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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	Wednesday, March 24, 2021
	9:30 a.m. Docket
Debtor.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 20-3190-sgj**
Plaintiff,	PLAINTIFF'S MOTION FOR ORDER REQUIRING JAMES DONDERO TO SHOW CAUSE WHY HE SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING THE TRO [48]
v.	
JAMES D. DONDERO,	
Defendant.	*Continued from 03/22/2021*

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

For the Debtor/Plaintiff: John A. Morris
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

For the Debtor/Plaintiff: Jeffrey Nathan Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

For Defendant James D. Dondero: John T. Wilson
BONDS ELLIS EPPICH SCHAFER JONES, LLP
420 Throckmorton Street,
Suite 1000
Fort Worth, TX 76102
(817) 405-6900

APPEARANCES, cont'd.:

For Certain Advisors:	Julian Vasek MUNSCH, HARDT, KOPF & HARR 500 N. Akard Street, Suite 3800 Dallas, TX 75201-6659 (214) 855-7587
For Certain Funds:	A. Lee Hogewood, III K&L GATES, LLP 4350 Lassiter at North Hills Avenue, Suite 300 Raleigh, NC 27609 (919) 743-7306
For Get Good Trust and Dugaboy Investment Trust:	Douglas S. Draper HELLER, DRAPER & HORN, LLC 650 Poydras Street, Suite 2500 New Orleans, LA 70130 (504) 299-3300
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539
Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062
Transcribed by:	Kathy Rehling 311 Paradise Cove Shady Shores, TX 76208 (972) 786-3063

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DALLAS, TEXAS - MARCH 24, 2021 - 9:40 A.M.

THE COURT: All right. We have Highland settings. We're going to talk about what's set and what's not set and what's requested to be set. But let's start by getting lawyer appearances. First, for the Debtor team, who will be appearing?

MR. MORRIS: Good morning, Your Honor. John Morris; Pachulski, Stang, Ziehl & Jones; for the Debtor.

MR. POMERANTZ: Your Honor, Jeff Pomerantz is also here, to the extent necessary.

THE COURT: Okay. Thank you. All right. For Mr. Dondero, who is appearing? (Pause.) If you're appearing, I can't hear you.

MR. WILSON: Your Honor? Sorry, Your Honor. John Wilson with Bonds, Ellis, Eppich, Schafer, Jones for Mr. Dondero.

THE COURT: All right. Well, I'll see if we have people appearing for the Advisors or Funds, because we did originally have matters set involving them. Do we have counsel, Mr. Rukavina or anyone, for the Advisors?

MR. VASEK: Good morning, Your Honor. Julian Vasek for the Advisors.

THE COURT: All right. Thank you. All right. What about the Funds? Do we have Mr. Hogewood?

MR. HOGEWOOD: Good morning, Your Honor. Lee

Hogewood with K&L Gates for the Funds is on the line.

THE COURT: All right. Mr. Draper, do we have you for the Trusts?

MR. DRAPER: Yes, Your Honor. Douglas Draper on the line.

THE COURT: All right. Thank you. And for the Committee, I think I saw Mr. Clemente, correct?

MR. CLEMENTE: Yes. Good morning, Your Honor. Matt Clemente, Sidley Austin, on behalf of the Committee.

THE COURT: All right. Thank you.

All right. Because there were some late afternoon decisions made yesterday with regard to our calendar, let me just make sure the record is clear. We originally had a follow-up hearing regarding the Motion for Stay Pending Appeal, the Motion for Stay Pending Appeal of the Confirmation Order that was filed by Mr. Dondero, the Advisors, the Funds, and the Trusts. The follow-up hearing was regarding, I guess to phrase it most clearly, whether Bankruptcy Rule 7062 and Federal Rule of Civil Procedure 62 might apply here, so that if the Appellants offered a sufficient monetary bond, supersedeas bond, I would be required to ender a mandatory stay.

There was a little bit of confusion, I guess I should say on my part maybe more than anybody else's, at the end of our hearing last Friday whether someone was suggesting that,

because there was some discussion of a monetary appeal. So I invited parties to -- in fact, the Appellants asked that I allow them an opportunity to brief that and maybe we'd have a follow-up hearing on that today. So I gave the affected parties until 3:00 p.m. Central time yesterday to submit briefs, and shortly before 3:00 p.m. the Court received a letter from the Funds and from the Advisors' counsel saying that they had concluded that there was no legally-viable path there and so they were withdrawing their request for a follow-up hearing on that.

I did get briefing from the Debtor and the Committee that was quite persuasive and convinced me that, in the context of confirmation order, you either meet the 8007 discretionary standards for a stay pending appeal and maybe add on a request for a bond if the four prongs are met or not.

So I was glad not to have a hearing. I understand the Debtor still wanted to have a hearing, thinking there might be some efficiencies in putting on a record at the bankruptcy court if the Appellants plan on next going to the district court seeking a stay pending appeal, or the Fifth Circuit. But I concluded that was not an appropriate way to go forward.

So I instructed Debtor's counsel late yesterday afternoon to submit an order, and I indicated in the email that should have been copied on all counsel what I thought that order should say to make clear for the record that the Court had

concluded, and I think all parties had concluded, that there was no possibility of a mandatory stay here pursuant to Rule 7062.

So, while our posted calendar still shows a follow-up hearing on the stay pending appeal issue, I have cancelled that.

So what we are here on today, what we're definitely here on today is scheduled closing arguments on the motion that the Debtor had filed several weeks ago, a couple months ago, asking this Court to hold Mr. Dondero in contempt of court for allegedly violating a TRO that the Court issued December 10th, 2020. I had allotted twenty minutes per side when we came back this morning for closing arguments on that contempt matter.

Now I see at 9:01 this morning -- news flash for anyone who didn't check their docket this morning within the last half hour or so -- Mr. Dondero's counsel has filed a Motion to Reopen Evidence to Allow for Additional Rebuttal Witness Testimony, and this pertains to what I'll call the cell phone issue that Mr. Dondero and Mr. Seery had inconsistent testimony on.

So, I'll ask, has the Debtor seen this motion? Again, it was filed at 9:01 this morning. Are you aware, I'll ask Mr. Morris, are you aware of the motion?

MR. MORRIS: Your Honor, John Morris; Pachulski,

Stang, Ziehl & Jones. I am aware of the motion. I read it briefly, and I've got argument and commentary to the extent the Court wants to hear anything.

THE COURT: All right. Well, --

MR. MORRIS: I'm prepared to proceed. The fact of the matter is, Your Honor, this is a motion. It's not on an emergency basis. It should be heard on regular notice.

What I would say, having read it, Your Honor, is that I give Mr. Dondero and his law firm 24 hours to withdraw it or we will be filing a motion under Rule 11 for sanctions. It is frivolous. This motion has been pending -- the motion for contempt has been pending since January 7th, more than two months ago. The issue of the cell phone has been front and center. So concerned were they about the cell phone that they actually made a motion to try to exclude it from evidence. Your Honor has made very specific comments about the cell phone. There is nothing here that would allow them in good faith to make this motion. They've got 24 hours to withdraw it or we will be seeking sanctions.

They seek to introduce testimony from Jason Rothstein? Jason Rothstein, as Mr. Dondero testified yesterday under oath, was under subpoena. He was on their witness list. Why they chose not to call him I'll leave for them to explain. Mr. Ellington was in the courtroom on Monday. He was their witness. They released him. And now they want to put in his

evidence?

They ended the proceedings on Monday and they rested. They made no reservation of rights. They did nothing of the kind. This motion is not made in good faith, and we will seek sanctions if it's not withdrawn in 24 hours.

THE COURT: All right. Well, Mr. Wilson, tell me about the filing of this motion. I'll let you know, by the way, you may think I'm being very technical, but one of the first things I do whenever I get a motion, especially when it's kind of emergency, short-notice in nature, is I go see if you have the required certificate of conference that our Local Rules require. And that always makes me grimace when I don't see that, because, you know, I know there are some contexts in a complex Chapter 11 case where you obviously can't have a conference with every affected party, but certainly in this one you could have had that conference.

So, anyway, but let's talk about the motion beyond just that technical point. What would you like to say, Mr. Wilson?

MR. WILSON: Well, Your Honor, Mr. Morris is correct that Mr. Rothstein and Mr. Ellington were on our witness list, although we did amend our witness to omit Mr. Rothstein prior to the time that this matter was heard yesterday.

The real substance of it is, is that Mr. Rothstein and Mr. Ellington's testimony, in our estimation, would have just been cumulative of other testimony in this proceeding. And because

Mr. Morris had, you know, released Mr. Ellington yesterday and said he would not be calling him -- or not yesterday, but Monday, I'm sorry -- we ended up thinking it through over the course of the hearing and determining that, you know, his testimony would just merely be cumulative of testimony that Mr. Dondero would offer and that we suspected that Mr. Seery would confirm.

However, we were greatly surprised by some of Mr. Seery's testimony, including his statements made about Mr. Rothstein and also statements regarding Mr. Ellington, stuff that directly contradicts what was in Mr. Ellington's deposition testimony and what we learned from our client, Mr. Dondero, and that he testified to yesterday.

So we ended up releasing Mr. Ellington prior to the testimony of Mr. Seery, and at such time that Mr. Seery made the statements, he was no longer under the Court's control to call as a witness, and that's why we had to work hurriedly to put this motion together. We had to go through Mr. Rothstein's counsel to get the declaration we got. We were finally able to get that early this morning. You know, I apologize if there's no certificate of conference. That was merely an oversight in a rush to get this filed.

So, you know, my other thought is that I'm not sure that we officially rested our evidence yesterday. But in any event, I understand the Court may --

THE COURT: Okay. Stop right there. You did. The whole discussion was we'll come back for closing arguments Wednesday. I mean, there's no way you could have been mistaken about that.

MR. WILSON: I understand that, Your Honor. And I'm not trying to -- I'm not trying to argue the point. My next statement was going to be that I, you know, I suspect the Court considers that we did. So I would say, if it is to be treated as a motion to reopen the evidence, I mean, there actually is case law on that from the Fifth Circuit. And there's a relevant case, *Garcia v. Woman's Hospital*, 97 F.3d 810, from 1996, and that case says that among the factors the trial court should examine in deciding whether to allow reopening are the importance and probative value of the evidence, the reason for the moving party's failure to introduce the evidence earlier, and the possibility of prejudice to the nonmoving party. And we think that analysis of those factors supports allowing this testimony from Mr. Ellington and Mr. Rothstein, and potentially Mr. Surgent, to rebut specific testimony given by Mr. Seery that we did not anticipate --

THE COURT: Okay. Let me stop --

MR. WILSON: -- that he would give.

THE COURT: Let me stop you right there. Those are broad principles, and every situation is going to be fact-

specific as far as reopening evidence. But you've more than once used the word rebuttal. You used it in the title of the pleading you filed at 9:01 this morning, and you've used it in oral argument. Mr. Seery was in the case in chief of the Movants, the Debtor. Okay? Then you all had your chance to put in your responsive evidence. Why are you calling it rebuttal? Rebuttal is --

MR. WILSON: Well, --

THE COURT: -- is if the Debtor then came along and said, you know, hey, I didn't have this person on my witness list but their witness said something completely different than what he said in discovery and I think, you know, I need rebuttal evidence, not just impeaching him or whatever with a prior depo. I mean, that's a -- there are other examples I could give, but my point is, this isn't rebuttal. This would have been your defensive evidence to the motion, okay? Rebuttal has a more, I don't know, sympathetic, equitable ring to it, like something came out you just had no way of anticipating. Okay? And so now, beyond everyone's case in chief and defensive case, we need something to shed new light.

That's not what we're talking about. You had every reason to know, if you chose to do a deposition of Mr. Seery -- which I'm guessing you did, but I don't know -- to know what he might say. And then he was in their case in chief, so you had your chance to put in a defensive witness at that point.

I have no idea why you decided, eh, we don't need Ellington, eh, we don't need Rothstein. We named them on our witness list. You know, there was a subpoena, I guess, it sounds like, of Rothstein. But correct me if you think I'm viewing this too harshly. It just seems like a litigation strategy that came back to haunt you.

MR. WILSON: Well, I would -- I would disagree with that, Your Honor. I mean, I -- the rebuttal term may be an imprecise moniker for this particular motion, but in essence that's exactly what it is. I mean, we were -- we were greatly surprised by the way Mr. Seery testified and we did not have another witness that was in court at the time to come on and to --

THE COURT: Because of your own --

MR. WILSON: -- counter it.

THE COURT: Because of your own litigation strategy to release them. No one forced you to do that. No one forced you to do that.

MR. WILSON: That may be true, Your Honor. Decisions were made. I've explained, you know, why decisions were made. And -- because I think we do have a couple options here. As I suggested in my motion, I don't believe a continuance is necessary to the extent that we can bring in Mr. Ellington's testimony by deposition. And secondly, if --

THE COURT: They don't agree to that. They don't

agree to that. They don't agree to this --

MR. WILSON: Well, I understand that.

THE COURT: -- entire motion, but I guarantee you, if I said I'm granting the motion, they're not going to agree to a declaration or deposition testimony. I'm sure they would want to cross-examine them. I mean, Mr. Morris, am I making a wrong assumption here?

MR. MORRIS: Your Honor, a couple -- just a couple of things. First of all, they actually never did take Mr. Seery's deposition in connection with the TRO enforcement contempt proceedings. They didn't even do that. Number two, I was specifically asked by Mr. Ellington's counsel at a break yesterday whether I would consent to the entry of Mr. Ellington's deposition transcript, and I categorically said no. I'm not going to call him, but if Mr. Dondero calls him, I'm going to cross-examine him live. And they knew that. And then they had the choice. They had the choice, Your Honor, to call him live or to not call him, and they chose not to call him.

And not only did they rest, if this -- if Mr. Seery's testimony was so stunning, if they were so surprised by the testimony, how come nobody said anything on Monday? How come they let the Court close the evidence? How come they didn't reserve the right? How come they didn't say, We'd like the opportunity to put on a rebuttal case because we just heard

something we didn't anticipate?

They did none of that, Your Honor. This is frivolous, and if it's not withdrawn in 24 hours we will move for sanctions.

THE COURT: All right. Well, Mr. Wilson, anything else you want to urge that you think I'm not hearing, missing here?

MR. WILSON: Well, Your Honor, I think I've explained, you know, our reasons for why we filed this motion. I would say that, in -- that --

THE COURT: And by the way -- I'm sorry to interrupt you again -- but I'm not clear even what you think you heard from Mr. Seery that you think is so surprising it made your team conclude we've got to call -- you say rebuttal evidence -- we've got to call Ellington or Rothstein. What even was it?

MR. WILSON: Well, there were -- there were a few things, Your Honor. I mean, as with respect to Mr. Rothstein, the issue was the written or unwritten -- and I believe the testimony was there was an unwritten policy of how cell phones were disposed of. There was testimony from Mr. Seery, although I believe it was speculation on his part, that the -- that Mr. Dondero actually instructed Mr. Rothstein to do something different in this instance when he submitted his cell phone for replacement. Mr. Rothstein, as shown in his affidavit, would say that --

THE COURT: Okay. Stop.

MR. WILSON: -- you know, he's been --

THE COURT: Stop right now. I feel like you're about to try to get in front of me evidence that you chose not to try to get in front of me Monday. I asked, what did Mr. Seery say in testimony Monday that you think warrants a reopening of evidence? I really, I get it that it's about a cell phone and company policy, but what specifically did he say, --

MR. WILSON: Well, the specific --

THE COURT: -- Seery say?

MR. WILSON: Right. And I gave one instance. But the specific testimony was that Mr. Seery accused Mr. Dondero of making up his testimony regarding the fact that there was ever a cell phone policy, number one. And number two, that Mr. Dondero persuaded Mr. Rothstein to do something improper that was out of the ordinary course with respect to the replacement of his cell phone.

THE COURT: All right. Well, again, if you had deposed Mr. Seery, or even just listening to him, you would have known at the conclusion of that. I mean, you could have cross-examined him and then decided did you need to call Rothstein or Ellington.

I just, it's not like you are articulating unfair surprise. You had every reason to know the theory of the case was he exercised control over property of the estate, *i.e.*,

the phone, in a way that violated the automatic stay. And I guess if you looked at their witness list you knew that the employee handbook and its policy stated therein might be a focus of their evidence. I mean, I'm just not getting what the unfair surprise is here, if that's one of the ways I should look at this.

MR. WILSON: Well, Your Honor, it's true that we did not depose Mr. Seery, but to be honest, we did not believe it was necessary at the time. We had no indication, no idea that he would have a completely different testimony on this from the employees who'd worked at Highland for, you know, many, many years. And we had -- we'd heard from three people, including Mr. Ellington, who confirms that testimony, and that's why we let Mr. Rothstein go.

With respect to Mr. Ellington, the issue runs deeper. It's not only --

THE COURT: I am not --

MR. WILSON: -- his testimony --

THE COURT: -- asking -- I'm not going to allow you to get in evidence before me. I'm really just trying to give you every opportunity to articulate why Seery said something that was an unfair surprise or you think somehow rises to the level where I should reopen the evidence. And I'm just, I'm not hearing --

MR. WILSON: Well, that's --

THE COURT: -- either an unfair surprise or some other reason. And I'm just trying to give you every opportunity to convince me if you think I'm missing something.

MR. WILSON: Well, I appreciate it, Your Honor. I was trying to get to a second point without trying to improperly admit evidence at this stage. But with respect to Mr. Ellington, he -- I did depose Mr. Ellington and got the pages of deposition testimony that I submitted with that motion. Among those pages, there were -- there were statements that contradicted Mr. Seery's testimony yesterday that he did not use Mr. Ellington as a go-between between Mr. Seery and Mr. Dondero. And Mr. Ellington's testimony directly conflicts with what Mr. Seery offered yesterday.

MR. MORRIS: Your Honor, if I might just --

THE COURT: All I can say is you should not have released him. I'm just baffled. I am baffled. I was baffled when it happened Monday, and now I'm baffled that you would argue, I guess, we rethought it after we left and we really wished we would have called him. I mean, that's not grounds to reopen the evidence. All right? So your motion is denied.

MR. WILSON: All right. Thank you, Your Honor. I'd like to make an offer of proof of the Rothstein declaration as well as the Ellington deposition testimony that I've submitted.

MR. MORRIS: We object, Your Honor. The motion was

just denied. There is no basis to offer proof in a record that's been closed.

THE COURT: All right. I'm not getting your procedural request. It's one thing if I deny the admissibility of evidence during a trial. Obviously, then a smart lawyer asks to make an offer of proof so a higher court can decide if that was error in not considering the evidence. But this different. Right, Mr. Wilson?

MR. WILSON: Well, I don't know that it's that different. But I think for purposes of review, I want to make a complete record, and I would offer the evidence as an offer of proof.

THE COURT: Well, didn't you say you attached to the motion -- I didn't look at the attachments -- the substance of the evidence you want to --

MR. WILSON: Yes. Both of the --

THE COURT: -- the substance of the evidence you want to get in?

MR. WILSON: That's true, Your Honor. It's in the attachments to our motion.

THE COURT: All right. Well, then it's there in the record if you want to appeal my denial of your motion to reopen evidence, okay?

All right. Well, let's hear closing arguments, then.

Mr. Morris, as you all will recall, I've limited you to

twenty minutes each, so I'm ready to hear your argument.

MR. MORRIS: Before we go on the clock, Your Honor, just one housekeeping matter.

THE COURT: Okay.

MR. MORRIS: Filed at Docket No. 130 is a list of the exhibits that were admitted into evidence. And because I have some feeling that there might be an appeal, I'd like to make sure that that's accurate, and there are several items that need to be corrected.

THE COURT: Okay. Let me pull this up. Where is the adversary? Here it is. Okay. So you're looking at what the --

MR. MORRIS: I think it's Exhibit -- I think it's Docket No. 130, is the list of exhibits.

THE COURT: Okay. I have it in front of me. You're saying it's inconsistent with what you thought was --

MR. MORRIS: Yeah. There are -- there are three errors, Your Honor.

THE COURT: Okay. I'm trying to -- I don't think I have in here with me my notes on the exhibits because I didn't anticipate this. They must be back in chambers, or maybe -- all right. Well, let's just let you present what you think is missing, and --

MR. MORRIS: Thank you, Your Honor.

THE COURT: Okay. Go ahead.

MR. MORRIS: First is actually -- first is actually an item that we had on our exhibit list that I agreed to withdraw, so it's actually, it's an exhibit against the Debtor.

THE COURT: Okay.

MR. MORRIS: And that's Exhibit No. 3. We had agreed to withdraw that exhibit from evidence, so it should not be on the list.

THE COURT: Okay. So we'll revise that to show No. 3 was withdrawn. Okay.

MR. MORRIS: Correct.

(Debtor's Exhibit 3 is withdrawn.)

MR. MORRIS: But Exhibits 35 and 36, which are the transcripts from the oral argument on the Committee's Motion for a Protective Order, and Exhibit 36, which is the transcript from the preliminary injunction hearing on January 8th, both of those transcript were admitted into evidence. And we would respectfully request that the Court amend the list to exclude Exhibit 3 and to add Exhibits 35 and 36.

THE COURT: Okay. Tell me again what the 35 transcript was. What hearing?

MR. MORRIS: That's the July 21, 2020 hearing on the discovery motions where the issue was the Committee's request for, among other things, ESI, including text messages from nine custodians, including Mr. Dondero.

THE COURT: All right. Mr. Wilson, do you have any contradictory view of that? I can go back in my chambers and get my own list if I need to. I definitely remember the preliminary injunction transcript coming in. I just couldn't remember for certain the July one. Do you have any contrary view?

MR. WILSON: I think that that's true. Was Exhibit 37 admitted?

MR. MORRIS: Yes, and it's on the list.

THE COURT: It's on the list.

MR. WILSON: That was my question. So 35, 36, and 37 are all admitted and in evidence?

THE COURT: Well, he is pointing out, Mr. Wilson, that the official record of the Court does not show 35 and 36, and he's saying that is a mistake. And I'm just asking, do you agree that they were admitted? Otherwise, we can go back and listen to the audio and I can pull my notes from chambers. But --

MR. WILSON: Well, I'm being told by my co-counsel that Your Honor admitted 35 and 36 yesterday.

THE COURT: Okay. Very good. So we will correct the official record here to show 35 and 36 are part of the evidence and No. 3 is not.

All right. Any other housekeeping matters?

MR. MORRIS: No, Your Honor. I'm ready to proceed if

Your Honor is.

THE COURT: Okay. I am ready. And it's 10:12. I have no problem if you save some of your twenty minutes for rebuttal. And if I stop either one of you and ask questions, Nate, you'll stop counting the time.

All right. You may proceed.

MR. MORRIS: That's my intention.

CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. MORRIS: Good morning, Your Honor. John Morris; Pachulski, Stang, Ziehl & Jones; for the Debtor.

Your Honor, as you'll recall, in the face of explicit threats to Mr. Seery and Mr. Surgent, as well as the brash interference with the Debtor's operations a few weeks after the board asked for Mr. Dondero's resignation, the Debtor sought and obtained a TRO against Mr. Dondero. Mr. Dondero has questioned the Debtor's motivation in seeking the TRO, but the motivation could not be clearer. Leave the Debtor alone. Unless he's in the courtroom, unless he's on the phone with lawyers or communicating with lawyers or is communicating with shared services, leave the Debtor alone. That's what the TRO was about, and that's exactly what it says.

But Mr. Dondero cannot help himself. Whether because he wants to burn the house down or he just cannot listen to authority, Mr. Dondero refuses to leave the Debtor alone.

The Debtor has proven by clear and convincing evidence

that in the few short weeks between the time the TRO was issued and the time it was converted to a preliminary injunction, he violated the TRO at least 18 separate times. Section 2(c) of the TRO says clearly and unambiguously, do not communicate with the Debtor's employees unless it's about shared services. It could not be any clearer. It was -- that was the only exception, shared services.

Can we put Slide 2 from the opening dep up on the screen?

Mr. Dondero -- while we wait for that, I'll continue. Mr. Dondero did offer into evidence two shared services agreements. We didn't dispute that shared services agreements existed. That's why there's an exception in the TRO for that. But while Mr. Wilson went through some of the communications that are at issue with Mr. Seery, it's interesting that he did not put one of these 13 communications in front of his client to try to show how any of the communications connected to shared services. And the reason he didn't do that, Your Honor, is because he can't. Every one of these communications is adverse to the Debtor's interests. Mr. Seery testified that he did not know of or authorize any of these communications, and that if he had known, he would have fired the employees on the spot.

And I ask Your Honor to put yourself in Mr. Seery's chair. If you were the CEO of the Debtor and you learned that your employees were engaged in these kinds of communications, what

would you have thought, what would you have done? These are not technical violations. They are not foot faults. Every one of these communications is adverse to the Debtor.

Look at the topics. Getting a witness to testify against the -- to testify on Mr. Dondero's behalf at a hearing against the Debtor. Discussions concerning the entry into a common interest agreement between certain of the Debtor's employees, Mr. Dondero, and other entities owned or controlled by him. Challenging the Debtor's decision to enter into the settlement agreements with Acis and HarbourVest.

And by the way, there's no problem with Mr. Dondero challenging those. The problem is when he brings the Debtor's employees, and in this case, Mr. Ellington, into those discussions.

He directed an employee not to produce documents that were in the Debtor's possession, custody, and control. He engaged in numerous communications between December 22nd and December 24th with Mr. Ellington concerning K&L Gates, the Advisors, the interference with the trading, the letters that were sent. Mr. Ellington's name was all over that.

This is wrong. And Mr. Dondero knows it. How do we know that he knows it was wrong? Because of one singular statement that he made that wasn't even in response to a question that I asked. If you recall, Your Honor, as I was putting these documents up on the screen, there were privileged

communications between Mr. Dondero and his lawyers, and at one point Mr. Dondero said -- and I can't quote because I don't have the transcript -- what are my privileged communications doing up on the screen? They were up on the screen because Mr. Dondero chose to forward them to the Debtor's general counsel.

We are going to deal with the consequences of that for a long time. It is a plain and blatant breach of the attorney-client privilege. It is on a number of topics. It is expensive. The ramifications will be felt for a long time in this case.

But the important point here, Your Honor, is consciousness of guilt. Mr. Dondero's statement of surprise that his communications could be shared with Mr. Ellington but would otherwise have been shielded from the rest of the world both completely destroys any argument, and there was no credible argument to begin with, that he was engaged in shared services, because if it were shared services, he would have no problem with the Debtor seeing the documents, he would have no problem with the Debtor seeing the communications that he voluntarily and knowingly shared with Debtor's general counsel.

But what it really shows is that he never thought these communications would see the light of day. The Court should hear Mr. Dondero's surprise for exactly what it is, an

admission of guilt.

Mr. Dondero wasn't shown any of these 13 communications. He offers no testimony as to how to connect any of them to shared services. And the explanations that he provided have no credibility and are completely undermined by the documents.

I'm just going to take a couple of examples. Exhibit 19 is the text message that he sent to Ms. Schroth: No Dugaboy details without the subpoena. Clearly, it's a violation of the TRO. Ms. Schroth was an employee of the Debtor. It can't have anything to do with shared services because the unrebutted testimony was that Dugaboy was not party to a shared services agreement. But it was -- his explanation is that the lawyers told him to do it.

Think about the credibility. Your Honor really should make some credibility findings here. Think about the credibility of blaming the lawyers. A lawyer who six days earlier heard a court enter a TRO against his client preventing him from speaking to the Debtor's employees except for shared services instructed his client to speak to the Debtor's employees about something other than shared services? Does that make any sense at all? Bonds Ellis is not that bad. They -- they -- I mean, they're good lawyers. They're good lawyers. I don't meant to demean them at all. I'm sure that they had no idea that this was happening. There is no way that somebody at Bonds Ellis -- and I specifically didn't ask

Mr. Dondero to identify the lawyer who told him that, because that wouldn't have been fair -- but somebody from Bonds Ellis, six days after the TRO is entered, instructs Jim Dondero to communicate with the Debtor's employee about something other than shared services? It makes no sense.

You know how I also know it makes no sense? Because Mr. Dondero put into evidence at Exhibits 16 through 20 a string of emails between and among me and Mr. Draper and Mr. Leventon concerning the Dugaboy financials. Mr. Draper was the lawyer for Dugaboy, and he and I are going back and forth about the documents, and he wants to know if I have them. And as Mr. Dondero did testify, Mr. Draper wanted to see them and I told him, I'll give you a copy when I get them, but they're in the Debtor's subject -- custody and control. You can see it. It's at Exhibit 20. I told that to Mr. Draper. I'll give you a copy, but I've got to get them and I've got to produce them.

None of us knew, right, and it's reflected in those exhibits, nobody ever says you need a subpoena. Mr. Draper never says they're not the Debtor's documents. He never seeks to exercise control of the documents. This is the lawyer for Dugaboy, with no knowledge that Mr. Dondero has instructed the one person at the Debtor who knows where the documents are not to produce them. And nobody knows that.

It's not right, Your Honor. This stuff is not right. So there you have 13 different instances where Mr. Dondero is

communicating with the Debtor's employees in ways that are adverse to the Debtor that have nothing to do with shared services.

Next, 362(a). Again, the TRO at Section 2(e) could not be clearer. There's nothing ambiguous. It's not overbroad. It simply says, don't violate the automatic stay.

362(a)(3), as we talked about the other day, prevents anyone from trying to exercise control over property of the Debtor. Mr. Dondero violated this at least three separate ways. The phone twice, because the phone, as he admitted, was the Debtor's property, and as the employee handbook of his baby showed, the text messages were the Debtor's property. I know on cross-examination or direct Mr. Wilson had him point to a line that says the Debtor's obligations or the employee's obligations, you know, maybe they terminate upon the end of the employment. The statement about the text messages being the Debtor's property, that's not an obligation of the employee. That's not an obligation at all. It's completely irrelevant.

The important point is that Mr. Dondero knew that the text messages were the property of the Debtor. And how do we know that? Because not once, but twice, in 2020 he executed certifications where he acknowledged that, and those can be found at Exhibits 56 and 57. Your Honor will recall, as part of the corporate governance settlement, Mr. Dondero agreed

that the Committee would do an investigation on related-party claims. Related-party claims included an investigation of Mr. Dondero. Mr. Dondero knew since no later than January 9, 2020 that he was under investigation.

If that were not enough, we had the motion practice last summer and the Committee said, I want the documents and I want the ESI and I want the text messages of nine custodians. We know that Mr. Dondero knew that. How do we know? Because he filed a pleading in this Court that said so. He said specifically at Paragraph 3 of his response to the Committee's motion, I know the Committee wants my ESI. I know the Committee wants my text messages. And yet there we were, in December, after he's fired, he changes out the phone, the text messages are gone, and we know the phone existed, we know the phone existed after the TRO was entered into.

And let's think about -- so, you know, again, not clear and convincing evidence, Your Honor. Beyond reasonable doubt. It's beyond reasonable doubt that he knew the text messages were the company's property. It's beyond reasonable doubt that he knew the company -- that he was under investigation. It's beyond reasonable doubt that he knew the U.C.C. wanted the text messages. And it's beyond reasonable doubt that the phone existed after the TRO was entered into. Beyond reasonable doubt. No dispute.

Let's look at some of his excuses as to why none of this

really matters. Again, you know, I'll just repeat, he refers to Rothstein and Surgent and Ellington. Again, Rothstein was under subpoena. He didn't call him here. Ellington was in the courtroom yesterday, or on Monday. He didn't sign -- he didn't sign -- where are the people corroborating his story? He had them here and he chose not to put them on.

There's no corroboration in any documents. A 50-page employee handbook that does say text messages are the Debtor's property, does not say anything that corroborates anything that Mr. Dondero said.

There's no communication. There no email. There's no document. There's nothing to corroborate what he said at all.

He says, oh, but there's no litigation hold letter. I have to tell you, Your Honor, I'm a little -- it's -- I don't know what to say when he just keeps trying to blame others. Litigation hold letters -- and this is argument, so I'm going to say what my view is -- litigation hold letters are used to put somebody who might not otherwise be on notice that claims might be asserted against them. You don't send a litigation hold letter to somebody who has agreed to submit to an investigation. You don't send a litigation hold letter to somebody who has acknowledged to a court that they know their text messages are being sought in the context of litigation. It's just, it's just ridiculous, Your Honor. It really is just ridiculous. As my kids would say, give me a break.

In the end, the evidence clearly and convincingly showed that Mr. Dondero controlled the Debtor's property, and in violation of TRO Section 2(e) he controlled it, he discarded it when he knew investigation was underway and when he knew the text messages were at issue.

The third part is trespass. I won't spend a lot of time on it, Your Honor. But, you know, it doesn't matter that he didn't trespass before the TRO was entered. What matters is that on January -- on December 23rd, in the letter, the Debtor told Mr. Dondero that it was going to exercise control over its property. And they told him, don't enter our premises after December 30th or we will consider it a trespass. The Debtor has every right to do that. So Mr. Dondero walking in on January 5th is a violation of the TRO.

Interference with trading. Mr. Dondero, his admission of interference with the trading is clear. It's unambiguous. The Debtor told his lawyers in that December 23rd letter that one of the very reasons they were evicting him was because of his interference with the trading and his interference with the Debtor's operations, and they never, ever rebut that. His lawyers never contest that. They never respond to it. They just let it go.

And so all you have now is Mr. Dondero backpedaling, you have the failure of his lawyers to respond, and you have his plain unambiguous admission, really, with the words December

22nd in my question from the earlier trial.

Your Honor can make whatever credibility findings the Court thinks is appropriate, but that's the evidence that exists, his backpedaling from clear and unambiguous admissions.

We can take down the slide.

I did want to point out just one more thing on the phone, right. The -- he thinks all of these people are going to corroborate what he has to say. You know who actually spoke on the topic and who didn't corroborate a single thing that he said was he lawyers. Because if you remember that one-paragraph letter, Your Honor, where his lawyers actually responded to the Debtor's demand for the cell phone -- let me see if I can find the exhibit number for you. I don't have it handy. But it's the one-page letter from Bonds Ellis where they respond on the issue of the cell phone, and they don't say anything that Mr. Dondero testified to. They don't say that Mr. Seery told them all to swap out their phones. They don't tell the Debtor that there's a longstanding company practice or policy that allows people to switch phones. They don't say anything. All they say is, we can't find it. They do admit that it's the company's phone, though. They do make that admission in their letter. So I just wanted to make that clear.

You know, they want to bring those guys in, Rothstein or

Surgent or Ellington. What about their lawyers? Just think about what their lawyers said contemporaneously in response to the Debtors' demand for the cell phone. They say nothing other than it is the Debtor's cell phone and we can't find it.

Let's just talk quickly about damages, Your Honor, and an appropriate sanction. It's very difficult to quantify. We've put in time records. I know people can have different views of what should and should not be included. I know there's a lot of stuff in there that's not included that probably should be. We don't have any evidence of the costs that the Debtor has borne as a result of these violations from FTI or Sidley or DSI. Kasowitz Benson was hired to analyze some of the issues my firm admittedly is not an expert on. So there's a lot of other expenses.

There's -- Mr. Seery testified extensively, and it's not contradicted, it's not rebutted at all, that there's noneconomic harm here, that his authority was undermined. You know, one could say the communications about a common interest agreement, how can you quantify the harm of knowing that your employees are engaged in discussions about entering into a common interest agreement with your adversary? How can you quantify that harm?

So I don't think that we have a burden, frankly, of proving to the dollar of the harm that the Debtor suffered, but it has suffered immensely. And it's suffered both

economically and non-economically. And we respectfully request that the Court enter a sanction for the violation of the TRO.

I think, Your Honor, I'm at eighteen minutes, and I'm going to save my last two minutes for rebuttal.

THE COURT: Okay. Thank you. Mr. Wilson?

MR. WILSON: Yes, Your Honor. May it please the Court.

THE COURT: Yes.

CLOSING ARGUMENT ON BEHALF OF JAMES D. DONDERO

MR. WILSON: A party commits contempt when he violates a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order. To hold a party in civil contempt, the court must find such a violation by clear and convincing evidence. And I cited you a similar passage from a case yesterday from the Fifth Circuit. That passage is from *Waste Management of Washington v. Kattler*, 776 F.3d 336. That's a case that I believe is in our briefing, but I'd like to highlight that in that case the Fifth Circuit was considering a contempt order issued by a district court, and the district court had issued a TRO enjoining a guy named Mr. Moore from disclosing confidential information and requiring Moore to produce images of electronic devices containing the confidential information.

The district court held Mr. Moore in contempt for failing to produce an iPad, and the Fifth Circuit reversed that contempt finding, holding, however, no contempt liability may attach if a party does not violate a definite and specific order of the court.

After the district judge determined that the iPad was a personal device that should have been produced to WM on December 22nd, Moore stated, If you want that device turned over directly to Waste Management, we'll do it tomorrow. The court responded, I think that's what the order said. The court was mistaken. The order required Kattler to produce an image of the device only, not the device itself. Several days later, after WM determined the image did not contain the relevant information, WM moved to hold Kattler in contempt because he had failed to produce the device itself in accordance with the court's alleged order from the bench. But Moore was under the understandable impression that the only order in place was to produce an image of the device. Therefore, given the degree of confusion surrounding whether the district court ordered production of the physical device, we conclude that Moore did not violate a definite and specific order of the court.

So with respect of each of charges of contempt that the Debtor makes here, Your Honor, you must determine whether the Debtor has met its burden by clear and convincing evidence

that Mr. Dondero violated a definite and specific order of the Court. I submit to you that the Debtor has failed to meet that burden.

With respect to the first charge of willful ignorance of the TRO, it's important to note that willful ignorance of a TRO is not a violation of a definite and specific order of the Court.

But equally important, I would point to you that the allegation simply isn't true. You heard testimony from Mr. Dondero that he was aware of why the TRO was entered. He discussed the order with his counsel. He became aware of what he could and couldn't do through those discussions. Mr. Dondero testified that he respected the Court's order. He took it seriously. He followed up with his counsel over the next few weeks, seeking advice regarding whether certain actions may or may not violate that order. And it was important to him. He made a conscious effort to modify his behavior after the TRO. He told you that yesterday. Or, I'm sorry, on Monday.

Moreover, Mr. Dondero testified that he did not believe that any action that he took would violate the TRO. And in fact, you heard Mr. Seery testify on Monday that he did not believe that Mr. Dondero was, in fact, ignorant of the TRO, in contradiction to what his papers would say.

Number two, the second charge that Mr. Dondero is alleged

to have violated is by throwing away his cell phone. Again, this is not a clear violation of any definite and specific order of the Court. Mr. Dondero did not have any reason to believe that getting a new phone would violate the TRO. Mr. Dondero testified that he changed over the financial responsibility for his phone and got a new device because he was made aware that the Debtor would be terminating all employees and discontinue paying for their cell phone plans. In fact, Mr. Dondero decided to get a new cell phone and initiated the process two weeks before the TRO had been entered.

Moreover, the evidence shows that when Mr. Dondero got a new phone, he simply followed the procedure that Highland had always required its employees to follow. In fact, the wiping of the cell phone was performed by the Debtor's own employee, Jason Rothstein, the head of IT.

And finally, Mr. Dondero did not personally throw away or destroy his phone. He turned it over to the Debtor and he never saw it again.

And I remind you, he turned it over to the Debtor well before the entry of the TRO, up to two weeks. The Debtor was, of course, free at that point, when they had possession of the phone, to preserve any information on the phone that they deemed appropriate. They apparently chose not to do so. Mr. Dondero testified that he assumed that the phone had been

destroyed in compliance with Highland's policies and procedures, but the evidence shows that the last he heard about his phone, it was actually in the Highland offices.

And finally, the Debtor's request for the phone did not come until nearly two weeks after the entry of the TRO and two weeks after Mr. Dondero had received his replacement cell phone, up to four weeks since Mr. Dondero had actually seen his cell phone.

But, however, we were surprised by Mr. Seery's testimony on Monday that accused Mr. Dondero of making up his testimony about the cell phone policy. And in fact, despite testifying that Mr. Rothstein was honest and ethical, Mr. Seery attempted to slander Mr. Rothstein by claiming that he did something nefarious at Mr. Dondero's instruction. Of course, there was no direct evidence of any nefarious conduct on Mr. Rothstein's part.

But in any event, Mr. Dondero's actions in replacing the cell phone, which actually occurred two weeks before the TRO, cannot violate the TRO itself. And there's two very specific reasons for that. Number one, it's not in the time frame. The evidence was that Mr. Dondero has not seen his cell phone since the TRO has been entered.

Second, that provision of -- to enforce that order -- oh, I'm sorry -- to enforce that action against Mr. Dondero does not violate any clear and specific provision in the TRO. The

TRO does not order Mr. Dondero not to replace his cell phone or destroy the old one, even if he did. And it -- in any event, the Debtor has tried to tie it into 362 and its letter that it sent on December 23rd. Both of those documents are documents outside of the TRO itself and cannot be considered to be a part of the TRO for enforcement purposes because that would violate Rule 65(d).

Now, finally, the Debtor, on this point, the Debtor wants a spoliation instruction against Mr. Dondero, apparently. But the spoliation instruction is confusing to us, Your Honor, because in the context of the Debtor's request, the Debtor would actually be seeking a spoliation instruction against itself as it relates to the litigation with the U.C.C.. This Court discussed spoliation in the *Carrera* case, writing, Generally, a party claiming spoliation of evidence must show the following events -- I'm sorry -- elements. That, one, the party had an obligation to preserve the electronic evidence at the time it was destroyed; number two, the electronic evidence was destroyed with a culpable state of mind; and three, the destroyed evidence was relevant and favorable to the party's claim, such that a reasonable trier of fact could support that claim. A duty to preserve arises when a party knows or should know that certain evidence is relevant to pending or future litigation.

The Debtor did not plead or prove any of these elements,

particularly the elements that electronic evidence was destroyed and that Mr. Dondero had an obligation to preserve that evidence at the time.

In any event, it did not occur during the pendency of this TRO and so it cannot be a violation of the TRO.

The third charge that the Debtor brings is that Mr. Dondero trespassed on the Debtor's property. Again, it is not a clear violation of any specific and definite order of the Court. Mr. Dondero did not have any reason to believe that going to the Highland office would violate the TRO. The charge relates to Mr. Dondero giving his deposition in a conference room at the Highland office on January 5, 2021. However, Mr. Dondero testified that he gave his deposition in the Highland offices on December 14th, four days after the entry of the TRO. And at that TRO [sic], Mr. Dondero made clear to Mr. Morris that he was giving his deposition in the Highland conference room. No one at the Debtor claimed that it violated the TRO for Mr. Dondero to give his deposition on December 14th from the Highland conference room, and the TRO did not change between the time that Mr. Dondero gave his deposition on the 14th and the time that he gave it on January 5th.

Therefore, if it wasn't a violation of the TRO on December 14th, it wasn't a violation on January 5th. The only thing that changed was that Mr. Pomerantz, in his letter on December

23rd to Mr. Lynn, but as we discussed in our objection to this line of questioning, that -- that violates Rule 65(d) because that is a document outside of the TRO itself.

Fourth, the Debtor claims that Mr. Dondero violated the TRO by interfering with the Debtor's trading as the portfolio manager of certain CLOs. This charge is admittedly closer to the language of the TRO. However, this allegation is insufficient to hold Mr. Dondero in contempt. There is no clear and convincing evidence that Mr. Dondero violated the TRO.

In fact, Mr. Morris just told you in his argument that his evidence of this charge is that the Debtor alleged in the December 23rd letter that Mr. Dondero had interfered with the Debtor's business and that Mr. Dondero's lawyers did not respond.

There were various reasons of why the response that was given by Mr. Dondero's lawyers was quick and to the point and addressed what seemed to be the main thrust of the letter, being the cell phone. Mr. Dondero was on vacation in Aspen at the time, he was communicating with his lawyers over the phone around the Christmas holidays, and the letter is what it is. But in any event, the letter that went unresponded to with respect to that allegation is not clear and convincing evidence of anything that Mr. Dondero did.

But there's a real question as to what interference means.

Mr. Seery testified that Mr. Dondero did not stop trades. Mr. Seery was able to execute every trade he wanted to make in December. He didn't change his investment strategy. He didn't change his trading decisions. He continued to operate the Debtor as he deemed appropriate.

So it begs the question of what does interference mean? We cite an Eighth Circuit case in our brief, *Robinson vs. Rothwell*, that holds that an order that prevented any actions to interfere in any way with the administration of those jointly administered bankruptcies was neither sufficiently specific to be enforceable, nor clear and unambiguous.

The evidence shows that the only action Mr. Dondero took was to ask Jason Post, his chief compliance officer, to take a look into some of the trades that Mr. Dondero was made aware of. Mr. Dondero did not know what Mr. Post did with respect to the trades until he heard Mr. Post's testimony at the January 23rd hearing. He testified to that on Monday.

But to be clear, all of the trades were executed and they all closed. Mr. Post's actions were merely to instruct the Advisors' employees not to book the trades after the fact because they did not conform to compliance procedures, but the Advisors' employees were under no obligation to book those trades in the first place.

In any event, those are actions of Mr. Post, not of Mr. Dondero, and there was no evidence that Mr. Dondero even took

those actions or even encouraged those actions.

Number five, the Debtor claims that Mr. Dondero violated the TRO by pushing and encouraging the K&L Gates clients to make further demands and threats against the Debtor. This charge attempts to invoke Paragraph 3 of the TRO that Mr. Dondero is enjoined from causing, encouraging, or conspiring with a person or entity to engage in any of the prohibited conduct, the allegation being threats against the Debtor. This charge is problematic for two reasons. First, what is a threat? The evidence consisted of two letters from the K&L Gates law firm to the Pachulski law firm. The first letter was a December 22nd letter that was simply a request between counsel that Debtor refrain from certain actions. The Debtor rejected that request. The Debtor was not intimidated or threatened by the request and did not change its course in any way. Mr. Seery testified to that.

In fact, the Debtor sent a rejection of the request the following day, and also demanded a withdrawal of the request and threatened sanctions for filing it, but -- or for sending it, but it was -- it did not change the Debtor's course in any way.

The next letter referred to was the Funds and Advisors letter, that they may take subject to the automatic stay to exercise a contractual right that they along with their counsel felt that they had. That was a letter that -- that,

again, Mr. Dondero testified he had nothing to do with the sending of, and although he later approved the position taken in the letter, agreed with the position taken in the letter, he did not do anything to cause the sending of the letter.

But, and that goes to my next point, that there was no evidence, other than the Debtor's suspicions, and Mr. Seery testified that his only evidence of this was that Mr. Dondero admitted that he sent an email to Mr. Post and that subsequently these letters were sent. And he concluded that, based on those two facts, that Mr. Dondero was pushing, encouraging, or directing the sending of these letters. However, you heard evidence directly to the contrary from Mr. Dondero himself.

Number six, the Debtor alleges that Mr. Dondero violated the TRO by communicating with the Debtor's employees to coordinate their litigation strategies against the Debtor. The first problem with this charge is the ambiguity of what Mr. Dondero is and is not allowed to do under the TRO, because you've got Footnote 2 of the TRO that says, For the avoidance of doubt, this order does not enjoin or restrain Mr. Dondero from seeking judicial relief upon proper notice or from objecting to any motion filed in the above-referenced bankruptcy case.

That footnote is at the very end of Paragraph 2, so that footnote apparently applies to every single prohibited conduct

element in Paragraph 2. So, therefore, you've got that exception to the TRO.

Second, you've got an exception to the TRO that's built into letter (c) that says that the -- Mr. Dondero was specifically allowed to communicate with employees related to shared services. The employees, Mr. Ellington and Mr. Leventon, were both part of Highland's legal department, which was part of a shared services agreement.

Third, Mr. Ellington was tasked with the role of go-between between Mr. Seery and Mr. Dondero. Mr. Dondero testified to that. Mr. Dondero testified that that role did not change after December 10th and that he continued to receive communications from Mr. Ellington that were -- or, I guess sent through Mr. Ellington that were from Mr. Seery. And moreover, Mr. Seery continued to talk to Mr. Ellington and send such messages up until January 4, 2021.

Given these exceptions to the TRO and the necessity of analyzing each communication to determine if it's permissible creates uncertainty and ambiguity. Therefore, this provision is not sufficiently specific to be enforceable.

In any event, the Debtor has not proved its allegation that Mr. Dondero coordinated his legal strategy against the Debtor with Mr. Ellington and Mr. Leventon. All you have is a few text messages and emails that may have been forwarded to Mr. Ellington or text message -- one text message sent to Mr.

Leventon. There's no evidence of a coordination of legal strategies against the Debtor.

Even if they had a common interest to pursue in this bankruptcy, the evidence showed that neither Mr. Ellington nor Mr. Leventon discussed a common interest agreement with Mr. Dondero's lawyers or participated in a drafting of a common interest agreement with Mr. Dondero and his lawyers, and that they never entered a common interest agreement with Mr. Dondero and his lawyers.

Number seven, finally, the Debtor alleges that Mr. Dondero violated the TRO by preventing the Debtor from completing its document production. This relates to the production of financial documents for the Get Good and Dugaboy Trusts. Once again, this is not a clear, direct violation of a specific order of the TRO because there's no provision in the TRO regarding the Debtor's document production or Mr. Dondero's document production or the document production of trusts that he may be related to.

But the evidence does not even support a finding that Mr. Dondero prevented the Debtor from completing its document production with the U.C.C.. In fact, Douglas Draper has been attempting to work, as you see from our exhibits, with Mr. Morris to get these documents produced since mid-December. Mr. Draper simply requested that he be allowed to look at the documents before they went out.

The only action that Mr. Dondero has taken in this regard was to ask that Melissa Schrath not produce the documents without a subpoena, which is to say that he wanted the proper legal protocols followed.

I will address their damages, Your Honor. With respect to damages, I submit that Mr. Dondero does not have fair notice of the damages that the Debtor seeks in this proceeding. The Debtor has put on no evidence of any monetary damage. Instead, the Debtor appeared to seek its fees in connection with bringing the contempt charges.

However, the evidence the Debtor submits is over 85 pages of fee statements reflecting time entries starting on November 3, 2020. Those entries date back well before the relevant time period.

And moreover, the Debtor did not introduce the fee statements with a sponsoring witness, so we have no testimony as to the reasonableness or necessity of these fees or any of the other loadstar factors.

But more problematic, we have no way to sort through the 85 pages of the statements and identify which entries the Debtor contends were incurred in connection with the Debtor's motion.

Although the burden is not on Mr. Dondero to do so, an examination of the fee statements would suggest that hundreds of thousands of dollars in fees were wholly unrelated to the

proper time period or the subject matter.

In sum, Your Honor, there is simply no clear and convincing evidence that Mr. Dondero violated a definite and specific order of this Court. The TRO had its intended effect. Mr. Dondero changed his behavior. Even though he may not have agreed, and he testified that he did not agree with many decisions that Mr. Seery made after the entry of a TRO, he made a conscious effort not to interfere.

However, the TRO had unintended effects as well, creating a situation where Mr. Dondero tried to comply with the order and he thought he was complying with the order but he wound up defending himself in a contempt proceeding.

The mere fact that the Debtor contends that Mr. Dondero getting a new phone, appearing at the Highland offices to give his deposition, or attempting to ensure that proper procedures for discovery are followed violates the TRO means that the TRO does not give fair notice to Mr. Dondero of what he was and was not allowed to do.

I'll close with a reference back to the case I cited in my opening. It's *United States Steel Corp. v. United Mine Workers* from the U.S. Supreme Court. This is 598 [F.2d] 363 (5th Cir. 1979). It says that a party may avoid a contempt finding where it can show that it substantially complied with the order or has made every reasonable effort to comply.

The evidence shows, at a bare minimum, Mr. Dondero

substantially complied with the Court's order.

And I misspoke. That wasn't the case I thought I was closing with. This is the case from the Supreme Court. The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one.

Congress responded to that danger by requiring a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid. That's the *Longshoremen Association v. Philadelphia Marine Trade Association* case, 389 U.S. 64.

THE COURT: All right. Your time is up. Thank you.

MR. WILSON: Thank you, Your Honor.

THE COURT: I'm going to have some questions for you and Mr. Morris, but I'm going to wait and hear the rebuttal and then have some questions for -- a couple of questions for each of you.

Mr. Morris, go ahead.

MR. MORRIS: Sure. Two minutes, Your Honor.

There's nothing ambiguous about the order. It says don't talk to employees except for shared services. Mr. Wilson just talked about all kinds of things that have -- he made no attempt to argue that any of these communications have to do with shared services.

The order says don't violate the automatic stay. You

didn't need the order to do that. Your Honor actually made the observation at the time. So, you didn't need it, but it was in there, and he knew it. There's nothing vague and ambiguous about that.

Don't interfere with the Debtor's business. I don't know how it could be any clearer, Your Honor. They seem to suggest that you should have put in the order, don't communicate about discovery. Don't communicate about common interests. Don't communicate -- no. That's not what's required. There's a blanket prohibition on communication, and that applies to everything except for shared services.

With respect to Mr. Rothstein, Mr. Seery testified accurately, it will never be factually disputed, that what Mr. Rothstein did with the wiping down of the phones was to wipe down the information that was on the Debtor's server, *i.e.*, emails and things that are on the Debtor's server. He testified very clearly that text messages are not part of that. So the wiping that Mr. Rothstein did was really at Mr. Seery's instruction and it was just to get him off the Debtor's system.

Interference. Mr. Wilson seems to think that the only thing we have here is the Debtor's letter. No. The Debtor's letter said you interfered. There's no response. But more importantly, we rely on Mr. Dondero's sworn testimony. Question, "You personally instructed on or about December 22,

2020 employees of those Advisors to stop doing the trades that Mr. Seery had authorized?" Answer, "Yeah." That's at Page 73. He's trying to walk it back, but the testimony is what it is.

We have proven beyond clear and convincing evidence. We've actually proven beyond reasonable doubt that Mr. Dondero has violated the TRO multiple ways.

With respect to damages, if Your Honor wants to have a hearing, if we really need to go down that path, that's fine, but it's always going to be subject to dispute because there's so many professionals involved. Think about all the people on the phone today.

I have nothing further, Your Honor.

THE COURT: All right. A couple of follow-up questions.

With regard to the cell phone, tell me what evidence I really have before me. I mean, there's a lot of, you know, argument and commentary of Mr. Dondero whether this is much ado about nothing or not, but what really is my evidence besides the testimony I heard? You've mentioned the I forget what date letter from the Bonds Ellis law firm regarding the phone, but what other evidence do I have that you would say is relevant on this issue?

MR. MORRIS: I'm sorry, who's the question directed to, Your Honor?

THE COURT: You, and then I'm going to ask Mr. Wilson the same thing.

MR. MORRIS: Okay. Very, very, very simply. Just one second, Your Honor. The evidence that I have on the issue of the cell phone. Exhibit 55 says that text messages are the Debtor's property. Right? And this is an allegation -- this is an allegation that Mr. Dondero violated Section 2(e) of the TRO, which (audio gap) him from violating the automatic stay. Section 263(a)(3) prevents anyone from exercising control over the Debtor's property. So the handbook itself describes text messages related to company business are the property of Highland. Right? So you've got the word property in the handbook, you've got the word property in Section 263(a)(3), and you've got the TRO provision that prevents the violation of the automatic stay.

THE COURT: All right. So the evidence --

MR. MORRIS: Next, --

THE COURT: -- Exhibit 55, the employee handbook. And what other evidence?

MR. MORRIS: Right. And then, next, we know that Mr. Dondero understood that. How do we know that he understood that? Because twice in the year 2020, including just moments before he left, he agreed to the certifications that can be found at Exhibits 56 and 57. And those certifications state, among other things, this is Mr. Dondero's certification: I

have received, have access to, and have read a copy of the employee handbook, and I am in compliance with the obligations applicable therein.

So he -- that's what the handbook, that was the company policy, and he said that he knew it.

We know that in January of 2020 he specifically entered into a corporate governance agreement in which the U.C.C. obtained the right to conduct an investigation of related-party claims. We know that Mr. Dondero was the subject of related-party claims. We know that the U.C.C. shares the privilege with the Debtor with respect to related party-claims. This was part of the agreement that he entered into. He knew no later than January 9, 2020 that the Debtor -- that the U.C.C. was conducting an investigation of him.

And if there was any doubt about that, in July 2020 the U.C.C. filed its motion for -- to compel the production of documents. And Mr. Dondero's own lawyers, at Exhibit 40, submitted a response to the U.C.C.'s motion to compel in which it said the proposed protocol the Committee seeks, among other things, documents, emails, and other electronically-stored information, exchanged from or between nine different custodians, who include Dondero. The Committee has requested all ESI for the non-custodians, including, without limitation, text messages.

So he knew he was under investigation. He knew the

Committee wanted them. His lawyers told you that he knew the Committee wanted them. And Your Honor subsequently issued an order relating to those text messages.

With no notice to the Debtor, and this is his testimony, with no notice to the Debtor, with no approval of the Debtor, he went out and swapped the phone. And nobody knows where the phone is today, but he had it. He knew where it was after the TRO was entered. He knew because Jason Rothstein told him on December 10th at 6:25 p.m. at Exhibit 8 that the cell phone exists. Okay? He swapped out the number without the knowledge and consent of the Debtor. He, you know, did whatever he did with the cell phone and the information. Nobody knows where it is.

He actually testified, and I don't have the line, he actually testified that it was thrown in the garbage last time. Now he says I don't know what happened to it. I could dig it out, Your Honor, if I had the time. I don't even think it's necessary. But at the last hearing on January 8th, it's in the evidence and I'll pull it out on appeal when that happens, Mr. Dondero testified that it was disposed of and thrown in the garbage.

That's the evidence that I have, Your Honor, as to what happened to the cell phone, why it was the company's property, and why it's a violation of the TRO Section 2(e) to have thrown it in the garbage without notice, when he knew he was

subject to investigation, when his lawyers told you that they knew the U.C.C. wanted the text messages, when you ordered that those text messages be produced.

THE COURT: All right. And I can go back and look at the transcript I'm sure we're going to have shortly from Monday's hearing to verify my memory of this, but maybe you can tell me. Am I remembering correctly that Mr. Seery testified that Highland should have -- the Debtor should have the emails that might have been on the phone because they would be on either Highland's server or the cloud, Highland's cloud or something, correct?

MR. MORRIS: Yes. This is not about emails. We do have emails, and that's how we were able to offer some of them into evidence, frankly, because we do have emails, if it was on the Debtor's server. Now, we understand that Mr. Dondero may have used other URLs, other email addresses that we would never have. But any information that was on the Debtor's server, we admittedly have. Text messages are not among them. And you heard Mr. Seery testify that we cannot go to AT&T or Verizon or whatever the carrier is. You have to go to Apple, and they won't give them to you. Okay? We can't -- they will never, ever be found. They just won't.

And so it's only the text messages that we're talking about. We're not talking about email. In fact, Your Honor, in compliance with the Court's order, because we were able to

do it as Debtor's counsel, in compliance with your Court's order, the Debtor produced, I think, seven or eight or nine million emails of the nine custodians over the five years prior to the petition date to the Committee over the summer. It was a gargantuan task. So, just to be clear, this is about text messages, not about emails.

THE COURT: Okay. All right. Well, let me --

MR. MORRIS: Oh, I'm sorry. If I may, just one more thing.

THE COURT: Uh-huh.

MR. MORRIS: Because the evidence is also in the record that he used text messages to communicate with business. There's no dispute about that.

THE COURT: Okay.

MR. MORRIS: Now I'm through.

THE COURT: All right. Well, I'm going to go to Mr. Wilson now. What do you think is the evidence in the record that is relevant to this whole cell phone issue?

MR. WILSON: Well, I would -- I would say two, two things, two big-picture items, Your Honor. Number one, like I referred to on Monday and like I referred to in my closing, Rule 65(d) says that every restraining order or injunction must describe in a reasonable detail and not by referring to the complaint or other document the act or acts restrained or required.

They're having to refer to Section 362 of the Bankruptcy Code. They're having to refer to --

THE COURT: Okay, Mr. Wilson, I'm going to stop you. This is turning into legal argument. And I understand your legal argument, that you don't think the TRO was specific enough with regard to the cell phone. I understand that, and you may be right. You may be wrong; you may be right. But I'm asking now, assuming you're wrong and this cell phone issue is a big deal, tell me what evidence you think I should focus on.

MR. WILSON: Well, Your Honor, there's really only one document that I think is relevant to this issue, and that would be the Debtor's Exhibit 8, which is the text message from Jason Rothstein to Mr. Dondero on Thursday, December 10th, at 6:25 p.m. And that text message says, I left your old phone --

THE COURT: Right.

MR. WILSON: -- in the top drawer of Tara's desk.

THE COURT: Uh-huh.

MR. WILSON: Your Honor, that testimony confirms what Mr. Dondero said about how he already had a new cell phone by December 10th. And I would say that the other -- the other issue is that if anybody improperly wiped the cell phone, it was Highland itself. Highland had possession of the cell phone up to two weeks before December 10th. And so the

actions --

THE COURT: Okay, again, not argument, evidence. My evidence.

MR. WILSON: Well, I think that this -- I think this exhibit is this evidence, because Jason Rothstein was a Highland employee, and the Highland employee is telling Mr. Dondero on December 10th that he's returning his cell phone to the desk drawer. So that's why I think this is the most relevant piece of written evidence on this. I think that the testimony also addresses it, and you can review that if you would like, Your Honor.

THE COURT: Okay. Let me figure out my notes here. My next question is for you, Mr. Morris. The prohibition in the TRO on Mr. Dondero communicating with Highland employees except as it pertained to shared services agreement, I think I hear you making the argument that Mr. Ellington was in Highland's legal department and shared services agreements encompassed the legal department of Highland; therefore, it was okay for him to talk to Mr. Ellington about anything. Am I putting words in your mouth, or is that your argument?

MR. MORRIS: That's for Mr. Wilson or for me?

THE COURT: That's for Mr. Wilson. Okay? And I have a second -- a follow-up to that, but go ahead and help me to understand. Is that your argument?

MR. WILSON: I think that my argument is, on this

matter, that the -- that the provision is not clear and specific enough to be enforceable because it's vague and unambiguous -- I'm sorry, vague and ambiguous, given that there's two exceptions in the TRO itself that are subject to interpretation, as well as an exception --

THE COURT: Okay. Again, again -- okay. I understand there's the exception with regard to the shared services agreement and with regard to you can file court pleadings or take legal positions in court. But I'm trying to get at, is your -- is the thrust of your argument that hey, any communications with Scott Ellington were fine because he was in the legal department and legal services are part of shared services agreements, which were excepted out of the TRO. Is that a proper characterization of your legal argument?

MR. WILSON: Well, I've got to tell you, Your Honor, I think that that is part of it. I think that the real -- the real issue goes to Mr. Dondero's state of mind and what he believed he was and was not restrained from doing and what the order on its face clearly and specifically restrains him from doing.

And my argument is that, with the exceptions and with the other testimony that was offered about Mr. Ellington's role between Mr. Seery and Mr. Dondero, that he was simply unclear as to what he was restrained --

THE COURT: Okay. Tell me -- tell me -- okay. I'm trying to get a direct answer, and what I think I'm hearing is you don't necessarily think conversations with Ellington would fit into the shared services agreement but you think that's what James Dondero thought. Is that what you're now saying?

MR. WILSON: Well, I believe that Mr. Dondero's testimony was that he was under the impression that because, for various reasons, because that he had been doing this for twelve months and also because it continued after the December 10th hearing, that he was allowed to communicate items to the Debtor in what he termed the role as settlement counsel. And despite Mr. Seery's denial of giving Mr. Ellington any instruction, I think that the issue is what was Mr. Dondero's state of mind, and so I do believe that Mr. Dondero thought he was communicating pursuant to shared services. I do believe he thought he was communicating in a permissible way pursuant to the settlement counsel issue, because he thought that a lot of these issues that he was forwarding text messages to Mr. Ellington would only -- would keep him apprised of where they were, because the whole time Mr. Dondero was still attempting to settle this case through a pot plan.

THE COURT: Okay. And I guess, since you've mentioned it, what is my evidence that Mr. Ellington was the designated, recognized settlement counsel? You know, he -- Mr. Dondero says it. Mr. Seery says absolutely no. Do I have

any other evidence on that point in the record?

MR. WILSON: Well, there -- there was proposed evidence that I submitted earlier this morning on that issue from Mr. Ellington's deposition.

THE COURT: I am not -- I'm asking what's in the record. What's in the record?

MR. WILSON: Right. Well, the evidence in the record on that is Mr. Dondero's testimony.

THE COURT: Okay. And here was a follow-up I meant to ask on shared services, and I'm going to ask Mr. Morris this, too. I thought I heard Mr. Seery testify that -- he testified about what he considered kind of the bizarreness of the legal department at Highland as it had historically been set up, and I thought he said legal was not part of the shared services agreement. Do you want to respond to that?

MR. WILSON: Well, I would respond to that, Your Honor. The shared services agreements were in place many years before Mr. Seery came into being.

THE COURT: Right. Okay.

MR. WILSON: And Mr. Dondero had been operating under those agreements for many years before Mr. Seery came into being.

THE COURT: Was legal covered by the shared services agreement or not?

MR. WILSON: It was, Your Honor. I put -- I put both

of the shared services agreements in the record, and I had Mr. Dondero read the provisions that talked about how broadly the legal services were covered by shared services.

THE COURT: Did it change during the bankruptcy?

MR. WILSON: Your Honor, there was no amendments or modifications to those agreements until they were eventually terminated by the --

THE COURT: Okay.

MR. WILSON: -- Debtor. We had the --

THE COURT: Okay. So there were no written --

MR. WILSON: We had the evidence in our record.

THE COURT: There were no written amendments that -- all right.

MR. MORRIS: If I may, Your Honor? Because I --

THE COURT: You may. Mr. Morris, go ahead.

MR. MORRIS: I've got -- I've got a number of thoughts on this.

THE COURT: Okay.

MR. MORRIS: If Mr. Dondero -- let's look at the language. It's always helpful to look at the language of the order. The language of the order could not be clearer. Section 2(c) prohibited him from communicating with any of the Debtor's employees. Full stop. That is a blanket, unambiguous prohibition. Total and complete. There is one exception. Not two, but one: except as it specifically

relates to shared services currently provided to affiliates owned or controlled by Mr. Dondero.

Mr. Dondero was not party to a shared services agreement. You have two entities that are. They're the Advisors. Those shared services are in Exhibits 1 and 2 of the -- of the Defendant.

There is no dispute that among the services provided were legal services. The point that Mr. Seery was making and the objection that he took to the way the question was phrased was the notion that the legal department was somehow kind of assigned or available. The Debtor wasn't obligated to provide legal services. He just -- he was making a very technical but very accurate and careful distinction between the legal department and the obligation to provide legal services.

THE COURT: Okay.

MR. MORRIS: We don't dispute it. It's, in fact, precisely why we agreed to put it in there, because the Debtor had a contractual obligation to provide all kinds of services, whatever they may be, under those agreements. So I want to be really clear about that.

What Mr. Wilson cannot do and what he will never be able to do is show you that any of the communications that are at issue in this case have anything to do with shared services. And if they're not related to shared services, they are a violation of the TRO.

There's only arguably, arguably, two that could be -- and why do I know that? I know that because none of these communications have any -- have any employee of the Advisors on it. They don't have the lawyers for the Advisors on it. They have people who represent entities other than anybody -- Mr. Draper doesn't represent -- this is the evidence. Mr. Draper doesn't represent anybody who's party to a shared services agreement. Bonds Ellis doesn't do that. Right? There is only two.

Exhibits 26 and 52 are with K&L Gates and Mr. Ellington. And so you can say, well, at least K&L Gates represents Advisors, and at least Advisors are party to shared services agreements. But those communications themselves are adverse to the Debtor. And I asked Mr. Dondero specifically, is there any provision in the shared services agreements that requires the Debtor to provide services to the counterparty that are adverse to itself? Right? And he said no, I can't think of any. It was a candid admission on his part.

So, there's -- there's nothing in this long list, Your Honor, there's nothing in here that has anything to do with shared services. Getting a witness for a hearing to testify on behalf of Mr. Dondero doesn't concern shared services. Discussions, discussions with employees about entering a common interest agreement has nothing to do with shared services. Discussing Mr. Dondero's interest in the UBS appeal

of Acis or the potential appeal of HarbourVest's settlement agreement has absolutely nothing to do with shared services. Asking Mr. Dondero to provide leadership in the coordination of his counsel has nothing to do with shared services. Talk -- telling Mr. Seery about no Dugaboy without a subpoena, what does that have to do with shared services? Dugaboy doesn't have a shared services agreement. There is nothing that fits into the exception.

Mr. Wilson talks about the footnote. We want -- I wrote that footnote, okay, and I wanted to make it clear that this injunction would not permit him -- would not prohibit him from seeking relief before Your Honor. And that's all it says. It doesn't say that he can communicate with the Debtor's employees about these things. It says for the avoidance of doubt because I didn't -- I didn't think it would be appropriate, I didn't think it would be proper to clip his wings and prevent him from coming to the Court to seek relief. He could come to the Court to seek relief. What he can't do is call up the Debtor's general counsel and say hey, I need a witness to testify on my behalf. That's not what the footnote -- that's not what the footnote says, Your Honor. It says he can come to this Court or to seek judicial relief upon proper notice.

I mean, certainly have no notice that Mr. Ellington was identifying witnesses who would testify against the Debtor.

Had -- Mr. Seery testified to, to that. That's in the record. That if he knew that was happening, he would have fired them on the spot.

So, there's no exception. None of this stuff falls into any -- the one exception is shared services. Yes, there's a shared services agreement. Yes, it includes provision of legal services. But none of these communications have anything to do with that.

Mr. Wilson has made no attempts -- he never put one of the communications in front of Your Honor. He never had Mr. Dondero try to explain how any particular communication related to shared services, because they can't. They just can't. So they say, oh, well, there is a shared services agreement, and so -- or, he was talking about settlement counsel. They knew -- here's -- we have the consciousness of guilt that I mentioned earlier. We know that Mr. Dondero didn't think these communications would ever see the light of day because he expressed surprise that his privileged communications were up on the screen. That's the tell. If you play poker, Your Honor, that's the tell. He tipped his hand and he gave me the signal, I didn't think anybody was going to see this stuff because I'm really mad that my privileged communications are out there. But he shared them with Mr. Ellington. That's number one.

And number two, Mr. Dondero and his lawyers knew how to

get -- knew how to seek clarification if they thought there was any ambiguity. And how do we know that? Because at Docket No. 24 they filed a motion, and the motion was to clarify the TRO in order to permit Mr. Dondero to speak directly with board members about the pot plan. He wanted the permission, he wanted it to be clear that he had the right to talk to the independent directors about the pot plan. That can be found at Exhibit 24. But a week later or six days later, at Docket No. 29, he withdrew that motion.

So he knew that if he was confused about what this allowed and what it didn't allow, he knew he could make a motion. There was absolutely nothing preventing him or his lawyers from coming to the Debtor and saying look, there's a blanket prohibition against shared services, can we still talk to Mr. Ellington about settlement? Nothing prevented him from doing that.

But here's the kicker. Number three. What do any of these communications have to do with settlement? There's not a settlement proposal. There's not a request for information about the settlement. They have nothing to do with settlement. This is Mr. Dondero trying to say Scott Ellington had to know everything I thought about every issue in this case.

I mean, if Your Honor buys that, then we've wasted many, many, many, many, many hours of time and hundreds of thousands

of dollars on this process, if he can just say, I'm basically allowed to talk to Scott Ellington about anything because it's in my head and I want to try to settle the case and therefore I can share it with Scott Ellington.

Number one, there's nothing in the order that allows him to talk to Scott Ellington about settlement. Number two, there's nothing on the face of any of these communications that are about settlement. And number three, again, consciousness of guilt. He was shocked that his privileged communications were disclosed. He thought he could share them with Mr. Ellington but not with you and not with me and not with Mr. Seery.

I have nothing further.

THE COURT: All right.

MR. WILSON: May I respond to that, Your Honor?

THE COURT: Um, --

MR. WILSON: Just briefly.

THE COURT: Briefly.

MR. WILSON: Yeah. So, I pointed you to Exhibits 1 and 2 in the -- in the Dondero exhibits.

THE COURT: The shared services agreements.

MR. WILSON: Those exhibits are --

THE COURT: The shared services agreements.

MR. WILSON: That's correct. Those --

THE COURT: Uh-huh.

MR. WILSON: That's correct. Those two shared services agreements relate to Exhibits 4 and 5, which show that those agreements were in place up until they were terminated by the Debtor effective January 31, 2021.

The next point I'd make is that the order itself says specifically relates to shared services. And those shared services agreements are drafted very broadly. They talk about legal compliance and risk analysis, and one of them says assistance with advice with respect to legal issues, litigation support, management of outside counsel, compliance support, and implementation and general risk analysis. The other agreement just says legal services.

But the agreements themselves were drafted very broadly and intended to cover a large array of services to be provided, because the parties receiving the services in these agreements did not provide any of their own accountants or any of their own lawyers or any of their own back office people or any of their own various other providers that are covered by these agreements. And so, therefore, over the years that these agreements were in place, Mr. Dondero was used to going to his lawyers, which were both employees of Highland and employees of the Advisors under these agreements, for compliance purposes, and he was able to talk to them about all of these various issues. And so if on December 10th Mr. -- and accountants as well.

Mr. Dondero then on December 10th was prohibited from doing certain things, with the exception of items that specifically relate to shared services. So my argument would be that Mr. Dondero did not know whether he could talk to these people or not under the Court's order because the order was not clear and specific enough.

If these agreements broadly covered legal services and accounting services, and Mr. Dondero was free to talk to these people whenever he wants before the order, but then the order creates a carve-out for talking about anything specifically relating to the shared services, that broadly does cover legal and accounting, and the people he's accused of talking to in violation of the TRO are lawyers and accountants.

THE COURT: All right. Here's my last question. With regard to the trespassing argument, as I understand it, we're talking about December 14th and January 5th, two times, both of which --

MR. MORRIS: Your Honor, if I may, I really apologize for interrupting, but that's not -- that's not accurate.

THE COURT: Okay.

MR. MORRIS: As I brought out in the questioning yesterday, the Debtor had no problem with Mr. Dondero being in their offices on December 14th.

THE COURT: Okay.

MR. MORRIS: Okay? What happened was it was a change

because the Debtor exercised control over its property in its letter of December 23rd when it evicted Mr. Dondero from its premises and informed him in writing that any entry by him in the future would be deemed a trespass. So we take no issue --

THE COURT: Okay.

MR. MORRIS: -- and have no quarrel with December 14th.

THE COURT: Okay. I'm glad I asked. I was forgetting that train of event, chain of events.

All right. So we're just talking about the January 5th occasion where he came onsite for a deposition, correct, Mr. Morris?

MR. MORRIS: Yes, Your Honor.

THE COURT: All right. Do we have any evidence of that, other than, I guess, the testimony that is relevant for me to consider -- and this is to you, but it's especially going to be to Mr. Wilson, because I heard some testimony of Mr. Dondero: oh, look, I've got a calendar invite, or I don't know if he looked at his phone or was just recalling he had a calendar invite from someone on behalf of the Debtor saying, Go to the Highland conference room. Do I have any evidence of that calendar invite or any other evidence that is in the record you think I need to focus on?

MR. WILSON: Your Honor, we did not admit the calendar invite into the record, although we could do so. Mr.

Dondero, you know, testified about it, but the testimony he gave was that someone from the Highland legal department named Sarah Goldsmith sent him a calendar invite for his deposition to appear the same way he did at the December 14th deposition.

THE COURT: Okay. So we have just the testimony? Okay.

Mr. Morris, anything further?

MR. WILSON: Your Honor, we'd be -- we'd be willing to supplement the record with the actual calendar invite.

THE COURT: I'm not --

MR. WILSON: We have it --

THE COURT: We've already gone through that.

MR. WILSON: -- on PDF.

THE COURT: We've already gone through that. I'm just asking was it in there and I just missed it on Monday? And the answer is no.

Any other evidence that I need to consider, you think, on the trespassing issue that's in the record?

MR. WILSON: Well, Your Honor, just that -- that, I mean, as you pointed out earlier, the -- it's the evidence that Mr. Dondero appeared in the Highland conference room on December 14th, which was after the entry of the TRO, and if that's not a violation of the TRO, then it can't be a violation of the TRO on January 5th.

MR. MORRIS: Your Honor, I do have evidence.

THE COURT: Okay. Tell me.

MR. MORRIS: Okay. So this would be at Exhibit -- Exhibit 36, which is the transcript of the preliminary injunction hearing, at Page 70, beginning at Line 20. I asked the following questions and got the following answers: Question, "You did not have the Debtor's approval to enter their offices on Tuesday to give your deposition, correct?" Answer, "No." "You did not even bother to ask the Debtor for permission, correct?" Answer, "I'm prohibiting -- I'm prohibited from contacting them, so, no, I did not."

THE COURT: Okay.

MR. MORRIS: So, he was in the offices. He didn't have approval. He didn't obtain consent. He didn't seek consent. That's his unambiguous testimony at Page 70, Line 22, continuing on through Page 71, Line 2.

THE COURT: All right. Thank you.

All right. Well, I'm going to wrap it up here. This obviously warrants very careful consideration of the evidence, and so I'm going to take under advisement this matter and get you out a detailed written ruling as soon as I can get it out. So you'll be expecting something from me, again, detailed, in writing, in the hopefully very near future.

All right. If there's nothing else, we're adjourned.

MR. MORRIS: Thank you, Your Honor.

MR. WILSON: Thank you, Your Honor.

THE CLERK: All rise.

MR. POMERANTZ: Thank you, Your Honor.

(Proceedings concluded at 11:27 a.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling **03/25/2021**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

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