reflecting personal loans to Mr. Dondero, show they were made on February 2, 2018; August 1, 2018; and August 13, 2018, respectively. A February 2018 internal monthly operating results of Highland, underneath a heading "Significant Items Impacting HCMLP's [Highland's] Balance Sheet," reflected a transfer to Mr. Dondero on February 2, 2018, as "($3.8M) partner loan." Ex. 39 at 1, Appx. 801. And in the Debtor's August 2018 internal monthly operating results, also under a heading "Significant Items Impacting HCMLP's [Highland's] Balance Sheet," the August 2018 transfers to Mr. Dondero were together contemporaneously identified as "($5.0M) partner loan." *See also* Pl. Ex. 78 at p. 2, Appx. 1362.

Highland's accounting group had a regular practice of creating, maintaining, and updating on a monthly basis "loan summaries" in the ordinary course of business (the "Loan Summaries"). The Loan Summaries identified amounts owed to Highland under affiliate notes and were created by updating underlying schedules for activity and reconciling with Highland's general ledger. Pl. Ex. 199, Appx. 3245-3246 is an example of a Loan Summary. The Loan Summaries identified each Note Maker Defendant by reference to the "GL" number used in the general ledger. *See* Pl. Ex. 199, Appx. 3246 (HCMS ("GL 14530"), HCMFA ("GL 14531"), NexPoint ("GL 14532"), HCRE ("GL 14533"), and Mr. Dondero ("GL 14565")).

The Debtor's Schedules of Assets and Liabilities [Bankr. DE # 247] (the "Debtor's Schedules"), filed

during the Highland bankruptcy case at a time when Mr. Dondero was still under control of Highland, included all of the Notes among the Debtor's assets. Pl. Ex. 40, Appx. 812815 (excerpts of the Debtor's Schedules showing that Highland (i) disclosed as assets of the estate "Notes Receivable" in the approximate amount of $150 million (Item 71), and (ii) provided a description of the Notes (Exhibit D)).

Additionally, all of the Debtor's Monthly Operating Reports filed during the Highland bankruptcy case (including those filed while Mr. Dondero was still in control of the Debtor) included the Notes as assets of the Debtor. *See, e.g.*, Pl. Ex. 41, Appx. 816-825; Pl. Ex. 42, Appx. 826-835; Pl. Ex. 88, Appx. 1475-1486; Pl. Ex. 89, Appx. 1487-1496. *See also* Bankr. DE # 405 (October 2019); Bankr. DE # 289 (November 2019); Bankr. DE # 418 (December 2019); Bankr. DE # 497 (January 2020); Bankr. DE # 558 (February 2020); Bankr. DE # 634 (March 2020); Bankr. DE # 686 (April 2020); Bankr. DE # 800 (May 2020), as amended in Bankr. DE # 905; Bankr. DE # 913 (June 2020); Bankr. DE # 1014 (July 2020); Bankr. DE # 1115 (August 2020); Bankr. DE # 1329 (September 2020); Bankr. DE # 1493 (October 2020); Bankr. DE # 1710 (November 2020); Bankr. DE # 1949 (December 2020); and Bankr. DE # 2030 (January 2021).

V. The Note Maker Defenses

A. The "Oral Agreement" Defense involving Mr. Dondero's Sister

As mentioned earlier, all Note Maker Defendants, besides HCMFA (sometimes referred to by Plaintiff as the "Alleged Agreement Defendants") have asserted as

their primary defense to payment on their Notes that there was an alleged "oral agreement," pursuant to which all of the Notes would be forgiven based on certain "conditions subsequent," or if certain assets were sold by a third party. Only Mr. Dondero originally asserted that defense (somewhat obliquely, in his original answer—merely stating that "it was previously agreed that Plaintiff would not collect the Notes")[22] and thereafter all of the Note Maker Defendants (except HCMFA) amended their pleadings to adopt the same affirmative defense. To be clear, the defense actually evolved over time. First, it was simply an alleged agreement by Highland not to collect on ***Mr. Dondero's*** Notes. Then, there were amended answers by each of the other Note Maker Defendants (except HCMFA) which obliquely referred to alleged agreements by Highland not to collect on the Notes upon fulfillment of undisclosed conditions subsequent. Finally, the "oral agreement" defense was set up as follows:

> Plaintiff's claims are barred . . . because prior to the demands for payment Plaintiff agreed that it would not collect the Notes upon fulfillment of conditions subsequent. Specifically, sometime between December of the year in which each note was made and February of the following year, [] Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff agreed that Plaintiff would forgive the Notes if certain portfolio companies were sold for

[22] Pl. Ex. 80, ¶ 40.

> greater than cost or on a basis outside of James Dondero's control. The purpose of this agreement was to provide compensation to James Dondero, who was otherwise underpaid compared to reasonable compensation levels in the industry, through the use of forgivable loans, a practice that was standard at HCMLP [Highland] and in the industry.[23] This agreement setting forth the conditions subsequent to demands for payment on the Notes was an oral agreement; however, Defendant [ ] believes there may be testimony or email correspondence that discusses the existence of this agreement that may be uncovered through discovery in this Adversary Proceeding.

Pl. Ex. 31 ¶ 82, Appx. 655 ("Dondero's Answer"). *See also* Pl. Ex. 15 ¶ 83, Appx. 435-436 ("NexPoint's Answer"); Pl. Ex. 16 ¶ 97, Appx. 451-452 ("HCMS's Answer"); and Pl. Ex. 17 ¶ 99, Appx. 468 ("HCRE's Answer").

---

[23] This statement appears to have been false, according to Mr. Dondero's own executive compensation expert, Alan Johnson. During the deposition of Mr. Johnson, he testified that he reviewed Highland's audited financial statements for each year from 2008 through 2018 (Pl. Ex. 101 at 119:14-189:21, Appx. 1988-2005) and concluded that (a) Highland did not have a standard practice of forgiving loans and had not forgiven a loan to anyone in the world since 2009, (b) Highland had never forgivinen a loan of more than $500,000, (c) Highland had not forgiven any loan to Mr. Dondero since at least 2008, and (d) since at least 2008, Highland had never forgiven in whole or in part any loan that it extended to any affiliate. *Id.* at 189:24-192:10, Appx. 2005-2006. *See also* Pl. Ex. 98 at 422:18-428:14, Appx. 1776-1778.

With regard to this "oral agreement" defense, certainly any trial judge should be inclined to send a dispute to a jury when there is any genuine material fact issue raised upon which reasonable minds might disagree. Nonetheless, ***there are numerous reasons why this court believes no reasonable jury could find that there was truly an "oral agreement" to forgive these loans to the Alleged Agreement Defendants***. The "oral agreement" defense does not pass the "straight face" test for a myriad of reasons.

First, to be clear, ***no document was ever uncovered or produced in discovery to establish, memorialize, or reflect the existence or terms of the alleged "oral agreement."***

Second, Mr. Dondero could not describe any material terms of the alleged "oral agreement" without relying on a document prepared by counsel. Specifically, without a list prepared by counsel, Mr. Dondero could not identify any of the Notes subject to the alleged "oral agreement" nor could he recall (i) the number of Notes subject to each alleged "oral agreement," (ii) the maker of each Note subject to each alleged "oral agreement," (iii) the date of each Note subject to each alleged "oral agreement," or (iv) the principal amount of any Note subject to the alleged "oral agreement." Pl. Ex. 99 at 13:4-28:22, Appx. 1815-1819.

Third, according to both Mr. Dondero and Sister Dondero, all of the Notes would be forgiven if Mr. Dondero sold one of three portfolio companies—***Trussway, Cornerstone, or MGM***—above cost. *See* Pl. Ex. 31 ¶ 82, Appx. 655. Notably, in November 2019, Mr. Dondero (while still in control of Highland) caused

the sale of a substantial interest in ***MGM*** for $123.25 million, a portion of which was for the Debtor's interest in a fund, but failed to declare all of the Notes forgiven, and remained silent about the alleged "oral agreement" altogether. *See* Pl. Ex. 201 ¶¶ 29-30, Appx. 3270-3271; Pl. Ex. 202 ¶ 14, Appx. 4135; Pl. Ex. 203 ¶ 1, Appx. 4143; Pl. Ex. 204 at p. 5 n.5, Appx. 4156.

Fourth, Mr. Dondero separately testified that Highland disclosed to its auditors all loans of a material amount that Highland ever forgave. Pl. Ex. 98 at 426:8-427:15, Appx. 1777. As earlier discussed, no forgiven loans are mentioned anywhere in Highland's audited financial statements.

Fifth, Sister Dondero was simply not capable of entering into any alleged "oral agreement" on behalf of Highland. For one thing, it is undisputed that Sister Dondero had no meaningful knowledge, experience, or understanding of (a) Highland or its business, (b) the financial industry, (c) executive compensation matters, or (d) Mr. Dondero's compensation or whether he was "underpaid compared to reasonable compensation levels in the industry." Pl. Ex. 100 at 42:22-43:8, Appx. 1885, 48:7-61:9, Appx. 1886-1889; 211:8-216:21, Appx. 1927-1928. Sister Dondero resides in Vero Beach, Florida and represents that she owns a private investigations business.[24] The only information Sister Dondero purported to have regarding Mr. Dondero's compensation from Highland was that he had told her he "was not highly paid" and that, in recent years, "his salary has been roughly less than a million, 500, 700,000 somewhere in that

[24] *See* Nancy Dondero Dec. DE # 155 in Adv. Proc. No. 21-3003.

ballpark." Pl. Ex. 100 at 51:11-22, Appx. 1887.[25] But this information was simply inaccurate. Pl. Ex. 68, Appx. 1129-1130 (2016 base salary of $1,062,500 with total earnings and awards of $2,287,175); Pl. Ex. 50, Appx. 860-861 (2017 base salary of $2,500,024 with total earnings and awards of $4,075,324); Pl. Ex. 51, Appx. 862-863 (2018 base salary of $2,500,000 with total earnings and awards of $4,194,925); and Pl. Ex. 52, Appx. 864-865 (2019 base salary of $2,500,000 with total earnings and awards of $8,134,500).

Additionally, Sister Dondero never reviewed Highland's financial statements (including balance sheets, bank statements, profit and loss statements, and statements of operations), never asked to see them, and knew nothing about Highland's financial condition prior to the Petition Date. *Id.* at 61:25-63:13, Appx. 1889-1890. Sister Dondero did not know of Highland's "portfolio companies" except for those her brother identified, and as to those, Sister Dondero did not know the nature of Highland's interests in the portfolio companies, the price Highland paid to acquire those interests, or the value of the portfolio companies. *Id.* at 63:18-80-22, Appx. 1890-1894; 208:24-210:13, Appx. 1926-1927.

Still further, Sister Dondero never saw a promissory note signed by Mr. Dondero, nor any other officer or employee of Highland, nor any "affiliate" of Highland. *Id.* at 83:14-84:8, Appx. 1895; 95:3-16, Appx. 1898; 99:20-100:10, Appx. 1899; 115:11-116:4, Appx. 1903; 127:13-128:4, Appx. 1906; 140:15-141:22, Appx. 1909, 180:18-23, Appx. 1919. Sister Dondero

---

[25] *See also id.*

purportedly learned from her brother that Highland allegedly had a "common practice" of forgiving loans but had no actual knowledge or information concerning any loan that Highland made to an officer, employee, or affiliate that was actually forgiven and made no effort to verify her brother's statement. *Id.* 84:9-92:3, Appx. 1895-1897, 100:11-103:8, Appx. 1899-1900.

And still further, Sister Dondero had no knowledge regarding any of the Alleged Agreement Defendants (i.e., NexPoint, HCMS, or HCRE), including (a) the nature of their businesses, (b) their relationships with Highland, including whether they provided any services to Highland, (c) their financial condition, or (d) the purpose of the loans made to them by Highland, and their use of the proceeds. *Id.* at 103:19-115:10, Appx. 1900-1903, 119:5-127:7, Appx. 1904-1906, 129:5-140:14, Appx. 1906-1909.

Finally, and perhaps most important, Sister Dondero (purportedly acting as trustee for Dugaboy—the family trust of which Mr. Dondero was beneficiary, and which was an indirect, majority ***limited*** partner of Highland) had no authority under the Highland partnership agreement to negotiate and enter into binding agreements on behalf of Highland. Pl. Ex. 2 at Ex. 4, Appx. 57-93.

If this were not all enough, the alleged "oral agreement" was never disclosed to anyone by Mr. Dondero or Sister Dondero. Other than Mr. Dondero and Sister Dondero, no one participated in the discussions that led to the alleged "oral agreement." Pl. Ex. 100 at 190:16-191:17, Appx. 1922. Sister Dondero and Dugaboy have admitted that (1) neither

ever disclosed the existence or terms of the alleged "oral agreement" to anyone, including PwC, Mr. Waterhouse (again, Highland's CFO), or Highland's co-founder, Mark Okada,[26] and (2) neither ever caused Highland to disclose the existence or terms of the alleged "oral agreement" to the bankruptcy court. Pl. Ex. 25 (Responses to RFAs 1-6, 9-16, responses to Interrogatories 1 & 2, Appx. 538-542); Pl. Ex. 26 (Responses to RFAs 1-6, 9-16, responses to Interrogatories 1 & 2, Appx. 554-558). Mr. Dondero has admitted that he (1) never disclosed the existence or terms of the alleged "oral agreement" to PwC, Mr. Okada, or the bankruptcy court; and (2) never caused Highland to disclose the existence or terms of the alleged "oral agreement" to the bankruptcy court. Pl. Ex. 24 (Responses to RFAs 1, 2, 5-7, 11-17, Appx. 521-524). To be clear, Mr. Dondero represented that he did, indeed, inform Mr. Waterhouse about the alleged "oral agreement." Pl. Ex. 24, Appx. 521 (Responses to RFAs 3 & 4). However, Mr. Waterhouse—again, the CFO of Highland and an officer of each of the Alleged Agreement Defendants—testified he did not learn of the alleged "oral agreement" until recently and only believes that it was subject to "milestones" that he cannot identify. Pl. Ex. 105 at 65:5-72:14, Appx. 2065-2067, 82:19-84:7, Appx. 2070.

B. The "Mutual Mistake" Defense of HCMFA

The "Mutual Mistake" defense—like the "oral agreement" defense asserted by the other Note Maker

---

[26] Mark Okada was not only the co-founder of Highland, but he and his family trusts owned all the limited partnership interests of Highland, other than those interests held by Dugaboy. *See* James Dondero Dec., DE # 155, ¶ 19 in Adv. Proc. No. 21-3003.

Defendants—is farfetched, to say the least, especially in the context of a multi-billion company with perhaps the world's most iconic and well-known public accounting firm serving as its auditors. As set forth below, this court does not believe any reasonable jury could reach a verdict in favor of HCMFA on the "Mutual Mistake" defense.

To fully understand the defense, a reminder is in order regarding the many hats that Frank Waterhouse wore. Mr. Waterhouse is a Certified Public Accountant who joined Highland in 2006 and served as Highland's CFO on a continuous basis from approximately 2011 or 2012 until early 2021. While serving as Highland's CFO, Mr. Waterhouse simultaneously served as (1) an officer of HCMFA, NexPoint, and HCMS, holding the title of Treasurer; and (2) Principal Executive Officer of certain retail funds managed by HCMFA and NexPoint. As Treasurer and Principal Executive Officer of these entities, Mr. Waterhouse was responsible for managing, among other things, HCMFA's accounting and finance functions. Pl. Ex. 35; Pl. Ex. 37; Pl. Ex. 105 at 18:615, 18:23-19:6, 21:15-17, 23:5-20, 25:17-26:8, 27:17-28:16, 29:2-10, 30:9-31:6, 34:12-35:19, 38:20-39:5.

With that in mind, the "Mutual Mistake" defense works as follows. HCMFA asserts that the HCMFA Notes are void or unenforceable because they were signed by mistake or without authority by Mr. Waterhouse, and Mr. Dondero (as the person in charge of both Highland and HCMFA) ***did not intend*** for $7.4 million of funds that were transferred from the Debtor to HCMFA in May 2019 to be loans—rather the

money was intended to be ***compensation to HCMFA from Highland***, for a Highland error that allegedly cause HCMFA harm. Pl. Ex. 13 ¶¶ 45 & 47, Appx. 412. HCMFA specifically contends that, in March 2019, Highland made a "mistake in calculating" the net asset value ("NAV") of certain securities that Highland Global Allocation Fund ("HGAF")—a fund managed by HCMFA—held in a portfolio company called Terrestar (the "NAV Error"). HCMFA maintains that after the NAV Error was discovered in early 2019:

> The Securities and Exchange Commission opened an investigation, and various employees and representatives of the Plaintiff, the Defendant, and HGAF worked with the SEC to correct the error and to compensate HGAF and the various investors in HGAF harmed by the NAV Error. Ultimately, and working with the SEC, the Plaintiff [i.e., Highland] determined that the losses from the NAV Error to HGAF and its shareholders amounted to $7.5 million: (i) $6.1 million for the NAV Error itself, as well as rebating related advisor fees and processing costs; and (ii) $1.4 million of losses to the shareholders of HGAF.
>
> The Defendant [HCMFA] accepted responsibility for the NAV Error and paid out $5,186,496 on February 15, 2019 and $2,398,842 on May 21, 2019. In turn, the Plaintiff [Highland] accepted responsibility to the Defendant [HCMFA] for having caused the NAV Error, and the Plaintiff [Highland] ultimately, whether through insurance or its

> own funds, compensated the Defendant [HCMFA] for the above payments by paying, or causing to be paid, approximately $7.5 million to the Defendant [HCMFA] directly or indirectly to HGAF and its investors.

Pl. Ex. 13 ¶¶ 41-42, Appx. 411.

While this is the theory of HCMFA's "Mutual Mistake" defense, there is an absence of summary judgment evidence to support it. In fact, to the contrary, on May 28, 2019, HCMFA sent a memorandum to the Board of Trustees of HGAF to describe the "Resolution of the Fund's" NAV Error, and HCMFA ***did not mention Highland***. Pl. Ex. 182, Appx. 2978-2980. In fact, no document was submitted to suggest: (a) HCMFA ever told the Securities and Exchange Commission or HGAF Board that Highland, and not HCMFA, was responsible for the NAV Error; or that (b) Highland ever agreed to "compensate" HCMFA for any mistake it may have made with respect to the NAV Error. *See* Pl. Ex. 192 at 140:7-11, Appx. 3049. While no document exists that corroborates HCMFA's contention that Highland agreed to pay HCMFA $7.4 million as compensation for the NAV Error, HCMFA has identified Mr. Dondero as the person who allegedly agreed to make that payment on behalf of Highland. *Id.* at 138:15-19, Appx. 3049.

HCMFA reported to the HGAF Board that the "Estimated Net Loss" from the NAV Error was $7,442,123. Pl. Ex. 182 at p. 2, Appx. 2980. Notably, HCMFA admits that it filed a claim for and received almost $5 million in insurance proceeds to fund the loss and had to pay approximately $2.4 million out-of-

pocket to fully cover the estimated loss. *Id.* at p. 2, Appx. 2980; Pl. Ex. 192 at 146:20-25, Appx. 3051. Yet, despite having received approximately $5 million in insurance proceeds, HCMFA now takes the position that (a) Highland's subsequent transfer of $7.4 million to HCMFA was "compensation" for Highland's negligence and (b) HCMFA was entitled to receive both and $5 million in insurance proceeds and $7.4 million in "compensation" from Highland, even though the total loss was only $7.4 million. It is undisputed that HCMFA never told its insurance carrier, ICI Mutual, that Highland was at fault or that Highland paid HCMFA $7.4 million as compensation for the same loss the carrier covered. Pl. Ex. 192 at 133:14-150:22, Appx. 3047-3052.

In summary, according to HCMFA, "it received $7.4 million from Highland as compensation, and approximately $5 million from the insurance carrier as compensation for a total receipt of $12.4 million in connection with the [NAV Error]." *Id.* at 147:4-11, Appx. 3051. There is no evidence that HCMFA ever told ICI Mutual that Highland made HCMFA "whole" or otherwise compensated HCMFA approximately $5 million dollars in connection with the NAV Error—the same amount HCMFA recovered from ICI Mutual in connection with the NAV Error.

To be clear, similar to all other Notes involved in this litigation, the HCMFA Notes were carried on its balance sheet and audited financial statements as liabilities. Pl. Ex. 45 at p. 17; Pl. Ex. 192 at 49:19-50:2, 54:6-9, 54:22-55:8, 55:23-56:3, 56:20-59-3, Appx. 3026-3029. There is nothing in HCMFA's books and records that corroborates HCMFA's contention that the

payments from Highland to HCMFA in exchange for the HCMFA Notes were intended to be compensation and not a loan. Pl. Ex. 192 at 59:8-63:20, Appx. 3029-3030. And Highland's bankruptcy filings (most or all of which were signed by Mr. Waterhouse—both the CFO of Highland and the Treasurer of HCMFA) contradict HCMFA's "Mutual Mistake" defense. As discussed earlier, Highland's contemporaneous books and records—before the Petition Date and after—recorded the HCMFA Notes as valid debts due and owing by HCMFA to Highland.

In summary, there is no evidence that creates any genuine issue of "Mutual Mistake." If one assumes that Mr. Waterhouse might have made a mistake in authorizing the preparation and execution of the HCMFA Notes,[27] then one must likewise assume that

---

[27] There can be no genuine dispute regarding Mr. Waterhouse's authority to execute the Notes on behalf of HCMFA. "The term 'actual authority' denotes that authority that a principal intentionally confers upon an agent or intentionally allows the agent to believe himself to possess." *Polland & Cook v. Lehmann*, 832 S.W.2d 729, 738 (Tex. App. 1992). Apparent authority arises when the "principal has acted in a manner that manifests the alleged agent's authority and whether the third party reasonably relied on the agent's authority." *Commercial Capital Holding Corp. v. Team Ace Joint Venture*, Civ. Action No. 99-3040, 2000 WL 726880, at *5 (E.D. La. June 2, 2000). The undisputed evidence establishes that Mr. Waterhouse had both actual and apparent authority to sign the Notes. At the time Mr. Waterhouse executed the Notes on behalf of HCMFA, Mr. Waterhouse was the Treasurer of HCMFA. See Incumbency Certificate (Pl. Ex. 35, Appx. 789). As Treasurer, he was authorized to, inter alia, "execute any and all agreements on behalf of the General Partner [of HCMFA] in its capacity as the general partner of [HCMFA]." *Id.* In this role, Mr. Waterhouse managed the accounting and finance for HCMFA. (Pl. Ex. 105 at 25:22-26:3, Appx. 2055-2056).

he compounded the mistake well over a dozen times when he (i) signed off on Highland's and HCMFA's audited financial statements, (ii) included the HCMFA Notes as liabilities on HCMFA's own balance sheet, and (iii) prepared each of the Debtor's MORs and other court filings. No reasonable jury could go there—particularly when the defense is based on mostly self-serving conclusory statements of Mr. Dondero and not any tangible evidence.[28]

C. Miscellaneous Defenses

Mr. Dondero also raised the affirmative defenses of waiver, estoppel, or lack of consideration. There is no summary judgment evidence in the record that supports his affirmative defenses of waiver, estoppel, or lack of consideration. Pl. Ex. 98 at 357:24-360:14,

---

Mr. Waterhouse testified that he "signed a lot of documents in [his] capacity" as Treasurer, and believed he was authorized to sign the HCMFA Notes. *Id.* at 143:24-25, Appx. 2085. To Mr. Waterhouse, the Notes were "just another document." *Id.* at 144:2-3, Appx. 2085. No one at HCMFA ever told Mr. Waterhouse that, as the Treasurer of HCMFA, he did not possess such authority. *Id.* at 158:2-16, Appx. 2089. At the time he signed the Notes on behalf of HCMFA, Mr. Waterhouse had no reason to believe he was not authorized to do so. *Id.* at 160:23-161:2, Appx. 2089. In fact, Mr. Waterhouse would not have signed the Notes on behalf of HCMFA if he did not believe he possessed such authority. *Id.* at 144:4-20, Appx. 2085. The Incumbency Certificate, which named Mr. Waterhouse as the Treasurer of HCMFA, gave Mr. Waterhouse "comfort" that he was authorized to sign the Notes. *Id.* at 159:13-160:4, Appx. 2089.

[28] One disturbing aspect of both the "Mutual Mistake" defense and the "oral agreement" defense is that, if they are to be believed, it means the audited financial statements of Highland and the Note Maker Defendants were materially misleading for several years. What human being(s) would be held accountable for this? Mr. Dondero himself? *See* Pl. Ex. 33.

Appx. 1760-1761.

With regard to the term loans of NexPoint, HCRE, and HCMS, these Note Maker Defendants each also contend that they made prepayments on their Notes, such that they cannot be deemed to have defaulted, and also assert they did not default under those loans because of Annual Installment payments that they made. First, the unrefuted summary judgment evidence of Plaintiff clearly dispels any argument that prepayments may have averted any defaults. *See* Klos Dec. pp. 3-6; Pl. Ex. 198 (Loan Summaries). Moreover, the Annual Installment payments were due on December 31, 2020, and these Note Maker Defendants did not make their Annual Installment payments to Highland until mid-January 2021, after receiving notices of default. These Note Maker Defendants had no right to cure in the loan documents. Thus, this defense fails as a matter of law. *See* Pl. Ex. 2 at Ex. 3, Appx. 49-56; Pl. Ex. 98 at 362:12-366:10, Appx. 1761-1762, 370:6-11, Appx. 1763, 389:10, Appx. 1768.

Finally, the "Alleged Agreement Defendants" pleaded defenses of "justification and/or repudiation; estoppel; waiver; and ambiguity."[29] No summary judgement evidence supported these affirmative defenses or any other defenses that were otherwise raised.[30]

---

[29] Mr. Dondero, who signed twelve of the sixteen Notes, testified that he did not read the Notes. Thus, he cannot rely on ambiguity as a defense. *See* Pl. Ex. 96 at 111:19-21; 125:13-20; 128:23-129:7.

[30] One stray defense alleged by HCMS, HCRE, and NexPoint, with regard to each of their Term Notes, is that they had "Shared Services Agreements" with Highland and, thus, Highland "made" them default by not directing them to make their Annual

V. Legal Standard

It is, of course, well settled that summary judgment is appropriate if a movant shows there is no genuine dispute as to any material fact and that movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *see also Warfield v. Byron*, 436 F.3d 551, 557 (5th Cir. 2006) ("[S]ummary judgment is proper when the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'") (quoting FED. R. CIV. P. 56(c)). A movant meets its initial burden of showing there is no genuine issue for trial by "point[ing] out the absence of evidence supporting the nonmoving party's case." *Latimer v. Smithkline & French Lab'ys*, 919 F.2d 301, 303 (5th Cir. 1990); *see also In re Magna Cum Latte, Inc.,* Bankr. No. 07-31814, 2007 WL 3231633, at *3 (Bankr. S.D. Tex. Oct. 30, 2007) ("A party seeking summary judgment may demonstrate: (i) an absence of evidence to support the nonmoving party's claims or (ii) the absence of a genuine issue of material fact."). "If the moving party

---

Installment payments timely in December 2021. First, as a technical matter, there was no admissible evidence that HCMS and HCRE had a shared service agreement with Highland. Second, while NexPoint did have a Shared Services Agreement with Highland, no provision authorized or obligated Highland to control NexPoint's bank accounts or to effectuate payments without instruction or direction from an authorized representative. *See* Pl. Ex. 205. Section 2.02 provided that "for the avoidance of doubt . . . [Highland] shall not provide any advice to [NexPoint] to perform any duties on behalf of [NexPoint], other than back- and middle-office services contemplated herein."

carries [its] initial burden, the burden then falls upon the nonmoving party to demonstrate the existence of genuine issue of material fact." *Latimer*, 919 F.2d at 303; *see also Nat'l Ass'n of Gov't Emps v. City Pub. Serv. Bd. of San Antonio, Tex.*, 40 F.3d 698, 712 (5th Cir. 1994) ("To withstand a properly supported motion for summary judgment, the nonmoving party must come forward with evidence to support the essential elements of its claim on which it bears the burden of proof at trial.") "This showing requires more than some metaphysical doubt as to the material facts." *Latimer*, 919 F.2d at 303 (internal quotations omitted); *see also Hall v. Branch Banking*, No. H13-328, 2014 WL 12539728, at *1 (S.D. Tex. Apr. 30, 2014) ("[T]he nonmoving party's bare allegations, standing alone, are insufficient to create a material dispute of fact and defeat a motion for summary judgment."); *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007) ("[A] party cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence.") (internal quotations omitted). "Where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant, or where it is so overwhelming that it mandates judgment in favor of the movant, summary judgment is appropriate." *Alton v. Tex. A&M Univ*, 168 F.3d 196, 199 (5th Cir. 1999); *see also Armstrong v. City of Dallas*, 997 F.2d 62, 66 n.12 (5th Cir.1993) ("We no longer ask whether literally little evidence, i.e., a scintilla or less, exists but, whether the nonmovant could, on the strength of the record evidence, carry the burden of persuasion with a reasonable jury.").

VI. Legal Analysis

A. The Context Here Matters: Promissory Notes are at Issue

It has often been said that "suits on promissory notes provide 'fit grist for the summary judgment mill.'" *Resolution Tr. Corp. v. Starkey*, 41 F.3d 1018, 1023 (5th Cir. 1995) (quoting *FDIC v. Cardinal Oil Well Servicing Co.*, 837 F.2d 1369, 1371 (5th Cir. 1988)); *see also Looney v. Irvine Sensors Corp.*, Civ. Action No. 3:09-CV-0840-G, 2010 WL 532431, at *2 (N.D. Tex. Feb. 15, 2010) ("Suits on promissory notes are typically well-suited for resolution via summary judgment."). To prevail on summary judgment for breach of a promissory note under Texas law, the movant need not prove all essential elements of a breach of contract, but only must establish (i) the note in question, (ii) that the non-movant signed the note, (iii) that the movant was the legal owner and holder thereof, and (iv) that a certain balance was due and owing on the note. *See Resolution*, 41 F.3d at 1023; *Looney*, 2010 WL 532431, at *2-3; *Magna Cum Latte*, 2007 WL 3231633, at *15.

Highland has made its prima facie showing that it's entitled to summary judgment on each of the Note Maker Defendants' breach of their respective Notes.

With regard to the Dondero Demand Notes, the evidence was that they were valid, signed by Mr. Dondero in Highland's favor and as of December 17, 2021, the total outstanding principal and accrued but unpaid interest due under the Dondero Notes was $9,263,365.05. Klos Dec. ¶¶ 18-20, Exs. D, E, F; ¶ 37.

With regard to the HCMFA Demand Notes, the

evidence was that they were valid, signed by HCMFA in Highland's favor and as of December 17, 2021, the total outstanding principal and accrued but unpaid interest due under the HCMFA Notes was $7,874,436.09. Klos Dec. ¶¶ 21-22, Exs. G, H; ¶ 40.

With regard to the HCMS Demand Notes, the evidence was that they were valid, signed by HCMS in Highland's favor and as of December 17, 2021, the total outstanding principal and accrued but unpaid interest due under the HCMS Term Notes was $972,762.81. Klos Dec. ¶¶ 2326, Exs. I, J, K, L; ¶ 45.

With regard to the HCRE Demand Notes, the evidence was that they were valid, signed by HCRE in Highland's favor and as of December 17, 2021, the total outstanding principal and accrued but unpaid interest due under the HCRE Demand Notes was $5,330,378.23. Klos Dec. ¶¶ 27-30, Exs. M, N, O, P; ¶ 50.

With regard to the NexPoint Term Note, the evidence was that it was valid, signed by NexPoint in Highland's favor and as of December 17, 2021, the total outstanding principal and accrued but unpaid interest due under the NexPoint Term Note was $24,383,877.27.[31] Klos Dec. ¶ 31, Ex. A; ¶ 51.

With regard to the HCMS Term Note, the evidence was that it was valid, signed by HCMS in Highland's favor and as of December 17, 2021, the total outstanding principal and accrued but unpaid

[31] Total unpaid principal and interest due actually decreased from January 8, 2021 to December 17, 2021 because a payment of $1,406,111.92 made January 14, 2021, which reduced the total principal and interest then-outstanding.

interest due under the HCMS Term Note was $6,748,456.31.[32] Klos Dec. ¶ 32, Ex. R; ¶ 52.

With regard to the HCRE Term Note, the evidence was that it was valid, signed by HCRE in Highland's favor and as of December 17, 2021, the total outstanding principal and accrued but unpaid interest due under the HCRE Term Note was $5,899,962.22.[33] Klos Dec. ¶ 33, Ex. S; ¶ 53.

Each of the Note Maker Defendants under the Demand Notes breached their obligations by failing to pay Highland all amounts due and owing upon Highland's demand. Each of the Note Maker Defendants under the Term Notes breached their obligations by failing to make the Annual Installment payment due on December 31, 2020.

The Reorganized Debtor, Highland, has been damaged by the Note Maker Defendants' breaches in the amounts set forth above, plus the interest that has accrued under the Notes since those calculations, plus collection costs and attorneys' fees—which amounts Highland should separately submit to the court.

In summary, Highland has made its prima facie case for summary judgment for the Note Makers Defendants' breach of the Notes. *See Resolution*, 41 F.3d at 1023 (holding that where affidavit "describes

---

[32] Total unpaid outstanding principal and interest due actually decreased from January 8, 2021 to December 17, 2021 because a payment of $181,226.83 made January 21, 2021, which reduced the total principal and interest then outstanding.

[33] Total unpaid principal and interest due actually decreased from January 8, 2021 to December 17, 2021 because a payment of $665,811.09 made January 21, 2021, which reduced the total principal and interest then-outstanding.

the date of execution, maker, payee, principal amount, balance due, amount of accrued interest owed, and the date of default for each of the two promissory notes," movant "presented a prima facie case of default on the notes."); *Looney,* 2010 WL 532431, at *2-3 (where movant "has attached a copy of the note … to a sworn affidavit in which he states that the photocopy is a true and correct copy of the note, that he is the owner and holder of the note, and that there is a balance due on the note … [movant] has made a prima facie case that he is entitled to summary judgment on the note.").

The Note Maker Defendants failed to rebut Highland's prima facie case.

B. The Unsubstantiated "Oral Agreements"

With regard to the alleged "oral agreement" defense, there was a complete lack of evidence for it—it was only supported by conclusory statements of Mr. Dondero and, to a lesser extent, Sister Dondero. Mr. Dondero could not identify any material terms of the alleged "oral agreement," such as (a) which Notes are subject to the alleged "oral agreement;" (b) the number of Notes subject to the alleged "oral agreement;" (c) the maker of each Note subject to the alleged "oral agreement;" (d) the date of each Note subject to the alleged "oral agreement;" or (e) the principal amount of any Note subject to the alleged "oral agreement." Mr. Dondero and Sister Dondero cannot even agree whether Mr. Dondero identified the Notes subject to the alleged agreement. Mr. Dondero sold MGM stock in November 2019—an alleged "condition subsequent" under the alleged agreement—but failed to declare the Notes forgiven, and otherwise remained silent about the alleged agreement. Sister Dondero, the counter-

party to the alleged agreement, never saw a Note signed by Mr. Dondero or any affiliate of Highland and was not qualified to enter into the alleged agreement. The existence or terms of the alleged agreement were never disclosed by Mr. Dondero or Sister Dondero to anyone, including PwC, Mr. Waterhouse, or the bankruptcy court. No document exists memorializing or otherwise reflecting the existence of terms of the alleged agreement. There is no history of loans being forgiven at Highland in the past decade.

No genuine issue of material fact has been raised here such that a reasonable jury might find an alleged "oral agreement." Moreover, any alleged agreement would be unenforceable as a matter of law for lack of: (a) consideration, (b) definiteness, and (c) a meeting of the minds. In order to be legally enforceable, a contract "must address all of its essential and material terms with a reasonable degree of certainty and definiteness." *Scott v. Wollney*, No. 3:20-CV-2825-M-BH, 2021 WL 4202169, at * 7 (N.D. Tex Aug. 28, 2021) (internal quotations omitted); *In re Heritage Org., L.L.C.*, 354 B.R. 407, 431–32 (Bankr. N.D. Tex. 2006) (In order to prove existence of a valid and binding subsequent oral agreement binding upon parties, a party must prove that there was "(1) a meeting of the minds" and "(2) consideration to support such a subsequent oral agreement.") "Whether a contract contains all of the essential terms for it to be enforceable is a question of law." *Id.* (internal quotations omitted). "A contract must also be based on valid consideration." *Id.* "In determining the existence of an oral contract, courts look at the communications between the parties and the acts and circumstances

surrounding those communications." *Melanson v. Navistar, Inc.*, 3:13-CV- 2018-D, 2014 WL 4375715, at *5 (N.D. Tex. Sept. 4, 2014). *See also id.* at *6 (finding that a reasonable trier of fact could not find that based on the oral conversation between the plaintiff and the defendant that there was an offer, an acceptance, and a meeting of the minds because the conversation did not contain all essential terms); *Wollney*, 2021 WL 4202169, at *8 (finding that "[w]hen, as here, 'an alleged agreement is so indefinite as to make it impossible for a court to 'fix' the legal obligations and liabilities of the parties, a court will not find an enforceable contract,'" finding that party "has not identified evidence of record that would allow a reasonable trier of fact to find that there was an offer, an acceptance, and a meeting of the minds between Plaintiff and Defendant.") (quoting *Crisalli v. ARX Holding Corp.*, 177 F. App'x 417, 419 (5th Cir. 2006) (citation omitted)); *Heritage*, 354 B.R. at 431–32 (finding a "subsequent oral amendment" defense fails where the summary judgment record does not support the existence of a subsequent agreement).

Accordingly, there is no genuine issue of material fact regarding the alleged "oral agreement" defense, and Highland is, therefore, entitled to summary judgment on Mr. Dondero's, NexPoint's, HCMS's, and HCRE's breach of their respective Notes.

C. The Alleged "Mutual Mistake" Asserted by HCMFA is Unsubstantiated

Finally, the "Mutual Mistake" defense also fails as a matter of law because there is no evidence to show that Highland and HCMFA were acting under some shared factual mistake when the HCMFA Notes were

prepared and executed. "For mutual mistake to nullify a promissory note, the evidence must show that both parties were acting under the same misunderstanding of the same material fact." *Looney*, 2010 WL 532431, at *5 (internal quotations omitted) (citing Texas law). "[A] party must show that there exists (1) a mistake of fact, (2) held mutually by the parties, (3) which materially affects the agreed upon exchange." *Whitney Nat'l Bank v. Med. Plaza Surgical Ctr. L.L.P.*, No. H-06 1492, 2007 WL 3145798, at *6 (S.D.Tex. Oct. 27, 2007) (alteration in original) (citing Texas law). In other words, "[m]utual mistake of fact occurs where the parties to an agreement have a common intention, but the written instrument does not reflect the intention of the parties due to a mutual mistake." *Id.* (internal quotations omitted). "In determining the intent of the parties to a written contract, a court may consider the conduct of the parties and the information available to them at the time of signing in addition to the written agreement itself." *Id.* (internal quotations omitted). "When mutual mistake is alleged, the party seeking relief must show what the parties' true agreement was and that the instrument incorrectly reflects that agreement because of a mutual mistake." *Al Asher & Sons, Inc. v. Foreman Elec. Serv. Co., Inc.,* MO:19CV-173-DC, 2021 WL 2772808, at *9 (W.D. Tex. Apr. 28, 2021) (internal quotations omitted). "The question of mutual mistake is determined not by self-serving subjective statements of the parties' intent … but rather solely by objective circumstances surrounding execution of the [contract.]" *Hitachi Cap. Am. Corp. v. Med. Plaza Surgical Ctr., L.L.P.*, Civ. Action No. 06-1959, 2007 WL 2752692, at *6 (S.D. Tex. Sept. 20, 2007) (internal quotations omitted). "The

purpose of the mutual mistake doctrine is not to allow parties to avoid the results of an unhappy bargain." *Whitney*, 2007 WL 3145798, at *7 (internal quotations omitted).

The undisputed documentary and testimonial evidence overwhelmingly establish that both HCMFA and Highland intended the HCMFA Notes to be loans. As discussed above: (i) Mr. Waterhouse, HCMFA's Treasurer, knew the money Highland transferred to HCMFA was being treated as an "intercompany loan"; (ii) the HCMFA Notes have always been recorded as liabilities in HCMFA's audited financial statements and balance sheets; (iii) the HCMFA Demand Notes were reflected as assets in Highland's Bankruptcy filings, and (iv) the HCMFA Demand Notes were represented as "liabilities" to third parties at all relevant times.

There is no evidence in support of HCMFA's contention that there existed a mistake of fact held by both Highland and HCMFA when entering into HCMFA Notes. The purported "mistake" was never disclosed to critical (or any) third parties, such as: (i) the Retail Board or (ii) the insurance company ICI Mutual. The purported "mistake" is also not reflected in HCMFA's books and records or audited financials.

In conclusion, HCMFA's "Mutual Mistake" defense fails as a matter of law. *See Hitachi,* 2007 WL 2752692, at *6 (finding "mutual mistake" defense fails as a matter of law where "there is no evidence that a mutual mistake was made in the [agreement,]" and where "the fact that [defendant] did not discover the 'mistake' until well after the [] agreements were signed undermines" the mutual mistake defense.);

Whitney, 2007 WL 3145798, at *6-7 (finding defendants' assertion of mutual mistake "fails as a matter of law" where assertions were "insufficient to raise a fact issue as to mutual mistake of fact" regarding written agreement where plaintiff "has presented competent evidence" of its own intention regarding the agreement, "there is no evidence that [plaintiff] had the intent that these defendants assert," "no document suggests any such intent," and where "the documents are clear" on their face); *Looney*, 2010 WL 532431, at *5 (granting summary judgment in favor of plaintiff for breach of note as a matter of law on "mutual mistake" defense where defendant "does not cite any record evidence in support of its claim that [parties] were operating under a shared mistake when they executed the note."); *Al Asher & Sons*, 2021 WL 2772808, at *9 (finding that defendant failed to carry its burden to establish there is a genuine issue of material fact as to mutual mistake under an agreement, noting that "mutual mistake [defense] is inapplicable [as a matter of law], because, even if [defendant's] assumption regarding the … contract is a mistake of fact, there is no evidence in the record that Plaintiff and [defendant] mutually held the mistake …").

There is no summary judgment evidence to support any remaining defenses of the Note Makers Defendants.

VII. Summary Judgment.

Accordingly, summary judgment should be entered holding the Note Maker Defendants liable for (a) breach of contract and (b) turnover for all amounts due under the Notes, pursuant to Bankruptcy Code

Section 542, including the costs of collection and reasonable attorneys' fees in an amount to be determined. Specifically:

With regard to the Dondero Demand Notes, Mr. Dondero should be liable on a Judgment for breach of contract and turnover in the amount of: (a) **$9,263,365.05**, the total outstanding principal and accrued but unpaid interest due under the Dondero Notes as of December 17, 2021; plus (b) interest accrued since December 17, 2021; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

With regard to the HCMFA Demand Notes, HCMFA should be liable on a Judgment for breach of contract and turnover in the amount of: (a) **$7,874,436.09**, the total outstanding principal and accrued but unpaid interest due under the HCMFA Notes as of December 17, 2021; plus (b) interest accrued since December 17, 2021; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

With regard to the HCMS Demand Notes, HCMS should be liable on a Judgment for breach of contract and turnover in the amount of: (a) **$972,762.81**, the total outstanding principal and accrued but unpaid interest due under the HCMS Demand Notes as of December 17, 2021; plus (b) interest accrued since December 17, 2021; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

With regard to the HCMS Term Note, HCMS should be liable on a Judgment for breach of contract and turnover in the amount of: (a) **$6,748,456.31**, the

total outstanding principal and accrued but unpaid interest due under the HCMS Term Note as of December 17, 2021; plus (b) interest accrued since December 17, 2021; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

With regard to the HCRE Demand Notes, HCRE should be liable on a Judgment for breach of contract and turnover in the amount of: (a) **$5,330,378.23**, the total outstanding principal and accrued but unpaid interest due under the HCRE Demand Notes as of December 17, 2021; plus (b) interest accrued since December 17, 2021; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

With regard to the HCRE Term Note, HCRE should be liable on a Judgment for breach of contract and turnover in the amount of: (a) **$5,899,962.22**, the total outstanding principal and accrued but unpaid interest due under the HCRE Demand Notes as of December 17, 2021; plus (b) interest accrued since December 17, 2021; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

With regard to the NexPoint Term Note, NexPoint should be liable on a Judgment for breach of contract and turnover in the amount of: (a) **$24,383,877.27**, the total outstanding principal and accrued but unpaid interest due under the NexPoint Term Note as of December 17, 2021; plus (b) interest accrued since December 17, 2021; plus (c) the costs of collection and reasonable attorneys' fees in an amount to be determined.

Submission of Judgment. The bankruptcy court directs Plaintiff to promptly submit a form of Judgment applicable to each Note Maker Defendant that calculates proper amounts due pursuant to this Report and Recommendation, including interest accrued to date (and continuing to accrue per diem), as well as costs and attorneys' fees incurred. The costs and attorneys' fees calculation shall be separately filed as a Notice with backup documentation attached. The Note Maker Defendants shall have 21 days after the filing of such Notice to file an objection to the reasonableness of the attorneys' fees and costs. The bankruptcy court will thereafter determine the reasonableness in Chambers (unless the bankruptcy court determines that a hearing is necessary) and will promptly submit the form Judgments, along with appropriate attorneys' fees and costs amounts inserted into the form Judgments, to the District Court, to consider along with this Report and Recommendation. This Report and Recommendation is immediately being sent to the District Court.

End of Report and Recommendation

Appendix K

Case: 23-10911 Document: 126-1
Date Filed: 10/16/2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10911

United States Court of Appeals
Fifth Circuit
FILED
October 16, 2024
Lyle W. Cayce
Clerk

IN THE MATTER OF HIGHLAND CAPITAL MANAGEMENT, L.P.

Debtor,

HIGHLAND CAPITAL MANAGEMENT,

Appellee,

versus

NEXPOINT ASSET MANAGEMENT, L.P., *formerly known as* HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; NEXPOINT ADVISORS, L.P.; NEXPOINT REAL ESTATE PARTNERS, L.L.C., *formerly known as* HCRE PARTNERS L.L.C.; HIGHLAND CAPITAL MANAGEMENT SERVICES, INCORPORATED; JAMES DONDERO,

Appellants,

IN THE MATTER OF HIGHLAND CAPITAL MANAGEMENT, L.P.

Debtor,

JAMES D. DONDERO;

Appellant,

versus

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee,

CONSOLIDATED WITH

No. 23-10921

IN THE MATTER OF HIGHLAND CAPITAL MANAGEMENT, L.P.

Debtor,

HIGHLAND CAPITAL MANAGEMENT,

Appellee,

versus

NEXPOINT ASSET MANAGEMENT, L.P., *formerly known as* HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.,

Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:21-CV-881
USDC No. 3:21-CV-880
USDC No. 3:21-CV-1010
USDC No. 3:21-CV-1378
USDC No. 3:21-CV-1379
USDC No. 3:21-CV-3160
USDC No. 3:21-CV-3162
USDC No. 3:21-CV-3179
USDC No. 3:21-CV-3207
USDC No. 3:22-CV-789

ON PETITION FOR REHEARING EN BANC

Before ELROD, *Chief Judge*, WIENER, and WILSON, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is

DENIED.

---

*Judge Irma Carrillo Ramirez did not participate in the consideration of the rehearing en banc.

No. _____

IN THE

Supreme Court of the United States

NEXPOINT ASSET MANAGEMENT, L.P., FORMERLY KNOWN AS HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; NEXPOINT ADVISORS, L.P.; NEXPOINT REAL ESTATE PARTNERS, L.L.C., FORMERLY KNOWN AS HCRE PARTNERS L.L.C.; HIGHLAND CAPITAL MANAGEMENT SERVICES, INCORPORATED; JAMES DONDERO,

Petitioners,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

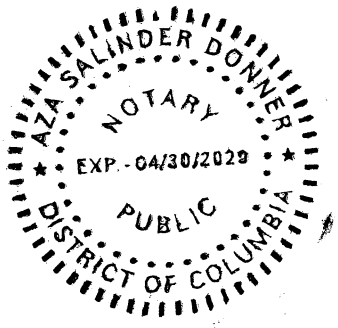
As required by Supreme Court Rule 33.1(h), I certify that the document contains 7,175 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Sworn to and subscribed before me this 13th day of February 2025.

AZA SALINDER DONNER
NOTARY PUBLIC
District of Columbia

My commission expires April 30, 2029.



WILSON-EPES PRINTING CO., INC.
Est. 1941

E-Mail Address:
briefs@wilsonepes.com

Web Site:
www.wilsonepes.com

1115 H Street, N.E.
Washington, D.C. 20002

Tel (202) 789-0096
Fax (202) 842-4896

No. ___

NEXPOINT ASSET MANAGEMENT, L.P., FORMERLY KNOWN AS HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; NEXPOINT ADVISORS, L.P.; NEXPOINT REAL ESTATE PARTNERS, L.L.C., FORMERLY KNOWN AS HCRE PARTNERS L.L.C.; HIGHLAND CAPITAL MANAGEMENT SERVICES, INCORPORATED; JAMES DONDERO,

Petitioners,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Respondent.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on February 13, 2025, three (3) copies of the PETITION FOR A WRIT OF CERTIORARI in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

MELISSA S. HAYWARD
ZACHERY Z. ANNAGLE
HAYWARD PLLC
10501 N. Central Expy, Suite 106
Dallas, Texas 75231

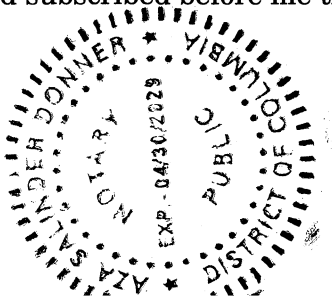
JEFFREY N. POMERANTZ
JOHN A. MORRIS
GREGORY V. DEMO
HAYLEY R. WINOGRAD
PACHULSKI STANG ZIEHL & JONES LLP
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067

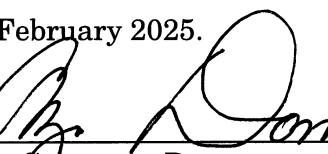
The following email addresses have also been served electronically:

zannable@haywardfirm.com
mhayward@haywardfirm.com
jpomerantz@pszjlaw.com
jmorris@pszjlaw.com
gdemo@pszjlaw.com
hwinograd@pszjlaw.com
ejaffe@schaerr-jaffe.com

ROBYN DORSEY WILLIS
WILSON-EPES PRINTING CO., INC.
1115 H Street, N.E.
Washington, D.C. 20002
(202) 789-0096

Sworn to and subscribed before me this 13th day of February 2025.





AZA SALINDER DONNER
NOTARY PUBLIC
District of Columbia
My commission expires April 30, 2029.