Docket #0019 Date Filed: 7/20/2021

BTXN 049 (rev. 03/15)

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

In Re: Highland Capital Management, L.P.	§	
	§	Case No.: 19−34054−sgj11
Debtor(s)	§	Chapter No.: 11
James Dondero et al Appellant(s)	§	
vs. Stacey G Jernigan Appellee(s)	§	3:21-CV-00879-K

NOTICE OF TRANSMITTAL

I am transmitting:

- ☐ The Motion for leave to Appeal 28 U.S.C. § (USDC Civil Action No. DNC Case).
- ☐ The Motion for Stay Pending Appeal (USDC Action No. − DNC Case).
- ☐ The Proposed Findings of Fact and Conclusions of Law.
- ☐ The Motion to Extend Time To File Designation (USDC Civil Action No DNC Case).
- ☐ On , the Record on Appeal was transmitted. The designation of record or item(s) designated by were not filed when the record was transmitted. The item(s) were filed on awaiting instructions from the assigned district judge.
- ☑ Other Transmitting Appellant Supplemental Record per District Court Electronic Order 6/29/2021 in 21−CV−00879−K (4 Volumes)
- ☐ Copies of:

TO ALL ATTORNEYS: File all subsequent papers captioned and numbered with the appropriate division of the United States District Clerk's Office. Any questions concerning this proceeding should be directed to the U.S. District Clerk's Office at (214) 753−2200.

DATED: 7/20/21

FOR THE COURT:
Robert P. Colwell, Clerk of Court

by: /s/J. Blanco, Deputy Clerk

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

In Re: Highland Capital Management, L.P.	§	Case No. 19-34054-sgj11
James Dondero et al	§	
Appellant	§	
vs.	§	
Stacey G Jernigan	§	3:21-CV-00879-K
Appellee	§	

[2083] Order denying motion to recuse (related document #2060) Entered on 3/23/2021

APPELLANT SUPPLEMENTAL RECORD
VOLUME 1

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

In re:	§	**Chapter 11**
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**Case No. 19-34054-sgj11**
	§	
Debtor.	§	
In re:	§	
	§	
JAMES DONDERO, *et al.*,	§	
	§	
Appellants,	§	
	§	
v.	§	**Case No. 3:21-cv-00879-K**
	§	
HON. STACEY G. C. JERNIGAN,	§	
	§	
Appellee.	§	

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MOTION FOR LEAVE TO SUPPLEMENT RECORD ON APPEAL

James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware limited liability company (collectively, "*Appellants*") file this Motion for Leave to Supplement Record on Appeal.

MOTION FOR LEAVE TO SUPPLEMENT

As the Court is aware, this is an appeal from the denial of a motion to recuse. The core issues on appeal are: (a) whether "a reasonable man, cognizant of the relevant circumstances surrounding [the Bankruptcy Court's] failure to recuse, would harbor legitimate doubts about that judge's impartiality;"[1] and (b) whether the Bankruptcy Court should be recused from sitting as the judge and jury in the various Adversary Proceedings listed above. Respectfully, Appellants, like

[1] *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir.1999).

every litigant, are entitled to a full and fair opportunity to make their case in a fair and impartial forum.[2] As an appellate court, this court has the discretion to order supplementation of the record on appeal.[3]

Here, Appellants timely filed their notice of appeal, statement of issues and designated the record that existed at that time to show the Bankruptcy Court's bias and prejudice to Appellants. However, since Appellants designated the record, the Bankruptcy Court has taken additional positions that further support a finding that the Court's impartiality is likely to be reasonably questioned. Debtor, who has just now intervened, will not suffer any prejudice, as it is just now preparing its own designation of record.

These hearings show the Bankruptcy Court's continued appearance of bias, lack of impartiality, and establish findings against Appellants that lack any evidence. For example, at one of these hearings the Bankruptcy Court suggested causes of action that the Debtor could bring against Appellants, namely Dondero, if Dondero's defenses were successful and ordering relief that no party had requested.

Appellants respectfully request the Court grant leave to supplement the record, including by adding the following:

Main Case

Vol. 1

000001

000010

Vol 2

000308

Docket No.	Date	Description
2256	4/29/21	Dugaboy Motion to Compel Compliance with Bankruptcy Rule 2015.3
2440	6/10/21	Transcript of hearing held on 6/8/21
2445	6/10/21	Transcript of hearing held on 6/10/21

[2] *Miller v. Sam Houston State Univ.*, 986 F.3d 880, 893 (5th Cir. 2021).
[3] *Huddleston v. Nelson Bunker Hunt Tr. Est.*, 102 B.R. 71, 75 (N.D. Tex. 1989).

Adversary No. 20-03190

Vol. 2

Docket No.	Date	Description
175	5/10/21	Transcript of hearing on trial docket call and defendant's emergency motion to stay
182	5/18/21	Order Resolving Adversary Proceeding
185	5/21/21	Transcript of Hearing on Ruling Resolving Adversary Proceeding
190	6/7/21	Memorandum Opinion and Order Granting in Part Plaintiff's Contempt Motion

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000454
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Adversary No. 21-03003

Vol. 3

Docket No.	Date	Description
21	4/15/21	Defendant's Motion to Withdraw Reference
22	4/15/21	Defendant's Motion to Stay Pending Motion to Withdraw Reference
23	4/15/21	Motion to Expedite Motion to Stay
	4/20/21	Email from courtroom deputy regarding request for expedited hearing on motion to stay
35	5/14/21	Motion to Compel Seery Deposition Testimony (including exhibits)
36	5/14/21	Motion to Expedite Motion to Compel
	5/14/21-5/17/21	Email chain between B Assink to Courtroom deputy re: filing of motion to compel and motion to expedite and setting of hearing on motion to compel, dated 5/14/21 – 5/17/21
	5/14/21-5/18/21	Additional Email chain between B Assink to Courtroom deputy re: filing of motion to compel and motion to expedite and setting of hearing on motion to compel, dated 5/14/21 – 5/18/21
49	5/24/21	Order Denying Motion to Compel
50	5/25/21	Transcript of hearing held on motion to compel on 5/20/21
58	5/27/21	Transcript of hearing held on Motion to Stay and Status Conference on Motion to Withdraw Reference
64	6/4/21	Order Granting In Part James Dondero's Motion to Stay

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Adversary No. 20-03195

Vol. 4

Docket No.	Date	Description

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000801
000806
000809
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000881
000887
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000975

45	5/19/21	UCC motion to expedite motion to stay
46	5/19/21	UCC motion to stay proceeding for 90 days (as re-filed)
47	5/19/21	Notice of Hearing setting hearing on motion to stay for 5/20/21
48	5/19/21	Order Granting UCC motion to expedite
50	5/19/21	Highland Dallas Foundation and CLO Holdco's Objection to UCC's emergency motion to stay
52	5/20/21	Highland Dallas Foundation and CLO Holdco's W&E List for Hearing on Motion to Stay (with exhibits attached)
54	5/20/21	Court admitted exhibits SEE # 52
57	5/21/21	Post-hearing memorandum suggesting error by the Court
62	5/24/21	Order staying adversary proceeding
65	5/25/21	Transcript of hearing held on UCC's motion to stay on 5/20/21
67	5/27/21	Order addressing post hearing memorandum suggesting error

CONCLUSION

For the foregoing reasons, Appellants respectfully request the Court grant leave to supplement the records and award Appellants such other and further relief to which they may be entitled.

Dated: June 16, 2021

Respectfully submitted,

By: */s/ Michael J. Lang*
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CERTIFICATE OF CONFERENCE

The undersigned certifies that on June 15, 2021, Appellants conferred with opposing counsel who indicated that they are opposed to the relief requested.

/s/ Michael J. Lang
Michael J. Lang

CERTIFICATE OF SERVICE

The undersigned certifies that on June 16, 2021, a true and correct copy of the above and foregoing document was served on all parties of record via the Court's e-filing system.

/s/ Michael J. Lang
Michael J. Lang

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

IN RE:	*	Chapter 11
	*	
	*	Case No. 19-34054sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.	*	
	*	
Debtor	*	

MOTION TO COMPEL COMPLIANCE WITH BANKRUPTCY RULE 2015.3

NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT THE EARLE CABELL FEDERAL BUILDING, 1100 COMMERCE STREET, RM. 1254, DALLAS, TEXAS 75242-1496 BEFORE CLOSE OF BUSINESS ON MAY 20, 2021, WHICH IS AT LEAST 21 DAYS FROM THE DATE OF SERVICE HEREOF.
ANY RESPONSE SHALL BE IN WRITING AND FILED WITH THE CLERK, AND A COPY SHALL BE SERVED UPON COUNSEL FOR THE MOVING PARTY PRIOR TO THE DATE AND TIME SET FORTH HEREIN. IF A RESPONSE IS FILED A HEARING MAY BE HELD WITH NOTICE ONLY TO THE OBJECTING PARTY.
IF NO HEARING ON SUCH NOTICE OR MOTION IS TIMELY REQUESTED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT OR THE NOTICED ACTION MAY BE TAKEN.

Now into Court, through undersigned counsel, come The Dugaboy Investment Trust and Get Good Trust ("Movers"), who file this motion to compel Highland Capital Management, L.P. ("Debtor") to comply with Bankruptcy Rule 2015.3 ("Motion"). In support of the Motion, Movers aver as follows:

CASE BACKGROUND

1. The Debtor filed for relief under Chapter 11 of the United States Bankruptcy Code on October 16, 2019 in the United States Bankruptcy Court for the District of Delaware.
2. The case was subsequently transferred to this Court on the 4th day of December, 2019 [Dkt. #1].
3. On November 24, 2020, the Debtor filed its *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* ("Fifth Amended Plan of Reorganization") [Dkt. #1472].
4. The Fifth Amended Plan of Reorganization was confirmed by this Court's *Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief* ("Order") on the 22nd day of February, 2021 [Dkt. #1943].
5. The Court's Order confirming the Debtor's Fifth Amended Plan of Reorganization has been appealed by Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. [Dkt. #1957].
6. In connection with the appeal, Motions for Stay Pending Appeal have been filed by (i) Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. [Dkt. #1955] (the "Advisors"); (ii) Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and NexPoint Capital, Inc. [Dkt. #1967] (the

"Funds"); (iii) The Dugaboy Investment Trust and Get Good Trust [Dkt. 1971] (the "Movers"); and (iv) James Dondero [Dkt. 1973] ("Dondero").

7. This Court entered an *Order on Motions for Stay Pending Appeal* on March 23, 2021, denying the requests for a stay pending appeal ("Order Denying Requests") [Dkt. #2084].
8. Advisors, Funds, Movers and Dondero have appealed this Court's Order Denying Requests for a stay pending appeal.
9. The appeal of this Court's Order Denying Requests for stay pending appeal is presently before Judge Godbey, United States District Judge for the Northern District of Texas.
10. The Debtor has not filed any reports required by Bankruptcy Rule 2015.3 over the approximately thirty (30) months in which this case has been pending.
11. The Effective Date for the Fifth Amended Plan confirmed by this Court has yet to occur.

OVERVIEW OF BANKRUPTCY RULE 2015.3

Rule 2015.3 requires "periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or debtor . . . in which the estate holds a substantial or controlling interest." Fed. R. Bankr. P. 2015.3(a). The purpose of Rule 2015.3 is "to assist parties in interest taking steps to ensure that the debtor's interest in any entity . . . is used for payment of allowed claims against the debtor." Pub. L. No. 109-8 § 419(b) (2005).

The term "substantial or controlling interest" is not defined, nor does it appear elsewhere in the Bankruptcy Code or Bankruptcy Rules. 9 Collier on Bankruptcy § 2015.3.07 (16th ed. 2020). In the absence of other guidance, Collier suggests that a court may turn to the definition of an "affiliate"[1] or "insider"[2] in the Bankruptcy Code, or even state law on the definition of a

[1] Bankruptcy Code § 102(2) defines an affiliate:
(2) The term "affiliate" means—
(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

controlling or substantial interest. See 9 Collier on Bankruptcy § 2015.3.07 (16th ed. 2020) ("case law regarding the definition of 'insider' or 'affiliate' may be helpful. Additionally, there is a substantial body of corporate case law regarding controlling interests that could be consulted.")

Under Rule 2015.3, there is a rebuttable presumption that the estate has a "substantial or controlling interest" of an entity in which it "controls or owns at least a 20 percent interest." Fed. R. Bankr. P. 2015.3(c).

The Court may, after notice and a hearing, vary the reporting requirement established by subdivision (a) of this rule for cause, including that the trustee or debtor in possession is not able, after a good faith effort, to comply with those reporting requirements, or that the information

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(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

[2] The Bankruptcy Code included a non-exclusive list of insiders:

(B) if the debtor is a corporation—

(i) director of the debtor;

(ii) officer of the debtor;

(iii) person in control of the debtor;

(iv) partnership in which the debtor is a general partner;

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership—

(i) general partner in the debtor;

(ii) relative of a general partner in, general partner of, or person in control of the debtor;

(iii) partnership in which the debtor is a general partner;

(iv) general partner of the debtor; or

(v) person in control of the debtor[.]

required by subdivision (a) is publicly available. The examples given for waiving cause are not exclusive. 9 Collier on Bankruptcy §2015.3.08 (16th ed. 2020).

When questioned at the confirmation hearing in connection with Bankruptcy Rule 2015.3, James Seery, on behalf of the Debtor, testified as to the following:

a) He was familiar with BR 2015.3 [Dkt. #1905, pg. 48, lines 12-15];

b) No report in compliance with BR 2015.3 has been filed by the Debtor [Dkt. #1905, pg. 48, lines 15-17]; and

c) "There was no reason for it (failure to file the 2015.3) other than we did not get it done initially and it fell through the cracks" [Dkt. #1905, pg. 49, lines 18-21].

EXISTING CASE LAW ON BANKRUPTCY RULE 2015.3

Little case law exists on the requirements of Bankruptcy Rule 2015.3. In general, cases where parties have sought and received a waiver fall into two categories: (1) cases where the subsidiary is in the process of being sold; and (2) prepacked bankruptcies if the plan is not confirmed by a certain date. See e.g., *In re RCS Capital Corp*., Case No. 16-102233 (Bankr. D. Del. Mar. 4, 2016) [Dkt. 714 ¶17] ("The Purchase Agreement has already been approved by the Court . . . . Therefore, within a relatively short period of time . . . , the Debtor will no longer have a substantial or controlling interest in [the subsidiary"); *In re HCR Manorcare*, Case No. 18-10467 (Bankr. D. Del. Oct. 3, 2018) [Dkt. 8 ¶ 47] (Seeking waiver of reporting requirements if a pre-packed bankruptcy plan is not confirmed within a set period of time).

The case law as it exists does not support a waiver of Bankruptcy Rule 2015.3 and especially for the "it slipped through the cracks excuse." It has been three (3) months since the issue of Debtor's failure to comply with Bankruptcy Rule 2015.3 was raised to the Debtor and

Debtor has not sought to remedy the failure and file the requisite 2015.3 reports for the applicable periods or seek leave of Court. The Debtor must believe the issue will simply go away and not be brought to the attention of the Court and, therefore, the Debtor will not have to disclose the financial condition of the assets in which it possesses a controlling or substantial interest. The Debtor's typical excuse in this case is the creditors committee has seen the information, however, Bankruptcy Rule 2015.3 requires a public filing and not a disclosure limited to a select few.

The Seery attempted excuse that "we were told we didn't have separate consolidating statements for every entity and it would be difficult" [Seery testimony Dkt. #1905, page 49, lines 14-20] is not credible in light of the fact that the majority of entities in which Debtor has a controlling or substantial interest are investment funds. Most of the entities listed below in which the Debtor has a substantial or controlling interest are either regulated or have third party investors and, as such, separate accounting and statements on an entity by entity basis are required. In addition, the fact that the Debtor lacked a "consolidated statement" on one entity is not a legitimate excuse for not filing a 2015.3 report for the other entities in which the Debtor has a controlling or substantial interest.

ENTITIES IN WHICH THE DEBTOR OWNS OR MAY OWN A CONTROLLING INTEREST

There is no complete listing in any one place that identifies the entities in which the Debtor possesses a substantial or controlling interest. To assemble the list, Mover has had to parse through various documents and filings. The entities include, but are not limited, to the following:

a) Highland Select Equity Fund [See ftn. 8, Debtor's Motion for Exit Loan Dkt. #2229]. The Exit Loan Motion identifies Highland Select Entity Fund, L.P., Highland

Restoration Capital Partners, L.P. Highland CLO Funding, Ltd., Highland Multi Strategy Credit Fund L.P., Highland Capital Management Korea Limited, Cornerstone Healthcare and Trussway Industries and Trussway Holdings, LLC.[3]

b) The Exit Financing Motion [Dkt. #2229, pg. 7, ftn. 9] indicates that the Debtor owns additional assets that, by the literal reading of ftn. 9, are not listed in the section of the motion that identifies the collateral for the loan. These entities should be specifically identified and reports should be filed for these entities that are not listed in the collateral section of the motion.

c) In the Deposition of James Seery taken on January 29, 2021, in addition to the entities listed above, James Seery generically identifies CCS Medical Inc., Targa International, PetroCap and JHT as entities controlled by Debtor or controlled through funds that are controlled by Debtor. It is believed the corporate names are PetroCap LLC, PetroCap Partners II LP, PetroCap Incentive Partners II LP , Targa Resources Partners LP, Targa S.A and JHT Holding Inc.

d) SSP Holdings Inc. and Omni Max, which were sold by the Debtor without Court approval based upon the Debtor's belief that Court approval was not required, should also have been the subject of a 2015.3 report for the period between the filing and the date of the sale.

CONCLUSION

Throughout this case the Debtor has taken the position that it does not have to seek court approval for sales of assets or report to anyone relative to assets owned by entities in which it has

[3] a) On information and belief, the Debtor asserted ownership of one hundred percent (100%) of Highland Select Entity Fund LP is incorrect and Mark Okata and PCMG Trading partners XXIII L.P. own an interest.

either control or a substantial interest. See Dondero *Motion for Entry of an Order Requiring Notice and Hearing for Future Estate Transactions Occurring Outside the Ordinary Course of Business* [Dkt. #1439] and the Debtor's Objection thereto [Dkt. #1546]. In its Objection, the Debtor states in PP 9 that the sales at issue (Highland Multi Strategy Credit Fund L.P, Highland Restoration Capital Partners L.P and SSI Holdings Inc.) were not subject to Court approval and 11 USC §363. It appears, however, that this restricted view of Bankruptcy Court jurisdiction no longer suits the Debtor's new narrative and now it is seeking court authority to secure an exit loan and to use the assets of a controlled non-debtor entity (See Debtor's Motion for an Exit Loan, Dkt. # 2229) in order that the Debtor can pay its professionals and, in a second Motion, settle the UBS claim using the assets of a different non-debtor controlled entity [Dkt. #2199].

Had the Debtor followed Bankruptcy Rule 2015.3, both this Court and the creditors, large and small, of the Estate along with the creditors and minority owners of the controlled entities would have had some insight over the Debtor's actions with respect to these entities over the course of the Chapter 11. Bankruptcy Rule 2015.3 was designed to provide transparency and it should be enforced as a matter of public policy.

April 29, 2021

Respectfully submitted,

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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
	Tuesday, June 8, 2021
	9:30 a.m. Docket
Debtor.	
	- SHOW CAUSE HEARING (2255)
	- MOTION TO MODIFY ORDER AUTHORIZING RETENTION OF JAMES SEERY (2248)
	- MOTION FOR ORDER FURTHER EXTENDING THE PERIOD WITHIN WHICH DEBTOR MAY REMOVE ACTIONS (2304)

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

APPEARANCES:

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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

DALLAS, TEXAS - JUNE 8, 2021 - 9:30 A.M.

THE COURT: All right. We have settings in Highland this morning. We have three settings. We have the show cause hearing with regard to a lawsuit filed in the District Court. We have a couple of more, I would say, ministerial matters, although I think we do have objections. I know we have objections. We have a motion to extend the removal period in this case as well as a motion to modify the order authorizing Mr. Seery's retention.

So let's go ahead and start out by getting appearances from the lawyers who are participating today. I'll get those now.

MR. MORRIS: Good morning, Your Honor.

THE COURT: Good morning.

MR. MORRIS: John Morris from Pachulski, Stang, Ziehl & Jones for the Debtor. I'm joined with me this morning by my colleagues, Jeffrey Pomerantz, Greg Demo, and Zachery Annable.

THE COURT: Okay.

MR. MORRIS: We do have a proposal on how to proceed today, a substantial portion of which is in agreement with the Respondents.

THE COURT: Okay.

MR. MORRIS: So, at the appropriate time, I'd be happy to present that to the Court.

THE COURT: All right. Well, let's get all the

appearances and then I'll hear from you on that.

MR. SBAITI: Your Honor, my name is -- would you like me to approach, Your Honor?

THE COURT: Yes, please.

MR. SBAITI: It's my first time appearing in Bankruptcy Court, Your Honor. My name is Mazin Sbaiti. I'm here on behalf of the charitable DAF Fund, CLO Holdco, and the Respondents to the show cause hearing. We are also representing them as the Movants on the motion to modify the Court's order appointing Mr. Seery.

THE COURT: All right. Thank you.

MR. BRIDGES: Jonathan Bridges, Your Honor, with Mr. Sbaiti, also representing the Charitable DAF and CLO Holdco, as well as our firm that is named in the show cause order.

THE COURT: Okay.

MR. BRIDGES: Thank you, Your Honor.

THE COURT: Thank you.

MR. PHILLIPS: Good morning, Your Honor. Louis M. Phillips from Kelly Hart Hallman here on behalf of Mark Patrick in the show cause matter. I'm joined with my colleague Michael Anderson from the Kelly Hart firm here in Fort Worth. And that's the matter that we're involved in, the show cause auction.

THE COURT: All right. Thank you, Mr. Phillips.

MR. TAYLOR: Good morning, Your Honor. Clay Taylor

of Bonds Ellis Eppich Schafer Jones here on behalf of Jim Dondero. I have Mr. Will Howell here with me from my firm.

THE COURT: All right. Thank you.

MR. CLEMENTE: Good morning, Your Honor. Matthew Clemente from Sidley Austin on behalf of the Committee. I'm here with my partner, Paige Montgomery.

THE COURT: Okay. Thank you.

MR. CLEMENTE: Good morning.

THE COURT: All right. Just to remind people, we do have participants on the WebEx, but in setting the hearing I made clear that participants today needed to be here live in the courtroom. So the WebEx participants are going to be only observers.

We have a camera on the screen here that is poised to capture both the lawyer podium as well as the witness box, and then another camera on the bench.

So, please be mindful. We want the lawyers to speak from the podium so that they are captured and heard by the WebEx. And so hopefully we don't have any cords you will trip over. We've worked hard to make it easy to maneuver around the courtroom.

All right. So, Mr. Morris, you had a proposal on how we would approach this today?

MR. MORRIS: I do, Your Honor. And it's rather brief, but I think it makes a lot of sense.

There are three motions on the calendar for today, --

THE COURT: Uh-huh.

MR. MORRIS: -- only one of which required the personal appearance of certain parties.

THE COURT: Uh-huh.

MR. MORRIS: And for that reason, and because, frankly, it was the first of the three motions filed, we believe that that ought to go first.

THE COURT: Okay.

MR. MORRIS: And then it can be followed by the motion for reconsideration of the July order, assuming time permits, and then the motion to extend the removal deadline.

And with respect to the contempt motion, Your Honor, the parties have agreed that each side shall have a maximum of three hours to make opening statements, closing arguments, direct and cross-examination of witnesses.

You know, I did point out to them that from time to time Your Honor has used the Court's discretion to adjust the time --

THE COURT: Uh-huh.

MR. MORRIS: -- if the Court is making inquiries, and I guess we'll deal with that matter as it comes. But as a general matter, that is what we've agreed to. And I would propose that, unless anybody has any objections, that we just proceed on that basis.

THE COURT: Okay.

MR. MORRIS: And I could -- I could go right forward.

THE COURT: So, three hours in the aggregate?

MR. MORRIS: Uh-huh.

THE COURT: It doesn't matter how people spend it -- with argument, examination, cross -- three hours in the aggregate?

MR. MORRIS: Correct.

THE COURT: Okay. So, Nate, you'll be the timer on that.

MR. MORRIS: Yeah. We thought it was very important to get this done today, with people coming in from out of town.

THE COURT: Okay. Sounds fine.

MR. MORRIS: So does the Court want to inquire if anybody has any questions or comments?

THE COURT: I do. Well, I see Mr. Bridges getting up. You confirm that that's agreeable?

MR. BRIDGES: Thank you, Your Honor. Yes, that's agreeable. We have one slight difference in our proposal. We would suggest to Your Honor that the motion for modification, if Your Honor decides our way, would moot the entire motion for contempt. And we'd suggest, if that possibility is realistic, that we would go first with that motion, perhaps obviate having to have the evidence presented and the lengthy

hearing.

The motion for modification, Your Honor, asks the Court to reconsider -- to modify that order because of jurisdictional and other shortcomings in it that make the order unenforceable. And because that's the order that is the subject of the contempt motion, we'd ask Your Honor to consider putting that motion first.

THE COURT: Okay. Or second? Ahead of the contempt matter?

MR. BRIDGES: Ahead of the contempt matter, --

THE COURT: Uh-huh.

MR. BRIDGES: -- because it has a possibility --

THE COURT: We have the removal matter, which I think is the shortest. All right.

MR. BRIDGES: No objection to that, Your Honor. That's correct.

THE COURT: Okay. So, Mr. Morris, that's fine by you?

MR. MORRIS: Your Honor, that doesn't make a lot of sense to us. We don't believe there's any basis for the Court to reconsider, modify, or amend in any way the July order. But even if we were wrong about that, that would not retroactively validate conduct which was otherwise wrongful at the time it was committed.

The contempt motion needs to go first. The other motion

will have no impact on whether or not there is a finding of contempt of court.

THE COURT: All right. And update me on this. There was something filed yesterday, a notice of a proposed form of order that the Debtor had proposed, that I think was not agreed to, where there would be a change about any action that goes forward, the cause of action would be in the sole jurisdiction of the Court, and you all agreed to change that part of the order, correct?

MR. MORRIS: So, just as a division of labor for Your Honor, I'm doing the contempt motion.

THE COURT: Okay. That's Mr. Pomerantz's?

MR. MORRIS: Mr. Pomerantz is going to take care of that.

MR. POMERANTZ: Yes, Your Honor. Good morning. Good to see you again.

THE COURT: Good to see you.

MR. POMERANTZ: Yes, Your Honor, that's correct. If Your Honor recalls, there's really three aspects of the January 9th and the July 16th order. First, requiring people to come to Bankruptcy Court before commencing or pursuing an action. Second, for the Bankruptcy Court to have the sole and exclusive authority to determine whether the claim is a colorable claim of willful negligence or gross misconduct. And then third, if Your Honor passed the claim through the

gate, whether you would have jurisdiction.

In Your Honor's January 9th and July 16th orders, you said you would have exclusive jurisdiction. In the motion for reconsideration, and particularly the reply, Movants said, if you just change that and say that if passes through the gate that you'd have jurisdiction only to the extent you would otherwise have it, that would resolve the motion, in the same way that the plan of reorganization was amended.

We proposed that. They rejected it. We put it before Your Honor. So we believe that it moots out a good portion -- actually, we think it should moot out the entire motion. They obviously disagree. But we definitely agree it moots out the most significant portion of their motion, which is that Your Honor would take jurisdiction to adjudicate a matter on an exclusive basis when you might not otherwise have jurisdiction on an exclusive basis.

THE COURT: Okay. Well, --

MR. BRIDGES: Your Honor, may I respond to that?

THE COURT: You may. And --

MR. BRIDGES: Thank you, Your Honor.

THE COURT: -- why -- could you clarify why you think it would moot out the entire show cause matter? I wouldn't be retroactively changing my order. Is that what you're proposing?

MR. BRIDGES: Your Honor, with all respect, we

believe the order is defective and unenforceable and has to be modified in order to fix it. And because of the defects, we're -- we're actually arguing, Your Honor, that it is unenforceable in a contempt proceeding. That is exactly what our argument is.

THE COURT: Okay. I think I'm getting way farther down this road than maybe I want to right now. But I guess here's the elephant in the room, I feel like: *Republic Supply versus Shoaf*.

MR. BRIDGES: Uh-huh.

THE COURT: The U.S. Supreme Court *Espinosa* case, for that matter. If I accept your argument that maybe there was a flaw in those orders, that maybe they went too far, don't you have a problem with those two cases?

MR. BRIDGES: Your --

THE COURT: The orders weren't appealed.

MR. BRIDGES: I understand completely, Your Honor.

THE COURT: Uh-huh.

MR. BRIDGES: And I think the answer is no because of the *Applewood* case from the Fifth Circuit. The *Applewood* case cited in our reply brief explains that in order for an order, a final order of the Bankruptcy Court to have exculpatory effect, in order for it to release claims, for example, that the claims at issue must be enumerated in the order. It's not enough to have a blanket statement like the order, the July

order has, like the January order has, saying that Mr. Seery's claims -- claims cannot be brought against him for ordinary negligence at all. The -- Your Honor, we're delving into my argument.

THE COURT: Okay.

MR. BRIDGES: And I was hoping to do this on a preliminary basis.

THE COURT: Right.

MR. BRIDGES: I don't mean to bog you down with that. But Your Honor, no, mandatory authority from the Fifth Circuit after *Shoaf* limits *Shoaf's* application and says that it does not extinguish the claims that are not specifically enumerated in the order. And the reason for that is because it doesn't give the kind of notice to the parties that they would need to make an appearance and object to those orders at the time. It actually helps to stem the amount of litigation at the time rather than to encourage it.

THE COURT: All right. Well, you'll get your opportunity to make your full argument on this. But I'm not convinced, preliminarily, at least, to affect my decision on the sequence, okay? So even if it potentially wastes time under your view of the law, I am going to do the removal matter first -- the extension of time request, I should say -- and then the show cause and then the motion to modify. And I realize, those last two matters, everything is kind of

interrelated. All right?

MR. BRIDGES: Yes, Your Honor.

THE COURT: All right. So, with that decided, is there a desire on the part of the lawyers to make opening statements, or shall we just go to the motions? And, of course, people can use their three hours for oral argument, however much they want to use for oral argument.

MR. MORRIS: Your Honor, the -- to be clear, the six-hour time limit only applies to the contempt proceeding.

THE COURT: Oh, yes. Yes. Uh-huh.

MR. MORRIS: And I do want to make an opening statement.

THE COURT: Okay.

MR. MORRIS: So, as the Movant, I'd like to go first.

THE COURT: You want to make opening statements?

MR. BRIDGES: Yes. Yes, Your Honor.

THE COURT: Okay. Okay.

MR. BRIDGES: I believe we've got a PowerPoint prepared that I think can lay out our side of it.

THE COURT: Okay.

MR. BRIDGES: I don't think we're participating in the motion to extend the removal time.

THE COURT: Okay.

MR. BRIDGES: That's going first.

THE COURT: All right.

MR. BRIDGES: So we'll wait until that is --

THE COURT: Well, so we don't get confused on the timing, let's just do the motion to extend right now. And I think we only had one objection. As Mr. Sbaiti just pointed out, they're not objecting on that one. We have a Dondero objection. So let's, without starting the timer, hear that one. Okay?

MR. DEMO: Good morning, Your Honor. Greg Demo; Pachulski, Stang, Ziehl & Jones.

THE COURT: Good morning.

MR. DEMO: I'll be arguing the removal motion and then turn it over.

It's fairly basic and straightforward, Your Honor. We're asking for a further extension of the statutory deadline to remove cases until December 14th, 2021. The deadline is procedural only. As Your Honor is well aware, there's a lot of moving parts in this case. You know, we don't know to this date, really, the full universe of what could actually be out there. So we're just asking for a short extension of the removal period to cover through December.

I know that there was an objection from Mr. Dondero. I know that he argues that 9006 does not allow us to extend that deadline past the effective date of the plan, and he cites one case for that purpose, which is *Health Support*. I think it's out of Florida. That case dealt with the extension of the

two-year extension of the statute of limitations and was very clear that you can't use 9 --

THE COURT: You mean the 546 deadline?

MR. BRIDGES: Yes. Yes.

THE COURT: Okay.

MR. BRIDGES: That you can't use 9006 to extend non-bankruptcy deadlines. That's not what we're doing here, Your Honor. We're using 9006 to extend the bankruptcy deadline to remove the cases.

THE COURT: Uh-huh.

MR. DEMO: And we'd just ask Your Honor for the extension through December.

THE COURT: Okay. I'll hear Mr. Dondero's counsel.

MR. HOWELL: Good morning, Judge. Will Howell for Mr. Dondero.

So, the argument here is not that the Court can't do this. I was just pointing that there is an outside limit to what we're doing. And so if you look at the cases that the Debtor cites in support of this motion, the one that is most apt was when Judge Nelms did a fourth extension of time. But those were all 90-day extensions. Here, we're in a situation where the Debtor is asking for a fourth 180-day extension of time, and this is really where the, you know, objection came -- or, the response in opposition came from. They specifically asked that it be without prejudice to further extensions.

And so, at some point, you know, does 9006 have an outside limit? You know, do we need to see some sort of a light at the end of the tunnel here?

So we would ask that the motion, at a minimum, be denied in part with respect to this open-ended request for extension beyond two years for a 90-day period. The other cases that they cite, they have one extension here, one extension there, 120 days here, but not 180 days after 180 days after 180 days, and then asking specifically for without prejudice to further extensions beyond two years. So that's -- that's where this comes from.

THE COURT: All right. Do you think it matters that this is a very complex case?

MR. BRIDGES: I --

THE COURT: There's litigation here, there, and everywhere.

MR. HOWELL: I also think, you know, *Mirant* was complex. I think *Pilgrim's Pride* was complex. I think, you know, it is not out of bounds for the Court to grant a fourth extension.

THE COURT: Uh-huh.

MR. BRIDGES: But to -- you know, at some point -- you know, maybe the Court could grant a 90-day extension and make them come back a little more frequently to kind of corral this thing, rather than just saying "This grant of 180 days,

the fourth time, is going to be without prejudice to further extensions." It just gets kind of large.

THE COURT: Okay. Mr. Demo, your motion. You get the last word.

MR. DEMO: Your Honor, I mean, it is without prejudice for further extensions, but that doesn't mean that Your Honor is granting the further extensions now. It means we'll have to come back. We'll have to make our case for why an extension is necessary. And, you know, if Your Honor doesn't want to give us another extension past December 2021, Your Honor doesn't have to. This is not an order saying that it's a limitless grant.

You know, I'd also ask, you know, quite honestly, why Mr. Dondero has such an issue with this. He hasn't said that any of these cases involve him. He hasn't given any reasons why this affects him. He hasn't given any reason why this damages him at all. So I do, I guess, wonder as an initial matter kind of why we're here, you know, why we're responding to Mr. Dondero's request, when that request really has no impact on him.

And then, Your Honor, to the extent that you are inclined to limit this, I would say, you know, we would ask for a reasonable extension of time. We do think an extension of time, because of the complexity of this case, through December is warranted. But if Your Honor for some reason does agree

that a shorter extension is necessary under 9006 -- I don't think it is -- we'd just ask that Your Honor grant us leave to come back for further extensions of time.

THE COURT: Okay. All right. I will -- I'll grant a 90-day extension, without prejudice for further extensions.

MR. DEMO: Thank you, Your Honor.

THE COURT: Maybe in 90 days we'll be farther down the road and we won't need any more extensions, but you'll have the ability to argue for more if you think it's really necessary. All right. So that will bring us to around September 14th, I guess.

All right. Well, let's go ahead and hear opening statements with regard to the show cause matter. And again, if you want to roll in arguments about the -- well, no, you said the six hours only applies to show cause, so we'll not hear opening statements with regard to the Seery retention modification, just show cause.

MR. MORRIS: All right. Before I begin, Your Honor, I have a small deck to guide --

THE COURT: Okay.

MR. MORRIS: -- to guide my opening statement.

THE COURT: All right.

MR. MORRIS: Can I approach the bench?

THE COURT: You may. And is your legal assistant going to share her content --

MR. MORRIS: Yes.

THE COURT: -- so people on the WebEx will see? Okay.

MR. MORRIS: That's the intention, Your Honor.

THE COURT: Okay.

MR. MORRIS: All right. Are you ready for me to proceed?

THE COURT: I am. And obviously, everyone has a copy?

MR. MORRIS: Yes.

THE COURT: Your opponents have a copy of this?

MR. MORRIS: Yep.

THE COURT: Okay. Although we hope to see it on the screen.

OPENING STATEMENT ON BEHALF OF THE DEBTOR

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

We're here today on the Debtor's motion to hold certain entities and individuals in contempt of court for violating a very clear and specific court order. I hope to be relatively brief in my opening here, Your Honor, and I'd like to begin where I think we must, and that is, how do we -- how do we prove this and what do we have to prove?

The elements of a claim for contempt of court are really rather straightforward. The Movant must establish by clear

and convincing evidence three things.

THE COURT: Let me stop you and stop the clock. We're not seeing the shared content.

MR. MORRIS: Uh-huh.

THE COURT: Did you want her to go ahead and share her content?

MR. MORRIS: I did.

THE COURT: Okay.

MR. MORRIS: I was hoping that she'd do that.

THE COURT: All right. It says it's receiving content.

MR. MORRIS: There we go. It's on my screen, anyway.

THE COURT: Oh, here it is. I don't know why it's not on my Polycom. Can you all see it out there?

(Chorus of affirmative replies.)

THE COURT: Okay. Very good.

MR. MORRIS: Okay.

THE COURT: You may proceed.

MR. MORRIS: Thank you, Your Honor.

So, there's three elements to the cause of action for contempt, for civil contempt. We have to prove by clear and convincing evidence that a court order was in effect; that the order required certain conduct by the Respondents; and that the Respondent failed to comply with the Court's order.

We've cited in the footnote the applicable case law from

the Fifth Circuit, and I don't believe that there's any dispute that is indeed the legal standard.

The intent of the Respondents as to liability is completely irrelevant. It doesn't matter if they thought they were doing the right thing. It doesn't matter if they believed in their heart of hearts that the court order was invalid. These are the three elements, and we will be able to establish these elements not by clear and convincing evidence, but if we ever had to, beyond reasonable doubt.

If we can go to the next slide, please.

We begin with the Court's order, the Court's July 9 order. And that order states very clearly what conduct was required. And the conduct that was required was that no entity could commence or pursue -- those are really the magic words -- commence or pursue a claim against Mr. Seery without the Bankruptcy Court doing certain things. And we've referred to this as the gatekeeper. And the only question I believe the Court has to ask today is whether the Respondents commenced or pursued a claim against Mr. Seery without seeking Bankruptcy Court approval, as set forth in this order.

I'll dispute that there's anything ambiguous about this. I'll dispute that it could not be clearer what conduct was prohibited. It could not be clearer. The only question is whether the conduct constitutes the pursuit of a claim.

Let's see what they did. If we could go to the next

slide. There will be no dispute about what they did. And what they did is, a week after filing a lawsuit against the Debtor and two others arising out of the HarbourVest settlement, a settlement that this Court approved, after notice and a hearing and participation by the Respondents, after they had the opportunity to take discovery, after they had the opportunity to examine Mr. Seery about the value of HarbourVest's interest in HCLOF, after all of that, they brought a lawsuit after Mr. Patrick took control of the DAF and CLO Holdco. And that lawsuit related to nothing but the HarbourVest suit, and it named in Paragraph 2, right up above, Mr. Seery as a potential party. And a week later, Your Honor, they filed what we call the Seery Motion, and it was a motion for leave to amend their complaint to add Mr. Seery as a defendant.

We believe that that clearly violates the Court's July 7 order. And indeed, again, these are facts. They're not -- they're not in dispute. Just look at the first sentence of their motion. The purpose of the motion was to name James Seery as a defendant. That was the purpose of the motion. And the way that they made the motion, Your Honor -- and these are undisputed facts -- the way they made the motion, Your Honor, shows contemptuous intent. We don't have to prove intent, but I think it might be relevant when you get to remedies. Okay?

And so how do I -- why do I say that? Because they made this motion, Your Honor, and they didn't have to. Everybody knows that under Rule 15 they could have amended the complaint if they wanted to. If they wanted to, they didn't need the Court's permission. What they wanted to do was try to get the District Court to do what they knew they couldn't. And that's contemptuous.

And they did it, Your Honor, without notice to the Debtor. Even after the Debtor had accepted service of the complaint, even after we told them, if you go down this path, we're going to file a motion for contempt, they did it anyway. They didn't serve the Debtor. They didn't give the Debtor a courtesy copy. They didn't notify the Debtor. The only thing that happened was the next day, when the District Court dismissed it without prejudice, they sent us a copy of that notice. And within three days, we were here.

A court order was in effect. Mr. Patrick is going to admit to that. There's not going to be any dispute about that. The order required that the Respondents come to this Court before they pursue a claim against Mr. Seery, and they failed to comply with that order. The facts, again -- if we can go to the next slide. We can look at some of the detail, because the timeline is mindboggling.

Mr. Patrick became the Plaintiffs' authorized representative on March 24th. And folks, when I took their

depositions, weren't specific about dates, and that's why some of the entries here refer to sometime after, but there's no question that the order of events is as presented here and as the evidence will show today.

The evidence will show that sometime after Patrick became the Plaintiffs' authorized representative, Mr. Dondero informed Mr. Patrick that Highland had usurped an investment opportunity from the Plaintiffs. Mr. Patrick is going to testify to that. Mr. Patrick is also going to testify that, without prompting, without making a request, D.C. Sauter, the general counsel of NexPoint Advisors, recommended the Sbaiti firm to Mr. Patrick. Mr. Patrick considered nobody else.

Mr. Patrick retained the Sbaiti firm in April. In other words, within 12 days of the filing of the complaint. They're retained and they conduct an investigation. You're going to hear the assertion of the attorney-client and the common interest privilege every time I ask Mr. Dondero what he and Mr. Sbaiti talked about and whether they talked about naming Jim Seery as a defendant. But with Patrick's authorization, the Sbaiti firm filed the complaint on April 12th, just days after they were retained.

It's like a -- it's an enormous complaint. I don't know how they did that so quickly. But in any event, the important point is that they all worked together. None of this happened until Mr. Patrick became the authorized representative.

Mr. Patrick is going to tell you, Your Honor, he's going to tell you that he had no knowledge of any wrongdoing by Mr. Seery prior to the time he assumed the rein of the DAF and the CLO Holdco. He had no knowledge, Your Honor, of any claims that the DAF and CLO Holdco had against the Debtor until he became the Plaintiffs' authorized representative and Mr. Dondero spoke to him.

If we can flip to the next page. Mr. Dondero has effective control of the DAF. He has effective control of CLO Holdco. You're going to be bombarded with corporate documents today, because they're going to show you -- and they want you to respect the corporate form, they really want you to follow the rules and respect the corporate form, because only Mr. Scott was responsible for the DAF and CLO Holdco until he handed the reins on March 24th to Mr. Patrick. Mr. Dondero has nothing to do with this. He's going to tell you. He's going to tell you he had nothing to do with the selection of Mr. Patrick as Mr. Scott's replacement.

The facts are going to show otherwise, Your Honor. The DAF is a $200 million charitable organization that is funded almost exclusively with assets derived from Highland or Mr. Dondero or the Get Good Trust or the Dugaboy Trust. The evidence is going to show that at all times these entities had shared services agreements and investment advisory agreements with HCMLP. The evidence will show that HCMLP at all times

was controlled by Mr. Dondero.

And it made sense. The guy put in an awful lot of money for charitable usage. Is he really just going to say, I don't really care who runs it? The evidence is going to show that between October 2020 and January 2021, Grant Scott actually exercised independence. Grant Scott was Mr. Dondero's childhood friend. They went to UVA together. They were roommates. Mr. Scott was the best man at Mr. Dondero's wedding. But we were now in bankruptcy court. We're now in the fishbowl. And I will -- this may be a little argument, but there's no disputing the facts that Mr. Scott acted independently, and he paid the price for it. Mr. Scott did it three times.

He did it when he amended CLO Holdco's proof of claim to take it down to zero. He did it again after he withdrew the objection to the HarbourVest settlement motion. And he did it again when he settled the lawsuit that the Debtors had brought against CLO Holdco. And that -- and on each of those three occasions, the evidence will show that Mr. Scott did not communicate with Mr. Dondero in advance, that Mr. Dondero found out about these acts of independence after the fact, and that each time he found out about it he had a little conversation with Mr. Scott.

Mr. Dondero is going to tell you about it, and he's going to tell you that he told Mr. Scott each act was inappropriate.

You may have heard that word before. Each act was not in the best interests of the DAF.

The last of those conversations happened either on or just after January 26th. And by January 31st, Mr. Scott gave notice of his resignation. And you're going to see that notice of resignation. And he asks for releases.

Mr. Patrick becomes, almost two months later, the successor to Mr. Scott. Mr. Dondero is going to say he has no idea how that happened. He was just told after the fact that Mr. Patrick and Mr. Scott had an agreement. He's going to tell you they had an agreement and he just heard about it afterwards. He didn't really -- for two months, I guess, he sat there after Mr. Scott told him that he wanted out and did nothing to try to find out who's going to take control of my charitable foundation with $200 million. He wasn't interested.

But here's the thing, Your Honor. If we go to the next slide. Let's see what Mr. Scott said at his deposition last week. Question, "Do you know who selected Mark?" Answer, "I do not." Question, "Do you know how Mark was selected?" Mark is a reference to Mark Patrick. "I do not." "Did you ever ask Mark how he was selected?" "I did not." "Did you ever ask Mark who selected him?" "I did not." "Did you ever ask anybody at any time how Mr. Patrick was selected to succeed you?" "No, I did not." "Did you ever ask anybody at any time

as to who made the decision to select Mr. Patrick to succeed you?" "No, I did not."

So I don't know what happened between Mr. Patrick and Mr. Dondero when Mr. Patrick supposedly told Mr. Dondero that there was an agreement with Mr. Scott, but that is news to Mr. Scott. He had no idea.

Your Honor, we are going to prove by clear and convincing evidence that each of the Respondents violated a very clear and specific court order. And unless the Court has any other questions, I'll stop for now.

THE COURT: No questions.

MR. MORRIS: Thank you, Your Honor.

THE COURT: All right. Who is making the argument for the Respondents?

MR. SBAITI: Your Honor, I am. I'm just trying to put the PowerPoint up on the WebEx.

THE COURT: Okay.

MR. SBAITI: Sorry about that.

MR. MORRIS: Your Honor, I'll try not to make this a practice, but can I inquire as to how much time I used?

THE COURT: Oh. Nate?

THE CLERK: About thirteen minutes.

THE COURT: Thirteen minutes?

MR. MORRIS: Thank you very much.

THE COURT: Okay. All right.

MR. SBAITI: Your Honor, our PowerPoint is a little bit longer than that one. May I approach with a copy?

THE COURT: You may. Uh-huh.

(Pause.)

MR. SBAITI: Your Honor, it does feel good to be back in the courtroom.

THE COURT: Okay.

MR. SBAITI: It's been a long time.

THE COURT: Yes. For us, too.

MR. SBAITI: Jut wish it wasn't under a circumstance where someone is trying to sanction me.

But we're going to be dividing up this oral argument a little bit. Also, to just kind of break up a little bit of the monotony, because I think we have a lot to cover at the opening stage of this. And I'll try to be as expeditious as I can be.

OPENING STATEMENT ON BEHALF OF THE SHOW CAUSE RESPONDENTS

MR. SBAITI: Your Honor, the thing we -- the thing we open with is the due process issue that we raised in our brief. And where this really arises from is the Court's show cause order calls us violators before we've had a chance to respond to the allegations and before we've obviously been able to approach this hearing. And the word violators means something to us, Your Honor, because I've been a lawyer for a long time, my partner has been a lawyer for a long time, our

clients have never been sanctioned, we've never been sanctioned, and for us to be labeled violators first by counsel and then in a court order makes us wonder whether or not this process is already prejudged or predetermined.

THE COURT: I actually want to address that. Turn off the clock.

Just so you know, I looked this up a while back, because we gave a bankruptcy judges panel at some CLE. The average bankruptcy judge in our district, back when I looked, signs over 200 orders a week.

MR. SBAITI: Sure.

THE COURT: Many of those -- in fact, most of them -- are submitted by lawyers. So, you know, a big chunk of my week is signing orders. And I obviously give more scrutiny to those that are substantive in nature. Okay? If someone submits to me a 50-page debtor-in-possession financing order, I will look at that much more carefully than what I consider a mere procedural order setting a hearing.

So I regret that that word was used, but I can assure you I fairly quickly set that -- signed that, I should say -- regarding it as a merely procedural order setting a hearing. Okay? So it's as simple as that. There was no hmm, I like that word, violator. I had a stack, if you will, an electronic stack of probably 200 orders in front of me the day I signed that. Okay?

So, if that makes anyone feel any better, I don't know, but that's the reality.

Okay. You can start the clock again.

MR. SBAITI: And I appreciate Your Honor saying that. It does make us feel better, both about where the -- the genesis of the order and the impact and its reflection on what Your Honor thinks in terms of going into this.

The other thing that obviously raised concerns, and I assume this comes from the same place, was four days ahead of that order counsel told us the Court was going to order everyone to be in person, and they had advance notice of that, and we weren't sure how they had advance notice of that. I guess they assumed --

THE COURT: I can assure you right here on the record I never had ex parte communications with any lawyer in this case, on this matter or any other matter. Okay? Again, those are pretty strong words to venture out there with, which your pleading did venture out there with those words.

My courtroom deputy, Traci, I think answers her phone 24 hours a day. So I'm quite sure she had communications with the lawyers about this, just like she probably had communications with you and your firm and every other firm in this case. Okay?

MR. SBAITI: Like I said, Your Honor, we appreciated what Your Honor -- appreciate what Your Honor said, but that

issue obviously stuck out -- stuck out to us, in combination. So I'll move on from that issue.

This has to do with the lawsuit that was filed, and the lawsuit, the genesis of the lawsuit, I think it's important to say, because the argument has been raised in the briefing and we wanted to address it upfront, why the lawsuit comes about. And it comes about because of the Advisers Act and the responsibilities that the Debtor has to the assets of the funds that it manages. And the Advisers Act imposes a duty not only on Highland but obviously on its control people and its supervised people. And the lawsuit has to do with HCLOF, which is what HarbourVest owned a piece of. And Highland, as the advisor to HCLOF and the advisor to the DAF, owed fiduciary duties to CLO Holdco, which is the DAF's holding entity of its assets in HCLOF, but Highland Capital was also an advisor, a registered investment advisor to the DAF directly at the time. And so those federally-imposed fiduciary duties lie at the crux of that lawsuit.

Moving on, Mr. Seery testified at the hearing that was in this Court to be -- to get him appointed, and this was Exhibit 2 that was presented by the Debtor, and on Page 16 at the bottom he says -- of the transcript, he says, I think, from a high level, the best way to think about the Debtor is that it's a registered investment advisor. As a registered investment advisor, which is really any advisor of third-party

money over $25 million, it has to register with the SEC, and it manages funds in many different ways.

In the middle of the next page he says, In addition, the Debtor manages about $2 billion, $2 billion in total managed assets, around $2 billion in CLO assets, and then other securities, which are hedge funds -- other entities, rather, which are hedge funds or PE style. Private equity style.

On Page 23 towards the bottom he says, As I said, the Investment Advisers Act puts a fiduciary duty on Highland Capital to discharge its duty to the investors. So while we have duties to the estate, we also have duties, as I mentioned in my last testimony, to each of the investors in the funds. CLO Holdco would be an investor in one of those funds, HCLOF.

He goes on to say, Some of them are related parties, and those are a little bit easier. Some of them are owned by Highland. HCLOF was not owned by Highland. But there are third-party investors in these funds who have no relation whatsoever to Highland, and we owe them a fiduciary duty both to manage their assets prudently but also to seek to maximize value.

Now, the lawsuit alleges that Seery testified that the HarbourVest portion of Highland CLO Funding was worth $22-1/2 million. Now, Mr. Morris wants the Court to hinge on the fact that, well, no one asked him whether he was lying. But that's not really the standard, and it certainly isn't the standard

when someone's an investment advisor and owes fiduciary duties, which include fiduciary duties to be transparent with your investors.

It also includes fiduciary duties not to self-deal.

The lawsuit also alleges that, in reality, those assets were worth double that -- double that amount at the time. We found out just, you know, in late March/early April that a third -- from a third party who had access to the underlying valuations at the time that those values were actually double and that there was a misrepresentation, giving rise to the lawsuit. That change in circumstance is the key issue behind the lawsuit.

We allege that Mr. Seery and the Debtor, as RIAs, had a duty to not self-deal and be fully transparent with that information, and we think both of those things were violated under the Advisers Act.

We don't allege that the HarbourVest settlement should be undone or unwound. We can't unscramble that egg. We do seek damages, as I believe is our right, arising out of the wrongdoing and the process of pushing forth the settlement.

I think one of the allegations in the actual motion for the show cause order was that this was going to undo all of the hard work that Court had done and basically unwind and try to re-piece Humpty Dumpty back together again. But that's simply not the case. Nowhere in our allegations or in the

relief that we request are we trying to undo the HarbourVest settlement as such.

Now, whether the lawsuit should be dismissed under the affirmative defenses that they bring up -- res judicata, waiver, release -- all of those are questionable under the Advisers Act, given the change of circumstance, and therefore are also questions on the merits. They don't go to the colorability of the underlying claims in and of themselves, which I think is important.

So we asked for leave to amend from the Court. And what they want us to do, Your Honor, is they want to sanction us for asking. They're saying asking for leave to amend is the same thing as pursuing a claim. And I'll get to the specifics on that in a little bit. But that's the frame. Can we be sanctioned for asking a court, any court, even if it's the wrong court, for permission to bring the lawsuit? They don't cite a single case that says that that, in and of itself, is sanctionable conduct, us asking.

So I'd like to introduce some of the Respondents.

Your Honor, may I have one of these waters?

THE COURT: Certainly.

MR. SBAITI: Thank you.

THE COURT: That's why they're there, by the way.

MR. SBAITI: I didn't know if they belonged to somebody else.

THE COURT: We've scattered water bottles around for people.

MR. SBAITI: I appreciate it. Thank you, Your Honor.

THE COURT: So if you see these little ones, that's for anyone.

MR. SBAITI: So, this is an org chart, and you'll see it as -- the exhibits that the Debtor's going to bring up. And when we talk about the DAF, Your Honor -- I don't know if that's visible to you. We're on Slide 19, if you're looking at it on paper. There's a little number at the lower right-hand corner. The charitable DAF GP, LLP and then the Charitable DAF Holdco, Ltd. together are the principles of the Charitable DAF Fund, LP. And so when we refer to the DAF or the Charitable DAF, that's really the entity structure that we're referring to. And then the GP and Holdco Ltd. have a managing member. It used to be Grant Scott at the time this was done. Today, it's Mr. Mark Patrick, who's in the room, sitting next to Mr. Bridges.

The DAF is a charitable fund. It's funded over $32 million, as the evidence will show, including Dallas-Fort Worth organizations, The Family Place, Dallas Children's Advocacy, Center for Brain Health, the Crystal Ray Initiative, Friends of the Dallas Police, Snowball Express, various community and education initiatives, Dallas Arts, museums, the Perot Museum, Dallas Zoo. That evidence is undisputed, Your

Honor. The DAF is a real fund. It is a real charitable fund. It does real good in the community.

Now, Respondents -- Holdco, which you will see at the bottom of that chart, is essentially the investment arm. There are assets that the DAF owns in various pots, and Holdco is the actual business engine that generates the money from those assets that then -- that then gets passed up to the charitable -- the four charitable foundations at the top.

I'll go back to Slide 21. And if you look at the top, Your Honor, the Dallas Foundation, Greater Kansas City Community, Santa Barbara Foundation, The Community Foundation of North Texas: Those are the charities that then themselves bestow the funds onto the actual recipients. So the money flows up as dividends or distributions, and then gets contributed.

CLO Holdco invests those assets, and it's an important part of the business model, so that you're not sending out principal. It's the money that CLO makes, the profits, if you will, that it is able to generate that gets donated and makes its way into the community.

So there's an important feature to the structure in that it has to be able to generate money. It's not just money that sits there and waits to be distributed. There's active investing going on.

Mr. Mark Patrick owns the control shares of the entities

comprising the DAF and CLO Holdco, as I showed you, and the beneficiary charitable foundations hold what we call beneficial interests, where they just get money. They don't have a vote.

Mr. Patrick cares about the public service the DAF engages in. He's been an advisor to the DAF, CLO Holdco, and its predecessor, Mr. Scott, since its inception. He receives no compensation for the job he's doing today. And you'll hear how he became -- how he inured to the control position of the DAF and CLO Holdco from him, but it doesn't involve Mr. Dondero, and the absence of someone saying that it did, I think, is going to be striking by the end of the presentation of evidence.

Their only argument against you, Your Honor, is going to be you just can't believe them. But not believing witnesses is not a substitute for the lack of affirmative evidence.

Mr. Patrick has said all along he authorized the filing of the motion for leave to add Mr. Seery to the lawsuit in District Court. He doesn't believe the motion to amend violated this Court's orders, for the reasons stated in our responsive filings to the motions for contempt and show cause order. That's why he authorized it.

My firm, Sbaiti & Company, we're a small Dallas litigation boutique retained by the DAF and CLO Holdco to file the lawsuit. We did an investigation. I'm tickled to death that

Mr. Morris loved our complaint so much and gave us the compliment that we got it done in a short amount of time, but we did get it done in a short amount of time, because, in the end, it's a rather simple issue, as I was able to lay it out in about three or four bullet points in a previous slide.

The written aspect of that doesn't take that long, as Your Honor knows, but the idea that there's a suspicion that we didn't write it or someone else wrote it and ghost-wrote it and gave it to us, which I think is the insinuation he was making, is completely unfounded. There's no evidence of that.

We carefully read Your Honor's orders. We developed a good-faith basis, as required by Rule 11, that the lawsuit and the motion to add Mr. Seery were not filed in bad faith or for an improper purpose. We don't think they're frivolous. We don't think they're in violation of Your Honor's orders, given the current state of the law.

Mr. Dondero is one of the settlors of the CRT, of the Charitable Remainder Trust that ultimately provided assets to CLO Holdco and the DAF. He does care about the DAF's mission. I think Mr. Morris hit the nail on the head. Of course Mr. Dondero cares about what happens to it. He's one of the settlors, and it was his funds that initially were put into it, so he's allowed to care. And I don't think him caring is insidious, and him caring doesn't mean he has control and doesn't mean he's the driving force behind some insidious

conspiracy that they're trying to insinuate exists.

He is an advisor to the DAF and CLO Holdco. It is a lot of money and it needs advice, and he's an advisor to Mr. Patrick. We don't run away from any of those facts, Your Honor.

We also don't run away from the fact that he was the source of some of the information that came in to that complaint and that he relayed some of that information. The content, we do claim work product privilege and attorney-client privilege, because he's an agent of our client, and as lawyers doing an investigation, the content of our communications is protected under the attorney-client and work product privileges, as well as the joint interest privilege. But the fact that we admit that those communications happened, we're not running away from that fact.

So, what does he have to do with this? It's interesting that that opening argument you just heard spent about three minutes on contempt and the other fourteen or fifteen minutes or so on Mr. Dondero. And only on Mr. Dondero. There's a negative halo effect, I believe, that they're trying to get this Court to abide by. They want to inflame Your Honor and hopefully capture -- cultivate and then capitalize on whatever antipathy you might have for Mr. Dondero, and then sweep us all in under that umbrella and sanction everybody just because he had some involvement.

But whatever involvement he has, which we admit he had some involvement in helping us marshal the facts, that's not a basis for us to be sanctioned if there isn't an actual sanctionable conduct that -- as we say there isn't.

We think there's an ulterior motive. That's why Mr. Morris just announced to Your Honor, Mr. Dondero controls it all. The ulterior motive, I believe, is, down the line, when they want to argue some kind of alter ego theory, they want to lay that foundation here. I don't think this is the appropriate time for that foundation, and I don't think any of the information and the evidence they're trying to marshal in front of you is really going to be relevant to the very specific question that's before Your Honor: Does our motion asking the District Court to add Mr. Seery violate your order, or violate it in a way that can be -- that we can be sanctioned for? We don't believe it violates it.

So, the three core standards that have to be met. First of all, civil contempt requires a valid, enforceable order. It's not debatable and it's not -- I don't think that's a shocking statement. Then they have to have clear and convincing evidence of a violation of a specific unambiguous term therein. Mr. Morris wants his version of the word pursue to be unambiguous, and I think the word pursue is unambiguous. But the way he wants you to construe it makes it completely ambiguous, and we'll -- I'll get to that in a moment.

Now, for sanctioning counsel, the Fifth Circuit has held you have to find bad faith. We're adjudged under a slightly separate standard under the Fifth Circuit law. So the contempt motion, though, to the extent it seeks to impose double and treble attorney's fees, those are in punitive fines. They are not compensatory. So criminal contempt standards are raised, and so they have to show a violation in bad faith. In other words, our arguments that we're making have to be bad faith, not simply that we're wrong, and they have to show beyond a reasonable doubt, usually in front of a jury. The U.S. Supreme Court explained the difference and the different procedural protections that have to be involved if they're really going to seek double and treble compensatory damages.

Now, he's right. Saying we intended -- saying that we didn't mean to violate it isn't necessarily a defense. But what you're actually going to hear from him is the opposite argument, that even though we didn't violate it, we wanted to. That's what he says. That's why he quoted you the opening section of our motion asking for permission to sue Mr. Seery, because that's a statement of purpose. And he says you should sanction them right there. That's literally what he said. It's right there, their purpose. If intent is irrelevant to them, it's irrelevant as to us. The fact that we wanted to sue Seery is fully admitted. We don't deny the fact that we

believe Mr. Seery should be a defendant in this lawsuit. But the fact that we didn't sue him is why we didn't violate the order. And they can't say that the fact that we eventually wanted to sue him means we did violate the order. That door swings both ways, Your Honor.

We don't think any element is met. The order, while writ large, prohibits suing Mr. Seery without permission, and we did not sue James Seery, pure and simple. The July 12 -- 14th, 2020 order purports to reserve exclusively to this Court that which, according to the statutes and the case law, we believe the Court can't exclusively reserve to itself. And Your Honor, the order prohibits commencing and pursuing a claim against Jim Seery without coming here first to decide the colorability of such a claim.

They, I believe, admit that we didn't commence a claim against Jim Seery. I think they've admitted that now. So now we're talking about what does pursue mean? We didn't pursue a claim against Jim Seery. Is asking for leave to bring suit the same thing as pursuing a claim? That's the question that's really before Your Honor. Lawyers never talk of pursuing a claim that hasn't been filed. We don't say, I'm pursuing a claim and I'm going to file it next week or next year. Usually, that type of language is in an order, because when the order happens, there may already be claims against Mr. Seery. And so the pursuit of claim is supposed to attack

those cases, to come here and show colorability, presumably, before they continue on with those lawsuits. It doesn't mean asking for permission.

If it did mean asking for permission, then complying with Your Honor's order would be a violation. If the motion for leave is a violation because it is pursuing a claim, if I had filed that motion in this Court, it would still be pursuing a claim without Your Honor's permission. I'd have to get permission just to ask for permission. It puts us in this endless loop of, well, if asking for permission is pursuing a claim, and pursuing a claim is without permission violates the Court's order, we'd always be in violation of the Court's order just for asking, just for following Your Honor's edict.

THE COURT: I'm just, I'm going to interject. You were supposed to, under the order, file a motion in this Court.

MR. SBAITI: I understand that, Your Honor, and I think that we can get to the specifics on why we disagree with how the motion went, Your Honor. We hadn't sued Mr. Seery. So as long as we dealt with the order, which is what our position is, then we don't believe we violated the order.

THE COURT: You think the order was ambiguous, requiring a motion to be filed in the Bankruptcy Court?

MR. SBAITI: Your Honor, what we believe is that the order was ambiguous in terms of whether us asking for

permission in the District Court was in and of itself a violation of the order. We don't think it was. Actually, we don't think the order's ambiguous to that extent. The second we file a suit against Mr. Seery and we don't have some resolution of the issue, then I think the question of sanctionability comes in. But we never filed suit, Your Honor.

The Court doesn't say I can't seek permission in the District Court or that we can't go to the District Court with -- which has general jurisdiction over this case, and has jurisdiction, we believe, over the actual case and controversy that's being raised. But the idea of pursuit being a violation of the order, of the letter of that order, is nonsensical under that, it leads to an absurd result, and it's plainly vague and ambiguous, Your Honor.

Asking Judge Boyle or asking a District Court for permission is not a violation of this Court's order, not the way it was written and not -- and I don't even believe it was a violation necessarily of the Court's -- of the language that the Court has. We -- it doesn't unambiguously prevent us from asking the District Court for leave.

The Court's order yesterday, Your Honor, applied this very rule. The TRO -- you said the TRO did not specifically state, Turn your cell phone over. And you denied motion for sanctions on that. That's basically the argument we're making

here, Your Honor. We think that was the correct ruling, and we think the same type of ruling applies here.

Your order yesterday also determined that the Court ultimately believes that hiring lawyers to file motions should not be viewed as having crossed the line into contemptuous behavior. That's essentially the argument they want you to buy, that there's somehow a vindictiveness behind this and an insidious plan to violate court orders, Your Honor. We don't have any evidence of that.

THE COURT: Okay. Take the words vindictiveness and insidious out of the equation. That's making things personal, and I don't like that. The key is the literal wording of the order, is it not?

MR. SBAITI: Your Honor, the key, I believe, is the --

THE COURT: No entity may commence or pursue a cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court first determining, after notice, that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery and specifically authorizing such entity to bring such a claim. So I'm trying to understand why you argue that filing a motion asking the District Court for permission is not inconsistent

with this order.

MR. SBAITI: Because it's not commencing a claim, Your Honor. It's not commencing a claim against him.

THE COURT: Okay. So is your argument that if Judge Boyle authorizes amendment of the pleading to add Mr. Seery and then you do it, at that point they may have grounds for a motion for contempt, but not yet, because she has not actually granted your motion?

MR. SBAITI: Correct, Your Honor. I mean, in a nutshell. In fact, that's one of -- I think that's probably our next argument. We think, in a sense, this argument is incredibly premature. There is three ways that this -- well, I'd like to address this, so I've got -- I've got a diagram that I think will actually help elucidate what our thought process was.

There's three things she could have done. She could have referred -- referred it to Your Honor, which is what we expected was likely to happen.

THE COURT: But you didn't file a motion for referral of the motion before her.

MR. SBAITI: Well, no, I don't mean in respect of enforcing the reference. The referral we thought was most likely going to happen because it's an associated case, and we actually put those orders in front of her, so we expected that those orders would end up -- that the question would

ultimately end up in front of Your Honor on that basis.

She could have denied our motion outright, in which case we haven't filed a claim, we haven't violated it, or she could have granted our motion and done one of two things. She could have granted it to the extent that she thought leave would be proper but then referred it down, or she could have decided -- taken the decision as the court with general jurisdiction and simply decided it all on her own. She had all of those options, Your Honor, and none of them results in a claim being commenced or pursued without the leave of this Court, if leave is absolutely necessary, Your Honor. And that's the point that we were trying to make.

Your Honor, the -- there's -- you know, there's no evidence that, absent an order from a court with jurisdiction, that we were going to file a claim against Mr. Seery, that we were going to commence or pursue a claim against Mr. Seery. We were cognizant of Your Honor's order. We considered that. And the reason we filed them the way we did is because, according to the statutes and the case law, this is the type of case that would be subject to a mandatory withdrawal of the reference.

And so there's this paradox that arises, Your Honor. And the paradox that arises is that we show up and immediately go, well, we need to be back in the District Court. So we filed our motion there, and I don't think that was contemptuous, it

wasn't intended to be contemptuous of the Court, but we showed the orders to the Court, made the same arguments that we have been making here, that we believe that there's problems with the order, we believe the order oversteps its jurisdiction and maybe is unenforceable, and it's up to that District Court, as it has been in almost all of these other gatekeeper order cases that get filed. None of them result in sanctions, Your Honor. What they result in is a District Court deciding, well, either they refer it or they decide I don't need to refer it. But I don't think that that is the same thing as commencing or pursuing a claim in the end, Your Honor, because all we did was ask for permission, and permission could have been denied or granted or granted in part.

Your Honor, they haven't cited an injury. You've heard the testimony, Your Honor, that they -- the first time they knew we had filed a motion -- which I don't understand why that's the first time they knew we had filed a motion; we told them we were going to file the motion -- was when I forwarded an email saying that it's been denied without prejudice, Your Honor. Well, that means they didn't have to do any work to respond to the motion. They didn't have to do any work to do any of the other things.

And one hundred percent of the damages that they're going to say they incurred is the litigation of this contempt hearing or this sanction motion, as opposed to some other

simpler remedy, like going in to Judge Boyle and saying, Your Honor, all that needs to go, which is what they eventually did. But they would have had to incur those costs anyway because they're now moving to enforce the reference. They filed a 12(b)(6). That briefing would have existed regardless of whether or not we had filed our motion, regardless of whether the sanctions hearing had commenced.

Your Honor, I'm going to let my partner, Mr. Bridges, address this part of it, if I could. I think that gets into more of the questions that you asked, and I think he can answer them a lot better than I can.

THE COURT: Okay.

MR. SBAITI: Thank you.

THE COURT: That's fine.

MR. BRIDGES: Thank you, Your Honor. And I do want to address pointedly the questions that you're asking. First, though, I was hoping to back up to some preliminary remarks that you made and say that I find the 200 orders a week just mindboggling. It amazes me, and puts the entire hearing in a different perspective for me. I'm grateful that you shared that with us.

Your expression of regret about naming us violators was very meaningful to me. It causes me -- well, the strong words in our brief were mine. I wrote them. And your expression of regret causes me to regret some of those words. I'm hopeful

that you can understand, at least in part, our reaction out of concern.

And Your Honor, it's awkward for me to talk about problems with your order, and that's the task that's come to me, to list and talk through four of them and why we think they put us in a really awkward position in deciding what to do in this case, in the filing of it, in where we filed it, and in how we sought leave to go forward against Mr. Seery. That was awkward and difficult for us, and I'm hopeful that I can explain that and that you'll understand, if I'm blunt about problems with the order, that I mean it very respectfully. Two hundred orders a week is still very difficult for me to get my mind around.

The four issues in the order start with the gatekeeping. Then, secondly, in the preliminary remarks, I made mention of the *Applewood* case and the notice that the order releases some claims. Its effect of --

THE COURT: And by the way, I mean, you might elaborate on the facts and holding of *Applewood*, because I came into this thinking *Republic Supply v. Shoaf*, and for that matter, as I said, *Espinosa*, were much more germane. And so, you know, you'll have to elaborate on *Applewood*. I remember that case, but it's just not one people cite as frequently as those two.

MR. BRIDGES: Yes, Your Honor. And our reply brief

devotes a page to the case, and I'm hopeful that I can remember it well enough to give you what you're looking for about it, but I would point you to our reply brief on that topic as well.

The *Shoaf* case that *Applewood* quotes from and distinguishes and expressly limits, the *Shoaf* case actually has been cautioned and limited and distinguished numerous times, if you Shepardize it, and the *Applewood* case is the leading case, and it also is from the Fifth Circuit, that describes and cabins the effects of *Shoaf*. And in *Applewood*, what happened is a bankruptcy confirmation order became final with releases in it, and the court held that exculpatory orders in a final order from the Bankruptcy Court do not have res judicata effect and do not release claims unless those claims are enumerated in the exculpatory order. And --

THE COURT: Okay. So it was about specificity more than anything else, right?

MR. BRIDGES: Yes, Your Honor. It was a --

THE COURT: Okay.

MR. BRIDGES: -- a blanket release, a blanket --

THE COURT: Okay.

MR. BRIDGES: -- exculpatory order that didn't specify what claims were released by what parties, and therefore the parties didn't have the requisite notice.

In my mind, Your Honor, it's comparable to the Texas

Supreme Court's holdings on what's required in a settlement release in terms of a disclaimer of reliance, --

THE COURT: Okay. But, again, --

MR. BRIDGES: -- that if you aren't --

THE COURT: -- it's about specificity --

MR. BRIDGES: Yes, Your Honor.

THE COURT: -- more than anything else? And then we've got the U.S. Supreme Court *Espinosa* case subsequent.

MR. BRIDGES: Okay. Your Honor, I'm not sure what *Espinosa* you're referring to. Can you tell me why that applies?

THE COURT: Well, it was a confirmation order. It was in a Chapter 13 context. And there were provisions that operated to discharge student loan debt, --

MR. BRIDGES: Uh-huh.

THE COURT: -- which, of course, cannot be discharged without a 523 action, a separate adversary proceeding. Nevertheless, the confirmation order operated to do what 523 suggests you cannot do, discharge student loan debt through a plan confirmation order.

The U.S. Supreme Court says, well, that's unfortunate that the confirmation order did something which it doesn't look like you can do, but no one ever objected or appealed. That's my recollection of *Espinosa*. So it seems to be the same holding as *Republic Supply v. Shoaf*. And what I -- why I

asked you to elaborate on *Applewood* is because it does seem to deal with the specificity of the order versus the enforceability, no?

MR. BRIDGES: Your Honor, if it's not obvious already, I'm not prepared to argue *Espinosa*. And your explanation of it is very helpful to me. I think you're right that the specificity issue from *Applewood* is what we're relying on. And it sounds like --

THE COURT: Okay. So, that being the case, how was this order not specific? Okay?

MR. BRIDGES: That's easy, Your Honor, because it doesn't say which parties are releasing which claims. And what we're talking specifically about there -- as we go through the order, I can show you the language -- but what we're talking about specifically are the ordinary negligence and breach of fiduciary duty claims that your order doesn't provide for at all. Rather, it says colorability of gross negligence or willful wrongdoing, if I remember the words precisely, that's what must be shown to pursue a case -- a cause of action against Mr. Seery, thereby -- thereby indicating that claims for mere negligence, not gross negligence, or breach of fiduciary duty, which is an even lesser standard, that those claims are prohibited entirely.

And by having that kind of general all-encompassing release or exculpation for potential liability involving

negligence, and most importantly, fiduciary duty breach under the Advisers Act, that that kind of exculpation under *Applewood* is not enforceable and has no res judicata effect because it wasn't -- those claims weren't enumerated in the order.

That for it to have the intended exculpatory effect, if that was what was intended, that the fiduciary duty claims and the parties who those claims may belong to would have to have been enumerated.

And indeed, that kind of specificity, what was required in *Applewood*, isn't even possible for a claim that hasn't yet occurred for future conduct. It's not possible to enumerate the details, any details, of a future claim, because the underlying act -- if the underlying basis, facts for that claim, haven't yet happened. It's something to happen in the future.

And here, that's what we're dealing with. We're dealing with conduct that took place well after the January and July 2020 orders that had that exculpatory effect. Is -- is that clear?

THE COURT: Understood.

MR. BRIDGES: Thank you, Your Honor. So, the four areas of the order, the four functions that the order does that are problematic to us that led us to do what we have done are the gatekeeping function; the release; the fact that by

stating sole jurisdiction, that it had a jurisdiction-stripping effect; and then, finally, jurisdiction asserting, where, respectfully, Your Honor, we think to some extent the order goes beyond what this Court's jurisdiction is. And so that not only claiming exclusive jurisdiction, but claiming jurisdiction over all actions against Mr. Seery, as described in the order, is going too far.

And those are the four issues I want to talk about one at a time, and here -- I went two screens instead of one. There we go. And here's the order. I have numbered the highlights here out of sequence because this is the sequence that I wish to talk about them and that I think their significance to our decision applies.

Before we get into the words of this July 16, 2020 order, I want to mention the January order as well. Although the motion for contempt recites both orders, we don't actually think the January order applies to us, because our lawsuit against Mr. Seery is not about his role as a director at Strand in any way. We didn't make an issue of that, other than in a footnote in our brief, because we don't think that distinction matters much since the orders essentially say the same things.

I'm not sure that it matters whether we have potentially violated one order or two. If Your Honor finds we've violated one, I think we're on the hook regardless. If Your Honor

finds that we didn't violate the July order, I don't think you will find that we violated the January order, either. So my focus is on the July order.

The gatekeeping function comes from the preliminary language about commencing or pursuing a claim or cause of action against Mr. Seery. And it says what you want us to do first before bringing such a claim.

The second issue of the release comes a little bit later. It's the colorable claim of willful misconduct or gross negligence language. In other words, because only claims of willful misconduct or gross negligence can pass the bar, can pass muster under this order, that lesser claims -- ordinary negligence and breach of fiduciary duty -- that those claims are released by this order. That's the second argument.

Third is your reference to sole jurisdiction and the effect that that has of attempting to say that other courts, courts of original jurisdiction, do not have jurisdiction because it solely resides here. That's the third thing I want to address.

And then the fourth is the notion that we have to come to this Court first for any action that fits the description of an action against Mr. Seery, when some actions are, through acts of Congress, removed from what this Court has the power to address. Under 157(d) of Title 28, Your Honor, there are some kinds of actions which withdrawal of the reference is

mandatory, and therefore this court lacks jurisdiction to address those.

And so those are the four issues I want to tackle, starting with the first, the gatekeeping. Your Honor, Section 28 -- Section 959 of Title 28 appears to be precisely on point. It calls -- it is called by some courts an exception to the Barton Doctrine, which we believe is the only basis, the Barton Doctrine, for this Court to claim that it has jurisdiction or sole jurisdiction and can require us to come here first. We think the Barton Doctrine is the only basis for that. We haven't seen anything in the briefing from opposing counsel indicating there was another basis for it. We think we're talking about the Barton Doctrine here as the basis for that.

959 is exception to the Barton Doctrine, and we think it explicitly authorizes what we have done.

Secondly, Your Honor, the order, the gatekeeping functions of the order are too broad because of its incorporation of the jurisdictional problems and the release problem that we'll talk about later. But for problem number one, the key issue that we're talking about is 959 as an exception to the Barton Doctrine. And I went the wrong way.

THE COURT: So, we could go down a lot of rabbit trails today, and I'm going to try not to do that, but are you saying the very common practice of having gatekeeping

provisions in Chapter 11 cases is just defective law under 28 U.S.C. § 959(a)?

MR. BRIDGES: Can I say yes and no?

THE COURT: Okay.

MR. BRIDGES: Yes, to some extent, for some claims. No as to other claims to another extent. We are not saying gatekeeping orders are altogether wrong, --

THE COURT: Okay.

MR. BRIDGES: -- no.

THE COURT: Okay.

MR. BRIDGES: There are problems with gatekeeping orders that do more than what the law, Section 959 in particular, allows them to do.

THE COURT: Okay. Be more explicit. I'm not -- I think you're saying, no, except when certain situations exist, but I don't know what the certain situations are.

MR. BRIDGES: And Your Honor, you're exactly right. It's complicated, and it takes a long explanation. Let me start --

THE COURT: Okay. I really want to know, --

MR. BRIDGES: Yeah, me, too.

THE COURT: -- since I do these all the time, and most of my colleagues do.

MR. BRIDGES: Thank you, Your Honor. And 959 is on the screen. Managers of any property --

THE COURT: Uh-huh.

MR. BRIDGES: -- is what we're talking about, including debtors in possession. Now, it starts off by saying trustees, receivers. I mean, this is exactly what the Barton Doctrine is about, right? We're talking about trustees and receivers, but not just them. We're also talking about managers of any property, including debtors in possession, --

THE COURT: Uh-huh.

MR. BRIDGES: -- may be sued without leave of the court appointing that. That's contrary to the Barton Doctrine so far.

With respect to what I've numbered five here -- these numbers are mine -- the quote is directly verbatim out of the U.S. Code, but the numbering one through five is mine. With respect to what acts or transactions in carrying on business connected with such property.

And so, Your Honor, what we're talking about isn't Barton Doctrine is inapplicable, or you can't have a gatekeeping order for any claims, but it's about managers of property. And one of the hornbook examples of this is the grocery store that files for bankruptcy and then, when --

THE COURT: Slip-and-fall.

MR. BRIDGES: You've got it, Your Honor.

THE COURT: Uh-huh.

MR. BRIDGES: And because they're managing property,

--

THE COURT: So your cause of action, if it went forward, is the equivalent of a slip-and-fall --

MR. BRIDGES: Yes, Your Honor.

THE COURT: -- in a grocery store?

MR. BRIDGES: Yes, Your Honor.

THE COURT: Okay. Let me skip ahead. What about the last sentence of 959(a)?

MR. BRIDGES: 959(b)? Or 959(a)?

THE COURT: No, of 959(a).

MR. BRIDGES: What we're looking at here?

THE COURT: That's the sentence that I have always thought was one justification for a gatekeeper provision. And I know, you know, a lot of others feel the same.

MR. BRIDGES: Are we talking about what I have listed in number five here?

THE COURT: No. I'm talking about the last sentence of 959(a). Such actions, okay, shall be subject to the general equity power of such court, you know, meaning the Bankruptcy Court, so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to a trial by jury.

Isn't that one of the provisions that lawyers sometimes rely on in arguing a gatekeeper provision is appropriate?

MR. BRIDGES: Certain --

THE COURT: You, Bankruptcy Judge, have the power, the general equity power, so far as the same may be necessary to the ends of justice?

MR. BRIDGES: Your Honor, you bet. Absolutely, there is equitable power to do more. There's no doubt that there are reliance -- there is reliance on that in many instances. So I'm not sure -- I'm not sure I'm responding to your point.

THE COURT: Well, again, I think this is the third or fourth argument down the line that really you start with in the analytical framework here, but I guess I'm just saying I always thought a gatekeeping provision was consistent, entirely consistent with 28 U.S.C. § 959(a), the last sentence.

MR. BRIDGES: When you're dealing --

THE COURT: You disagree with that?

MR. BRIDGES: I do, Your Honor.

THE COURT: Okay.

MR. BRIDGES: And it's not that the Court lacks equitable powers to do more. It's that those equitable powers are affected by when management of other parties, third parties' property is at issue.

What we're talking about is similar to yesterday's contempt order. When you set the basis of describing what it is that Highland's business is, that they're a registered investment advisor in the business of buying, selling, and

managing assets -- assets, of course, are property, and that property is not just Highland's, but it's third-party property, as if a railroad loses luggage belonging to its customers. Rather than the railroad with a trustee appointed having mismanaged railroad property, we're talking about third-party property here, third-party property that belongs to the CLOs, about a billion dollars of assets in these CLO SPEs that Highland manages.

And again, the slide that Mr. Sbaiti showed you showing Highland, yes, they manage their own assets, the assets of the Debtor, but also of the third parties, including the Charitable DAF and CLO Holdco, and that the Advisers Act imposes fiduciary duties on them that are unwaivable when they're doing that.

In *Anderson*, the Fifth Circuit called 959 an exception to the rule requiring court's permission for leave to sue. In *Hoffman v. City of San Diego* much more recently, relying on this statute again, the court rejected a *Barton* challenge and called it a statutory exception. And in *Barton* itself, from a century ago, the U.S. Supreme Court even acknowledged there that where a receiver misappropriated the property of another -- not the debtor's property, the property of another -- that the receiver could still be sued personally, without leave of court.

Absent *Barton*, absent applicability of the Barton

Doctrine, Your Honor, the gatekeeper order is problematic.

Barton applies where a court has appointed a trustee, and I don't think, Your Honor, under the circumstances in this case, that it is fair to say Mr. Seery was appointed, as opposed to approved by this Court. And it involves a trustee's actions under the powers conferred on him. The Barton Doctrine is not about a broader exculpation of the trustee.

Here, what the Debtor asked for in its motion for approval, approval of hiring Mr. Seery, what it asked for specifically in the motion was that the Court not interfere with corporate decisions absent a showing of bad faith, self-interest, or gross negligence, and asking the Court to uphold the board's decision to appoint Mr. Seery as the CEO as long as they are attributable to any rationale business purpose.

At the hearing, Your Honor, at the hearing, we've quoted your comments saying that the evidence amply shows a sound business justification and reasonable business judgment on the part of the Debtor in proposing that Mr. Seery be CEO and CRO. Your Honor, respectfully, those words don't sound like the judge using its discretion to choose -- appoint a trustee. They sound like the Court exercising deference to the business judgment of a business. And appropriately so. We don't have trouble with application of the business judgment rule. Our problem is with application of it and the Barton Doctrine.

Those two do not go together. A trustee has protection because it's acting under color of the court that appointed it. A court that merely deferred to someone else's appointment, that's not what the Barton Doctrine is about. The Barton Doctrine is about the court's function that the trustee takes on, not deference to the business judgment of the debtor in possession or the other fiduciary appointed by the court.

Problem one was the gatekeeping. Problem two is about the release and the *Applewood* case. Your Honor, again, ordinary negligence and ordinary fiduciary duty breaches do not rise to the level of gross negligence and willful misconduct. And because of that, the language of this order appears to be barring them entirely. No entity may bring a lawsuit against Mr. Seery in certain circumstances without the Bankruptcy Court doing what? Determining that the cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery.

A breach of fiduciary duty under the Advisers Act can be unintentional, it can fall short of gross negligence by miles, and to exculpate Mr. Seery from those kinds of claims entirely is to make him no longer a fiduciary. A fiduciary duty that is unenforceable makes someone not a fiduciary. That's plainly not what Mr. Seery thinks his role is. It's inconsistent with the Advisers Act. And Your Honor, the

notion that he would not owe his clients fiduciary duties as he manages their assets would require disclosures under the SEC regulations. It creates all kinds of problems to state that a fiduciary under the Advisers Act does not have enforceable fiduciary duties. The order appears to be releasing all of those. But for *Applewood's* specificity requirement, it would be doing that.

As an asset manager under the Advisers Act, Mr. Seery is managing assets belonging to CLO Holdco and The Charitable DAF. That's precisely what the District Court action is about, those fiduciary duties. And Mr. Seery, in describing these recently in testimony here -- forgive me for reading through this, Your Honor, but it is pretty short -- Mr. Seery testifies, I think, from a high level, the best way to think about the Debtor is that it's a registered investment advisor. As a registered investment advisor, which is really any advisor of third-party money over $25 million, it has to register with the SEC and it manages funds in many different ways. The Debtor manages approximately $200 million current values -- it was more than that of the start of the case -- of its own assets.

I'm pausing there, Your Honor. $200 million of its own assets, but we're about to talk about third-party assets.

It doesn't have to be a registered investment advisor for those assets, but it does manage its own assets, which include

directly-owned securities, loans, from mostly related entities but not all, and investments in certain funds, which it also manages.

And then here it comes: In addition, the manager -- the Debtor manages about roughly $2 billion, $2 billion in total managed assets, around $2 billion in CLO assets, and then other entities, which are hedge funds or PE style.

We also had to get a very good understanding of each of the funds that we manage. And as I said, the Investment Advisers Act puts a fiduciary duty on Highland Capital to discharge its duty to the investors. So while we have duties to the estate, we also have duties, as I mentioned in my last testimony, to each of the investors in the funds.

Now, some of them are related parties, and those are a little bit easier. Some of them are owned by Highland. But there are third-party investors in these funds who have no relation whatsoever to Highland, and we owe them a fiduciary duty both to manage their assets prudently but also to seek to manage -- maximize value.

Those duties do not require -- requires the opposite of what I mean. They don't merely require avoiding gross negligence or willful wrongdoing. When you're managing assets of others, the fiduciary duties that you owe are far stricter than that. The highest duty known to law is a fiduciary duty.

The order is inconsistent with that testimony,

acknowledging the fiduciary duties owed to The Charitable DAF and to CLO Holdco. It appears to release the Debtor -- maybe not the Debtor. My slide may be wrong about that. It appears to release Seery from having to uphold these duties.

In addition to problems with the gatekeeping under the Barton Doctrine, in addition to the release problem and *Applewood* and the unwaivable fiduciary duties under the Advisers Act, there's also a problem with telling other courts that they lack jurisdiction. Your Honor knows bankruptcy court law -- bankruptcy -- and the Bankruptcy Code far better than I do, I'm certain. But a first principle, I believe, of bankruptcy law is that this Court's jurisdiction is derivative of the District Court's. And the only doctrine I've heard of that can allow this Court to exercise exclusive jurisdiction of the District Court that it sits in is the Barton Doctrine, which, again, is very problematic to apply in this case, for the reasons we've discussed already.

By claiming to have -- by stating in the order that this Court has sole jurisdiction, it appears to either be inclusive of the District Court, which I understand Your Honor doesn't think her order can be read that way, but if it's not read that way, then it results in telling the District Court that it doesn't have the original jurisdiction that Congress has given it. And that's problematic in the order as well.

THE COURT: Let me ask you. If you think the word

"power" had been used, or "authority," versus "jurisdiction," that would have cured it?

MR. BRIDGES: I think there would still have been other problems. Would it have cured this? I don't think so, Your Honor, because, again, I think the only basis for that power is the Barton Doctrine.

THE COURT: Okay.

MR. BRIDGES: To listen to opposing counsel, you'd think that our jurisdictional argument was entirely about the jurisdiction stripping. It's not. Frankly, Your Honor, that's maybe even a lesser point. A key problem here to is the assertion of jurisdiction, not over any of the claims, but over all of the claims, because of 157(d), Your Honor, because some claims, some causes of action, have been put outside the reach of bankruptcy, the Bankruptcy Court, and those actions may in some instances fit within your description of the cases that are precluded here.

That's a problem jurisdictionally with this Court's ability to say it retains jurisdiction or that it has, that it asserts jurisdiction. Over what? Any kind of claim or cause of action against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor.

Some claims that fit into that bucket also fit into the description in 157(d) of cases that require both consideration

of bankruptcy law and federal laws affecting interstate commerce or regulating it. Right? Some cases must fall into -- under 157(d), despite having something to do with Mr. Seery's role as a chief executive officer. And Your Honor, the Advisers Act fiduciary duty claims asserted by Respondents in the District Court are such claims. They cannot be decided without considering the Advisers Act.

There are also RICO claims that, of course, require consideration of the RICO statute. But the Advisers Act claims absolutely require consideration of both bankruptcy law and this Court's order exonerating -- exculpating Mr. Seery from some liability, in addition to the unwaivable fiduciary duties imposed by the Advisers Act.

The assertion of jurisdiction here blanketed, in a blanket manner, over all claims against Mr. Seery in any way related to his CEO role is a 157(d) problem that the order has no -- has no solution for and we see no way around. 157(d) requires withdrawal of the reference, makes it mandatory, when a case requires considerations of federal law implicating interstate commerce.

Your Honor, we think we had to do it the way we did, filing in the District Court instead of filing here, in order to preserve our jurisdictional arguments. To come to this Court with a motion and then what? Immediately file a motion to withdraw the reference on our own motion here? To come

here and ask for a decision on colorability, when first colorability would exclude the claims that we're trying to bring, at least some of them, the mere negligence, mere fiduciary duty breaches, because they don't rise to the level necessarily of gross negligence or willful wrongdoing.

Your Honor, coming here and asking this Court to rule on that may well have waived our jurisdictional objections. Coming here to this Court and doing that and immediately filing a motion --

THE COURT: I don't get it.

MR. BRIDGES: The ordinary --

THE COURT: Subject matter jurisdiction, if it's a problem, it's not waivable.

MR. BRIDGES: The ordinary issue -- the ordinary waiver rule, Your Honor, is that when you come and ask for a court to rule on something, that you waive your right to -- to later -- you're estopped judicially from taking the contrary position.

THE COURT: Okay. Well, again, I don't get it. If you filed your motion and I ruled in a way you didn't like, you would appeal to the District Court.

MR. BRIDGES: Yes, Your Honor. An appeal to the District Court, we would be entitled to do. I understand, no matter what happens here, we can appeal to the District Court. That's different from whether or not, by coming here first,

have we waived or have we created an estoppel situation, in terms of arguing jurisdiction.

THE COURT: Okay.

MR. BRIDGES: Because of the problems with the order, we thought we were in a situation where coming here would waive rights that we could avoid waiving by asking in the District Court.

In other words, there was a jurisdictional paradox: How does a party ask a court to do something it believes the court lacks the power to do? That's the spot we found ourselves in. What were we supposed to do?

Your Honor, it is definitely a complex case. And coming into this matter with over 2,000 filings on the docket before I had ever heard of Highland was a very daunting thing, coming into this case. And whether or not there's something that we missed is certainly possible, but these orders that are the subject of the contempt motion, these orders are not things that we overlooked. These are things that we studied carefully, that we did not ignore or have disdain for, but that affected and changed our actions.

And in the Slide #3 from Mr. Morris's -- from Mr. Morris's presentation, in his third slide, he quotes from the first page of our motion for leave, the motion that he says exhibits our contemptuous behavior.

The second paragraph is kind of tiny print there, Your

Honor, and it's not highlighted, but I'd like to read it. Seery is not named in the original complaint, but this is only out of an abundance of caution due to the Bankruptcy Court in HCM's pending Chapter 11 proceeding having issued an order prohibiting the filing of any causes of action against Seery in any way related to his role at HCM, subject to certain prerequisites. In that order, the Bankruptcy Court also asserts sole jurisdiction over all such causes of action.

Your Honor, our intent was not to violate the order. Our intent was to be cautious about how we proceeded, to fully disclose what we were doing, and to do it in a District Court that absolutely could refer the matter here to this Court for a decision, but to do it in a way that didn't waive our jurisdictional arguments, that didn't waive our arguments regarding the release of the very claims we were trying to bring, by first having to prove that they were colorful claims of willful misconduct or gross negligence, when we were trying to assert claims that weren't willful negligence or gross -- gross negligence or willful misconduct. That was what I was trying to say.

Your Honor, this was not disregard of your order. If we're wrong on the law, we're wrong on the law, but it's not that we disregarded your order or lacked respect for it. We disclosed it.

Mr. Morris has argued in the briefs that we attempted to

do this on an ex parte basis. Your Honor, we did not attempt to do this on an ex parte basis. And if there are errors, they probably are mine. I know one error is mine. On the civil cover sheet in the filing in the District Court, I noted and passed on that we should check the box for related case and list this case on there. I did not follow up to make sure that it happened, and administratively, it didn't happen. We did not check the box on the civil cover sheet. Mr. Morris is correct that we failed to do that. He's incorrect that that was sneaky or intentional. It was my error, having noticed it but not followed up.

Your Honor, similarly, the argument that we didn't serve them with the motion I think is disingenuous. What happened, Your Honor, is that counsel for the Debtor had agreed to accept service of the complaint itself against the Debtor before the motion for leave, and after accepting service, I was under the impression that they'd be monitoring the docket, especially when I emailed them, informed them that we were filing the motion for leave to amend, because I was required to submit a certificate of conference on that motion. I informed them in a polite email. The polite email is not quoted in their brief. It is included in the record, and it's quoted in full in our brief.

The email exchange indicates to them, Thank you for pointing out the Court's orders. We've carefully studied them

and we don't think what we're doing is a violation of those orders.

That we didn't serve them is because we thought they already knew that the motion was coming and would be monitoring the docket, and we didn't know which lawyers they were going to have make an appearance in that case, so we wouldn't have known who to serve. But if not serving them -- first, the Rules do not require that service. But if not serving them out of politeness --

THE COURT: Mr. Morris is standing up. Did --

MR. MORRIS: I move to strike all of this, Your Honor. If Counsel wants to take the stand and raise his hand, he should testify under oath. I'm just going to leave it at that. He's not on their witness list.

THE COURT: All right. I overrule. You can continue.

MR. BRIDGES: Thank you, Your Honor.

If failure to serve them was an error, it was mine. I know of no rule that requires it.

THE COURT: Can I ask you, you were talking about the cover sheet mistake in not checking the box. What about your jurisdictional statement in the actual complaint not mentioning 28 U.S.C. § 1334 as a possible basis for subject matter jurisdiction? Do you think that was a mistake as well, or was that purposeful, not necessary?

MR. BRIDGES: Candidly, Your Honor, standing here right now, I have no recollection whatsoever of it.

THE COURT: You mention 28 U.S.C. § 1331, and then 1367 supplemental jurisdiction, but you don't mention 1334.

MR. BRIDGES: I suspect it's true, but Mr. Sbaiti would have written that.

THE COURT: Okay.

MR. BRIDGES: I have no recollection of --

THE COURT: Okay.

MR. BRIDGES: -- making any decision at all --

THE COURT: All right.

MR. BRIDGES: -- with regards to that.

THE COURT: Okay.

MR. BRIDGES: Your Honor, you've been very patient with a very long opening argument, and I'm very grateful for that. Please know that we take this Court's order seriously. We voluntarily appeared here before the Court ordered us to do so by filing our motion asking for a modification of the order we're accused now of having been in violation of.

And the last thing I'd like to say, Your Honor, Mr. Morris's brief claims that the first he knew of the motion, the motion seeking leave to add Mr. Seery to the District Court claim, the first he knew of that was when Mr. Sbaiti forwarded him the District Court's order dismissing that motion, denying that motion without prejudice.

Your Honor, in a civil contempt proceeding, where the issue is compensating, not punishing, if the aggrieved party didn't even know about the action until it had been denied by the District Court, we submit that there can be no harm from that having taken place.

That's all I have for opening. Thank you, Your Honor.

THE COURT: All right. Thank you.

Before we give you a time check, do we have other opening statements?

MR. ANDERSON: Yes. Yes, Your Honor. Michael Anderson on behalf of Mr. Patrick. If we need to take a break, that's fine, too.

THE COURT: Well, how long do you plan to use?

MR. ANDERSON: No more than ten minutes, for sure.

THE COURT: Let's go ahead and do that, and then we'll take a break.

MR. POMERANTZ: Your Honor, after, I would ask the opportunity to respond to Mr. Bridges' argument. Probably another ten minutes.

THE COURT: All right. Let's go ahead and take a ten-minute break. And Mr. Taylor, you're going to have something, because you --

MR. TAYLOR: Five.

THE COURT: Okay. We'll take a ten-minute break. And Nate, can you give them a time?

THE CLERK: I'm showing it was about 59-1/2 minutes.

THE COURT: Fifty-nine and a half? And is that subtracting some for my questioning?

THE CLERK: I stopped whenever you talked, maybe a little over --

THE COURT: Okay. So he stopped it whenever I asked questions and you answered, so 59 minutes has been used by the Respondents.

All right. We'll take a ten-minute break. We'll come back at 11:35.

THE CLERK: All rise.

(A recess ensued from 11:25 a.m. to 11:37 a.m.)

THE COURT: All right. We're going back on the record in the Highland matter. We have further opening statements. Counsel, you may proceed.

OPENING STATEMENT ON BEHALF OF MARK PATRICK, RESPONDENT

MR. ANDERSON: Thank you. May it please the Court, Counsel. Michael Anderson on behalf of Respondent, Mark Patrick.

Your Honor, after listening to this and looking at the filings in this case, this issue of whether there's contempt -- and I would argue there's not -- is ripe for decision. We have no real undisputed facts for purposes of the contempt issue. We have your Court's July order, the subject of Mr. Bridge's arguments. We have the Plaintiffs in the underlying

lawsuit at issue. They commenced the lawsuit in April of this year. There's absolutely nothing improper about that filing. It's not subject to the contempt. A week later, there is a motion for leave to add Mr. Seery. That's the issue. There's no dispute over that. There's no dispute that Mr. Patrick authorized the filing of the motion for leave.

And so then the question becomes we look at the Court's July order, did a motion for leave, did that violate the terms of the order? The motion for leave is not commencing a lawsuit. It's also not pursuing a claim, because whether or not the Court grants the motion, denies the motion, or whatever the Court does, nothing happened, because the day after the motion for leave was filed it was dismissed *sua sponte* without prejudice because not all parties had been served in the case.

It was permission asked one day. The matter was mooted the following day by the District Court. And so that is completely undisputed.

And so the question is, is asking permission, is that commence? I think everybody says there's no way that's commencing a lawsuit because you have asked permission. The question, then, is it pursuing a claim? And the argument, well, no, that's not pursuing a claim; it's asking permission.

And I think it's also important to note that when the motion for leave was filed, there were no secrets there. I

mean, I'm coming in this after the fact, representing Mr. Patrick. You look at a motion for leave, and right there on Page 1 it talks about Your Honor's order. Page 2, it quotes the order and it gives the reasons, there's arguments being made as to why that order doesn't bar adding Mr. Seery as a defendant in the lawsuit, many of the arguments that Mr. Bridges made.

So that's where we are. And so when I hear, hey, we've got six hours, three hours and three hours, and we're going to split this up, you know, maybe too simplistic from Fort Worth, but I'm like, wait a second, this is all undisputed. It's totally undisputed. The -- whether or not the prior order is enforceable or not enforceable, those are all legal arguments. You know, no witnesses are necessary for that. And as I understood, right before we broke, counsel stood up and he's going to do what generally doesn't happen in opening statements, which is respond to opening statements, which shows that that's a legal issue.

And so it really does come down to undisputed facts. There's no testimony. No -- nothing is necessary. And a lot of what this comes down to is the old statement, you know, is it better to ask forgiveness or permission? And usually that statement comes up when somebody has already done something: Hey, I'm going to go do it anyway and I'll ask for forgiveness later. Well, what the Plaintiffs in the underlying case did

was ask permission. Motion for leave. That is not contemptuous. And there's literally no damages. As was pointed out, by the time counsel found out, it had already been dismissed.

The last thing I want to point out, Your Honor, is that the argument from opposing counsel was, well, under Rule 15 of the Federal Rules of Civil Procedure, since parties hadn't answered yet, the Plaintiffs in the underlying case could have just simply added Mr. Seery as a defendant and moved on that way, but then that would be another ball of wax and then we would be addressing issues as far as whether or not there is a violation of the Court's order, notwithstanding Mr. Bridge's arguments. But then we would have those issues. But that's not what happened. Everybody knows that's not what happened. It was a motion for leave that was resolved the following day.

And so, Your Honor, for those reasons, and those undisputed reasons, we would request that the Court at the end of this hearing deny the request for sanctions and a contempt finding against our client, Mr. Patrick.

Mr. Phillips is going to address one brief issue bankruptcy-wise I believe that was raised earlier.

THE COURT: Okay. Mr. Phillips?

MR. PHILLIPS: Your Honor, thank you very much. Louis M. Phillips on behalf of Mark Patrick.

The only thing that I would point out, Your Honor, and I'm

going to do -- try to simplistically, because that's about the level at which I operate, boil down the questions about the order.

This order was an employment order. The problem that Mr. Bridges has elucidated to Your Honor is that the precise effect, one of the precise effects of that order is to bar the claims of third parties that arise into the future on the basis of the employment of Mr. Seery, because the order required that all claims asserting gross negligence or willful misconduct need to be brought before you to determine that they're colorable.

One question I have is, does it apply to the lawsuit that was filed? Doesn't apply unless the effect of the order was to release those claims and preclude any party from bringing those claims at all. And while you can say correctly that this Court issues gatekeeper orders all of the time, one thing I cannot imagine that you would say is that in employment orders you release claims of third parties existing and as may arise in the future that could be brought against the party employed to be a CRO of a debtor, who, by his own testimony, says we do all kinds of stuff in the billions of dollars for third parties that we owe fiduciary duties to.

There's no way, Your Honor, that you were considering your July order to bar third-party claims arising from breach of fiduciary duties by Mr. Seery to third parties who held third-

party claims that did not involve some assertion that, in his capacity as CRO, he was in some way acting within the scope of his authority as CRO for the Debtor and yet committed negligence against the Debtor.

Now, if the order was asserting that you know what a lot of people in this courtroom know, that the standard of liability for a CRO doing work for a debtor, just like the standard of liability for the president of a corporation or an officer of the corporation, is as long as you're within the course and scope of your employment, your actions for the corporation have -- can -- the corporation takes care of you because there's no personal claim unless you're outside the scope, and you're outside the scope if you commit gross negligence or willful misconduct.

That, if you're restating the standard of care and standard of liability for a CRO, we have no problem with that, because Mr. Patrick did not authorize a cause of action arising against Mr. Seery against the Debtors for damage to the Debtors. He authorized the filing of a complaint in the District Court with jurisdiction for a third-party claim for breach of a fiduciary duty to a third party that Mr. Seery admits he owes, and then sought leave because they didn't understand the order that Your Honor issued. It couldn't have been to release the breach of fiduciary duty claims that wouldn't rise to gross negligence or willful misconduct, it

couldn't be that, but it might be. But if it did, under an employment order? That's very different from *Espinosa*, that's very different from *Shoaf*, when you're at the end of a case in a confirmation of a plan and you're talking about matters arising in the past.

This order, if it has the effect it could be read to have, precludes any third party from asserting a breach of fiduciary duty against Seery for actions that violate the duty to that third party, when Seery's biggest job, it looks to us like, is running third-party money. That could not have been what Your Honor was thinking.

And so all I'm pointing out is I'm trying to distill down. The lawsuit doesn't involve gross negligence or willful misconduct allegations. It involves breach of fiduciary duty, breach of the Advisers Act, et cetera, et cetera. Mr. Patrick authorized that lawsuit.

Now, what we're here for today is to determine whether the complaint, which was not against the Debtor -- which was not against Seery, the motion for leave, which did not -- all they did was ask for permission, not forgiveness. And we can't understand how the Debtor should be saying, all they had to do was amend. Well, if they amended, would we be in hotter water than we are today for asking for permission to sue? I think we would have been, that should have been the prescribed course, when we are more concerned and we are more risk-averse

by asking for leave rather than just amending by right. Absolutely, that makes no sense. We can't be held to be more contemptuous because we asked for permission, when we could have just sued him, because they're saying asking for permission was wrong. Certainly, suing him would have been wrong. That would have been easier.

THE COURT: But Mr. Phillips, the issue is you all didn't come to the Bankruptcy Court and ask permission.

MR. PHILLIPS: Look at your order, Your Honor.

THE COURT: It's right in front of me.

MR. PHILLIPS: Right. That order either doesn't apply to the claims that were brought or it released the claims that were brought. That's our point. It couldn't have released them. Does it apply to them? Thank you.

THE COURT: Okay. Mr. Taylor?

MR. TAYLOR: Good morning.

THE COURT: Good morning.

OPENING STATEMENT ON BEHALF OF JAMES DONDERO

MR. TAYLOR: Your Honor, Clay Taylor on behalf of Jim Dondero. I'll be very brief because I know we've already spent a lot of time on opening argument. But I do think it is appropriate to, one, first look at who brought the lawsuit, CLO Holdco & DAF. That was authorized -- it's undisputed it was authorized by Mr. Patrick. There is no dispute about that. There's no dispute who the Plaintiffs are. But yet my

client is up here as an alleged violator.

I think it's very clear, as all the parties have said, there's no dispute as to there's an order, there was a complaint, and there was a motion for leave.

It seems to me that the rest of the evidentiary hearing that you may be about to go through is going to be about pin the blame on Mr. Dondero. It is undisputed that he is not a control person for the DAF or CLO Holdco. The only type of evidence you will hear is going to be insinuation that he somehow controls Mr. Patrick and used to control Mr. Scott. There will be no direct evidence that he authorized this or that he's the control person and the proper corporate authorized representative that signed off on the --

It seems to me, Your Honor, first of all, that's a discrete issue that should be able to be decided separately from this, and the first gating issue is, was there indeed a violation of this Court's order? It would seem to me that there is no disputes about those facts and that we should bifurcate that, and if you then find that there is a violation and find that there is any even need to move into who the alleged violators are, that then we could have that evidentiary portion. But there is no reason to do that now before there's even been found to be a violation.

THE COURT: All right. Thank you.

All right. Well, someone made the point rebuttals in

opening statements are not very common, --

MR. POMERANTZ: Your -- Your --

THE COURT: -- but you can use your three hours however you want.

OPENING STATEMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: Your Honor, I didn't intend to stand up.

THE COURT: Okay.

MR. POMERANTZ: I also didn't intend to have the motion to modify the sealing order presented to Your Honor, which it was in the course of that opening argument. And despite your comments at the beginning of the hearing, the Movants have taken Your Honor down a series of rabbit holes that have really no relevance to the contempt motion. And notwithstanding, as I said, your ruling that basically the contempt would go first and the modification would go second, there they were, persistent in making all the arguments why this Court should modify the order.

They're just really trying to obfuscate the simple issue that Mr. Morris presented and raised at the beginning of the hearing: Did they violate the order by pursuing a claim? We think the answer is undoubtedly yes.

I'm not going to try to address each of the issues they raised in connection with the modification motion in detail. I have a lengthy presentation. I'll do it at the appropriate

time. But there are a few issues I want to address. I want to address one of the last points Mr. Bridges raised first. If they thought that the order was a problem, they could have filed their motion to modify that order before Your Honor. They could have had that heard first. There was no statute of limitations issue in connection with the HarbourVest matter. They could have come to Your Honor to do that. But no, they didn't. They went to the District Court first, and it was only after we filed our contempt motion that they came back and said, well, Your Honor, you should modify the order. Their argument that if they did that there would have been waiver and estoppel is just an after-the-fact justification for what they did and what they tried to do, which was unsuccessful. They tried to have the District Court make the decision.

And why? Your Honor, they've filed motions to recuse before Your Honor. They -- they -- it's no secret the disdain they have for Your Honor's rulings as it relates to them. They wanted to be out of this courtroom and in another courtroom.

And their belated argument, Mr. Bridges falling on the sword, that they failed to check the box, inadvertent, it's on me, it's very curious. Because if they had done so and had referred to the correct 1334 jurisdictional predicate, as Your Honor had mentioned, the complaint would have been referred to

this Court and the entire trajectory of the proceedings would have been different. They would have had the opportunity to take their shot to go to District Court and argue that your order didn't apply.

Your Honor, they say the January 9th order is not relevant. It is entirely relevant. It covered the independent directors and their agents. Yes, Mr. Seery is an independent director, but he was also an agent of the independent directors and carried out the duties. You heard argument at the July 16th hearing that Mr. Seery had been acting as the chief executive officer for several months. And why is it important? Mr. Bridges said, well, if we violated one order, we violated the other. It's important because, Your Honor, number one, Mr. Dondero supported that order. We would never have had an independent board in this case if Mr. Dondero, the decision-making -- of the Debtor at that time, supported that order and supported the exculpations that are now claimed to have been invalid.

And also Your Honor heard testimony at the confirmation hearing that the independent directors would never have taken this job, would never have taken this job because of the potential for litigation, litigation that we've now had to endure for several months. So to come back 16 months later and say, well, you know, you couldn't really exculpate them, it's really an employment order: It was an employment order.

They know it. We know it. Your Honor knows it. It was a resolution of corporate governance issues that changed the whole trajectory of the case, and luckily it -- luckily, Your Honor approved it.

The question just is whether they violated the order, period. And I'll have a lot to say about res judicata, but I won't go in too much in detail, but I will just briefly address their arguments. They're correct and the Court is correct that there's a difference between *Applewood* and *Shoaf*. And Your Honor got the exact difference. In one case, a release was not specific, *Applewood*. In one case it was. *Shoaf* hasn't been discredited by *Applewood*. It was different facts. In fact, *Shoaf* relied on two Supreme Court cases, the *Stoll* case and the *Chicot* case, both for the propositions that a court that enters an order, a clear order, even if it didn't have jurisdiction, that cannot be attacked in res judicata. So here what we have is clear, unambiguous, you come to this Court before commencing or pursuing a claim. That's the clarity. The focus on the releases, that's not what we're here for today, that's not what we're here for on a contempt motion, on whether the release covered them or it didn't cover them. We're here on the clear issue of did they violate the language, and we submit that they did.

And similarly, *Espinosa* applies. Your Honor, just to quote some language, "Appellees could have moved to remand the

action to state court after it improperly -- after its improper removal to the federal court or challenge the district court's exercise in jurisdiction on direct appeal. Because they did neither, they are now barred by principles of res judicata."

Res judicata actually does apply, and I will speak about it in much more detail in the modification motion.

With respect to *Barton*, Your Honor, we disagree with their argument that Mr. Seery is not a court-appointed agent. We've briefed it extensively in our motion to modify. *Barton* applies to debtors in possession. *Barton* applies to general partners of the debtor. *Barton* applies to chief restructuring orders -- officers who are approved by the debtor. And it applies to general counsel who are appointed by the chief restructuring order. Officer.

So the argument that *Barton* is somehow inapplicable is just wrong. Your Honor knows that. Your Honor has written extensively on *Barton* in connection with your *Ondova* opinion.

Some of the argument about 959 is all wrong, as well. Your Honor got it right that 959 applies to slip-and-fall cases or torts, injuries to parties that are strangers to this process. There is a legion of cases that I will cite to Your Honor in connection with argument. 959 does not apply here. There's nothing more core to this case than the transactions surrounding the resolution of the HarbourVest claims.

We also disagree, Your Honor, that the complaint is subject to mandatory withdrawal of the reference. We've -- one of our exhibits in the motion to modify is our motion to enforce the reference. We think Movants have it completely wrong. This is not the type of case that will be subject to withdrawal -- mandatory withdrawal of the reference, and in any event, for this contempt motion, it's irrelevant.

And they argue -- one of the other points Mr. Bridges raises is that, because this Court would not have had jurisdiction under 157 because of the mandatory withdrawal, then Your Honor could not legally act as a gatekeeper. But they haven't addressed *Villegas v. Schmidt*. We've raised it throughout this case. And again, in these series of pleadings, they don't even address it. And *Villegas v. Schmidt* was a *Barton* case. It was a *Barton* case where the -- where the argument was that *Barton* does not apply because it's a *Stern* claim and the Bankruptcy Court would not have jurisdiction. And *Villegas* said no, it does apply. And Your Honor even cited that in your *Ondova* case. And why does it apply? Because there's nothing inconsistent with a Bankruptcy Court having exclusive decision to make a *Barton* determination.

In fact, in that case *Villegas* said, you can't go to the District Court for that decision, it is the Bankruptcy Court's decision.

So, again, it's a red herring, Your Honor. Your Honor had the ability to act as an exclusive gatekeeper for these types of actions.

With that, Your Honor, I'll leave the rest of my argument for the next motion.

THE COURT: All right. Thanks.

All right. Nate, let's give everyone their time.

THE CLERK: That was just about eight and a half additional from the Debtor, and then altogether the other ones were just shy of fourteen minutes. Thirteen minutes and fifty seconds for the other three combined. Do you want me to --

THE COURT: Yes, I meant for Debtor combined versus --

THE CLERK: Oh. Oh.

THE COURT: Respondents combined.

THE CLERK: So that would be twenty one and a half the Debtor. Let me do the math on the other one. Be an hour twelve minutes and fifty seconds for --

THE COURT: Okay. All right. Got that? Debtors used a total of twenty one and a half minutes; Responders have used an hour twelve minutes and fifty seconds.

All right. Mr. Morris, you may call your first witness.

MR. MORRIS: Thank you very much, Your Honor. The Debtor calls Mark Patrick.

THE COURT: All right. Mr. Patrick? Please approach

our witness stand and I'll swear you in. Please raise your right hand.

(The witness is sworn.)

THE COURT: All right. Please take a seat.

MARK PATRICK, DEBTOR'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MORRIS:

Q Good afternoon, Mr. Patrick.

A Good afternoon.

Q Can you hear me okay?

A Yes, I can.

Q Okay. You have before you several sets of binders. They're rather large. But when I deposed you on Friday, we did that virtually. Now, I may direct you specifically to one of the binders or one of the documents from time to time, so I just wanted you to know that those were in front of you and that I may be doing that.

Mr. Patrick, since March 1st, 2001 [sic], you've been employed by Highland Consultants, right?

A I believe the name is Highgate Consultants doing business as Skyview Group.

Q Okay. And that's an entity that was created by certain former Highland employees, correct?

A That is my understanding, correct.

Q And your understanding is that Mr. Dondero doesn't have an

ownership interest in that entity, correct?
A That he does not. That is correct.
Q And your understanding is that he's not an employee of that -- of Skyview, correct?
A That is correct.
Q Prior to joining Skyview on March 1st, you had worked at Highland Capital Management, LP for about 13 years, correct?
A Correct.
Q Joining in, I believe, early 2008?
A Correct.
Q Okay. I'm going to refer to Highland Capital Management, LP from time to time as HCMLP. Is that okay?
A Yes.
Q While at HCMLP, you served as a tax counselor, correct?
A No, I would like to distinguish that. I did have the title tax counsel. However, essentially all my activities were in a non-lawyer capacity, being the client representative. I would engage other outside law firms to provide legal advice.
Q Okay. So you are an attorney, correct?
A Yes, I am.
Q But essentially everything you did at Highland during your 13 years was in a non-lawyer capacity, correct?
A Correct.
Q In fact, you didn't even work in the legal department; is

that right?
A That is correct. I worked for the tax department.
Q Okay. Let's talk about how you became the authorized representative of the Plaintiffs. You are, in fact, authorized representative today of CLO Holdco, Ltd. and Charitable DAF, LP, correct?
A Charitable DAF Fund, LP. Correct.
Q And those are the two entities that filed the complaint in the United States District Court against the Debtor and two other entities, correct?
A Correct.
Q And may I refer to those two entities going forward as the Plaintiffs?
A Yes.
Q You became the authorized representative of the Plaintiffs on March 24th, 2021, the day you and Mr. Scott executed certain transfer documents, correct?
A Correct.
Q And you had no authority to act on behalf of either of the Plaintiffs before March 24th, correct?
A Correct.
Q The DAF controls about $200 million in assets, correct?
A The Plaintiffs, you mean? CLO Holdco and Charitable DAF Fund, LP.
Q Yes.

A Around there.
Q Okay. Let me try and just ask that again, and thank you for correcting me. To the best of your knowledge, the Plaintiffs control about $200 million in assets, correct?
A Net assets, correct.
Q Okay. And that asset base is derived largely from HCMLP, Mr. Dondero, or Mr. Dondero's trusts, correct?
A Can you restate that question again, Mr. Morris?
Q Sure. The asset base that you just referred to is derived largely from HCMLP, Mr. Dondero, or donor trusts?
A The way I would characterize it -- you're using the word derived. I would characterize it with respect to certain charitable donations --
Q Uh-huh.
A -- that were -- that were made at certain time periods, where the donors gave up complete dominion and control over the respective assets and at that time claimed a federal income tax deduction for that.
I do -- I do believe that, as far as the donor group, as you specified, Highland Capital Management, I recall, provided a donation to a Charitable Remainder Trust that eventually had expired and that eventually such assets went into the supporting organizations. And then I do believe Mr. Dondero also contributed to the Charitable Remainder Trust No. 2, which seeded substantial amounts of the original assets that

were eventually composed of the $200 million. And then from time to time I do believe that Mr. Dondero's trusts made charitable donations to their respective supporting organizations.

Q Okay. Thank you.

A Is that responsive?

Q It is. It's very responsive. Thank you very much. So, to the best of your knowledge, the charitable donations that were made that form the bases of the assets came from those three -- primarily from those three sources, correct?

A Well, you know, there's two different trusts. There's the Dugaboy Trust and the Get Good Trust.

Q Okay.

A Then you have Mr. Dondero and Highland Capital Management. So I would say four sources.

Q Okay. All right. Thank you. Prior to assuming your role as the authorized representative of the Plaintiff, you had never had meaningful responsibility for making investment decisions, correct?

A I'm sorry. You kind of talk a little bit fast. Please slow it down --

Q That's okay.

A -- and restate it. Thank you.

Q And I appreciate that. And any time you don't understand what I'm saying or I speak too fast, please do exactly what

you're doing. You're doing fine.

Prior to assuming your role as the authorized representative of the Plaintiffs, you never had any meaningful responsibility making investment decisions. Is that correct?

A To whom?

Q For anybody.

A Well, during my deposition, I believe I testified that I make investment decisions with respect to my family. Family and friends come to me and they ask me for investment decisions. I was -- in my deposition, I indicated to you that I was a board member of a nonprofit called the 500, Inc. They had received a donation of stock in Yahoo!, and the members there looked to me for financial guidance. As an undergrad at the University of Miami, I was a -- I was a finance major, and so I do have a variety of background with respect to investments.

Q Okay. So you told me that from time to time friends and family members come to you for investing advice. Is that right?

A That is correct.

Q And when you were a young lawyer you were on the board of a nonprofit that received a donation of Yahoo! stock and the board looked to you for guidance. Is that correct?

THE COURT: Just a moment. I think there's an objection.

MR. MORRIS: Uh-huh.

THE COURT: Go ahead.

MR. ANDERSON: So far -- relevance, Your Honor. This is way out of the bounds of the contempt proceeding. You know, what he did as a young person with Yahoo! stock. We're here to -- he authorized the lawsuit. They filed the lawsuit. That's it. Getting into all this peripheral stuff is completely irrelevant.

THE COURT: Your response?

MR. MORRIS: My response, Your Honor, is very simple. Mr. Patrick assumed responsibility, and you're going to be told that he exercised full and complete authority over a $200 million fund that was created by Mr. Dondero, --

THE COURT: Okay.

MR. MORRIS: -- that funds -- that is funded virtually by Mr. Dondero, and for which -- Mr. Patrick is a lovely man, and I don't mean to disparage him at all -- but he has no meaningful experience in investing at all.

THE COURT: All right. Counsel, I overrule. I think there's potential relevance.

And may I remind people that when you're back at counsel table, please make sure you speak your objections into the microphone. Thank you.

BY MR. MORRIS:

Q When you were a young lawyer, sir, you were on the board

of a nonprofit that received a donation of Yahoo! stock and the board looked to you for guidance, correct?

A Yes, correct.

Q And -- but during your 13 years at Highland, you never had formal responsibility for making investment decisions, correct?

A That is correct.

Q Yeah. In fact, other than investment opportunities that you personally presented where you served as a co-decider, you never had any responsibility or authority to make investment decisions on behalf of HCMLP or any of its affiliated entities, correct?

A That is correct.

Q And at least during your deposition, you couldn't identify a single opportunity where you actually had the authority and did authorize the execution of a transaction on behalf of HCMLP or any of its affiliates, correct?

A Correct.

Q And yet today you are now solely responsible for making all investment decisions with respect to a $200 million charitable fund, correct?

A Yes, but I get some help. I've engaged an outside third party called ValueScope, and they have been as -- effectively working as a "gatekeeper" for me, and I look to them for investment guidance and advice, and I informally look to Mr.

Dondero since the time period of when I took control on March 24th for any questions I may have with respect to the portfolio. So I don't feel like I'm all by myself in making decisions.

Q Okay. I didn't mean to suggest that you were, sir, and I apologize if you took it that way. I was just asking the question, you are the person now solely responsible for making the investment decisions, correct?

A Yes.

Q Okay. Let's talk about the circumstances that led to the filing of the complaint for a bit. On April 12, 2021, you caused the Plaintiffs to commence an action against HCMLP and two other entities, correct?

A Correct.

Q Okay. One of the binders -- you've got a couple of binders in front of you. If you look at the bottom, one of them says Volume 1 of 2, Exhibits 1 through 18. And if you could grab that one and turn to Exhibit 12. Do you have that, sir?

A It says -- it says the original complaint. Is that the right one?

Q That is the right one. And just as I said when we were doing this virtually last Friday, if I ask you a question about a particular document, you should always feel free to review as much of the document as you think you need to

competently and fully answer the question. Okay?
A Okay. Thank you.
Q All right. You instructed the Sbaiti firm to file that complaint on behalf of the Plaintiffs, correct?
A Correct.
Q And to the best of your recollection, the Plaintiffs returned -- retained the Sbaiti firm in April, correct?
A Correct.
Q So the Sbaiti firm was retained no more than twelve days before the complaint was filed, correct?
A Correct.
Q You personally retained the Sbaiti firm, correct?
A Correct.
Q And the idea of filing this complaint originated with the Sbaiti firm, correct?
A Correct.
Q Before filing -- withdrawn. Before becoming the Plaintiffs' authorized representative, you hadn't had any communications with anyone about potential claims that might be brought against the Debtor arising out of the HarbourVest settlement, correct?
A That is correct.
Q Now, after you became the Plaintiffs' authorized representative, Mr. Dondero communicated with the Sbaiti firm about the complaint that's marked as Exhibit 12, correct?

A Yes. After he brought certain information to myself and then that I engaged the Sbaiti firm to launch an investigation, I also wanted Mr. Dondero to work with the Sbaiti firm with respect to their investigation of the underlying facts.

Q Okay. Mr. Dondero did not discuss the complaint with you, but he did communicate with the Sbaiti firm about the complaint, correct?

A I believe -- yeah. I heard you slip in at the end "the complaint." I know he communicated with the Sbaiti firm. I can't -- I can't say what he said or didn't say with respect to the -- the actual complaint.

Q Okay. But Mr. Dondero got involved in the process initially when he brought some information to your attention concerning the HarbourVest transaction, correct?

A Correct.

Q And he came to you with the HarbourVest information after you assumed your role as the authorized representative of the Plaintiffs on March 24th, correct?

A That is correct.

Q At the time he came to you, you did not have any specific knowledge about the HarbourVest transaction, correct?

A I did not have specific knowledge with respect to the allegations that were laid out and the facts with respect to the original complaint. I think I had just had a general

awareness that there was a HarbourVest something or other, but the specific aspects of it, I was unaware.

Q Okay. And you had no reason to believe that Mr. Seery had done anything wrong with respect to the HarbourVest transaction at the time you became the Plaintiffs' authorized representative, correct?

A That is correct.

Q But you recall very specifically that some time after March 24th Mr. Dondero told you that an investment opportunity was essentially usurped or taken away, to the Plaintiffs' harm and for the benefit of HCMLP, correct?

A That is correct.

Q And after Mr. Dondero brought this information to your attention, you hired the Sbaiti firm to launch an investigation into the facts, correct?

A Correct.

Q You had never worked with the Sbaiti firm before, correct?

A That is correct.

Q And you had hired many firms as a tax counselor at HCMLP, but not the Sbaiti firm until now. Correct?

A That is correct.

Q You got to the Sbaiti firm through a recommendation from D.C. Sauter, correct?

A Correct.

Q Mr. Sauter is the in-house counsel, the in-house general

counsel at NexPoint Advisors, correct?
A Correct.
Q You didn't ask Mr. Sauter for a recommendation for a lawyer; he just volunteered that you should use the Sbaiti firm. Correct?
A That is correct.
Q And you never used -- considered using another firm, did you?
A When they were presented to me, they appeared to have all the sufficient skills necessary to undertake this action, and so I don't recall interviewing any other firms.
Q Okay. Now, after bringing the matter to your action, Mr. Dondero communicated directly with the Sbaiti firm in relation to the investigation that was being undertaken. Correct?
A That is correct.
Q But you weren't privy to the communications between Mr. Dondero and the Sbaiti firm, correct?
A I did not participate in those conversations as the -- what I, again, considered Mr. Dondero as the investment advisor to the portfolio, and he was very versant in the assets. I wanted him to participate in the investigation that the Sbaiti firm was undertaking prior to the filing of this complaint.
Q Let's talk for a minute about the notion of Mr. Dondero being the investment advisor. Until recently, the entity

known as the DAF had an investment advisory committee with HC -- an investment advisory agreement with HCMLP. Correct?

A It's my understanding that the investment advisory agreement existed with the Plaintiffs, CLO Holdco, as well as Charitable DAF Fund, LP, up and to the end of February, throughout the HarbourVest transaction.

Q Okay. And since February, the Plaintiffs do not have an investment advisory agreement with anybody, correct?

A That is correct.

Q Okay. So Mr. Dondero, if he serves as an investment advisor, it's on an informal basis. Is that fair?

A After I took control, he serves as an informal investment advisor.

Q Okay. So there's no contract that you're aware of between either of the Plaintiffs and Mr. Dondero pursuant to which he is authorized to act as the investment advisor for the Plaintiffs, correct?

A That is correct.

Q Okay. When you communicated with Grant Scott -- withdrawn. You know who Grant Scott is, right?

A Yes, I do.

Q He's the gentleman who preceded you as the authorized representative of the Plaintiffs, correct?

A Yes.

Q Okay. You communicated with Mr. Scott from time to time

during February and March 2021, correct?

A February and March are the dates? Yes.

Q Yeah. And from February 1st until March 21st -- well, withdrawn. Prior to March 24th, 2021, Mr. Scott was the Plaintiffs' authorized representative, correct?

A Correct.

Q And you have no recollection of discussing with Mr. Scott at any time prior to March 24th any aspect of the HarbourVest settlement with Mr. Scott. Correct?

A Correct.

Q And you have no recollection of discussing whether the Plaintiffs had potential claims that might be brought against the Debtor. Correct? Withdrawn. Let me ask a better question.

You have no recollection of discussing with Mr. Scott at any time prior to March 24th whether the Plaintiffs had potential claims against the Debtor. Correct?

A That is correct.

Q You and Mr. Scott never discussed whether either of -- either of the Plaintiffs had potential claims against Mr. Seery. Correct?

A Correct.

Q Okay. At the time that you became their authorized representative, you had no knowledge that the Plaintiffs would be filing a complaint against the Debtors relating to the

HarbourVest settlement less than three weeks later, correct?
A That is correct.
Q Okay. Now, if you look at Page 2 of the complaint, you'll see at the top it refers to Mr. Seery as a potential party. Do you see that?
A Yes, I do.
Q Okay. You don't know why Mr. Seery was named -- withdrawn. You don't know why Mr. Seery was not named as a defendant in the complaint, correct?
A No, I -- that's correct. I do not know why he was not named. That's in the purview of the Sbaiti firm.
Q Okay. And the Sbaiti firm also made the decision to name Mr. Seery on Page 2 there as a potential party when drafting the complaint, correct?
A That's what the document says.
Q And you weren't involved in the decision to identify Mr. Seery as a potential party, correct?
A That is correct. Again, I rely on the law firm to decide what parties to bring a suit to -- against.
Q Okay. Okay. Do you recall the other day we talked about a document called the July order?
A Yes.
Q Okay. That's in -- that's in Tab 16 in your binder, if you can turn to that. And take a moment to look at it, if you'd like. And my first question is simply whether this is

the July order, as you understand it.

(Pause.)

A Yes, it is. I was just looking for the gatekeeper provision. It looks like it's Paragraph 5. So, --

Q Okay. Thank you for that. About a week after the complaint was filed, you authorized the Plaintiffs to file a motion in the District Court for leave to amend the Plaintiffs' complaint to add Mr. Seery as a defendant. Correct?

A I authorized the filing of a motion in Federal District Court that would ask the Federal District Court whether or not Jim Seery could be named in the original complaint with respect to the gatekeeper provision cited in that motion and with respect to the arguments that were made in that motion.

Q Okay. Just to be clear, if you turn to Exhibit 17, the next tab, --

A I'm here.

Q -- do you see that document is called Plaintiffs' Motion for Leave to File First Amended Complaint?

A Yes.

Q And that's the document that you authorized the Plaintiffs to file on or about April 19th, correct?

A Correct.

Q Okay. And can we refer to that document as the motion to amend?

A Yes.
Q Okay. You were aware of the July order at Tab 16 before you authorized the filing of the motion to amend. Correct?
A Yes, because it's cited in the motion itself.
Q Okay. And at the time that you authorized the filing of the motion to amend, you understood that the July order was still in effect. Correct?
A Yes, because it was referenced in the motion, so my assumption would be it would still be in effect.
Q Okay. Before the motion to amend was filed, you're -- you are aware that my firm and the Sbaiti firm communicated by email about the propriety of filing the motion to amend?
A Before it was filed? Communications between your firm and the Sbaiti firm? I would have to have my recollection refreshed.
Q I'll just ask the question a different way. Did you know before you authorized the filing of the motion to amend that my firm and the Sbaiti firm had engaged in an email exchange about the propriety of filing the motion to amend in the District Court?
A It's my recollection -- and again, I could be wrong here -- but I thought the email exchange occurred after the fact, not before. But again, I -- I just --
Q Okay. In any event, on April 19th, the motion to amend was filed. Correct?

A Correct.
Q That's the document that is Exhibit 17. And you personally authorized the Sbaiti firm to file the motion to amend on behalf of the Plaintiffs, correct?
A Correct.
Q And you authorized the filing of the motion to amend with knowledge -- withdrawn.
Can you read the first sentence of the motion to amend out loud, please?
A Yeah. (reading) Plaintiffs submit this motion under Rule 15 of the Federal Rules of Civil Procedure for one purpose: to name as defendant one James P. Seery, Jr., the CEO of defendant Highland Capital Management, LP (HCM) and the chief perpetrator of the wrongdoing that forms the basis of the Plaintiffs' causes of action.
Q And does that fairly state the purpose of the motion?
MR. SBAITI: Objection, Your Honor. Asks him to make a legal conclusion about the purpose of the legal motion filed in court that he didn't draft.
THE COURT: Okay. I overrule. You can answer if you have an answer.
THE WITNESS: It's always been my general understanding that the purpose of filing this motion was to go to the Federal District Court and ask that Court of reference to this Court whether or not Mr. Seery could be named with

respect to the original complaint, citing again the gatekeeper provisions and citing the various arguments that we've heard much earlier.

BY MR. MORRIS:

Q Okay. You personally didn't learn anything between April 9th, when the complaint was filed, and April 19th, when the motion to amend was filed, that caused you to authorize the filing of the motion to amend, correct?

A That is correct.

Q In fact, you relied on the Sbaiti firm with respect to decisions concerning the timing of the motion to amend. Correct?

A Correct.

Q And you had no knowledge of whether anyone acting on behalf of the Plaintiffs ever served the Debtor with a copy of the motion to amend. Correct?

A Yes. I have no knowledge.

Q Okay. And you have no knowledge that the Sbaiti firm ever provided my firm with a copy of the motion to amend. Correct?

A I cannot recall one way or another.

Q Okay. You never instructed anyone on behalf -- acting on behalf of the Plaintiffs to inform the Debtor that the motion to amend had been filed, correct?

A That is correct.

Q And that's because you relied on the Sbaiti firm on

procedural issues, correct?

A That is correct.

Q You didn't consider waiting until the Debtor --

(Interruption.)

Q -- had appeared in the action before authorizing the filing of the motion --

A Yeah, --

THE COURT: Yes. Y'all are being a little bit loud. Okay.

A VOICE: Sorry.

MR. MORRIS: No problem.

MR. PHILLIPS: I've heard that before, Your Honor, and I apologize.

THE COURT: I bet you have. Thank you.

MR. MORRIS: Admonish Mr. Phillips, please.

THE COURT: Okay.

MR. MORRIS: He's always the wild card.

MR. PHILLIPS: I admonish --

MR. MORRIS: He's always the wild card.

MR. PHILLIPS: I admonish myself.

THE COURT: All right. I think he got the message. Continue.

BY MR. MORRIS:

Q You didn't consider waiting until the Debtor had appeared in the action before filing the motion to amend, correct?

A Again, I am the client and I rely upon the law firm that's engaged with respect to making legal decisions as to the timing and notice and appearance and what have you. I'm a tax lawyer.

Q Okay. You wanted the District Court to grant the relief that the Plaintiffs were seeking. Correct?

A I wanted the District Court to consider, under the gatekeeper provisions of this Court, whether or not Mr. Seery could be named in the original complaint. That's -- that, from my perspective, is what was desired.

Q All right. You wanted the District Court to grant the relief that the Plaintiffs were seeking, correct?

MR. SBAITI: Objection, Your Honor. Asked and answered.

THE COURT: Overruled.

THE WITNESS: Again, I would characterize this motion as not necessarily asking for specific relief, but asking the Federal District Court whether or not, under the gatekeeper provision, that Mr. Seery could be named on there. What happens after that would be a second step. So I kind of -- I dispute that characterization.

BY MR. MORRIS:

Q All right. I'm going to cross my fingers and hope that Ms. Canty is on the line, and I would ask her to put up Page 57 from Mr. Patrick's deposition transcript.

THE COURT: There it is.

MR. MORRIS: There it is. It's like magic. Can we go down to Lines 18 through 20?

BY MR. MORRIS:

Q Mr. Patrick, during the deposition on Friday, did I ask you this question and did you give me this answer? Question, "Did you want the Court to grant the relief you were seeking?" Answer, "Yes."

A I -- and it was qualified with respect to Lines 12 through 17. In my view, when I answered yes, I was simply restating what I stated in Line 12. I wanted the District Court to consider this motion as to whether or not Mr. Seery could be named in the original complaint or the amended complaint pursuant to the existing gatekeeper rules and the arguments that were made in that motion. That's -- that's what I wanted. And so then when I was asked, did you want the Court to grant the relief that you were seeking, when I answered yes, it was from that perspective.

Q Okay. Thank you very much. If the District Court had granted the relief that you were seeking, you would have authorized the Sbaiti firm to file the amended complaint naming Mr. Seery as a defendant if the Sbaiti firm recommended that you do so. Correct?

A If the Sbaiti firm recommended that I do so. That is correct.

Q Okay. Let's talk for a little bit about the line of succession for the DAF and CLO Holdco. Can we please go to Exhibit 25, which is in the other binder? It's in the other binder, sir.

(Pause.)

Q I guess you could look on the screen or you can look in the binder, whatever's easier for you.

A Yeah. I prefer the screen. I prefer the screen.

Q Okay.

A It's much easier.

Q All right. We've got it in both spots. But do you have Exhibit 25 in front of you, sir?

A Yes, I do.

Q All right. Do you know what it is?

A This is the organizational chart depicting a variety of charitable entities as well as entities that are commonly referred to the DAF. However, when I look at this chart, I do not look at and see just boxes, what I see is the humanitarian effort that these boxes represent.

MR. MORRIS: Your Honor, may I interrupt?

THE COURT: You may.

MR. MORRIS: Okay.

BY MR. MORRIS:

Q I appreciate that, and when your lawyers get up to ask you questions, I bet they'll want to know just what you were about

to tell me. But I just want to understand what this chart is. This chart is the DAF, CLO Holdco, structure chart. Correct?

A Correct.

Q Okay. And you were personally involved in creating this organizational structure, correct?

A I -- yes.

Q Okay. And from time to time, the Charitable DAF Holdco Limited distributes cash to the foundations that are above it. Correct?

A Correct.

Q All right. I want to talk a little bit more specifically about how this happens. The source of the cash distributed by Charitable DAF Holdco Limited is CLO Holdco, Ltd., that entity, the Cayman Islands entity near the bottom. Correct?

MR. ANDERSON: Your Honor, I have an objection. Completely irrelevant. I'm objecting on relevance grounds. This has nothing to do with the contempt proceeding. We've already gone over that he authorized the filing of the complaint, that he authorized the filing of the motion to amend. It's all in the record. This is completely irrelevant at this point.

THE COURT: Okay. Relevance objection. Your response?

MR. MORRIS: I believe that it's relevant to the Debtor's motion to hold Mr. Dondero in contempt for pursuing

claims against Mr. Seery, in violation of the July 7 order. I think an understanding of what the Plaintiffs are, how they're funded, and Mr. Dondero's interest in pursuing claims on behalf of those entities is relevant to the -- to the -- just -- it's just against him. It's not against their clients, frankly. It's just against Mr. Dondero.

THE COURT: I overrule.

MR. MORRIS: I'll try and -- I'll try and make this quick, though.

BY MR. MORRIS:

Q CLO Holdco had two primary sources of capital. Is that right?

A Two primary sources of capital?

Q Let me ask it differently. There was a Charitable Remainder Trust that was going to expire in 2011, correct?

A That is correct.

Q And that Charitable Remainder Trust had certain CLO equity assets, correct?

A Correct.

Q And the donor to that Charitable Remainder Trust was Highland Capital Management, LP. Correct?

A Not correct. After my deposition, I refreshed my memory. There were two Charitable Remainder Trusts that existed, which I think in my mind caused a little bit of confusion. The Charitable Remainder Trust No. 2, which is the one that

expired in 2011, was originally funded by Mr. Dondero.
Q Okay. So, so the Charitable Remainder Trust that we were talking about on Friday wasn't seeded with capital from Highland Capital Management, it came from Mr. Dondero personally?
A That is correct.
Q Okay. Thank you. And the other primary source of capital was the Dallas Foundation, the entity that's in the upper left-hand corner of the chart. Is that correct?
A No.
Q The -- you didn't tell me that the other day?
A You said -- you're pointing to the Dallas Foundation. That's a 501(c)(3) organization.
Q I apologize. Did you tell me the other day that the Dallas Foundation was the second source of capital for HCLO Hold Company?
A No, I did not. You --
(Pause.)
Q Maybe I know the source of the confusion. Is the Highland Dallas Foundation something different?
A Yes. On this organizational chart, you'll see that it has an indication, it's a supporting organization.
Q Ah, okay. So, so let me restate the question, then. The second primary source of capital for CLO Holdco, Ltd. is the Highland Dallas Foundation. Do I have that right?

A Yes.
Q Okay. And the sources of that entity's capital were grantor trusts and possibly Mr. Dondero personally. Correct?
A In addition -- per my refreshing my recollection from our deposition, the other Charitable Remainder Trust, I believe Charitable Remainder Trust No. 1, which expired later, also sent a donation, if you will, or assets to -- and I cannot recall specifically whether it was just the Highland Dallas Foundation or the other supporting organizations that you see on this chart.
Q But the source of that -- the source of the assets that became the second Charitable Remainder Trust was Highland Capital Management, LP. Is that right?
A I think that is accurate from my recollection. And again, I'm talking about Charitable Remainder Trust No. 1.
Q Okay. So is it fair to say -- I'm just going to try and summarize, if I can. Is it fair to say that CLO Holdco, Ltd. is the investment arm of the organizational structure on this page?
A Yes.
Q And is it fair to say that nearly all of the assets that are in there derived from either Mr. Dondero, one of his trusts, or Highland Capital Management, LP?
A Yes. It's like the Bill Gates Foundation or the Rockefeller Foundation. These come from the folks that make

their donations and put their name on it.

Q Okay.

MR. MORRIS: Now, now, Your Honor, I'm going to go back just for a few minutes to how Mr. Scott got appointed, because I think that lays kind of the groundwork for his replacement. It won't take long.

THE COURT: Okay. I have a question either --

MR. MORRIS: Sure.

THE COURT: -- for you or the witness. I'm sorry, but --

MR. MORRIS: Sure. Yeah.

THE COURT: -- the organizational chart, it's not meant to show everything that might be connected to this substructure, right? Because doesn't CLO Holdco, Ltd. own 49.02 percent of HCLOF, --

MR. MORRIS: That --

THE COURT: -- which gets us into the whole HarbourVest transaction issue?

MR. MORRIS: You're exactly right, Your Honor.

THE COURT: Okay.

MR. MORRIS: But that's just an investment that HCLO Holdco made.

THE COURT: Right.

MR. MORRIS: Right? And so I -- let me ask the witness, actually.

THE COURT: Okay. Thank you. Thank you.

MR. MORRIS: Let me ask the witness. Yeah.

THE COURT: I just want my brain --

MR. MORRIS: Right.

THE COURT: -- to be complete on this chart.

BY MR. MORRIS:

Q Mr. Patrick, there are three entities under CLO Holdco, Ltd. Do you see that?

A Yes.

Q And does CLO Holdco, Ltd. own one hundred percent of the interests in each of those three entities?

A Yes.

Q Do you know why those three entities are depicted on this particular chart? Is it because they're wholly-owned subsidiaries?

A Correct.

Q Okay. And CLO Holdco, Ltd. has interests in other companies. Isn't that right?

A It has other investments. That is correct.

Q And the reason that they're not depicted on here is because they're not wholly-owned subsidiaries, they're just investments; is that fair?

A That is fair.

MR. MORRIS: Does that--?

THE COURT: Yes.

MR. MORRIS: Okay.

THE COURT: Uh-huh.

BY MR. MORRIS:

Q So, so let's go back to Mr. Grant for a moment. Mr. Scott, rather. Mr. Dondero was actually the original general partner. If you look at this chart, while it's still up here, you see on the left there's Charitable DAF GP, LLC?

A Yes.

Q And the Charitable DAF GP, LLC is the general partner of the Charitable DAF Fund, LP. Correct?

A Correct.

Q And on this chart, Grant Scott was the managing member of Charitable DAF GP, LLC. Right?

A Correct.

Q Okay. But Mr. Dondero was the original general partner of that entity, correct?

A That is correct. But I do want to point out, I just note that the GP interest is indicating a one percent interest and the 99 interest to Charitable DAF Holdco. I believe that's incorrect. It's a hundred percent by Charitable DAF Holdco, Ltd., and the Charitable DAF GP interest is a noneconomic interest. So that should actually reflect a zero percent to the extent it may indicate some sort of profits or otherwise.

Q Okay. Thank you for the clarification. Can you turn to Exhibit 26, please, in your binder? And is it your

understanding that that is the amended and restated LLC agreement for the DAF GP, LLC?

A Yes.

Q Okay. And this was amended and restated effective as of January 1st, 2012, correct?

A Yes.

Q And if you go to the last page, you'll see there are signatures for Mr. Scott and Mr. Dondero, correct?

A Yes.

Q And Mr. Dondero is identified as the forming -- former managing member and Mr. Scott is identified as the new managing member. Correct?

A Correct. That's what the document says.

Q And it's your understanding that Mr. Dondero had the authority to select his successor. Correct?

A Correct.

Q In fact, it's based on your understanding of documents and your recollection that Mr. Dondero personally selected Mr. Scott as the person he was going to transfer control to, correct?

A Upon advice of Highland Capital Management's tax compliance officer, Mr. Tom Surgent.

Q What advice did Mr. Surgent give?

A He gave advice that, because Mr. Dondero -- and this is what I came to an understanding after the fact of this

transaction, because I was not a part of it -- that by Mr. Dondero holding that GP interest, that it would be -- the Plaintiffs, if you will, would be an affiliate entity for regulatory purposes, and so he advised that if he -- if Mr. Dondero transferred his GP interest to Mr. Scott, it would no longer be an affiliate, is my recollection.

Q Okay. You didn't appoint Mr. Scott, did you?

A No.

Q That was Mr. Dondero. Is that right?

A Yes.

Q Okay. Let's go to 2021. Let's come back to the current time. Sometime in February, Mr. Scott called you to ask about the mechanics of how he could resign. Correct?

A That is correct.

Q But the decision to have you replace Mr. Scott was not made until March 24th, the day you sent an email to Mr. Scott with the transfer documents. Correct?

A That is correct.

Q And it's your understanding that he could have transferred the management shares and control of the DAF to anyone in the world. Correct?

A Correct.

Q That's what the docu... that he had the authority under the documentation, as you understood it, to freely trade or transfer the management shares. Correct?

A Wait. Now, let's be precise here.
Q Okay.
A Are you talking about the GP interests or the management shares held by Charitable DAF Holdco, Ltd.?
Q Let's start with the management shares. Can you explain to the Court what the management shares are?
MR. ANDERSON: Your Honor? Hang on one second. Your Honor, I want to object again on relevance. We're going way beyond the scope of the contempt issue, whether or not --
MR. MORRIS: This is about control.
MR. ANDERSON: -- the motion to amend somehow violated the prior order of this Court. Getting into the management structure, transfer of shares, that's way outside the bounds. I object on relevance.
THE COURT: Okay. Relevance objection?
MR. MORRIS: Your Honor, they have probably 30 documents, maybe 20 documents, on their exhibit list that relate to management and control. I'm asking questions about management and control. Okay? This is important, again, to (a) establish his authority, but (b) the circumstances under which he came to be the purported control person.
THE COURT: Okay. Overruled. Go ahead.
THE WITNESS: It might be helpful to look at the organizational chart, but if not -- but I'll describe it to you again. With respect to the entity called --

MR. MORRIS: Hold on one second. Can we put up the organizational chart again, Ms. Canty, if you can? There you go.

THE WITNESS: Okay. So with respect to the Charitable DAF Holdco, Ltd., it is my understanding that Mr. Scott, he organized that entity when he was the independent director of the Charitable Remainder Trust, and he caused the issuance of the management shares to be issued to himself. And then those are, again, noneconomic shares, but they are control shares over that entity.

And I think, to answer your question, is -- it -- he alone decides who he can transfer those shares to.

BY MR. MORRIS:

Q Do I have this right, that whoever holds the noneconomic management shares has the sole authority to appoint the representatives for each of the Charitable DAF entities and CLO Holdco? It's kind of a magic ticket, if you will?

A It -- I think there's a -- the answer really is no from a legal standpoint, because Charitable DAF Holdco is a limited partner in Charitable DAF Fund, LP, so it does not have authority -- authority under all -- the respective entities underneath that. It could cause a redemption, if you will, of Charitable DAF Fund. And so, really, the authority -- the trickle-down authority that you're referencing is with respect to his holding of the Charitable DAF GP, LLC interest. It's a

member-managed Delaware limited liability company. And from that, he -- that authority kind of trickles down to where he can appoint directorships.

Q All right. I think I want to just follow up on that a bit. Which entity is the issuer of the manager shares, the management shares?

A Yeah, the -- per the organizational chart, it is accurate, it's the Charitable DAF Holdco, Ltd. which issued the management shares to Mr. Scott.

Q Okay. And that's why you have the arrow from Mr. Scott into that entity?

A Correct.

Q And do those -- does the holder of the management shares have the authority to control the Charitable DAF Holdco, Ltd.?

A Yes.

Q Okay. And as the control person for the Charitable DAF Holdco, Ltd., they own a hundred -- withdrawn. Charitable DAF Holdco Limited owns a hundred percent of the limited partnership interests of the Charitable DAF Fund, LP. Correct?

A Correct.

Q And so does the holder of that hundred percent limited partnership interest have the authority to decide who acts on behalf of the Charitable DAF Fund, LP?

A I would say no. I mean, you know, just -- I would love to

read the partnership agreement again. But I, conceptually, what I know with partnerships, I would say the limited partner would not. It would be through the Charitable DAF GP, LLC interest.

Q The one on the left, the general partner?

A The general partner.

Q I see. So when Mr. Scott transferred to you the one hundred percent of the management shares as well as the title of the managing member of the Charitable DAF GP, LLC, did those two events give you the authority to control the entities below it?

A Yes.

Q Thank you. And so prior to the time that he transferred those interests to you, is it your understanding that Mr. Scott had the unilateral right to transfer those interests to anybody in the world?

A Yes.

Q Okay. And you have that right today, don't you?

A Yes, I do.

Q If you wanted, you could transfer it to me, right?

A Yes, I could.

Q Okay. But of all the people in the world, Mr. Scott decided to transfer the management shares and the managing member title of the DAF GP to you, correct?

A Restate that question again?

Q Of all the people in the world, Mr. Scott decided to transfer it to you, correct?
A Yeah. Mr. Scott transferred those interests to me.
Q Okay. And you accepted them, right?
A Yes.
Q You're not getting paid anything for taking on this responsibility, correct?
A I am not paid by any of the entities depicted on this chart.
Q And Mr. Scott used to get $5,000 a month, didn't he?
A I believe that's what he testified to.
Q Yeah. But you don't get anything, right?
A Correct.
Q In fact, you get the exact same salary and compensation from Skyview that you had before you became the authorized representative of the DAF entities and CLO Holdco. Correct?
A Correct.

MR. MORRIS: Okay. Your Honor, if I may just take a moment, I may be done.

THE COURT: Okay.

(Pause.)

MR. MORRIS: Your Honor, I have no further questions.

THE COURT: All right. Pass the witness. Any examination of the witness?

CROSS-EXAMINATION

BY MR. ANDERSON:

Q Mr. Patrick, I just had a few follow-up questions. When you authorized the filing of the lawsuit against Highland Capital Management, LP, Highland HCF Advisor Limited, and Highland CLO Funding, Limited, when that lawsuit was filed in April of this year, was Mr. Seery included as a defendant?

A No.

Q Have the two Plaintiffs in that lawsuit, have they commenced any lawsuit against Mr. Seery?

A No.

Q Have they pursued any lawsuit against Mr. Seery?

A No.

Q Have they pursued a claim or cause of action against Mr. Seery?

A No.

Q At most, did the Plaintiffs file a motion for leave to add Mr. Seery as a defendant?

MR. MORRIS: Objection, Your Honor. To the extent that any of these questions are legal conclusions, I object. He's using the word pursue. If he's trying -- if he's then going to argue that, But the witness testified that he didn't pursue and that's somehow a finding of fact, I object.

THE COURT: Okay. I understand.

MR. MORRIS: Yeah.

THE COURT: But I overrule. He can answer.

MR. MORRIS: That's fine.

THE WITNESS: Can you restate the question again?

BY MR. ANDERSON:

Q Sure. On behalf of the Plaintiffs -- well, strike that. Did the Plaintiffs pursue a claim or cause of action against Mr. Seery?

A No.

Q At most, did the Plaintiffs file a motion for leave to file an amended complaint regarding Mr. Seery?

A Yes. But, again, I viewed the motion as simply asking the Federal District Court whether Mr. Seery could or could not be named in a complaint, and then the next step might be how the Federal District Court might rule with respect to that.

Q And we have -- it's Tab 17 in the binders in front of you. That is Plaintiffs' motion for leave. If you could turn to that, please.

A Yes. I've got it open.

Q Is the Court's July order, the Bankruptcy Court's July order, is it mentioned on the first page and then throughout the motion for leave to amend?

A Yes, it is. I see it quoted verbatim on Page 2 under Background.

Q Was the Court's order hidden at all from the District Court?

A The document speaks for itself. It's very transparent.

Q Was there any effort whatsoever to hide the prior order of the Bankruptcy Court?

A No.

MR. ANDERSON: Pass the witness.

THE COURT: Okay. Other examination?

MR. SBAITI: Yes, Your Honor. Just a couple of questions.

CROSS-EXAMINATION

BY MR. SBAITI:

Q Do you mind flipping to Exhibit 25, which I believe is the org chart, the one that you were looking at before?

A Okay.

Q It'll still be in --

A Okay. Yeah.

Q -- the defense binder. No reason to swap out right now.

A I've got the right binders. Some of them are repeatable exhibits, so --

Q Yeah.

A -- I have to grab the right binder. Yes.

Q As this org chart would sit today, is the only difference that Grant Scott's name would instead be Mark Patrick?

A Yes.

Q Was there ever a period of time where Jim Dondero's name would sit instead of Grant Scott's name prior?

A Yes, originally, when this -- yes.

Q So did Mr. Dondero both have the control shares of the GP, LLC and DAF Holdco Limited?
A No, I believe not. I believe he only held the Charitable DAF GP interest and that Mr. Scott at all times held the Charitable DAF Holdco, LTD interest, until he decided to transfer it to me.
Q Can you just tell us how Mr. Scott came to hold the control shares of the Charitable DAF Holdco, LTD?
A When he was the independent trustee of the Charitable Remainder Trust, he caused that -- the creation of that entity, and that's how he became in receipt of those management shares.
Q And does the Charitable DAF GP, LLC have any control over Charitable DAF Fund, LP's actions or activities?
A Yes, it does.
Q What kind of control is that?
A I would describe complete control. It's the managing member of that entity and can -- and effectively owns, you know, the hundred percent interest in the respective subsidiaries, and so the control follows down.
Q And when did Mr. Scott replace Mr. Dondero as the GP -- managing member of the GP?
A Well, I think as the -- and Mr. Morris had shown me with respect to that transfer occurring on March 2012.
Q So nine years ago?

A Yes.
Q Does Mr. Dondero today exercise any control over the activities of the DAF Charitable -- the Charitable DAF, GP or the Charitable DAF Holdco, LTD?
A No.
Q Is he a board member of sorts for either of those entities?
A No.
Q Is he a board members of CLO Holdco?
A No.
Q Does he have any decision-making authority at CLO Holdco?
A None.
Q The decision to authorize the lawsuit and the decision to authorize the motion that you've been asked about, who made that authorization?
A I did.
Q Did you have to ask for anyone's permission?
A No.

MR. SBAITI: No more questions, Your Honor.

THE COURT: Okay. Any -- I guess Mr. Taylor, no. All right. Any redirect?

REDIRECT EXAMINATION

BY MR. MORRIS:
Q Since becoming the authorized representative of the Plaintiffs, have you ever made a decision on behalf of those

entities that Mr. Dondero disagreed with?

A I have made decisions that were adverse to Mr. Dondero's financial -- financial decision. I mean, financial interests. Whether he disagreed with them or not, I don't -- he has not communicated them to me. But they have been adverse, at least two very strong instances.

Q Have you ever -- have you ever talked to him about making a decision that would be adverse to his interests? Did he tell -- did --

A I didn't -- I don't -- I did not discuss with him prior to making the decisions that I made that were adverse to his economic interests.

MR. MORRIS: Okay. No further questions, Your Honor.

THE COURT: Any further examination? Recross on that redirect?

MR. ANDERSON: No further questions.

MR. SBAITI: No further questions, Your Honor.

MR. ANDERSON: Sorry.

THE COURT: Nothing?

MR. ANDERSON: I think we're good.

THE COURT: Okay. I have one question, Mr. Patrick. My brain sometimes goes in weird directions.

EXAMINATION BY THE COURT

THE COURT: I'm just curious. What are these Cayman Island entities, charitable organizations formed in the Cayman

Islands?

THE WITNESS: Yeah. I'll keep it as simple as I can, even though I'm a tax lawyer, so I won't get into the tax rules, but the Cayman structure is modeled after what you typically see in the investment management industry, and so I -- and I won't reference specific entities here with respect to the Highland case, but I think you'll note some similarities, if you think about it. They're -- it's described as an offshore master fund structure where you have a -- and that would be the Charitable DAF Fund that's organized offshore, usually in the Cayman or Bermuda Islands, where the general partner, typically, in the industry, holds the management --

THE COURT: Yeah. Let --

THE WITNESS: Okay.

THE COURT: -- me just stop you. I've seen this enough --

THE WITNESS: Yeah, it's

THE COURT: -- to know that it happens in the investment world. But in --

THE WITNESS: Yeah.

THE COURT: You know, usually, I see 501(c)(3), you know, domestically-created entities for charitable purposes, so I'm just curious.

THE WITNESS: Yes.

THE COURT: Uh-huh.

THE WITNESS: The offshore master fund structure typically will have two different types of -- they call it foreign feeder funds. One foreign feeder fund is meant to accommodate foreign investors; the other foreign feeder fund is meant to accommodate U.S. tax-exempt investors.

Why, why is it structured that way? In order to avoid something called -- I was trying not to be wonkish -- UBTI. That's, let's see, Un -- Unrelated Trader Business Income. I probably have that slightly wrong. But it's essentially, it's a means to avoid active business income, which includes debt finance income, which is what these CLOs tend to be, that would throw off income that would be taxable normally if the exempts did not go through this foreign blocker, and it converts that UBTI income -- it's called (inaudible) income -- into passive income that flows -- that flows up to the charities.

And so it's very typical that you'll have a U.S. tax-exempt investor, when they make an investment in a fund, prefer to go through an offshore feeder fund, which is actually Charitable DAF Holdco, LTD. That's essentially what, from a tax perspective, represents as a UBTI blocker entity. And then you have the offshore investments being held offshore because there's a variety of safe harbors where the receipt of interest, the portfolio interest exception, is not taxable.

The creation of capital gains or losses under the -- they call it the trading, 864(b) trading safe harbor, is not taxable. So that's why you'll find these structures operating offshore to rely on those safe harbor provisions as well as -- as well as what I indicated with respect to the two type blocker entities. It's very typical and industry practice to organize these way. And so when this was set --

THE COURT: It's very typical in the charitable world to --

THE WITNESS: In the investment management --

THE COURT: -- form this way?

THE WITNESS: In the investment management world, when you have charitable entities that are taking some exposure to assets that are levered, to set this structure up in this way. It was modeled after -- they just call them offshore master fund structures. They're known as Mickey Mouse structures, where you'll have U.S. investors --

THE COURT: Yes. I -- yes, I --

THE WITNESS: -- enter through a U.S. partnership, and the foreign investors enter through a blocker.

THE COURT: It was really just the charitable aspect of this that I was --

THE WITNESS: Yeah. Yeah.

THE COURT: -- getting at.

THE WITNESS: Yeah. No, but I'm just trying to

emphasize if --

THE COURT: All right. It's --

THE WITNESS: Yeah.

THE COURT: -- neither here nor there. All right.

MR. SBAITI: Your Honor, may I ask a slightly clarifying leading question on that, because I think I understand what he was trying to say, just for the record?

THE COURT: Well, --

MR. MORRIS: I object.

THE COURT: -- I tell you what. Anyone who wants to ask one follow-up question on the judge's question can do so. Okay? You can go first.

MR. SBAITI: I'll approach, Your Honor.

THE COURT: Okay.

RECROSS-EXAMINATION

BY MR. SBAITI:

Q Would it be a fair summary of what you were saying a minute ago that the reason the bottom end of that structure is offshore is so that it doesn't get taxed before the money reaches the charities on the U.S. side?

A Tax -- it converts the nature of the income that is being thrown off by the investments so that it becomes a tax friendly income to the tax-exempt entity. Passive income. That's --

Q So, essentially, --

THE COURT: Okay. Okay.

MR. SBAITI: -- so it doesn't get taxed before it hits the --

THE COURT: I said one question.

MR. SBAITI: Sorry, Your Honor.

THE COURT: Okay. He answered it.

MR. PHILLIPS: And I have one question, Your Honor

THE COURT: Okay.

MR. PHILLIPS: I don't know if I need to ask this question, but I'd rather not ask you if I need to ask it.

THE COURT: Go ahead.

MR. PHILLIPS: But if I do, you know, I could --

THE COURT: Go ahead.

MR. PHILLIPS: Well, okay.

RECROSS-EXAMINATION

BY MR. PHILLIPS:

Q We've talked about the offshore structure. Are the foundations in the top two tiers of the organizational chart offshore entities?

A No.

Q They're --

A They're onshore entities. They're tax-exempt entities.

Q Thank you.

A The investments are offshore.

Q Thank you.

THE COURT: Mr. Morris? One question.

FURTHER REDIRECT EXAMINATION

BY MR. MORRIS:

Q Do you hold yourself out as an expert on the organizational structures in the Caribbean for charitable organizations?

A I hold myself out as a tax professional versant on setting up offshore master fund structures. It's sort of a bread-and-butter thing. But there are plenty of people that can testify that this is very typical.

Q Uh-huh. Okay.

THE COURT: Okay. Thank you.

All right. You are excused, Mr. Patrick. I suppose you'll want to stay around. I don't know if you'll potentially be recalled today.

(The witness steps down.)

THE COURT: All right. We should take a lunch break. I'm going to put this out for a democratic vote. Forty-five minutes? Is that good with everyone?

MR. SBAITI: Do we have to leave the building to eat, Your Honor, or is there food in the building?

THE COURT: I think --

MR. SBAITI: I'm sorry to ask that question, but --

THE COURT: Yes. You know what, there used to be a very bad cafeteria, but I think it closed. Right, Mike? So,

you know, --

MR. SBAITI: Sorry I asked that.

A VOICE: Hate to miss that one.

THE COURT: Is 45 minutes not enough since you have to go off campus? I'll give you an hour. It just means we stay later tonight.

A VOICE: Can we just say 2:00 o'clock?

MR. SBAITI: That's fine with us, Your Honor.

THE COURT: 2:00 o'clock. That's 50 minutes. See you then.

MR. SBAITI: Thank you.

A VOICE: Your Honor, can we just get a time check?

THE COURT: Okay.

THE CLERK: Yeah. The Debtors are at an hour and eleven minutes. Respondents at an hour nineteen.

THE COURT: And hour and eleven and an hour and nineteen.

A VOICE: Wait, that's not right.

A VOICE: That can't be right.

A VOICE: Two hours? We started at --

THE COURT: Okay. So, again, their side, the collective Respondents?

THE CLERK: An hour and eleven, responding to your questions, --

A VOICE: Yeah, he's not recording --

THE CLERK: So an hour and eleven and an hour and nineteen.

THE COURT: But they were already over an hour --

A VOICE: Yeah. It's been over three hours.

THE COURT: -- with opening statements.

THE CLERK: An hour and twelve. Yes. They were very short with the questioning. It was only like --

THE COURT: Okay. We'll double-check that over the break with the court reporter.

A VOICE: All right. Thank you, Your Honor.

THE COURT: We'll double-check and let you know.

THE COURT: All rise.

(A luncheon recess ensued from 1:09 p.m. until 2:03 p.m.)

THE COURT: All right. Please be seated. We're going back on the record in Highland after our lunch break. I'm going to confirm time. We've had the Debtor an aggregate of an hour and eleven minutes. The Respondents, an aggregate of an hour and twenty minutes. Okay? So we've gone two hours and thirty-one minutes.

If it seems like we've been going longer, it's because we did not do the clock on the opening matters regarding removal, extension of time. And then when I interjected with questions, we stopped the clock. All right? So let's go.

You may call your next witness, Mr. Morris.

MR. MORRIS: Thank you, Your Honor. The Debtor calls

James Dondero.

THE COURT: All right.

A VOICE: He had to step down the hall. We had a little trouble getting through security. Let me --

THE COURT: All right. Mr. Dondero, you've been called as the next witness. So if you'll approach our witness stand, please. All right. Please raise your right hand.

(The witness is sworn.)

THE COURT: All right. Please be seated.

JAMES D. DONDERO, DEBTOR'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MORRIS:

Q Good afternoon, Mr. Dondero.

A Good afternoon.

Q Can you hear me?

A Yes.

Q Okay. So, you were here this morning, correct?

A Yes.

Q All right. So, we're going to put up -- we'll put it up on the screen, but if you'd prefer to look at a hard copy in the binder that's marked Volume 1 of -- 2 of 2, I'd ask you to turn to Exhibit 25. Or you could just follow on the screen. And this is a one-page document, so maybe that's easier.

A Sure.

Q Do you have it? All right.

A Yes.
Q This is the organizational chart for what's known as the DAF, correct?
A Yes.
Q And Mark Patrick set up this structure, correct?
A I believe he coordinated. I believe it was set up by third-party law firms. I believe it was Hutton or a firm like that.
Q Mr. Patrick participated in the creation of this structure because you gave him the task of setting up a charitable entity for Highland at that time, correct?
A Yes.
Q And you approved of this organizational structure, correct?
A Yes.
Q And Grant Scott was the Trustee of the DAF for a number of years, correct?
A I often use that word, trustee, but technically I think it's managing member.
Q That's right. I appreciate that. I was using your word from the deposition. But is it fair to say that, to the best of your knowledge, Grant Scott was the sole authorized representative of the entity known as the DAF from 2011 until just recently?
A Sole -- I would describe it more he was in a trustee

function.
Q Uh-huh.
A Advice was being provided by Highland on the investment side. He wasn't expected to be a financial or an investment expert. And then accounting, tax, portfolio, tracking, you know, compliance with all the offshore formation documents, that was all done by Highland as part of a shared services agreement.
Q Okay. I appreciate that, but listen carefully to my question. All I asked you was whether he was the authorized representative, the sole authorized representative for the ten-year period from 2011 until recently.
A Yes.
Q Okay.
A I believe so.
Q Thank you. You served as the managing member of the DAF GP, LLC before Mr. Scott, correct?
A Yes.
Q Okay. And if you turn to Exhibit 26 in your binder, that's the amended and restated limited liability company agreement for the DAF GP, LLC, correct?
A Yes.
Q And on the last page, that's your signature line, right?
A Yes.
Q And you stepped down as the managing member on March 12,

2012, and were replaced by Mr. Scott, correct?
A Yes.
Q And as you recall it, Mr. Scott came to be appointed the trustee of the DAF based on your recommendation, right?
A Based on my recommendation? Yes, I would say that's fair.
Q And you made that recommendation to Mr. Patrick, right?
A I -- I don't remember who I made the recommendation to. But I would echo the testimony of Mark Patrick earlier that the purpose of stepping down was to make the DAF unaffiliated or independent versus being in any way affiliated.
MR. MORRIS: I move to strike.
BY MR. MORRIS:
Q And I'd ask you to listen carefully to my question.
THE COURT: Sustained.
BY MR. MORRIS:
Q You made the recommendation to Mr. Patrick, correct?
A I would give the same answer again.
Q Okay.
MR. MORRIS: Can we please put up Mr. Dondero's deposition transcript from last Friday at Page 297?
I believe, Your Honor, that the court reporter thought that this was a continuation of a prior deposition, and that's why the pages begin in the, you know, high in the 200s and not at Page 1. Just to avoid any confusion.
BY MR. MORRIS:

Q Mr. Dondero, do you see the transcript in front of you?
A Yes.
Q Okay. Were you asked this question and did you give this answer? "Who did you make the" -- question, "Who did you make the recommendation to?" Answer, "It would have been Mark Patrick."
A I don't recall right now as I sit here, and it seems like I was speculating when I answered, but it -- it probably would have been Mark Patrick. I just don't have a specific recollection.
Q You made the recommendation to Mr. Patrick because he was responsible for setting up the overall structure, correct?
A I -- I can't testify to why I did something I don't remember. I think that would be --
Q Can we --
A -- speculative.
Q Are you finished, sir?
A Yeah.
Q Okay.

MR. MORRIS: Can we go to Page 299, please?

BY MR. MORRIS:
Q Lines 6 through 10. Did I ask this question and did you give me this answer? Question, "But why did you select Mr. Patrick as the person to whom to make your recommendation?" Answer, "Because he was responsible for setting up the overall

structure."

Were you asked that question and did you give that answer last Friday?

A Yes.

Q Thank you. But it's your testimony that you don't really know what process led to Mr. Scott's appointment, correct?

A No, I -- I said I was refreshed by Mark Patrick's testimony earlier.

Q Yeah. Were you refreshed that, in fact, you specifically had the authority to and did appoint Grant Scott as the managing member of the DAF GP, LLC?

A I -- I don't know.

Q Well, you're referring to Mr. Patrick's testimony and I'm asking you a very specific question. Did you agree -- is your memory refreshed now that you're the person who put Grant Scott in the position in the DAF?

A I -- I don't know if I owned those secret shares that -- well, they're not secret, but shares that could appoint anybody on the planet. I guess if I was in that box at that time before Grant, then I would have had that ability. I'm not denying at all that I recommended Grant. I'm just saying I don't -- I don't remember if I went specifically to him or if it was Thomas Surgent that was orchestrating it at the time. I don't remember.

Q Do you deny that you had the authority to and that you did

appoint Grant Scott as your successor?

MR. TAYLOR: Your Honor, objection to the extent it calls for a legal conclusion. I can't get close to a mic, so --

THE COURT: I overrule the objection.

THE WITNESS: Can you repeat the question for me?

BY MR. MORRIS:

Q Do you deny that you had the authority to and that you did, in fact, appoint Grant Scott as your successor?

A It'd be better to say I don't -- I don't -- no, I don't remember or I didn't know the details at the time. But, again, I -- I assume I owned those shares. And, again, I do remember recommending Grant and -- but exactly how it happened, I don't remember.

Q Did you hear Mark Patrick say just an hour ago that you appointed Grant Scott as your successor?

MR. SBAITI: Objection, Your Honor. Misstates testimony. The witness testified he transferred shares. That's different than an appointment power.

THE COURT: Response? I can't remember the exact way you worded it, to be honest.

MR. MORRIS: Neither can I, but I'll even take it that way.

THE COURT: Okay.

MR. MORRIS: I think he's wrong, but I'll even take

it that way.

THE COURT: Okay.

BY MR. MORRIS:

Q Mr. Dondero, did you listen to Mark Patrick say that you are the person who made the decision to transfer the shares to Mr. Scott in 2012?

A Yes, I heard him say that.

Q Okay. So, do you -- do you dispute that testimony?

A I -- I don't have any better knowledge to dispute or confirm.

Q You and Mr. Scott have known each other since high school, correct?

A Yes.

Q You spent a couple of years at UVA together, correct?

A Yes.

Q You were housemates together, correct?

A Yes.

Q He was the best man at your wedding, correct?

A Yes.

Q He's a patent lawyer, correct?

A Yes.

Q He had no expertise in finance when -- when he was appointed as your successor to the DAF, correct?

A Correct.

Q To the best of your knowledge, at the time Mr. Scott

assumed his position, he had never made any decisions concerning collateralized loan obligations, correct?

A Correct, but he wasn't hired for that. That wasn't his position.

Q Was he the person who was going to make the decisions with respect to the DAF's investments?

A My understanding on how it was structured was the DAF was paying a significant investment advisory fee to Highland. Highland was doing portfolio construction and the investment selection of -- or the investment recommendations for the portfolio. There is an independent trustee protocol that I believe was adhered to, but it was never my direct involvement. It was always the portfolio managers or the traders.

You have to provide three similar or at least two other alternatives, and then with a rationale for each of them, but a rationale for why you think one in particular is better. And the trustee looks at the three, evaluates them. And the way I understand it always worked, that it works at pretty much every charitable trust or trust that I'm aware of, they generally, if not always, pick alongside the -- or, pick the recommendation of their highly-paid investment advisory firm.

Q And are you the highly-paid investment advisory firm?

A Highland was at the time, yes.

Q And you controlled Highland, right?

A Yes.
Q Okay. But at the end of the day, is it your understanding that Mr. Scott had the exclusive responsibility for making actual decisions on behalf of the charitable trust that you had created?
A Yeah, I mean, subject to the protocol I just described.
Q Yeah, okay, so let's keep going. Mr. Scott had no experience or expertise running charitable organizations at the time you decided to transfer the shares to him, correct?
A Yes, I believe that's correct.
Q Okay. You didn't recommend Mr. Scott to serve as the DAF's investment advisor, did you?
A No.
Q And until early 2021, as you testified, I believe, already, HCMLP served as the DAF's investment advisor, correct?
A Yes.
Q And until early 2021, all of the DAF's day-to-day operations were conducted by HCMLP pursuant to a shared services agreement, correct?
A Yes.
Q And from the time the DAF was formed until January 9, 2020, you controlled HCMLP, correct?
A Yes.
Q You can't think of one investment decision that HCMLP

recommended that Mr. Scott ever rejected in the ten-year period, correct?

MR. SBAITI: Objection, Your Honor. Lacks foundation.

THE COURT: Response?

MR. MORRIS: I'm not quite sure what to say, Your Honor. The witness has already testified that HCMLP was the investment advisor, made recommendations to Mr. Scott, and that Mr. Scott was the one who had to make the investment decisions at the end of the day.

MR. SBAITI: He's not here as a witness for HCMLP. He's here in his personal capacity. There's no foundation he'd have personal knowledge of which specific investments were proposed, which ones were rejected or accepted. He said it was done by the portfolio manager.

THE COURT: Okay. I overrule. He can answer if he has an answer.

BY MR. MORRIS:

Q Sir, you can't think of one investment decision that HCMLP ever recommended to Mr. Scott that he rejected, correct?

A I can't think of one, but I would caveat with I wouldn't have expected there to be any.

Q So you expected him to just do exactly what HCMLP recommended, correct?

A No. I would expect him to sort through the various

investments when he was given three or four to choose from and be able to discern that, just as we had with our expertise, which was much greater than his, discern which one was the best and most suitable investment, the best risk-adjusted investment, that he would come to the same conclusion.

Q Okay. You can't think of an investment that Mr. Scott ever made on behalf of the DAF that didn't originate with HCMLP, correct?

A Again, no, but I wouldn't expect there to be.

Q Okay. And that's because you expected all of the investments to originate with the company that you were controlling, correct?

A We were the hired investment advisor with fiduciary responsibility --

Q Uh-huh.

A -- and with a vested interest in making sure the DAF performance was the best it could be.

Q Okay. Let --

A He was, as you said, a patent attorney. It would have been unusual for him to second-guess. I'm sure, in any private investment or any investment that was one off or didn't have comps, you know, he probably sought third-party valuations. But you would have to talk to him about that, or the people at Highland that did that.

MR. MORRIS: I move to strike. It's a very simple

question.

THE COURT: Sustained.

BY MR. MORRIS:

Q Sir, you can't think of one investment that Mr. Scott made on behalf of the DAF that did not originate with HCMLP, correct?

A I'm going to give the same answer.

Q Okay. Let's go to Page 371 of the transcript, please. Lines 7 through 11.

Oh, I apologize. I think I might -- I think I meant 317. I think I got that inverted. Yeah.

Did I ask this question and did you give this answer: "Can you think of any investment that Mr. Scott made on behalf of the DAF that didn't original with HCMLP?" Answer, "He wasn't the investment advisor, but no, I don't -- I don't recall."

Is that the answer you gave on Friday?

A Yes.

Q Thank you. Let's --

MR. SBAITI: Just for clarification, Your Honor, --

THE COURT: Pardon?

MR. SBAITI: -- the deposition was last Tuesday, not on Friday.

MR. MORRIS: I stand corrected, Your Honor.

THE COURT: Okay.

MR. MORRIS: I apologize.

THE COURT: Okay.

MR. MORRIS: I apologize if the Court thinks I misled it.

BY MR. MORRIS:

Q Let's talk about Mr. Scott's decision during the bankruptcy case that preceded his resignation. After HCMLP filed for bankruptcy, CLO Holdco, Ltd. filed a proof of claim, correct?

MR. ANDERSON: Your Honor, I haven't objected yet, but we literally haven't covered anything that deals with commencing or pursuing a claim or cause of action. I'm going to object. This is way outside, again, the bounds of the contempt hearing. It's -- otherwise, it's other discovery for something else. It literally has nothing to do with pursue a claim or cause of action.

THE COURT: We have another relevance objection. Your response?

MR. MORRIS: Your Honor, the evidence is going to show that Mr. Dondero told Mr. Scott on three separate occasions that his conduct, which were acts of independence, were inappropriate and were not in the best interests of the DAF. Within days of the third strike, he resigned. Okay?

I think it's relevant to Mr. Dondero's control of the DAF. I think that the moment that Mr. -- this is the argument I'm

going to make. I'll make it right now. You want me to make it now, I'll make it now. The moment that Mr. Scott exercised independence, Mr. Dondero was all over him, and Mr. Scott left. That's what happened. The evidence is going to be crystal clear.

And I think that that control of the DAF is exactly what led to this lawsuit. And what led -- and I'm allowed to make my argument. So that's why it's relevant, Your Honor, because I think it shows that Mr. Scott -- Mr. Scott, after exercising independence, was forced out.

MR. ANDERSON: That doesn't move the needle one bit as to whether a lawsuit was commenced or a claim or cause of action was pursued, which is the subject of the contempt motion. It doesn't move the needle one bit as to those two issues, as to whether that has any bearing on was it commenced or was it pursued.

MR. MORRIS: Your Honor, I appreciate the very narrow focus that counsel for a different party is trying to put on this, but it is absolutely relevant to the question of whether Mr. Dondero was involved in the pursuit of these claims. All right? That's what the order says. Pursue.

THE COURT: All right. Overruled.

BY MR. MORRIS:

Q After HCMLP filed for bankruptcy, CLO Holdco filed a proof of claim, correct?

A I believe so.
Q And in the fall of 2020, Mr. Scott amended the proof of claim to effectively reduce it to zero, correct?
A I -- I guess.
Q And Mr. Scott made that decision without discussing it with you in advance, correct?
A Yes.
Q But you did discuss it with him after you learned of that decision, correct?
A I don't -- I don't recall. I'm willing to be refreshed, but I don't remember.
Q Well, you told him specifically that he had given up bona fide claims against the Debtor, correct?
A Let me state or clarify my testimony this way. Um, --
MR. MORRIS: Your Honor, it's really just a yes or no question. His counsel can ask him if he wants to clarify, but it's really just a yes or no question.
BY MR. MORRIS:
Q You told Mr. Scott that he gave up bona fide claims against the Debtor, correct?
THE COURT: Okay.
THE WITNESS: I don't know if I told him then with regard to those claims.
BY MR. MORRIS:
Q Okay. Can we go to Page 321 of the transcript? At the

bottom, Line 21? 22, I apologize.

Did I ask this question and did you give this answer? "And what do you" -- Question, "And what do you recall about your discussion with Mr. Scott afterwards?" Answer, "That he had given up bona fide claims against the Debtor and I didn't understand why."

Did I ask that question and did you give that answer last Tuesday?

A Yes.

Q Okay. A short time later, in December, the Debtor filed notice of their intention to enter into a settlement with HarbourVest, correct?

A Yes.

Q And CLO Holdco, under Mr. Scott's direction, filed an objection to that settlement, correct?

A Yes.

Q And that settlement, the substance of that settlement was that the Debtor did not have the right to receive HarbourVest's interests in HCLOF at the time, correct?

A I don't remember the exact substance of it.

Q Okay. But you do remember that you learned that Mr. Scott caused CLO Holdco to withdraw the objection, correct?

A Yes, ultimately.

Q Okay. And again, Mr. Scott did not give you advance notice that he was going to withdraw the HarbourVest

objection, correct?
A No, he -- he did it an hour before the hearing. He didn't give anybody notice.
Q You learned that Mr. Scott caused CLO Holdco to withdraw its objection to the HarbourVest settlement at the hearing, correct?
A Yes.
Q And you were surprised by that, weren't you?
A I believe everybody was.
Q You were sur... you were surprised by that, weren't you, sir?
A Yes.
Q And you were surprised by that because you believed Mr. Scott's decision was inappropriate, right?
A Partly inappropriate, and partly because 8:00 o'clock the night before he confirmed that he was going forward with the objection. And I think the DAF's objection was scheduled to be first, I think.
Q After you learned that Mr. Scott instructed his attorneys to withdraw the CLO Holdco objection to the HarbourVest settlement, you again spoke with Mr. Scott, correct?
A Yes.
Q And that conversation took place the day of the hearing or shortly thereafter, correct?
A Yes.

Q And during that conversation, you told Mr. Scott that it was inappropriate to withdraw the objection, correct?
A Yes.
Q And in response, Mr. Scott told you that he followed the advice of his lawyers, correct?
A Yes.
Q But that didn't -- that explanation didn't make sense to you, right?
A Yes.
Q In fact, you believed that Mr. Scott failed to act in the best interests of the DAF and CLO Holdco by withdrawing its objection to the HarbourVest settlement, correct?
A Yes.
Q And while you didn't specifically use the words fiduciary duty, you reminded Mr. Scott in your communications with him that he needed to do what was in the best interests of the DAF, correct?
A Yes.
Q You're the founder of the DAF, correct?
A I put it -- I put it in motion. Yeah. I tasked Mark Patrick and third-party law firms to do it, but if that boils down to founder, I guess yes.
Q Uh-huh. And you're the primary donor to the DAF, correct?
A Yes.
Q You're the investment advisor to the DAF, or at least you

were at that time?
A Yes.
Q And because you served in these roles, you expected Mr. Scott to discuss his decision to withdraw the HarbourVest objection in advance, correct?
A Yes, I -- I think it was even broader than that. I mean, he was having health and anxiety issues, and to the extent he felt overwhelmed, I -- you know, yeah, you should do what's in the best interests at all times, but -- but yes, I thought it would be helpful if he conferred with me or Mark Patrick or whoever he was comfortable with.
Q Mr. Dondero, you specifically believed that Mr. Scott's failure to tell you that he was going to withdraw the HarbourVest objection in advance was inappropriate, right?
A Yes.
Q Even though he was the sole authorized representative, you believed that, because you were the founder of the DAF, the primary donor of the DAF, and the investment advisor to the DAF, he should have discussed that before he actually made the decision, correct?
A No. What I'm saying is at 8:00 o'clock at night, when he confirms to numerous people he's ready to go first thing with his objection, and then he or counsel or some combination of them change their mind and don't tell anybody before the hearing, that's odd and inappropriate behavior.

MR. MORRIS: Can we go to Page 330 of the transcript, please?

And Your Honor, before I read the testimony, there is an objection there. So I'd like you to rule --

THE COURT: Okay.

MR. MORRIS: -- before I do that. It can be found at -- on Page 330 at Line 21.

(Pause.)

MR. MORRIS: Here we go. Page 30, beginning at Line 19. 330, rather.

THE COURT: Okay.

(Pause.)

THE COURT: Okay. I overrule that objection.

BY MR. MORRIS:

Q Mr. Dondero, were you asked this question and did you give this answer last Tuesday? Question, "Do you believe that he had an obligation to inform you in advance?" Answer, "I don't know if I would use the word obligation, but, again, as the founder or the primary donor and continued donor to the DAF, and as the investment advisor fighting for above-average returns on a daily basis for the fund, significant decisions that affect the finances of the fund would be something I would expect typically a trustee to discuss with the primary donor."

Did you give that answer the other day, sir?

A Yes.
Q If Mr. Patrick decides tomorrow to withdraw the lawsuit that's in District Court, does he have an the obligation to tell you in advance?
A Again, I wouldn't use the word obligation. But something that I think ultimately is going to be a $20 or $30 million, if not more, benefit to the DAF, to the detriment of Highland, if you were to give that up, I would expect him to have a rationale and I would expect him to get other people's thoughts and opinions before he did that.
Q Okay. But does he have to get your opinion before he acts?
A No, he does not.
Q Okay. So he -- Mr. Patrick could do that tomorrow, he could settle the case, and if he doesn't come to you to discuss it in advance, you won't be critical of him, right?
A He doesn't have the obligation, but there's -- there's a reasonableness in alignment of interests. I -- a growing entrepreneur sets up a trust, a lot of times they'll put their wife in charge of it, and she hires investment advisers and whatever, but they've got the best interests at mind for the charity or the children or whatever.
You know, people who go rogue and move in their own self-interest or panic, that stuff can happen all the time. It doesn't make it appropriate, though.

Q A couple of weeks after Mr. Scott withdraw the objection to the HarbourVest settlement, he entered into a settlement agreement with the Debtor pursuant to which he settled the dispute between the Debtor and CLO Holdco, correct?
A Yes.
Q Okay. You didn't get advance notice of that third decision, correct?
A No.
Q Can we go to Page -- Exhibit 32 in your binder? And this is the settlement agreement between CLO Holdco and the Debtor, correct? Attached as the exhibit. I apologize.
A Yes.
Q And do you understand that that's Mr. Scott's signature on the last page?
A Yep.
Q And you learned about this settlement only after it had been reached, correct?
A Yep.
Q And you believed Mr. Scott's decision not to pursue certain claims against the Debtor or to remove HCMLP as the manager of the CLOs was not in the best interests of the DAF, correct?
A Correct.
Q And you let Mr. Scott know that, correct?
A Yes.

Q After learning about the settlement agreement on January 26th, you had one or two conversations with Mr. Scott on this topic, correct?
A Yes.
Q And your message to Mr. Scott was that the compromise or settlement wasn't in the DAF's best interest, correct?
A It was horrible for the DAF.
Q Uh-huh. And you told him that, right?
A Yes.
Q Okay. From your perspective, any time a trustee doesn't do what you believe is in the trust's best interest, you leave yourself open to getting sued, correct?
A Who is "you" in that question?
Q You. Mr. Dondero.
A Can you repeat the question, then, please?
Q Sure. From your perspective, any time you're a trustee and you don't believe that the trustee is doing what's in the best interests of the fund, the trustee leaves himself open to getting sued, correct?
A I don't know who the trustee leaves himself open to, but as soon as you go down a path of self-interest or panic, you -- you potentially create a bad situation. But I don't know who holds who liable.
Q Did you believe that Mr. Scott was acting out of self-interest or panic when he decided to settle the dispute with

the Debtor on behalf of CLO Holdco?
A Yes.
Q Did you tell him that?
A He told me that.
Q He told you that he was acting out of panic or desperation? With self-int... withdrawn. Withdrawn. Did he tell you that he was acting out of self-interest?
A He was having health problems, anxiety problems, and he didn't want to deal with the conflict. He didn't want to testify. He didn't want to come to court. He didn't want to do those things. And I told him I didn't think the settlement was going to get him out of that stuff. I think, you know, it got him out of some issues, but I think you guys are going to go after him for other stuff. But he -- he panicked.
MR. MORRIS: I move to strike the latter remark.
THE COURT: Sustained.
BY MR. MORRIS:
Q Shortly after you had the conversation with Mr. Scott, he sent you notice of his intent to resign from his positions at the DAF and CLO Holdco, correct?
A Yes.
Q Okay. Let's take a look at that, please. Exhibit 29. This is Mr. Scott's notice of resignation, correct?
A Yes.
Q He sent it only to you, correct?

A Yes.
Q A couple of days before he sent this, he told you he was considering resigning; isn't that right?
A Yes.
Q Okay. And he told you he was considering resigning because he was suffering from health and anxiety issues regarding the confrontation and the challenges of administering the DAF given the bankruptcy, correct?
A Yes.
Q He didn't tell you that he made the decision -- withdrawn. Did you tell him in this same conversation -- withdrawn. Is this the same conversation where you conveyed the message that the compromise or settlement wasn't in the best interests of the DAF?
A You mean the conversation -- or the resignation? Is that -- can you rephrase the question, please?
Q Yeah, I apologize. It's my fault, sir. You testified that after the January 26th hearing you had a conversation with Mr. Scott where you told him that the compromise or settlement was not in the best interests of the DAF, correct?
A Yes.
Q Okay. Did Mr. Scott share with you his concerns about anxiety and health issues in that same conversation, or was it in a subsequent conversation?
A It was at or around that time. I -- I don't remember

which conversation.
Q Okay.
A But it was right at or around that time.
Q All right. You never asked Mr. Scott to reconsider, did you?
A No.
Q You don't recall sending this notice of resignation to anyone, do you?
A No.
Q You don't remember notifying anyone that you'd received notice of Mr. Scott's intent to resign from the DAF, do you?
A It was -- yeah, no, I -- I don't remember. It was a busy time around that time and this was a secondary issue.
Q Okay. So the fact that the person who has been running the DAF for a decade gives you and only you notice of his intent to resign was a secondary issue in your mind?
A Yes, because when I talked to him at about that time, I said, okay, well, it's going to take a while. I don't even know how the mechanism works. But don't do anything adverse to the DAF, don't do anything else until, you know, you've figured out transition.
Q Uh-huh.
A And so once he had confirmed he wouldn't do anything outside normal course until he transitioned, I didn't worry about this. I had bigger issues to worry about at the time.

Q In the third paragraph of his email to you, he wrote that his resignation will not be effective until he approves of the indemnification provisions and obtains any and all necessary releases. Do you see that?
A Yes.
Q And that was the condition that on January 31st Mr. Scott placed on the effectiveness of his resignation, correct?
A Condition? Yeah, I -- I think he's trying to state the timing will happen after that.
Q After he gets the release, right?
A Yes.
Q And he wanted the release because you'd told him three different times that he wasn't acting in the best of the DAF, correct?
MR. TAYLOR: Objection, Your Honor.
MR. SBAITI: Objection. Calls for --
MR. TAYLOR: Objection. Calls for speculation.
THE WITNESS: Yeah, I --
THE COURT: Sustained.
THE WITNESS: I can't take that jump. Yeah.
BY MR. MORRIS:
Q In response to this email from your lifelong friend, you responded, if we could scroll up, about whether divest was a synonym -- if we can look at the first one -- whether divest is a synonym for resigned. Do I have that right?

A (no immediate response)
Q If you will look at your response on Monday morning at 9:50.
A Yes.
Q Okay. And then after Mr. Scott responds, you respond further, if we can scroll up, and you specifically told him, "You need to tell me ASAP that you have no intent to divest assets." Correct?
A Yes.
Q And you wrote that because you believed some of his behavior was unpredictable, right?
A I think I wrote that because the term divest in investment terms means sale or liquidate, but I guess it had a different legal term in the way he was looking at it. I wasn't aware at that time of the shares that could be bequeathed to anybody, and I think the divest refers to that, but I wasn't aware that that's how the structure worked at that time, and I was worried that divest could be the investment term and I -- it wouldn't have been appropriate for him to liquidate the portfolio.
Q So, and you wanted to make sure he wasn't liquidating or intending to liquidate any of the CLOs, correct?
A Correct.
Q Okay. So he's still the authorized, the sole authorized representative, but you wanted to make sure that he didn't do

anything that you thought was inappropriate. Fair?
A It's because I had talked to him before this and he said he wasn't going to do anything outside normal course, and then the word divest scared me, but I didn't realize it was a legal term in this parlance here.
Q And so after he explained, you still wanted to make sure that he wasn't divesting any assets, correct?
A Yes.
Q Okay. Since February 1st, you've exchanged exactly one text messages with Mr. Scott; is that right?
A I think there've been several, several text messages. But one on his birthday.
Q Yeah. And you haven't spoken to him in months, correct?
A In a couple months, yes.
Q All right. Let's talk about the replacement of Mr. Scott. With -- with Mr. Scott's notice, someone needed to find a replacement, correct?
A Yes.
Q And the replacement was going to be responsible for managing a charitable organization with approximately $200 million of assets, most of which was seeded directly or indirectly through you, correct?
A Yes.
Q And the replacement was going to get his and her -- his or her investment advice from you and NexPoint Advisors; do I

have that right?
A That was the plan.
Q Okay. Ultimately, Mr. Patrick replaced Mr. Scott, correct?
A Yes.
Q But it's your testimony that you had no knowledge that Mr. Patrick was going to replace Mr. Scott until after it happened on March 24, 2021. Correct?
A That's correct. I believe it happened suddenly.
Q So, for nearly two months after you had received notice of Mr. Scott's intent to resign, you were uninvolved in the process of selecting his replacement, correct?
A I was uninvolved. I'd say the process was dormant for an extended period of time until Mark Patrick came on board, and then Mark Patrick ran the process of interviewing multiple potential candidates.
Q Mark Patrick didn't have any authority prior to March 24th, correct?
A Is March 24th the date that he transitioned the shares to himself from Grant Scott?
Q Yep.
A That's when he then became the trustee of the DAF, yes.
Q Do you know -- do you know who was instructing Mr. Patrick on who to interview or how to carry the process out?
A He was doing that on his own with, I think,

recommendations from third-party tax firms.

Q So Mr. Patrick was trying to find a successor to Mr. Scott, even though he had no authority to do that, and you were completely uninvolved in the whole process? Do I have that right?

A I was uninvolved, yes. He was trying to facilitate it for the benefit of his friendship with Grant Scott and knowing that it -- it -- with his resignation, it had to transition to somebody. And he enjoys working on the DAF, he enjoys the charitable stuff in the community, and he was the most appropriate person to work on helping Grant transition.

MR. MORRIS: All right. I move to strike, Your Honor. It's hearsay.

THE COURT: Sustained.

BY MR. MORRIS:

Q You're aware that Mr. Seery was appointed the Debtor's CEO and CRO last summer, correct?

A Yes.

Q And you're aware that Mr. Seery's appointment was approved by the Bankruptcy Court, correct?

A Yes.

Q And you were aware of that at the time it happened, correct?

A Yes.

Q And even before that, in January of 2020, you consented to

a settlement where you gave up control of the Debtor. Correct?

A To the independent board for a consensual Chapter 11 restructuring that would leave Highland intact.

Q And do you understand that the gatekeeper provision in the July order is exactly like the one that you agreed to in January except that it applies to Mr. Seery instead of the independent directors?

A I -- I learned a lot about that today, but I don't think it's appropriate to move what applied to the board to the CEO of a registered investment advisor.

Q Okay. I'm just asking you, sir. Listen carefully to my question. Were you aware in January 2020 that you agreed to a gatekeeper provision on behalf of the independent board?

A Generally, but not specifically.

Q Okay.

A Not -- not like what we've been going over today.

Q Okay. And you knew that Mr. Seery had applied to be appointed CEO subject to the Court's approval, correct?

A Wasn't it backdated to March? I -- I think the hearing was in June, but it was backdated for -- for money and other purposes, right? I -- that's my recollection. I don't remember otherwise.

Q You do remember that Mr. Seery got -- he got -- his appointment got approved by the Court, right?

A Yes. But, as far as the dates are concerned, I thought it was either in March or retroactive to March. Maybe it was June or July.
Q And you --
A But I don't remember.
Q Did you have your lawyers review the motion that was filed on behalf of the Debtor?
A I'm -- I assume they do their job. I -- if they didn't, I don't know.
Q Okay. That's what you hired them to do; is that fair?
A Yes.
Q Okay. Can we go to Exhibit 12, please? I think it's in Binder 1. You've seen this document before, correct?
A Yes.
Q In fact, you saw versions of this complaint before it was filed, correct?
A Yes, I saw one or two versions towards the end. I don't know if I saw the final version, but --
Q Sir, you participated in discussions with Mr. Sbaiti concerning the substance of this complaint before it was filed, correct?
A Some. I would just use the word some.
Q Okay. Can you describe for me all of your conversations with Mr. Sbaiti concerning the substance of this complaint?
MR. SBAITI: Your Honor, I would object on the basis

of work product privilege and attorney-client communications. He was an agent for my client, the DAF, at the time he was having these discussions with us, and our discussions with him were work product. So to the extent he can reveal the conversations without discussing the actual content, we would raise privilege objection, Your Honor.

THE COURT: Mr. Morris?

MR. MORRIS: Your Honor, there is no privilege here. That's exactly why I asked Mr. Patrick the questions earlier today. Mr. Dondero is not party to any agreement with the DAF today. It's an informal agreement, perhaps, but there is no contractual relationship, there is no privity any longer between Mr. Dondero or any entity that owns and controls in the DAF, as far as I know. If they have evidence of it, I'm happy to listen, but that -- that's exactly why I asked those questions of Mr. Patrick earlier today.

THE COURT: All right.

MR. SBAITI: Your --

THE COURT: That was the testimony. There's an informal arrangement, at best.

MR. SBAITI: Well, Your Honor, I would suggest that that doesn't necessarily mean that he isn't an agent of the DAF. It doesn't have to be a formal agreement for him to be an agent of the DAF.

Everyone's agreed he was an advisor. Everyone's agreed he

was helping out. That is an agency relationship. It doesn't have to be written down. It doesn't have to be a formal investment advisory relationship. He's still an agent of the DAF. He was requested to do something and agreed to do it under the expectation that all of us had that those would be privileged, Your Honor. That is -- that is sufficient -- that is sufficient, I would argue, to get us where we need to be. The privilege should apply, Your Honor, and they don't have a basis for, I would say, invading the privilege, Your Honor.

THE COURT: Well, do you have any authority? Because it just sounds wrong. He's not an employee of your client. He doesn't have any contractual arrangement with your client.

MR. SBAITI: Your Honor, I would dispute the idea that he has no contractual arrangement with my client. The question was asked, do you have a -- do you have a written agreement, and then the question was, so you don't have a contract, and the answer was no, I don't have a contract, building upon that first -- that first question. But the testimony as he just recounted is that there is an agreement that he would advise Mr. Patrick and he would advise the DAF.

THE COURT: Okay.

MR. SBAITI: That's -- that's a contract.

THE COURT: Okay. My question was, do you have any legal authority? That's what I meant when I said authority. Any legal authority to support the privilege applying in this

kind of --

MR. SBAITI: In an informal arrangement, Your Honor? I don't have one at my fingertips at the moment, Your Honor, but I don't know that that should be a reason to invade the privilege.

And I would just add, Your Honor, I would just add, we've already -- because of the purpose of these questions, you've heard Mr. Morris state several times that the purpose is to show that Mr. -- that Mr. Dondero had some role in advising and participating in the creation of this complaint. That's been conceded by myself. I believe it was conceded by Mr. Dondero.

The actual specific facts, the actual specific conversations, Your Honor, shouldn't be relevant at this point and they shouldn't be admissible, given -- given the relevancy, given the perspective of the privilege.

THE COURT: Okay.

MR. MORRIS: If I might --

THE COURT: I overrule your objection. I don't think a privilege has been shown here --

MR. SBAITI: And Your Honor, --

THE COURT: -- and I think it's relevant.

MR. SBAITI: -- I would ask if we could *voir dire* the witness on the basis of the privilege, if that's --

THE COURT: All right. You may do so.

VOIR DIRE EXAMINATION

BY MR. SBAITI:

Q Mr. Dondero, do you have a relationship with the DAF?

A Yes.

Q How would you describe that relationship?

A I view myself and my firm as the investment advisor. I was actually surprised by the testimony today that there wasn't a contract in place, but there should be one. There should be one soon, in my opinion.

Q Have you -- did you hear Mr. Patrick testify earlier that he comes to you for advice?

A Yes.

Q Is that --

A As he should. Yeah.

Q Is that true?

A Yes.

Q When you render that advice, do you render that advice with some expectation about him following or listening to that advice?

A Okay, I think there's only been one investment or one change in the DAF portfolio since Mark Patrick's been involved, only one, and it was a real estate investment that I wasn't directly involved in. And so the people who put that investment forward worked with Mark without my involvement, and then I think Mark got third-party appraisal firms and

third-party valuation firms involved to make sure he was comfortable, which was a good process.

Q When you supplied information to Mr. Patrick, do you do so under the belief that there is a contractual, informal or formal, relationship?

MR. MORRIS: Objection to the form of the question.

THE COURT: Overruled.

MR. SBAITI: What specific form?

THE COURT: Overruled.

MR. SBAITI: Thank you.

THE WITNESS: Yes. I believe it -- it's a relationship that can and should be papered as -- soon. That's my -- I mean, unless I get some reason from counsel not to, I think it's something that should be memorialized.

BY MR. SBAITI:

Q And when you have that -- in that relationship, when you communicate with Mr. Patrick about matters, investment or otherwise, is there an expectation of privacy?

A Yes.

Q When Mr. Patrick -- did Mr. Patrick request that you interface with my firm and myself, as he testified earlier?

A Yes.

Q And when he did so, did he ask you to do so in an investigatory manner?

MR. MORRIS: Objection to the form of the question.

THE COURT: Sustained. Rephrase.

BY MR. SBAITI:

Q Did he tell you why he wanted you to talk to us?

A Yeah. At that point, he had started an investigation into the HarbourVest transaction.

Q And -- and when he -- when you were providing information to us, did he tell you whether he wanted you to help the Sbaiti firm conduct the investigation?

A The -- overall, the financial numbers and tables in there were prepared by not myself, but I -- I did -- I did help on -- on the -- some of the registered investment advisor issues as I understood them.

Q Okay. And the communications that you had with us, was that part of our investigation?

MR. MORRIS: Objection to the form of the question.

THE COURT: Overruled.

THE WITNESS: Yes.

BY MR. SBAITI:

Q And did you understand that we had been retained by Mr. Patrick on behalf of the DAF and CLO Holdco?

A Yes.

Q And did you appreciate or have any understanding of whether or not you were helping the law firm perform its legal function on behalf of the DAF and CLO Holdco?

A Perform its legal function? I was just helping with

regard to the registered investment advisor aspects of the overall, you know, like that.

Q Let me ask a more simple question. Did you -- did you appreciate that you were assisting a law firm in its representation of the DAF?

A Yes.

Q And you were helping the law -- and were you helping the law firm develop the facts for a complaint?

A Yes. I would almost say, more importantly, I wanted to make sure that there weren't errors in terms of understanding either how CLOs worked or how the Investment Advisers Act worked. So I was -- it was almost more of a proofing.

MR. SBAITI: Your Honor, based upon that, I mean, he's helping a law firm perform its function for the client. That's an agency relationship that gets cloaked. You can call him a consulting expert. You can call him, to a certain extent, a fact witness, Your Honor. If we want to take a break, I'm sure we could find authority on that basis for a work product privilege pretty easily.

But he's an agent of the DAF. Even if it's an informal agency relationship, that's still agency. He's in some respects, I guess, an agent of the law firm, to the extent he's helping us perform our legal work. And it seems like invading that privilege at this juncture is (a) unnecessary, because we've already conceded that there's been

conversations, which I think is the relationship they wanted to establish. And it's not unusual for a law firm to use someone with specialized knowledge to understand some of the intricacies of the actual issues that they're -- that they're getting ready to litigate.

THE COURT: Okay. I find no privilege. All right. That's the ruling.

MR. BRIDGES: Your Honor, may I add one thing to the objection for the record?

THE COURT: Okay, we have a rule, one lawyer per witness. Okay? So, thank you. A District Court rule, by the way, not mine.

MR. SBAITI: Your Honor, may we take a short recess, given the Court's ruling?

THE COURT: Well, I'd really like to finish this witness. How much longer do you have?

MR. MORRIS: About eight more questions.

THE COURT: All right. We'll take a break after the direct, okay?

MR. SBAITI: Your Honor, I would ask that we -- if he's going to ask him more questions about the content of the communications, I ask respectfully for a recess so we can figure out what to do about that. Because, right now, there's a ruling that he's going to have to reveal privileged information, and we don't have a way to go around and figure

out how to resolve that issue if we needed to.

THE COURT: Okay. I've ruled it's not privilege. Okay?

MR. SBAITI: I understand that, Your Honor, but --

THE COURT: Your client is CLO Holdco and the DAF.

MR. SBAITI: Yes, Your Honor.

THE COURT: Representative, Mark Patrick. No contract with Mr. Dondero. The fact that he may be very involved I don't think gives rise to a privilege. That's my ruling.

MR. SBAITI: I understand, Your Honor. I understand, Your Honor, but I'm asking for a recess so that we can at least undertake to provide Your Honor with some case law on a reconsideration before we go there, because that bell can't be unrung.

MR. MORRIS: Your Honor, if I may?

MR. SBAITI: And it's --

THE COURT: Uh-huh.

MR. MORRIS: I'm happy to give them ten minutes, Your Honor, as long as they don't talk to the witness.

THE COURT: Okay.

MR. MORRIS: I want to give them the opportunity. Go right ahead.

THE COURT: All right. We'll take a ten-minute break.

MR. SBAITI: Thank you.

THE COURT: It's 3:05.

THE CLERK: All rise.

(A recess ensued from 3:03 p.m. until 3:17 p.m.)

THE CLERK: All rise.

THE COURT: Okay. Please be seated. Going back on the record in Highland. Mr. Sbaiti?

MR. SBAITI: Yes, Your Honor. May I approach?

THE COURT: You may.

MR. SBAITI: Your Honor, we have some authority to support the position we'd taken. We'd ask the Court to reconsider your ruling on the privilege.

The first bit of authority is Section 70 of the Restatement (Third) of Law Governing Lawyers. Privileged persons within the meaning of Section 68, which governs the privilege, says that those persons include either agents of either the lawyer or the client who facilitate communications between the two in order for the lawyers to perform their function.

Another case that we found is 232 F.R.D. 103 from the Southern District of New York, 2005. It's *Express Imperial Bank of U.S. v. Asia Pulp Company*. And in that case, Your Honor, the consultant was a -- had a close working relationship with the company and performed a similar role to that of the employee and was assisting the law firm in

performing their functions, and the court there found that the work product privilege -- actually, the attorney-client privilege -- attached in what they called a Functional Equivalents Doctrine, Your Honor.

And here we have pretty much the same set of facts that's pretty much undisputed. The fact that there -- and the fact that there isn't a written agreement doesn't mean there isn't a contractual arrangement for him to have rendered services and advice. And the fact that he's, you know, recruited by us to help us perform our functions puts him in the realm, as I said, of something of a consulting expert.

Either way, the work product privilege, Your Honor, should apply, and we'd ask Your Honor not to invade that privilege at this point, Your Honor. And I'll ask you to reconsider your prior ruling.

Furthermore, I believe Mr. Morris, you know, in making his argument, is trying to create separation. The fact that he has no relationship, that the privilege can be invaded, seems to defeat the whole premise of his whole line of questioning.

So, once again, Your Honor, I just -- it's a tit for a tat there, and it seems to kind of eat itself. Either he is working with us, which we've admitted he is working with us, us being the law firm, and helping us do our jobs, or he's not. And if he's not, then this should be done.

THE COURT: Okay.

MR. MORRIS: Your Honor, briefly?

THE COURT: Well, among other things, what do you want me to do? Take a break and read your one sentence from the Restatements and your one case? And could you not have anticipated this beforehand?

MR. SBAITI: Your Honor, --

THE COURT: This is not the way we work in the bankruptcy courts, okay? We're business courts. We have thousands of cases. We expect briefing ahead of time.

MR. SBAITI: Your Honor, this has been a rather rushed process anyway. And to be honest, --

THE COURT: When was the motion filed?

MR. SBAITI: Your Honor, --

THE COURT: More than a month ago.

MR. SBAITI: -- his deposition was a week ago.

THE COURT: Well, okay. So you could not have anticipated this issue until his deposition one week ago?

MR. SBAITI: Your Honor, this issue arose at the deposition, obviously, because that's what he's quoting from. However, at least to us, this is such a well-settled area, and to be honest, --

THE COURT: Such a well-settled area that you have one sentence from the Restatement and one case from the Southern District of New York?

MR. SBAITI: No, Your Honor. I think the work

product privilege lexicon -- we had ten minutes to try to find something more on point than the general case law that applies the work product privilege to people that work with lawyers, consultants who work with lawyers, employees who work with lawyers, even low-down employees who normally wouldn't enjoy the privileges that attach to the corporation, when they work with the company for -- when they work with the company lawyers, it typically attaches.

THE COURT: You know, obviously, I know a few things about work product privilege, but he doesn't check any of the boxes you just listed out.

MR. SBAITI: I disagree, Your Honor.

THE COURT: He's not an employee. He's not a low-level employee.

MR. SBAITI: He's a consultant.

THE COURT: With no agreement.

MR. SBAITI: With a verbal agreement. He's an advisor. And he was recruited by us, and at the request of the DAF, of the head of the DAF, Mr. Patrick, to help us do our job for the DAF. I don't --

THE COURT: Okay. Mr. Morris, what do you want to say?

MR. MORRIS: Just briefly, Your Honor. This issue has been ripe since last Tuesday. They directed him not to answer a whole host of questions about his involvement at the

deposition last Tuesday, so they've actually had six days to deal with this. That's number one.

Number two, there's absolutely nothing inconsistent with the Debtor's position that Mr. Dondero is participating in the pursuit of claims and at the same time saying that his communications with the Sbaiti firm are not privileged. There's nothing inconsistent about that.

So the argument that he just made, that somehow because we're trying to create separation, that that's inconsistent with our overall arching theme that Mr. Dondero is precisely engaged in the pursuit of claims against Mr. Seery, I think that takes care of that argument.

Finally, your Honor, with respect to this consultancy arrangement, not only isn't there anything in writing, but either you or Mr. Sbaiti or I, I think, should ask Mr. Dondero the terms of the agreement. Is he getting paid? Is he doing it for free? Who retained him? Was it Mr. -- because the -- there's no such thing. There's no such thing.

The fact of the matter is what happened is akin to I have a slip-and-fall case and I go to a personal injury lawyer and I bring my brother with me because I trust my brother with everything. It's not privileged. Any time you bring in somebody who is not the attorney or the client, the privilege is broken. It's really quite simple. Unless there's a common interest. They can't assert that here. There is no common

interest. So --

THE COURT: Okay. Mr. Sbaiti, I'll give you up to three more minutes to *voir dire* Mr. Dondero to try to establish some sort of agency relationship or other evidence that you think might be relevant.

VOIR DIRE, RESUMED

BY MR. SBAITI:

Q Mr. Dondero, when you provided information to the law firm, were you doing so under an agency relationship? Do you know what an agency relationship is?

A Generally. When you're working on the -- or why don't you tell me?

Q Tell me your understanding, so we can use --

A That you're working for the benefit or as a proxy for the other entity or the other firm or the other person.

Q Right. So you're working for the DAF?

A Yes.

Q Do you do work for the DAF?

A Yes. As I stated, I'm surprised there isn't -- when we reconstituted after leaving Highland, we put in shared services agreements in place and asset management agreements in place and tasked people with doing that for most of the entities. There might be still a few contracts that are being negotiated, but I thought most of them were in place.

So I would imagine that there'll be an asset management

agreement with the DAF back to NexPoint sometime soon, so it -- it's --

Q Let me ask you this question. When you were providing information to us and having conversations with us, were you doing that as an agent of the DAF, the way you described it, --

A Yes.

Q -- on their behalf?

A Yes.

Q Were you also doing it to help us do our jobs for the DAF?

A Yes.

Q Did you respond to requests for information from myself?

A Yes.

Q Did you help coordinate other -- finding other witnesses or sources of information at my request?

A Yes.

Q Did you do so based upon any understanding that I was working on behalf of the DAF for that?

A Yes. I knew -- I knew you were working for the DAF. No one else, yeah.

Q And so -- and so did you provide any expertise or any in-depth understanding to myself in helping me prepare that complaint?

A I think so, but I give a lot of credit to your firm for researching things that I -- I knew reasonably well but then

you guys researched in even more depth.

MR. MORRIS: I'd move to strike the answer as nonresponsive.

THE COURT: Sustained.

BY MR. SBAITI:

Q Let me ask the question again. When you were providing us information and expertise, were you doing so knowing you were working -- helping us work for the DAF?

A Yes.

Q Now, did you demand any compensation for that?

A No.

Q Do you require compensation necessarily to help the DAF?

A No.

Q Do you do other things for the DAF sometimes without compensation?

A Right. We do the right thing, whether we get paid for it or not. Yes.

Q Had you known that our communications were not necessarily part of an agency relationship with the DAF, as you understood it, that you were just some guy out on the street, would you have had the same conversations with us?

A (sighs)

Q Let me ask a better question. If I had come to you working for someone that wasn't the DAF, you didn't already have a relationship with, would you have given us the same

help?
A I wouldn't have been involved if it was somebody else.
Q Is the reason you got involved because we were the lawyers for the DAF?
A Correct.
MR. MORRIS: Objection. It's just leading. This is all leading.
THE WITNESS: Correct.
THE COURT: Sustained.
MR. SBAITI: Can --
THE WITNESS: Yeah. Sorry.
BY MR. SBAITI:
Q Do you get -- do -- did you -- did you do work for the -- did you provide the help for the DAF laboring under the understanding that there was an agreement?
MR. MORRIS: Objection; leading.
THE COURT: Sustained.
BY MR. SBAITI:
Q Earlier you testified you believed there was an agreement?
A I thought that was an agreement, and I thought there will be one shortly if there isn't one, yes.
Q Okay.
A And so we -- I've been operating in a bona fide way in the best interests of the DAF throughout -- assuming there was an agreement, but even if there wasn't a formal one, I would

still be moving in the best interests of the DAF and helping your firm out or --

Q And you did that because you believed there was an agreement or soon would be?

A Yes.

MR. SBAITI: Your Honor, I mean, I believe we've established a dual role here, both as an agent of the DAF and as an agent of the law firm, Your Honor.

THE COURT: Okay. Just a minute. I'm looking at Texas authority on common interest privilege to see if there's anything that --

(Pause.)

THE COURT: All right. Again, it would have been very nice to get briefing ahead of time. I think this absolutely could have been anticipated.

I do not find the evidence supports any sort of protection of this testimony under work product privilege, common interest privilege. I just haven't been given authority or evidence that supports that conclusion. So the objections are overruled.

Mr. Morris, go ahead.

DIRECT EXAMINATION, RESUMED

BY MR. MORRIS:

Q Can you describe for the Court the substance of your communications with Mr. Sbaiti concerning the complaint?

A As I've stated, directing him toward the Advisers Act and then largely in a proofing function regarding CLO nomenclature and some of the other fund nomenclature that sometimes gets chaotic in legal briefs.

Q Did you communicate in writing at any time with anybody at the Sbaiti firm regarding any of the matters that are the subject of the complaint?

A I can't remember anything in writing. Almost everything was verbal, on the phone.

Q You don't tend to write much, right?

A Periodically.

Q Did you communicate with Mr. Patrick? Did you communicate with anybody in the world in writing regarding the substance of anything having to do with the complaint?

MR. SBAITI: Objection, Your Honor. Argumentative.

THE COURT: Overruled.

THE WITNESS: I --

MR. SBAITI: Your Honor, may I just -- one housekeeping. Rather than raise the same objection, may we have a standing objection, just so we're not disruptive, as to the privilege, just for preservation purposes, on the content of these communications? Otherwise, I'll just make the same objections and we can go through it.

THE COURT: Well, disruptive as it may be, I think you need to object to every --

MR. SBAITI: Okay.

THE COURT: -- question you think the privilege applies to.

MR. SBAITI: I will do so. Thank you, Your Honor. Uh-huh.

BY MR. MORRIS:

Q Mr. Dondero, the question was whether you've ever communicated with anybody in the world in writing concerning anything having to do with the complaint?

A Not that I remember.

Q Okay.

MR. MORRIS: I will point out, Your Honor, that last week, when the privilege was asserted, I had requested the production of a privilege log. I was told -- I forget exactly what I was told, but we never received one. I'll just point that out as well.

THE COURT: Okay.

BY MR. MORRIS:

Q You provided comments to the drafts of the complaint before it was filed, correct?

A Yes, a few.

Q Can you describe for the Court all of the comments that you provided to earlier drafts of the complaint?

MR. SBAITI: Your Honor, we object on the basis of privilege and work product and joint -- joint interest

privilege.

THE COURT: Overruled.

THE WITNESS: It's along the lines of things I've said in this court several times. The obligations under the Advisers Act cannot be negotiated away and they cannot be waived by the people involved, full stop. I remember giving the -- Mazin the example of the only reason why we're in a bankruptcy is from an arbitration award that, even though we did what was in the best interests of the investors, we got the investors out more than whole over an extended period of time, they got an arbitration award that said when we purchased some of the secondary interests we should have offered them up to the other 800 members in the committee besides the -- the 800 investors in the fund besides the eight people on the committee who had approved it and that the committee couldn't approve a settlement that went against the Advisers Act and the Advisers Act stipulates specifically that you have to offer it up to other investors before you take an opportunity for yourself. And someday, hell or high water, in this court or some other, we will get justice on that. And that was the primary point that I reminded Mazin about.

BY MR. MORRIS:

Q And that's exactly the conversation you had with Mark Patrick that started this whole thing, correct?

A No.

Q You told Mark Patrick that you believe the Debtor had usurped a corporate opportunity that should have gone to the DAF, didn't you?
A That was not our conversation.
Q So when Mr. Patrick testified to that earlier today, he just got it wrong, right?
A Well, maybe later on, but it wasn't that in the beginning. The beginning, any conversation I had with Mark Patrick in the beginning was smelling a rat in the way that the Debtor had priced the portfolio for HarbourVest.
Q Hmm. So you're the one, again, who started that piece of the discussion as well, correct?
A Started the -- I -- I guess I smelled a rat, but I put the person who could do all the numbers in touch with the Sbaiti firm.
Q And was the rat Mr. Seery?
A Was the rat Mr. Seery? Or the independent board. Or a combination thereof. I believe the independent board knew exactly what Seery was doing with --
Q Do you have any idea --
A -- HarbourVest.
Q Do you have any idea why, why the Sbaiti firm didn't name the whole independent board in the -- in the motion for leave to amend?
A I don't know. Maybe they will at some point.

Q Yeah.
A I don't know.
Q But did you tell the Sbaiti firm that you thought the whole independent board was acting in bad faith and was a rat?
MR. SBAITI: Your Honor, I object on the basis of privilege.
THE COURT: Overruled.
MR. SBAITI: All three.
THE WITNESS: I knew Jim Seery was and I knew Jim Seery had weekly meetings with the other independent board members, so the HarbourVest settlement was significant enough that it would have been approved, but I don't have direct knowledge of their involvement.
BY MR. MORRIS:
Q And so you -- but you believed Jim Seery was certainly a rat, right?
A Oh, I -- there was a defrauding of third-party investors to the tune of not insignificant 30, 40, 50 million bucks, and it was obfuscated, it was -- it was highly obfuscated in the 9019.
Q Did you think Mr. Seery was a rat, sir? Yes or no?
A I believe he had monthly financials. He knew that the numbers presented in the 9019 were wrong. And if that makes him a rat, that makes him a rat. Or maybe he's just being aggressive for the benefit of his incentive or for the estate.

But I -- I believe those things wholeheartedly.
Q Did you tell the Sbaiti firm you thought Jim Seery was a rat?
MR. SBAITI: Objection, Your Honor. Privilege.
THE COURT: Overruled.
THE WITNESS: I -- I don't remember using those words.
BY MR. MORRIS:
Q Did you tell the Sbaiti Firm that you thought Jim Seery had engaged in wrongful conduct?
MR. SBAITI: Your Honor, objection. Privilege.
THE COURT: Overruled.
THE WITNESS: I believe he violated the Advisers Act, and I was clear on that throughout.
BY MR. MORRIS:
Q Listen carefully to my question. Did you tell the Sbaiti firm that you believed that Jim Seery engaged in wrongful conduct?
MR. SBAITI: Objection, Your Honor. Calls for privileged communications.
THE COURT: Overruled.
THE WITNESS: I think I gave the answer. I'll give the same answer. I believe he violated the Advisers Act.
BY MR. MORRIS:
Q What other wrongful conduct did you tell the Sbaiti firm

you thought Mr. Seery had engaged in?

MR. SBAITI: Same objection, Your Honor.

THE COURT: Overruled.

MR. SBAITI: Calls for privileged communications.

THE COURT: Overruled.

THE WITNESS: I -- I just remember the obfuscating and mispricing portfolio violations of the Advisers Act was all I discussed with the Sbaiti firm regarding Seery's behavior.

BY MR. MORRIS:

Q Did you talk to them about coming to this Court under the gatekeeper order to see if you could get permission to sue Mr. Seery?

A I --

MR. SBAITI: Objection, Your Honor. Calls for privileged communication.

THE COURT: Overruled.

THE WITNESS: I wasn't involved in any of the --

BY MR. MORRIS:

Q Did you --

A -- tactical stuff on who to sell or -- who to sue or when or whatever.

Q Did you tell the Sbaiti firm that you thought they should sue Mr. Seery?

MR. SBAITI: Objection, Your Honor. Calls for

privileged communication.

THE COURT: Overruled.

MR. SBAITI: I'll also say, Your Honor, the question is getting a little argumentative.

THE WITNESS: I didn't get directly --

THE COURT: Overruled.

THE WITNESS: I didn't get directly involved in who was -- who was specifically liable.

BY MR. MORRIS:

Q How many times did you speak with the Sbaiti firm concerning the complaint?

A Half a dozen times, maybe.

Q Did you ever meet with them in person?

A I've only met with them in person a couple, three times. And I don't think any of them -- no, it was, excuse me, it was on deposition or other stuff. It wasn't regarding this.

Q Did you send them any information that was related to the complaint?

A I did not.

Q Did you ask anybody to send the Sbaiti firm information that related to the complaint?

A I did not. I -- I was aware that Hunter Covitz was providing the historic detailed knowledge to the firm, but it -- it wasn't -- I don't believe it was me who orchestrated that.

Q Did you talk to anybody at Skyview about the allegations that are contained in the complaint before it was filed?
A I don't -- I don't remember.
Q Have you ever talked to Isaac Leventon or Scott Ellington about the allegations in the complaint?
A No. They weren't involved.
Q How about -- how about D.C. Sauter? You ever speak to him about it?
A I don't --

MR. TAYLOR: Objection, Your Honor.

THE WITNESS: I don't remember.

MR. TAYLOR: At this point, D.C. Sauter is indeed an employee of Skybridge and is a general counsel for some of the entities which he worked for. And to the extent he's trying to ask for those communications, that would be invasion of the privilege.

MR. MORRIS: I'll withdraw it, Your Honor. That's fair.

THE COURT: Okay

MR. MORRIS: That's fair.

THE COURT: Question withdrawn.

THE WITNESS: I thought you only had eight more questions.

MR. MORRIS: Opened the door.

BY MR. MORRIS:

Q Can you describe the general fact -- withdrawn. You provided facts and ideas to the Sbaiti firm in connection with your review of the draft complaint, correct?

A Ideas and proofreading.

Q Anything beyond what you haven't described already?

A Nope.

Q Okay. Who is your primary contact at the Sbaiti firm, if you had one?

A Mazin.

Q Okay. Did you suggest to Mr. Sbaiti that Mr. Seery should be named as a defendant in the lawsuit before it was filed?

MR. SBAITI: Your Honor, calls for privileged communication. We object --

THE COURT: Overruled.

MR. SBAITI: -- to that answer.

MR. SBAITI: Okay.

THE WITNESS: Again, no. I wasn't involved with the tactics on who would be defendants and when or if other people would be added.

BY MR. MORRIS:

Q Did you -- are familiar with the motion to amend that was filed by the Sbaiti firm?

A I'm more familiar with it after today --

Q Right.

A -- than I was before.

Q And were you aware that that motion was going to be filed prior to the time that it actually was filed?
A I -- I don't remember. Probably.
Q And who would have been the source of that information? Would that have been Mr. Sbaiti?
A Yes.
Q Okay. And did you express any support for the decision to file the motion for leave to amend in the District Court?
A I -- I wasn't involved. It was very complicated legal preservation conver... -- I wasn't involved. I knew the conversations were going on between different lawyers, but I wasn't involved in the ultimate decision. I didn't encourage, applaud, or even know exactly what court it was going to be filed in.

MR. MORRIS: All right. I have no further questions, Your Honor.

THE COURT: All right. Pass the witness.

MR. ANDERSON: We have no questions, Your Honor.

THE COURT: Okay. Any questions from Respondents?

MR. SBAITI: No questions.

THE COURT: Okay. Mr. Taylor?

CROSS-EXAMINATION

BY MR. TAYLOR:
Q Mr. Dondero, --

A Yes, sir.
Q -- you are not the authorized representative of CLO Holdco, are you?
A No.
Q You're not the authorized representative for the DAF, are you?
A No.
Q Do you know who that person is as we sit here today?
A Yes.
Q Who is that?
A Mark Patrick.
Q Thank you.

MR. TAYLOR: No further questions.

THE COURT: Any redirect on that cross?

MR. MORRIS: I do not, Your Honor. I would just like to finish up the Debtor's case in chief by moving my exhibits into evidence.

THE COURT: Okay. Mr. Dondero, you're excused.

(The witness steps down.)

THE COURT: All right. So you have no more witnesses; you're just going to offer exhibits?

MR. MORRIS: Yes, Your Honor.

THE COURT: Okay.

MR. MORRIS: So, at Docket #2410, --

THE COURT: Uh-huh.

MR. MORRIS: -- the Court will find Exhibits 1 through 53.

THE COURT: Uh-huh.

MR. MORRIS: In advance, Your Honor, I've conferred with the Respondents' counsel. They had previously objected to Exhibits 15 and 16, which I believe were the Grant Scott deposition transcripts. They objected to them on the grounds of lack of completeness because I had taken the time to make deposition designations, but I'm happy to put the entirety of both transcripts into evidence, and I hope that that will remove the objections to Exhibits 15 and 16.

THE COURT: All right. Before we confirm, let's just make sure we have the right one.

MR. MORRIS: Oh, I apologize.

THE COURT: I have 16 as the July order.

MR. MORRIS: I apologize. You're absolutely right, Your Honor. What I was referring to was -- oh, goodness. One second. (Pause.) I was referring to Exhibits 23 and 24. Those are Mr. Scott's deposition designations. They had lodged an informal objection with me on grounds of completeness. And in order to resolve that objection, we're happy to put the entirety of both transcripts in.

THE COURT: All right. So if our Respondents could confirm with the agreement to put in the entire depos at 23 and 24, you stipulate to 1 through 53?

MR. PHILLIPS: We also -- Your Honor, --

MR. MORRIS: Yeah, I was going to take them one at a time. Just take those two.

MR. PHILLIPS: Yeah, can we just take those two? Confirmed?

MR. MORRIS: Okay.

THE COURT: Oh, okay.

MR. PHILLIPS: Because there are other -- there are other -- we exchanged objections to each other's witness and exhibit lists. And so I think you can handle the rest of them kind of in a bunch, right?

MR. MORRIS: Yeah. Yeah, there's two bunches, actually.

MR. PHILLIPS: Yeah.

THE COURT: Okay. So you have just now stipulated to 23 and 24 being admitted --

MR. MORRIS: Correct.

THE COURT: -- with the full depos? Okay.

MR. PHILLIPS: Yes, ma'am. Thank you.

THE COURT: All right.

(Debtor's Exhibits 23 and 24 are received into evidence.)

MR. MORRIS: And then the next two that they objected to are Exhibits 15 and 16. 15 is the January order and 16 is the July order. They objected on relevance grounds. I think 16 -- these are the two orders that the Debtors contend the

Respondents have violated, so I don't understand the relevance objection, but that's what it was and that's my response.

MR. PHILLIPS: Resolved, Your Honor.

THE COURT: Okay. 15 and 16 are admitted.

(Debtor's Exhibits 15 and 16 are received into evidence.)

MR. MORRIS: Okay. And then the last objection relates to a group of exhibits. They're Exhibits 1 through 11. Those exhibits I think either come in together or stay out together. They are exhibits that relate to the HarbourVest proceedings, including deposition notices, including I think the transcript from the hearing, the Court's order, the motion that was filed.

The Debtor believes that those documents are relevant because they go right to the issue of the gatekeeper order and had they filed, had the Respondents followed the gatekeeper order, this is -- this is why they didn't do it. You know what I mean? That's the argument, is that the Respondents, one of the reasons the Respondents -- argument -- one of the reasons the Respondents didn't come to this Court is because they knew this Court had that kind of record before it. And I think that's very relevant.

THE COURT: All right. Response?

MR. PHILLIPS: Your Honor, we think that these exhibits are not relevant. We have a very focused, we think, -- we have the Court's order. Those objections are withdrawn.

We have the complaint. We have the motion to amend. And the issue is whether the motion to amend, which was dismissed one day, or the next day after it was filed, constitutes criminal -- constitutes contempt.

So we think the prior proceedings go to their underlying argument, which is the lawsuit or the complaint is no good, and that has nothing to do with -- there's been no foundation laid and it's not relevant what happened in connection with the HarbourVest settlement. It is what it is, and there's no dispute that it is what it is, but it's not relevant to establish any type of -- they've even said intent is not even relevant here. So we -- that's -- we think all of that goes out and simplifies the record, because it has nothing to do with whether or not there was a contempt.

THE COURT: Response?

MR. MORRIS: We withdraw the exhibits, Your Honor. I'm just going to make it simple for the Court.

THE COURT: Okay.

MR. MORRIS: I'm just going to make it simple for the Court.

THE COURT: 1 through 11 are withdrawn.

(Debtor's Exhibits 1 through 11 are withdrawn.)

MR. MORRIS: So, the balance, there was no objection. So all of the Debtor's exhibits on Docket #2410 -- let me restate that. Exhibits 12 through 53 no longer have an

objection. Is that correct?

MR. PHILLIPS: Yes.

MR. MORRIS: Okay. And then --

MR. PHILLIPS: Confirmed.

THE COURT: Okay.

(Debtor's Exhibits 12 through 53 are received into evidence.)

MR. MORRIS: Okay. Thank you. And then we filed an amended list, I believe, yesterday --

THE COURT: Uh-huh.

MR. MORRIS: -- to add Exhibits 40 -- 54 and 55.

THE COURT: Uh-huh.

MR. MORRIS: And those exhibits are simply my firm's billing records.

THE COURT: Okay.

MR. MORRIS: You know, we added Mr. Demo to the witness list in case there was a need to establish a foundation. That's the only thing he would testify to. I don't know if there's an objection to those two exhibits, because we hadn't had an opportunity to confer.

THE COURT: Any objection?

MR. PHILLIPS: Your Honor, we're not going to require authenticity and foundation for -- we have the right, we think, to say that they're not a ground -- we're not going to challenge that they are the bills, and the bills say what they

say. We don't need Mr. -- we don't need a witness to authenticate those exhibits. But we reserve all substantive rights with respect to the effect of those exhibits.

THE COURT: All right. 54 and 55 are admitted.

(Debtor's Exhibits 54 and 55 are received into evidence.)

MR. MORRIS: And with that, Your Honor, the Debtor rests.

THE COURT: Okay. All right. Respondents?

(Counsel confer.)

MR. PHILLIPS: If I could have a second?

THE COURT: Okay.

A VOICE: Sorry, Your Honor.

(Pause.)

MR. PHILLIPS: Your Honor, we have filed in our witness and exhibit list, and I have to say I don't have the number, but we'll get the docket entry number, but we have 44 exhibits. There's an objection to Exhibit #2, which is -- thank you -- it's Document 2411, Your Honor. Thank you.

THE COURT: Uh-huh.

MR. PHILLIPS: There is a pending objection to Exhibit #2 which we have not resolved. There's no objection to any other exhibit. But in reviewing our exhibit list, I found that we had some -- some mistakes and duplications.

So, with respect to 2411, we would withdraw Exhibit 13, 14, and 29, and we would offer Exhibit 1, and then 30 through

44, with 13, 14, and 29 deleted.

THE COURT: Okay. So 1, 3 through 12, --

MR. PHILLIPS: Yes.

THE COURT: -- 15 through 28, and then 30 --

MR. PHILLIPS: And then 30 through 44.

THE COURT: -- through 44? Do you confirm, Mr. Morris?

MR. MORRIS: Yes, Your Honor. The only objection we have is to Exhibit #2.

THE COURT: And that's -- he's not offering that?

MR. MORRIS: Yeah.

MR. PHILLIPS: Not at this time, Your Honor.

THE COURT: Okay.

MR. PHILLIPS: We would have to have testimony about that.

THE COURT: Okay. All right. So those are admitted.

MR. PHILLIPS: Okay.

(Mark Patrick's Exhibits 1, 3 through 12, 15 through 28, and 30 through 44 are received into evidence.)

THE COURT: By the way, it looks like Exhibit 44 is at a different docket number, Docket 2420. Correct? You have --

MR. SBAITI: Your Honor, I believe Exhibit 44 is the hearing transcript from the July approval hearing. At least that's what it's supposed to be.

THE COURT: Okay.

MR. SBAITI: It was Exhibit 2 on the Debtor's list, and then I think they took it off, so we had to add it.

MR. PHILLIPS: Oh, okay. I was looking -- oh, that's right. They -- that's correct, Your Honor.

THE COURT: Okay.

MR. PHILLIPS: Exhibit 44 was added --

THE COURT: Okay.

MR. PHILLIPS: -- because the Debtor's withdrew it, and so it was added in the second -- in the supplemental and amended list. The -- the one that I was talking about was the prior list.

THE COURT: Okay. So that's at Docket 2420?

MR. PHILLIPS: Yes.

THE COURT: You're not offering 45 or 46?

MR. PHILLIPS: No, I think we'd offer 45 and 46 as well. I'm sorry.

THE COURT: Okay. Any objections, Mr. Morris?

MR. MORRIS: No, Your Honor.

THE COURT: Okay. So 45 and 46 are admitted as well. They're at Docket Entry 2420.

(Mark Patrick's Exhibits 45 and 46 are received into evidence.)

THE COURT: All right. Your witnesses?

MR. PHILLIPS: Your Honor, could we have five minutes

to just see what we're -- our plan is, and then we'll be back at 4:00?

THE COURT: Okay. We'll be back at 4:00.

MR. PHILLIPS: Thank you.

THE CLERK: All rise.

(A recess ensued from 3:55 p.m. until 4:04 p.m.)

THE CLERK: All rise.

THE COURT: Please be seated. All right. Back on the record in Highland. Mr. Phillips?

MR. PHILLIPS: Your Honor, with the introduction of the Respondents -- CLO Holdco, DAF Fund, LP, and Mark Patrick, those Respondents, and we consider Mark Patrick a Respondent although not formally named as a Respondent because he is the party who authorized the filing of the Seery motion -- we rest.

THE COURT: You rest? Okay. Well, Mr. Morris, closing arguments?

MR. MORRIS: How much time do I have?

THE COURT: You've got a lot more time than you probably thought you were going to. You're under an hour.

MR. MORRIS: 42 minutes?

THE COURT: How much?

THE CLERK: 42 minutes.

THE COURT: 42 minutes? Feel free not to use it all.

MR. SBAITI: Out of curiosity, how long do we have?

THE COURT: You have a lot of time, which I hope you won't use.

THE CLERK: Hour and twenty-five minutes or so.

MR. SBAITI: I was afraid it was going to be an hour and twenty, so --

MR. PHILLIPS: No, not either.

MR. MORRIS: I don't suspect I'll use all the time.

THE COURT: Okay. Thank you.

MR. MORRIS: May I proceed?

THE COURT: You may.

CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. MORRIS: Good afternoon, Your Honor. John Morris; Pachulski Stang Ziehl & Jones; for the Debtor. I'd like to just make some closing remarks after the evidence has closed.

This is a very, very important motion, Your Honor. I take this stuff seriously. It's only the second contempt motion I've ever brought in my life. I've never gone after another law firm. But these facts and circumstances require it, because my client is under attack, and these orders were entered to prevent that.

It is serious stuff. There's no question in my mind, there's no question the evidence showed, clear and convincingly, beyond reasonable doubt, that they violated this Court's order.

I started off with three very simple prongs. So simple you'd think I'd remember them. Number one, was a court order in effect? There is no dispute. The court order was in effect.

Number two, did the order require certain conduct by the Respondent? We believe it did. We heard an hour-long argument styled as an opening statement, but it was really argument and not an opening statement, about all the defects in the order. But the one thing that is crystal clear in the order are the words commence or pursue. You've been told many times by the Respondent that nobody has commenced an action against Mr. Seery. That is true. We all know what the word commence means. We all know what the word pursue means.

I heard argument this morning that pursue means after a claim is filed you pursue a case. That's the way lawyers talk about it. But that doesn't make any sense, Your Honor, because once you've commenced the action you've violated the order. It's commence or pursue, it's in the disjunctive, and you can't read out of the order the concept of pursuit by making it an event that happens after the commencement, because that's exactly what they're trying to do. They're trying to read out of the order the word pursuit.

And I ask you to use very simple common sense. If filing a motion for leave to amend a complaint to add Mr. Seery as a defendant is not pursuit, what is? What is? There's nothing

left. You commence an action or you do something less than commencing an action when you're going after the man. That's what pursuit means. They're going after the man. And they asked the District Court to do what they knew they couldn't.

Mr. Phillips is exactly right. I made the point about Rule 15 because they knew they couldn't do it. I'm not suggesting that they should have. I'm suggesting that the reason that they didn't is because they knew they were -- they were in a bad place. Because if they really just wanted to name Mr. Seery as a defendant, they wouldn't have done it. They knew commence was crystal clear.

What they're trying to do is claim that somehow there's an ambiguity around the word pursuit. Does that make any sense at all? Filing a motion for leave to amend the complaint. And Mr. Patrick, to his credit, candidly admitted that if the motion was granted, they were suing, yeah, as long -- as long as the Sbaiti firm, you know, recommended it. That's what would have happened.

Those orders that you signed, nothing, absolutely meaningless from their point of view. They believed they were wrong. They believed that they were overbroad. They believed they were too narrow. They believed they were vague. They believed they were without authority. They don't get to be the gatekeeper. They want to be the gate -- that's this Court's decision. That's why we went through all of the

processes that we did. And they just flagrantly said, I don't agree. I don't agree because it's wrong this way and it's wrong that way and it's wrong the other way, and therefore let me go find a higher authority to validate my thinking. That's not the way this process is supposed to work.

The independent directors and Mr. Seery relied on the gatekeeper in accepting their positions. It was a quid pro quo. Mr. Dondero agreed to the exact same provision, the exact same gatekeeper provision in the January order that he now complains about today, that the DAF complains about today. Where were these people?

As the Court knows, nobody appealed either order. The Debtor, the independent board, Mr. Seery expected that the plain and unambiguous words would be honored and enforced. I think that's fair. I think that's the way the process is supposed to work.

Instead, we have games. We have these linguistic gymnastics. We have statements that are too cute by half. Mr. Dondero won't even admit that he appointed Mr. Scott back in 2012. I couldn't even get him to do that, really, even though the documents say it, even though Mr. Patrick says it.

I'll take the Respondents one at a time in a moment, but I just want to deal with some of the more interesting arguments they make. The order was vague because it didn't say you can't seek leave from the District Court to amend your

complaint to add Mr. Seery. They said that that's what makes the order vague.

Your Honor, if you had thought to put that language in, you know what they would have done? They would have sued Mr. Seery in New York State Supreme Court, where he lives, and said, the order didn't say I couldn't do that. Where does it end?

There's a reason why the order was crafted broadly to say no commencement or pursuit without Bankruptcy Court approval. You have to bring a colorable claim.

We heard an argument this morning that they couldn't possibly have brought that motion for reconsideration first. You know, the one they filed about eight hours after we filed the contempt motion. They couldn't possibly have brought that motion before the motion for leave to amend because somehow they would have been estopped or they would have been found to have waived some right.

How could it be that anybody reasonably believes that complying with a court order results in a waiver of some right? It just -- these are games. These are not good arguments. And they certainly don't carry the day on a contempt motion.

We've heard repeatedly, the District Court denied the motion without prejudice, how have you been harmed? They shouldn't be able to rely on the District Court's prudence to

protect themselves. The question shouldn't be, have you been harmed since the District Court didn't grant the motion? No. The question should be, were we harmed by the attempt to name Mr. Seery a defendant, in violation of court orders, without notice? Without notice.

I'm told they assumed that I'd be checking the dockets. I wasn't checking the docket, Your Honor. I hadn't filed an appearance in the case. And, in fact, if you look at the exhibits, because I could pull it out, but we put in the communications between the lawyers. The last communication was from Mr. Pomerantz, and the last communication from Mr. Pomerantz said, Don't do it or we're going to file a motion for contempt. That's now in the evidence.

So, having sent that message, I wasn't going to check the docket to see if they really were going to go ahead and do it. I didn't think they would. And if they did, I certainly thought I'd get notice of it. Nothing.

And, again, I don't really need to establish intent at all in order to meet my burden of clear and convincing evidence of a contempt of court, but I think it is relevant when the Court hopefully finds liability and is considering damages, because that's really the most important point I have to make right now, is the Court needs to enforce its own orders, because if the Court doesn't, or doesn't impose a penalty that's meaningful, this is just going to continue. And Your Honor,

it's all in the record. Your Honor knows this. Mr. Daugherty has gone through it. Right? Mr. Terry went through it. UBS went through it. You've seen litigation now for a year and a half. It's happening in New York, right, the Sbaiti firm is reopening the Acis case. we've got this other lawsuit that's filed by an entity with like a five-tenths of one percent interest who's complaining about the SSP transaction that Mr. -- that the Debtor engaged in. There's no end here.

We need the Court to pump the brakes. We need the Court to exercise its authority. We need the Court to protect the estate fiduciary that it approved.

It is true, Mr. Seery is not a trustee. But it is also true that he is a third-party outsider who came into this case with the expectation and the promise in an order that he wouldn't be subjected to frivolous litigation, that this Court would be the arbiter of whether claims could be pursued against him. That was the code of conduct. That was the quid pro quo. That was the deal that Mr. Seery made. It's the deal that the board members made.

What gives these people the right to just say, your order is wrong, and because I think your order is wrong I'm going to go to the District Court, and if the District Court agrees, too bad, and if the District Court doesn't agree, we'll be back before Your Honor, and no harm, no foul? No. It can't be. It can't be that that's the way this process works. It

just can't.

So, Your Honor, let me take the Defendants one at a time, the Respondents one at a time. CLO Holdco and the DAF are corporate entities. They've done what they've done. Mr. Patrick, bless him, I think he's a lovely man. I don't think he quite bargained for what he's getting right now, but nevertheless he is where he is and he's willing to stand up and be counted, and for that, at least, I admire his courage. He's willing to say, I authorized those. But you know what? It's a violation of the law, it's a violation of this Court's order to file that motion, and so he has -- and he was very candid today. He knew of the order. Right? He knew it was in effect. He pointed out that it was in their papers. Right?

They're trying to be cute, they're trying to thread this needle, but it has no hole in it. They keep -- they keep doing this. Well, maybe if we do it this way, maybe if we do it -- no. The order was crystal clear.

The Sbaiti firm. They're probably fathers and husbands and good people and I wish them no ill will, but this is wrong. This is wrong. To come into a court you've never been in before and in less than twelve days to jump the shark like this in twelve -- in less than twelve days, because Mr. Patrick said they weren't hired until April, and the complaint was filed on the 12th.

We're told that they understood this was an overwhelming case with two -- why don't you take your time? What was the rush? Why not wait until the Defendant -- the Debtor appeared in the action before rushing to do this?

It's bad conduct, Your Honor, and that's really a very important point that I have to make, is that there's lots of lawyers who are engaging in highly-questionable conduct here that, from my perspective, goes well beyond the bounds of zealous advocacy.

It's not aggressive lawyering. I love aggressive lawyering. I really do. Respectful, honest -- and I don't, you know, I don't want to say that they're dishonest people. I don't mean to do that. But I think, I think they made a gross error in judgment, and there's no question that they violated this Court's order.

And then that leaves Mr. Dondero. I don't even know what to say about his testimony, Your Honor. He pursued claims against Mr. Seery. He thinks he's a rat. He's the one who started the whole process. He's the one who put the bug in Mark Patrick's ear. All of this is uncontested. Right? Uncontested.

I don't have to go back in time. We can talk about what happened to Grant Scott. It's a very sad story. Mr. Scott, I think, did his honest best to do what he believed, on the advice of counsel, was in the best interest of the DAF. And

Mr. Dondero, as you hear time and time again when he speaks about Mr. Seery, it was inappropriate. He's the arbiter of what's in the best interest of entities that other people control. And they pay a price. And they pay a price. And so Mr. Dondero felt it was his job, even though he tries to distance himself from the DAF -- I have no responsibility, I don't -- I'm not involved -- until, until somebody wants to sue Seery and the Debtor. Then he'll go all in on that, no matter how specious the claim may be.

The Debtor's not going to fold its tent because a motion for leave to amend was denied without prejudice. That's not the point. The point is that people need to respect this Court, people need to respect the Court's orders, and those that aid and abet or otherwise support the violation of court orders ought to be held to account, Your Honor.

I have nothing further.

THE COURT: All right. Thank you. Respondents?

CLOSING ARGUMENT ON BEHALF OF THE RESPONDENTS

MR. SBAITI: Your Honor, the fact that we're here on a motion for leave, and the motion for leave is what they're saying is pursuing a claim under the Court's order, and then you hear that the mere act of investigating a claim against Mr. Seery is also pursuing a claim, this goes to the infinite regression problem with this word pursue the way they want to construe it, Your Honor. Asking for permission is not

pursuing a claim and can't be the definition of pursuing a claim because it's not doing anything other than asking for permission.

We didn't file a suit. We didn't commence a suit. I think that's established. We did not pursue a claim. Mr. Morris ignores, I think, the very commonsensical aspect that we put out in the opening, which is that the reason pursue -- and sometimes the language in these types of orders is, instead of pursue, it's maintain -- but the reason that word is there is because sometimes the case has already been started when the order is entered. And so to pursue a claim, *i.e.*, one that's already been filed as of the date of the order, that would be lost if the commencement of that claim hadn't happened until after the -- until the -- if the commencement happened before the order was filed. That's the --

THE COURT: Okay. So are you saying it's a sequential thing?

MR. SBAITI: I'm not sure I understood your question, Your Honor. I'm sorry.

THE COURT: Well, I'm trying to understand what it is you're saying about how pursue should be interpreted.

MR. SBAITI: Sure.

THE COURT: I think you're saying you have to -- you can either have -- well, we've got a prohibition on commencing

an action.

MR. SBAITI: Yes.

THE COURT: And then the separate word pursue, I think you're saying that must refer to you already have an action that's been commenced and you're continuing on with it. Is that what you're saying?

MR. SBAITI: Yes, Your Honor.

THE COURT: Then why not use the word continue?

MR. SBAITI: Well, Your Honor, the choice of --

THE COURT: Kind of like 362(a) of the Bankruptcy Code, you know, is worded.

MR. SBAITI: Well, Your Honor, the choice of the wording of pursue at that point, Your Honor, I believe ends up being ambiguous, because by filing the motion here that would be pursuing a claim under that definition. So before I got permission to pursue a claim, I've got to pursue a claim. That's the problem that they have with the words that they're trying to get you to adopt, or the meaning of the words they're trying to get you to adopt.

If I came to this Court and said, Judge, I need permission, I need leave to file suit against Mr. Seery, and then the question is, well, you're not allowed to seek leave because that's pursuing the claim, it's infinitely regressive. And in fact, his closing argument just proved how it's infinitely regressive.

THE COURT: Okay. Let me -- I'm not following this infinitely regressive or whatever the term was.

MR. SBAITI: Yes.

THE COURT: Just answer this very direct question. Why did you not file a motion for leave in the Bankruptcy Court? That would have clearly, clearly complied with the July order.

MR. SBAITI: Your Honor, I believe we explained this in the opening. I took a stab at it. Mr. Bridges took a stab at it. We did not believe coming here and asking for leave and asking for -- for Your Honor to do what we don't believe Your Honor can do, would effectuate an estoppel or a waiver, which we didn't think was in the best interest of our client to have. Your Honor, this happens -- I don't believe this is the --

THE COURT: Okay. Connect the dots. Make that clear as clear can be for me. You file a motion for leave --

MR. SBAITI: Yes.

THE COURT: -- to file this District Court action against the Debtor and Seery, and if I say yes, everything is fine and dandy from your perspective. If I say no, tell me again what your estoppel argument is.

MR. SBAITI: Your Honor, the key question is whether us putting the Court's ability to decide colorability and the Court's gatekeeper functions, for us to invoke those functions

concerned us because there's case law that says that that effectuates an estoppel. And so we don't get our chance in front of an Article III judge to make that in the first instance.

THE COURT: Okay. Tell me what cases you're talking about and the exact context of those cases.

MR. SBAITI: Your Honor, I would have to defer to my partner on this one, Your Honor.

THE COURT: Okay.

MR. SBAITI: So, --

THE COURT: Because I'm just letting you know --

MR. SBAITI: Yes.

THE COURT: -- I am at a complete loss. I'm at a complete loss understanding what you're saying. I am.

MR. SBAITI: Well, Your Honor, the --

THE COURT: I don't understand. If you have followed the order to the letter and I tell you no, --

MR. SBAITI: Then --

THE COURT: -- what, you're saying you were worried you'd be estopped from appealing my order to the District Court and saying abuse of discretion or invalid order in the first place? You'd be estopped from taking an appeal?

MR. SBAITI: No, Your Honor. We wouldn't be estopped from taking an appeal.

THE COURT: Then why didn't you follow the letter of

the order?

MR. SBAITI: For one thing, Your Honor, asking the District Court made sense to us, given the order and given our understanding of the law. Certainly, we had other options, as Your Honor is pointing out. We could have come here. Our read of the law, our understanding of what we were doing, made it -- put us in, like I said, put us in the sort of jurisdictional and paradoxical position.

THE COURT: This is your chance to tell me exactly which law you think applies here. What case? What statute?

MR. SBAITI: Your Honor, like I said, I don't have those at the moment.

THE COURT: Why not? Your whole argument rides on this, apparently.

MR. SBAITI: Well, Your Honor, I don't know that our whole argument rides on that.

THE COURT: Okay.

MR. SBAITI: I mean, our argument rides on we don't think we violated the letter of the order. I think that's really what I'm -- what we're here to say, is that we didn't commence a lawsuit and we didn't pursue a claim by filing for leave in the District Court, just like filing for leave in this Court would not be pursuing a claim. It would be filing for leave.

THE COURT: I agree. Filing a motion for leave in

this Court would be exactly what the order contemplated.

MR. SBAITI: I understand, Your Honor.

THE COURT: What you did is not exactly what the order contemplated.

MR. SBAITI: Your Honor, but we're -- we're moving back and forth between two concepts. One, your question is why didn't we file for leave?

THE COURT: Uh-huh.

MR. SBAITI: And the answer to that, I've tried to explain. And if we -- if you'd like us to bring up the case law or to give you a better articulation of our concern, I'm happy to defer to my partner.

What I'm really here to say, Your Honor, is a very simple point, though. Just because we didn't file for leave here and we filed for leave in the District Court doesn't mean we violated your order, and that's the point I'm trying to make, Your Honor. And I think that's the simplest point I can make. Asking the Article III judge for leave to amend, for leave to amend to add Mr. Seery, doesn't violate, facially, at least as we read it, Your Honor's order. It's not commencing a suit and it's not -- it's not pursuing a claim against him. It's all preliminary to pursuing a claim against him, because a claim hasn't even been filed.

The judge could have -- the judge could have -- the District Court could have denied it, the District Court could

have referred it down here, the District Court could have decided part of it and then asked Your Honor to rule on some portion of it. There are innumerable ways that could have gone. That fork -- those forks in the road is precisely why we say this is not pursuing the claim. Otherwise, where does it stop?

Does pursuing a claim happen just when we file the motion for leave? Why didn't it happen when we started the investigation? If pursuing a claim means having the intent and taking steps towards eventually filing a lawsuit, that's the point that I'm making that it is infinitely regressive, and that's exactly what Mr. Morris argued to you.

He said Mr. Dondero, by merely speaking to me, is pursuing a claim and that violates your order. Speaking to me. Even if we had never filed it. Speaking is pursuing a claim.

THE COURT: I don't agree with that, for what it's worth.

MR. SBAITI: Okay. But that was his argument. I'm just responding to it.

THE COURT: Okay.

MR. SBAITI: And if that's not pursuing a claim, filing a motion for leave likewise wouldn't be pursuing a claim. I understand it's an official act in a court, but we did it in a Court that is an adjutant to this Court. This Court is an adjutant to that Court. It's the Court with

original jurisdiction over the matter. So we didn't go to New York. We didn't go to the state court in New York where I learned Mr. Seery lives. We came to the Northern District of Texas, understanding that this Court and this Court's orders had to be -- had to be addressed. And that's the very first thing we did. We asked the Court to address it.

That judge could either decide to send it down here, which is normally what I think -- what we understood would happen. So it's not like we were avoiding it. But we wanted to invoke the jurisdiction which we, as the Plaintiff, we believe we had the right to invoke. We're allowed to choose our forum. So that's the forum we chose for the primary case, which there's not a problem, no one's raised an issue with us filing the underlying lawsuit.

Adding Mr. Seery to that lawsuit and filing a motion for leave in the same court where we actually had the lawsuit, knowing that it might get -- that might get decided or referred in some way, doesn't strike me as being anything improper, because he didn't get sued and we don't know what Judge Boyle would have said had the motion gone forward. And for them to speculate and to say that, well, this is exactly the type of thing you have to protect against, I completely disagree.

The case law that they cited for you on these -- on most of these orders really do discuss the fact that you have

somebody who is actually protecting the underlying property of the Debtor. This claim comes from a complete third party that Mr. Seery himself has admitted under oath he owes a fiduciary duty to. Two third parties. One is an investor of a fund that he manages, and one to a fund that the Debtor, with Mr. Seery as the head of it, was an advisor for up until recently.

Those fiduciary duties exist. We felt like there was a valid claim to be brought against Mr. Seery. And the only reason -- and he says this like it's a negative; I view it as a positive -- the reason he wasn't named is because of Your Honor's orders. And so we asked a Court, the Court with general jurisdiction, to address it for us or to tell us what to do. And I don't see how that is a violation of this Court's order, nor is it contemptuous of this Court's order.

If every time one of these issues came up it was a contempt of the court that appointed a trustee, we'd see a lot more contempt orders.

Interestingly, the cases that were thrown out to you in the opening argument by the other side, for example, *Villages* [sic] *v. Schmidt*, was a trustee case, but not one that involved a sanction. And the trustee case specifically in that case held that the Barton Doctrine didn't have an exception for *Stern* cases, whereas the cases we cited to you, *Anderson*, for example, in the Fifth Circuit, which is 520 F.2d 1027, expressly held that Section 959 is an exception to the

Barton Doctrine.

And my partner, Mr. Bridges, can walk through the issues that we had on the enforceability of the order, but all -- to me, all of that is sort of a secondary issue because, *prima facie*, we didn't violate this order. I understand it may irritate the Debtor and may raise questions about why the motion wasn't filed here versus the District Court. But it was a motion for leave. In order to sanction us, Your Honor would have to find that asking for permission is sanctionable conduct in the gatekeeper order. Even if we ask the wrong court. Simply asking the wrong court is sanctionable, not knowing what that court would have done, not knowing what that court's mindset was, not even having the benefit of the argument. And that's, I guess, where this bottom -- the bottom line is for me.

The evidence that they put on for you, Your Honor. Everything you heard was evidence in the negative. You know, they talk about the transition from Mr. Dondero to Mr. Scott and Mr. Scott to Mr. Patrick, but if you actually look at the evidence he wants you to see and he wants you to rule on, it's the evidence that wasn't there. It's the evidence that Mr. Dondero had no control. In fact, I believe that was the basis he argued for why there should be no privilege. And all he said is that he was promoting it.

But the fact of the matter is, like I said, all of that is

secondary to the core issue that we didn't violate the order. We didn't take steps to violate the order. We took steps to try to not violate the order. And they want you to punish us to send a message. Even used words like the Court needs to enforce its own orders. And he did that as a transition away from the idea that there were no damages, Your Honor, and I think that has implications.

And then he said you have to enforce a meaningful penalty. Well, Your Honor, I don't think that is the purpose of these sanctions. These sanctions are supposed to be remedial, according to the case law, according to the case law that they cite. So a meaningful --

THE COURT: Coercive or remedial.

MR. SBAITI: Sorry?

THE COURT: Coercive or remedial. Civil contempt.

MR. SBAITI: Sure, Your Honor. But usually coercive sanctions require someone to do something or they are sanctioned until they do it.

THE COURT: Coerced compliance. Coerced compliance --

MR. SBAITI: Yes.

THE COURT: -- with an existing order.

MR. SBAITI: Yes.

THE COURT: Uh-huh.

MR. SBAITI: The last thing, he says you have to

protect the estate of the fiduciary and his expectation -- I believe he's talking about Mr. Seery -- his expectation that the Court would be the gatekeeper. And Your Honor, that argument rings a little bit hollow here, given that what they're really saying is that we should have come here first and asked for permission. But that insinuates that, by coming here, the case is dead on arrival, which I don't think is the right argument.

I think the issue for us has been, who do we have to ask and who can we ask to deal with the Court's gatekeeper order? I believe we chose a court, a proper court, a court with jurisdiction, to hear the issue and decide the issue. Your Court's -- Your Honor's indication of the jurisdiction of this Court we believed invoked the District Court's jurisdiction at the same time.

And so the last thing is he said -- the last thing, and getting back to the core issue, is Mr. Morris wants you to believe that we intended to violate the order, and now, as an afterthought, we're using linguistic gymnastics to get around all of that. But it's not linguistic gymnastics. Linguistic gymnastics is saying that pursue means doing anything in pursuit of a claim. That's a little -- I believe that's almost a direct quote. They're chasing the man. Well, that's the infinite regression that I talked about, Your Honor, that it's going to be impossible in any principled way to reconcile

Mr. Morris's or the Debtor's definition of pursue with any logical, reasonable limitation that is readable into the order, Your Honor.

And I'm going to defer to my partner, Mr. Bridges -- oh, go ahead.

THE COURT: I'm going to stop you. I mean, we have the linguistic argument. But how do you respond to this?

MR. SBAITI: Sure.

THE COURT: What if I tell you, in my gut, this appears to be an end run? An end run. I mean, I'm stating something that should be obvious, right? An end run around this Court. This Court spent hours, probably, reading a motion to compromise issues with HarbourVest, issues between the Debtor and HarbourVest. I had objections. An objection from CLO Holdco that was very document-oriented, as I recall. Right of first refusal. HarbourVest can't transfer its 49.98 percent interest in HCLOF, right? Talk about alphabet soup. We definitely have it.

MR. SBAITI: Yes.

THE COURT: Without giving CLO Holdco the first right to buy those assets. Read pleadings. Law clerk and I stay up late. And then, you know, we get to the hearing and there's the withdrawal -- we heard a little bit about that today -- withdrawal of the objection. We kind of confirmed that two or three different ways on the record. And then I remember going

to Mr. Draper, who represents the Dugaboy and Get Good Trusts. You know, are you challenging the legal propriety of doing this? And he backed off any objection.

So the Court ended up having a hearing where we went through what I would call the standard 9019 prove-up, where we looked at was it in the best interest, was it fair and equitable given all the risks, rewards, dah, dah, dah, dah. You know, HarbourVest had initially, you know, started at a $300 million proof of claim, eye-popping, but this all put to bed a very complicated claim.

MR. SBAITI: Yeah.

THE COURT: Tell me something that would make me feel better about what is, in my core, in my gut, that this is just a big, giant end run around the Bankruptcy Court approval of the HarbourVest settlement, which is not on appeal, right? There are a gazillion appeals in this case, but I don't think the HarbourVest --

A VOICE: It is on -- it is on appeal, Your Honor.

THE COURT: Is it? Oh, it is on appeal? Okay. So I may be told --

MR. SBAITI: I didn't know.

THE COURT: I may be told, gosh, you got it wrong, Judge. You know, that happens sometimes.

So, this feels like an end run. You know, the appeal is either going to prevail or not. If it's successful, then, you

know, do you really need this lawsuit? You know, I don't -- okay. Your chance.

MR. SBAITI: Thank you, Your Honor.

THE COURT: Uh-huh.

MS. SBAITI: Your Honor, this wouldn't be the first case where finality or where there was a settlement -- I'm not familiar as well with bankruptcy, but certainly in litigation -- where the settlement then reveals -- well, after a settlement is done, after everyone thinks it's done, some new facts come to light that change people's views about what happened before the settlement or before the resolution. And that's what happened here, Your Honor. This is what we've pled. And this is what we understand.

There were the instances of Mr. Seery's testimony where he testified to the value of the HarbourVest assets. I believe, as I recall, he testified in I believe it's the approval hearing that Your Honor is talking about that the settlement gave HarbourVest a certain amount of claims of I think it's, Series 8 and then Series 9 claims, and that those were discounted to a certain dollar value that he quantified as about $30, $31 million. And the way he ratified and justified the actual settlement value, the actual money or value he was conferring on HarbourVest, given the critique of HarbourVest claims that he was settling, is he explained it this way. He said $22-1/2 million of this whole pot that I'm giving them

pays for the HarbourVest -- HarbourVest's interests in HCLOF -- it's alphabet soup again -- and Highland CLO Funding, Limited. And so it's the other $9 million that's really settling their claims. And given the amount of expense it's going to take, so on and so forth, $9 million seems like a reasonable amount to settle them with, especially since we're just giving them claims.

So that $22-1/2 million everyone apparently took to the bank as being the value, including CLO Holdco at the time, because they didn't have the underlying valuations. Highland was supposed to give the updated valuations.

So, fast-forward a couple of months -- and this is what we've played in our lawsuit, Your Honor; this is why I don't think it's an end run -- we pled in our lawsuit just a couple months later Highland -- I believe some of the people that worked at Highland started leaving, according to some mechanisms that I saw where Highland didn't want to keep all the staff and so the staff was migrated to other places. And one of those gentlemen, I believe Mr. Dondero referred to him as a gentleman named Hunter Covitz, and Hunter Covitz, who's also an investor in HCLOF, he owns a small piece of HCLOF, he had the data, he had some of the information that showed that, actually, in January, when Mr. Seery said that the HarbourVest settlement was worth 22 -- excuse me, the HarbourVest interests in HCLOF were worth $22-1/2 million, that they're

actually worth upwards of $45 million.

And so that information, Your Honor, we believe gives us a different -- a different take on what happened and what was supposed to happen. This is strictly about the lack of transparency.

THE COURT: Okay. Assuming --

MR. SBAITI: Yeah.

THE COURT: -- I buy into your argument that this is newly-discovered evidence --

MR. SBAITI: Yes.

THE COURT: -- CLO Holdco would not have had reason to know -- I guess that's what you're saying, right?

MR. SBAITI: I'm saying they -- they didn't know.

THE COURT: That they didn't know.

MR. SBAITI: Uh-huh.

THE COURT: And didn't have reason to know. I'm trying to figure out who's damaged here.

MR. SBAITI: Well, CLO Holdco, my client, is damaged, Your Honor.

THE COURT: How?

MR. SBAITI: Because one of the aspects of the -- of Highland, one of the issues under, excuse me, of Highland's advisory, is that it has a fiduciary duty. And that fiduciary duty, at least here, entails two, if not, three prongs. The first prong is they have to be transparent. You can't say --

THE COURT: How is -- you know, I know a lot about fiduciary duties, believe it or not. How is CLO Holdco harmed and the DAF harmed?

MR. SBAITI: Because, Your Honor, they lost out on an investment opportunity to buy the piece of -- the HarbourVest piece. They would have been able to go out and raise the money. They had the opportunity --

THE COURT: Okay.

MR. SBAITI: They would have had the opportunity to make a different argument.

THE COURT: What you're saying, you're saying, if they had known what they didn't have reason to know, that it was worth, let's say, $45 million, that they would have gone out and raised money and said, oh, we do want to exercise this right of first refusal that we decided we didn't have and gave in on, we're going to press the issue and then outbid the $22 million, because we know it's worth more? Is that where you're going? I'm trying to figure out where the heck you're going, to be honest.

MR. SBAITI: That's -- Your Honor, I'd push back on a little of the phrasing, only because the way these duties -- the way we understand the SEC's duties work when you're an investment advisor is you have a transparency obligation and an obligation --

THE COURT: Yes. Yes.

MR. SBAITI: -- not to divert these. So, yes, CLO Holdco would have at least had the opportunity and been offered the opportunity, which it could have taken advantage of, to, if the assets were really on the block for $22-1/2 million, they should have been able to buy their percentage pro rata share of that $22-1/2 million deal. I mean, in a nutshell, that's -- that's where we believe we've been harmed. And we believe that the obfuscation of those values and, to a certain extent, the misrepresentation of those values in the settlement is not cleansable by the argument, well, you should have asked.

Well, you should have asked is fine in normal litigation, but when the person you should have asked actually owes you a positive duty to inform, we believe that the should-have-asked piece doesn't really apply and there's -- and that's, that's the basis of our case.

So it's not an end run around the settlement, Your Honor. I think I opened with we're not trying to undo the settlement. We're not saying HarbourVest has to take its interest back. We're not saying the settlement has to go on. We're not even saying any of the things that happened in Bankruptcy Court need to change. But Section 959 is pretty clear that this is management of third-party property --

THE COURT: I guess -- okay. Again, rabbit trail, maybe. But CLO Holdco still owns its same 49.02 percent

interest that it did before this transaction. So if there's value galore in HCLOF, it still has its 49.02 percent interest. What am I missing?

MR. SBAITI: Oh, I think Your Honor's assuming that HCLOF bought the piece back from HarbourVest. It didn't.

THE COURT: No, I'm not.

MR. SBAITI: Oh.

THE COURT: I'm not assuming that.

MR. SBAITI: Well, --

THE COURT: I know that now the Debtor has, what, fifty point, you know, five percent of HCLOF, whereas it only had, you know, a fraction.

MR. SBAITI: Point six-ish. Yeah.

THE COURT: Point six-ish, and HarbourVest had 49.98.

MR. SBAITI: Right.

THE COURT: So, again, please educate me. I'm really trying to figure out how this lawsuit isn't just some crazy end run around a settlement I approved. And moreover, what's the damages?

MR. SBAITI: Well, Your Honor, --

THE COURT: What's the damages? CLO Holdco still has its 49.02 percent interest in HCLOF.

MR. SBAITI: Your Honor, again, --

THE COURT: What am I missing? I must be missing something.

MR. SBAITI: I think so, Your Honor.

THE COURT: What?

MR. SBAITI: The damages is the lost opportunity, the lost opportunity to own more of HCLOF.

THE COURT: Oh, it could have owned the whole darn thing?

MR. SBAITI: I could have owned 90 -- whatever 49 plus 49.98, 98.98 percent.

THE COURT: But --

MS. SBAITI: Or some pro rata portion.

THE COURT: But Mr. Seery had some information that you think he was holding back from CLO Holdco that CLO Holdco had no reason to know?

MR. SBAITI: Yes, Your Honor. The -- the -- what he testified to that the value of those assets, excuse me, the value of the HarbourVest interests in HCLOF or its share of the underlying assets being $22-1/2 million was either, one, intentionally obfuscated, or, two, and I don't think this excuses it at all, he simply used ancient data and simply never updated himself, not for the Court and not for any representations to the investors, who he himself testified under oath in this Court that he has a fiduciary duty to under the Investment Advisers Act.

THE COURT: This could get very --

MR. SBAITI: So that's injury to my client, Your

Honor.

THE COURT: This could get really dangerous. Maybe --

MR. SBAITI: I'm sorry.

THE COURT: This could get really dangerous. Maybe I should cut off where I'm going on this.

MR. SBAITI: Okay.

THE COURT: Of course, someone dangled it out there in a pleading. You know where I'm going, right?

MR. SBAITI: I'm not sure I do, Your Honor.

THE COURT: Hmm. I do read the newspaper, but someone put it in a pleading. HCLOF owns MGM stock, right? Is that what this is all about? Is that what this is all about? Or shall we not do this on the record?

MR. SBAITI: Well, Your Honor, this has nothing -- I don't -- I don't think this has anything to do with the MGM stock one way or the other.

THE COURT: You don't? OH?

MR. SBAITI: Your Honor, my charge as a counsel for the DAF is pretty straightforward. We looked at the claims. We looked at the newly-discovered information. We talked to the people who had it, Your Honor. That was our investigation. We put together a complaint. We believed that we had a good basis to file suit, despite Your Honor's -- the settlement approval. We expressly, because we understand how

finality is so critical in a bankruptcy context, we expressly didn't ask for rescission. We expressly didn't ask for anything that would undo the settlement.

Asking for damages because of how the settlement happened, through no fault of the Court's, of course, but asking for damages is not, at least not as I see it, an end run around the Court's settlement, and it's a legitimate claim. And I don't think this is far from the first time that new evidence has come up that's allowed someone to question how something was done that actually -- that actually damaged them.

THE COURT: Usually, they come in for a motion to reopen evidence to the court who issued the order approving the settlement.

MR. SBAITI: Well, Your Honor, I mean, that's --

THE COURT: Newly-discovered evidence.

MR. SBAITI: That would be the case in a final judgment, Your Honor. But, you know, our understanding of the way the settlement worked was that that was not necessarily going to be -- not the direction anybody wanted to go, but seeking damages on a straight claim for damages, which we're allowed to seek, which I think is our prerogative to seek, we went that direction.

THE COURT: Okay. Okay.

MR. SBAITI: But this --

THE COURT: My last question.

MR. SBAITI: Yes, Your Honor.

THE COURT: Again, I have to know. You have filed some sort of pleading to reopen litigation against Acis in New York? I'm only asking this because it's part of what's going on here. What is going on here?

MR. SBAITI: Your Honor, that's a -- that's a separate lawsuit, and it's not to reopen litigation against Acis. It deals with post-plan confirmation mismanagement by Acis.

THE COURT: Oh, okay. Okay.

MR. SBAITI: Yeah.

THE COURT: All right.

MR. SBAITI: But I believe there's a motion in front of Your Honor, just to -- that gave notice that the suit was filed, but I believe Mr. -- well, a bankruptcy lawyer filed it. I don't know.

THE COURT: A motion or a notice? I don't know.

MR. SBAITI: I don't know, Your Honor. That's above my paygrade.

THE COURT: I have not seen it. Okay?

MR. SBAITI: Okay.

THE COURT: Maybe it's there, but no one has called it to my attention.

MR. SBAITI: With the Court's permission, I'm going to yield time to Mr. Bridges.

THE COURT: Okay. Mr. Bridges?

CLOSING ARGUMENT ON BEHALF OF THE RESPONDENTS

MR. BRIDGES: Thank you, Your Honor. I'm grateful that you asked most of those questions to Mr. Sbaiti. I would not have been able to answer them. The one I can answer is the one about judicial estoppel. Apparently, I did a pretty lousy job earlier. I think I'm prepared to do a better job now.

The case law I'd like to refer you to is the Texas Supreme Court's 2009 decision in *Ferguson v. Building Materials*, 295 S.W.3d 642. And this was my concern and my issue, perhaps because I used to teach it and so it was at the front of my mind. But contrary to what you would think and what you said earlier, it's not your ruling against us that would create a judicial estoppel problem. It's if you ruled in our favor. And I know that seems weird. Let me explain.

The two things that have to take place for there to be judicial estoppel are, first, successfully maintaining a position in one proceeding, and then taking an inconsistent position in another. And Your Honor, what we talked about earlier is the notion that your July order forecloses the key claim that Mr. Sbaiti was just describing, that Mr. Seery should have known. Not that he was grossly negligent or did intentional wrong, but that he breached fiduciary duties because he should have known and should have disclosed.

And if your order forecloses that and we come and convince you that we nonetheless have colorable claims, colorable claims of gross negligence or willful wrongdoing, that we ultimately are unable to prove, our lawsuit could fail, even though we had proved -- in the lawsuit we had proved he should have known and that he breached fiduciary duties, but we would be estopped, having succeeded from coming here and asking in compliance with the order and its colorability rule, that we would be estopped from then saying that this Court lacked the authority to have issued that order in the first place, to have released the claim on the mere breach of fiduciary duty or ordinary negligence. That's the inconsistency that I was concerned about.

By coming here rather than trying to make our objection and our position known without submitting to the foreclosure of that claim that is, in many ways, the most important, the headliner from our District Court complaint, is the concern, Your Honor. And frankly, if Your Honor's order does foreclose that, then we're in serious trouble. That's the claim that we're trying to preserve.

But Your Honor, I don't think it was in anyone's contemplation in July of 2000 that what that order would do is terminate -- 2020; sorry, Your Honor -- in July of 2020, that that order would terminate future claims that might arise based on future conduct that had not yet happened in Mr.

Seery's role. Not in his role as a manager of the Debtor's property, but in his role as a registered investment advisor on behalf of his clients and their property. And that is the concern that the judicial estoppel argument is about.

THE COURT: I still don't understand. I'm very well aware of judicial estoppel, the old expression, you can't play fast and loose with the court. Take one position in one court, you're successful, and then take another position in another court. That's the concept.

MR. BRIDGES: Coming here --

THE COURT: How is this judicial estoppel if you had done what I think the order required and asked this Court for leave? What -- and I said fine, you have leave. Where's the judicial estoppel problem?

MR. BRIDGES: If you say fine, you have leave, but that leave is only, as the order states, because we have colorable claims of gross negligence, colorable claims of intentional wrongdoing, what happens to our mere negligence and mere breach of fiduciary duty claims? Are they foreclosed? The order on its face --

THE COURT: Well, I would interpret the order to be yes, and then you could appeal me, and the Court would either say it's too late to appeal that because you didn't appeal it in July 2020, or fine, I'll hear your appeal. Where's the estoppel?

MR. BRIDGES: Your Honor, our claims that this Court lacks the authority either to have made that order in the first place or the jurisdiction to rule on colorability now because of Section -- the mandatory abstention provision, whose section number I've now lost. That if we come to you and ask you to rule on those things, have we not thereby waived on appeal our claim that you couldn't rule in the first place on those things?

That is what our motion for leave in the District Court argues, is that there's -- there are jurisdictional shortcomings with your ability to decide what we're asking that Court to decide. And Your Honor, by coming here first and then appealing, that's what we fear we would have lost. And instead of coming here and appealing, what we -- what we would have done, in the alternative, I guess, would be to come here and ask you not to rule but move to withdraw the reference of our own motion.

That two-step, filing here and filing a motion to withdraw the reference on the thing we filed here, we didn't think was required, nor could we find any case law or rule saying that that was appropriate.

THE COURT: Okay.

MR. BRIDGES: These are not games, Your Honor. We were not trying to play games. We aren't bankruptcy court lawyers. We're not regularly in front of the Bankruptcy

Court. So the notion why didn't we come here first isn't exactly at the top of our mind. The question for trial lawyers typically is, where can we file this, what are the permissible venues, not why don't we come to Bankruptcy Court? Especially when your order appears to say that causes of action that don't rise to the level of gross negligence or intentional wrongdoing are already foreclosed.

Your Honor, the January order, I think I have to just briefly address again, even though I don't understand why it makes a difference. Apparently, counsel thinks it makes a difference because Mr. Dondero apparently supported it in some way. Our position is, for whatever difference it makes, the January versus the July, we don't believe there's anything in the District Court complaint putting at issue Mr. Seery's role as a director, so we don't understand how that order is implicated.

Again, I'm not sure that matters at all. I'm not raising it as a defense. I'm just telling Your Honor this is all about the July order, from our perspective. Certainly, the July order puts his role as a CEO -- certainly, the District Court case puts his role as a CEO at issue, and that's what the July order is about.

Your Honor, the *Applewood* case requires specifics in order to terminate our rights to sue and to bring certain causes of action, and without that kind of specificity, Your Honor, we

believe that that order fails to preclude, fails to have preclusive effect as to these later-arising claims. And we would submit not only that it was not contemplated, but that it was not intended to have that effect, and that even Mr. Seery's testimony suggests that that's not how he understood that order to be effective.

Counsel argued that the Barton Doctrine does apply here and rattled off the names of cases that don't -- to my knowledge, no case, no case that I can find deals with this type of deferential order where someone is asked -- where a court is asked to defer to the business judgment of an entity in approving an appointment, and nonetheless deciding that the Barton Doctrine applies. That's not what *Villegas* holds. That's not what *Espinosa* holds. I don't think *Barton* is applicable in a situation like that. Certainly, it's outside of the context of what *Barton* anticipated itself over a century ago when it was decided.

Your Honor, if we're wrong, please know we're wrong in earnest. These are not games. These are not sneakiness. No such motivation is at issue here. I was hopeful that that would be plain from the text of the motion for leave itself. If it's not, I'd offer this in addition. The docket at the District Court shows that immediately upon filing the motion for leave, a proposed order was filed with it asking to have the proposed complaint deemed filed, which as soon as I saw I

asked us to immediately retract it and to substitute a new proposed order that does not ask for the amended complaint to be deemed filed. That is not what we wanted.

And the fear was what if our motion is granted because the District Court says you have the right, you don't even need leave, but as to the Bankruptcy Court, you're on your own, this is at your own risk, I'm not going to rule on any of the jurisdictional questions that you attempt to raise? We did not want our complaint deemed filed for that reason. What we did want was for a court where we did not risk judicial estoppel to decide whether or not our key claim under the Advisers Act had been foreclosed by your July order, and that was the key and motivating factor.

On top of that, Your Honor, instead of arguing the meaning of the word pursue, let me just say this. We understood pursue in that context to refer to claims or causes of action, not potential, unfiled, unasserted, contemplated claims or causes of action. That until a claim or cause of action is actually asserted in some way, that it can't be pursued, and that the reference here was to two kinds of action, those that had not yet been commenced -- and your order foreclosed the commencing of them without permission -- and those that had been commenced. And your order couldn't foreclose the commencing of them because they hadn't been commenced yet, but your order did foreclose pursuing them.

And that was my reading of what that order said. And it fits with this notion that a claim or cause of action isn't something you're considering or even researching. It didn't dawn on us that researching or talking to a client about a potential claim could violate the order because in some respect that conversation could be in pursuit of the claim.

By the same notion, we didn't think asking a court with original jurisdiction according to Congress, asking a court to decide whether or not we were foreclosed from bringing our claims in a motion for leave was violating your order.

We don't have much else, Your Honor. In terms of the need to enforce compliance with your orders, if we understand them, we sure as heck are going to follow them. And if we've misconstrued the term pursue, I'm certainly very sorry about that.

I appreciate counsel saying he thinks we're probably good people. I did not think what we did was any kind of gross error in judgment. I thought that what we were doing was preserving our clients' rights, going to a court of competent jurisdiction, and asking the question, can we do what we think we ought to be able to do, but is -- frankly, Your Honor, we're a bit confused about because of the order that seems on its face to foreclose the very lawsuit that we think we should be bringing on behalf on this charitable organization that foreclosed it months before the conduct at issue that gave

rise to the complaint. And with that conundrum, knowing what to do was not obvious or easy for the lawyers or for the client who was dependent on his lawyers to give him good, sound advice.

I'm very grateful for you giving us the time and for your very pointed questions. Thank you, Your Honor.

THE COURT: Thank you. All right. Who's next?

CLOSING ARGUMENT ON BEHALF OF MARK PATRICK

MR. ANDERSON: May it please the Court, Michael Anderson on behalf of Mr. Patrick, Mark Patrick.

You know, this is a contempt proceeding. It's very serious. And, you know, my stomach aches for the people here.

THE COURT: Mine does, too, by the way.

MR. ANDERSON: It truly aches.

THE COURT: Uh-huh.

MR. ANDERSON: And I mean what I said when I did opening, when I said we don't need a hearing, an evidentiary hearing. And I still don't believe we did, because it comes down to what does the word pursue mean, because there's already been an acknowledgement --

THE COURT: Do you all want to withdraw all your exhibits? I've got a lot of exhibits that I now need to go through. If I admit them into evidence, I'm going to read them.

MR. ANDERSON: No, I understand.

THE COURT: Uh-huh.

MR. ANDERSON: But it does come down to the word pursue. Counsel has already said commence doesn't do it, and so then it's pursue.

And I could ask Your Honor, what did you mean when you said pursue in the July order, but I'm not going to say that. And I asked my client on the stand, you know, did you pursue a claim or cause of action? And then it was very telling. What happened with counsel? He stood up and objected to me even asking if it was pursued. And it dawned on me, if he's going to object, does pursue have some sort of legal -- that was his objection. It was he objected on legal grounds. Does that have some sort of legal meaning?

This is contempt. You can't be held in contempt unless it is bright-line clear that you have deviated from a standard of conduct and there's no ambiguity. Well, clearly, there is ambiguity, because over on this side of the room we say filing a motion for leave can't be pursue. We can look at the order and we know it doesn't mean pursue because I just heard Your Honor say you should have filed a motion for leave in this Court before doing anything. All right? So if that -- if that is what without the Bankruptcy Court first determining, if that's what the motion for leave is, well, then if we go up to the first sentence, No entity may commence or pursue a claim or cause of action, then it has this, without the

Bankruptcy Court first determining, that means -- if pursue means a motion for leave, if that's what that means, then that order says you can't commence or file a motion for leave before you file a motion for leave. Because that's what it means. If pursue means motion for leave and you've said you should have come here and filed a motion for leave because it says, Debtor, without the Bankruptcy Court first determining that notice that such claim or cause of action represents a colorable claim, and specifically authorizing. The vehicle to do that would be a motion for leave, right? And you can't pursue anything until a motion for leave has been filed.

Now, where was the motion for leave? And I understand, Your Honor, you know, no expert at reading the room, obviously, you're frustrated that the motion for leave was filed in the District Court and not in this Court. But it doesn't change the fact, and neither did any of the evidence, change anything, is what does pursue mean?

And if someone says, well, it's obviously clear it means *x*, well, is it really obviously clear it means filing a motion for leave? Because nobody on my side, when you read it, when you say pursue, can read it that way. And if we're going to have contempt sanctions being posed, and there has to be clear and convincing evidence or beyond reasonable doubt, depending upon, you know, I don't think you have to get to that part, but clear --

THE COURT: This is not criminal contempt.

MR. ANDERSON: Clear and convincing is the civil standard for contempt.

THE COURT: Right.

MR. ANDERSON: And if pursue is open to that much interpretation, it's not the kind of thing that can be held in contempt on. And I understand the frustration. I hear the frustration. I hear counsel talk about that was not their intent when they filed it. You know, I heard Mr. Patrick get up there. I heard counsel say, hey, Mr. Patrick's doing his job, he's a good guy, seems like a good guy. Well, Mr. Patrick's up there. Look, they filed the underlying lawsuit. Nobody -- there's no motion for that in this Court about the underlying lawsuit. It's only about the motion for leave. That's all we're here about.

And so you go to that, and we've heard all these arguments about it, and we've been here almost as long as the motion for leave was actually on file before it was sua sponte dismissed without prejudice.

And so I go back to that and I say that, if pursue means filing a motion for leave, then that order would require an order for anyone to violate -- it would be violated upon the filing of a motion for leave, because you can't pursue something until the Bankruptcy Court has already first determined, after notice, that such claim or cause of action

represents a colorable claim and specifically authorizing the entity to bring such a claim. Because that -- we already know that's a motion for leave in and of itself. Therefore, pursue, just simply filing a motion for leave will put you in that.

But that gets into all these -- we don't need to be having this discussion about, you know, is a motion for leave pursue? Is pursue a motion for leave? I've heard both arguments here. It doesn't justify contempt. And I know -- and so certainly with respect to my side, I, you know -- given that, I would request that the Court deny the request for contempt.

And again, I want to say, too, look, we hear you. Absolutely hear you. Understand the frustration. Totally hear you on that.

I'm going to turn over the balance of my time to Mr. Phillips, --

THE COURT: Okay.

MR. ANDERSON: -- unless you have any questions, Your Honor. I appreciate it.

THE COURT: Okay. I do not.

CLOSING ARGUMENT ON BEHALF OF MARK PATRICK

MR. PHILLIPS: Your Honor, Louis M. Phillips, and I'll be brief. I'm going to try to bring it down to -- I was not involved. We are -- we are here because of the indemnification provisions of CLO Holdco representing Mr.

Patrick individually. My firm was not involved in the litigation. We were hired to represent CLO Holdco and some of the defendants in the UCC litigation, and our role has expanded to do some other stuff, particularly represent Mr. Patrick because of the indemnification provisions of the Holdco entity documents. He's entitled to indemnification and we're providing a defense for him. That's why we're here.

So I come way after the order. We have not been involved in anything. But I think I'm just going to try to distill everything about the order and about the concern and about the litigation, because the Court is asking about is this an end run on the settlement? The Court is also saying, all you had to do was come here first.

But let's look. We're here about one thing, the motion for leave. And as Mr. Anderson pointed out, the commence or pursue a claim, according to the order, commence or pursue can only occur after the Court has authorized the litigation. Okay. So that's what the order says. You can't commence or pursue.

Counsel for the Debtors says, well, it can't be after commencement because you've already commenced the action. So pursue has to mean something before the commencement of the action. It would mean something before the commencement of the action under this order.

But it doesn't mean something before the Court approves

the commencement of the action, because commence or pursue under this order does not occur before the Court has acted. That's the language of the order. It only occurs after the Court has authorized it. That's the context in which commence or pursue exists, after this Court has authorized.

Okay. So it can't be pursuit before the Court has authorized without commencement because it only is triggered by the Court's authorization of the action, which means, before you commence it, actions in time take time, before you commence the action, you have to pursue the action to commence it. But you can't do that until you've approved it. All right?

That's the temporal concern and why we say the motion for leave can't be pursuit of an action under this order. It might be pursuit under another definition or another order. In other words, maybe an order could be issued saying, you can't file a motion for leave in any other court but this one. I don't know whether it'd be a good order, but the order could say that. But when you say all you had to do was file a motion for leave in this Court and everything would be okay, no. The motion for leave is not, under this order, pursuit. Pursuit only occurs under this order after you've done something, after Your Honor has done something.

So if a motion for leave is violative at the District Court, the motion for leave would be violative here, because

it occurs before Your Honor has taken action.

Now, clearly, you want people to ask, but just as clearly, and this was the point of my remarks earlier at the tail-end of opening, just as clearly, I have a question, because frankly, I understand what these guys are saying. These guys haven't really said it. They're a little shame-faced at what these guys are asking. Because what these guys are asking is whether or not an employee Seery, as the CRO -- and we heard, oh, he bargained for it, he wouldn't have done it without getting the order and the protections because -- did he bargain for not having to comply with the Investor Advisory Act? Did he bargain for not having a fiduciary duty to third parties? Because the one thing that Mr. Bridges has been trying to tell you is that, under this order, if it's interpreted one way, you would never authorize a violation of the Investment Advisory Act because it wouldn't necessarily be gross negligence or willful misconduct.

In other words, in employing Seery, did the Debtor go out in this disclosure statement and say, we are advisor to $1.2 billion of third-party money, and guess what, our CRO has no fiduciary duty to you? We have forestalled any claim under the Investment Advisory Act in our employment order. Did that happen?

Because if that happened, I don't know if the Court was really thinking that way, because that -- that can't happen in

a confirmation order before, under the Fifth Circuit authority, after disclosure statement, plan, et cetera, et cetera, because that's a third party release of claims that may -- that haven't occurred yet. You would be releasing because you would be saying you have no right. You have no right. This is not temporal. This is saying you have no right, if it's saying that, to bring an Investment Advisory -- Investment Advisory Act or a Breach of Fiduciary Duty Act that's not gross negligence or willful misconduct forever upon an employment order.

Now, if that's not what it means, then we have another conundrum. The other conundrum -- and I'm new to this, maybe this has been thought out by everybody, but I don't think so. The other conundrum is this order doesn't apply to actions that don't involve willful -- gross negligence or willful misconduct. It only applies to those types of actions. So, frankly, I don't know what the order does.

I think the problem -- I probably shouldn't be the purviewer of who ought to know because my standard's probably really low, given my capacity here. But I'm a guy off the street. Seery gets hired to run the Debtor. Seery testifies and he admits, we've got Investment Advisory Act all over the place. We're making lots of fees out of administering all this third-party money. Do they know? Do they know he's immune? Do the third parties know?

Now, a standard about managing the Debtor? Absolutely. That's just pure D Chapter 11, pure D corporate, pure D standard liability if you're operating an entity. You're not liable for gross negligence or willful misconduct. You're not. And so any claim for damage to the Debtor or to the estate by actions taken in the CRO capacity, absolutely. Absolutely. You don't want a bunch of yoyos suing, you did something against the Debtor and the Debtor is now worth $147 less than it was because you did something, you were negligent and you forgot to put the dog out. No. It's got to be gross negligence or willful misconduct if you are talking about running the Debtor and running the estate.

But that's not what we have here. And you can ask all the questions you want about whether the lawsuit's any good, but that's not what's up before the Court. What's up before the Court is whether filing a motion for leave is contempt. And under this order, you're saying, all you had to do is come here. Well, in one reading of it, you'd have never got relief because you can't bring the kind of action. I foreclosed it by employing Seery. He no longer has a fiduciary duty and is no longer bound by the Investment Advisory Act. Case closed. Get out of here. Unless you can formulate something around so that you can establish gross negligence or willful misconduct, I've done away with all those causes of action.

I don't think that's what happened. And if that's not

what happened, this doesn't apply because it shouldn't apply to third-party actions. It should apply to actions for damage to the estate by creditors of the estate for whom Seery is acting as CRO of the Debtor, who is the -- in possession of the estate. That makes perfect sense. Perfect sense. And nobody would say that you shouldn't have sole authority to determine whether a CRO who's acting for the estate and damages the estate -- because that'd be a claim against the estate. That would be an administrative claim against the estate. That is just hornbook law.

That's the way I see this order. And I admit I didn't write it. I admit I didn't submit it. I admit I didn't litigate it. I admit I'm coming in late. But sometimes maybe a fresh pair of elderly, trifocal-assisted eyes doesn't hurt. Because I will tell you, Judge, on one read this Court says don't bother coming here because you don't have the kind of claim that can be brought, even if you're a third party. And the only way that happens is if Seery's released from any obligation under the Investment Advisory Act, and I think everybody would like to know that. And he can't be sued for breach of fiduciary duty to third parties that he admits he owes. I think people would like to know that.

And if it doesn't, then this is not -- this order is not about that. But the fact -- I've been at this 40 years, and I usually don't want to talk about myself. There's really not a

lot to talk about. But I hear Mr. Morris how he's never done this, he's never done that. I hear this, I'm a good -- you know, whatever. I'm confused. I've been doing this 41 years. Bankruptcy, 39.7. I must be crazy, but that's what I've been doing. And I'm confused because I don't even know if they needed to come here. I don't even know if, had they come here, if they could have even presented an action for gross -- for negligence or breach of fiduciary duty, could have -- gross negligence or willful misconduct? I don't know whether this order just applies to Seery's duties as CRO vis-a-vis creditors of the estate and property of the estate and damage to the estate. Because that's not what we're dealing with here.

The point is, Judge, this is contempt. And I understand Your Honor knows all about contempt. Your Honor knows about *Matter of Hipp*. Your Honor knows about civil contempt authorization for bankruptcy courts. Your Honor knows that you can't operate without the right to impose civil contempt sanctions. And Your Honor knows, and I agree with Your Honor, that civil contempt is both remedial and coercive.

But how do you coerce around my questions? Maybe I am all wet, but if I am, I don't think I am, and I don't understand that I am, and that's why I'm concerned about going off into this contempt wilderness and millions in fees, when the motion for leave was dismissed and when the lawsuit doesn't ask for

or includes most of its claims. I don't even -- I have not studied the lawsuit. I wasn't involved in it. But if it's a breach of fiduciary duty and Advisory Act and it says what you've been told it says, that he should have pulled up different stuff, that the valuation metrics were different, that he shouldn't have used it, I don't know that they're saying fraud. I don't know that they're saying he knew he was doing -- I think they're saying he breached the Investment Advisory Act. And that's not gross negligence or willful misconduct. Then does this order apply or this order -- does this order foreclose that?

The fact is, I think we could have decided this on the pleadings and on the order. We didn't. The fact that Mr. Dondero did A, B, C. And I will tell you this. Mr. Patrick has stood up. He's going to get a harpoon, he's going to get a harpoon, subject to his right to appeal. But he has told this Court. We represent him. We're not trying to get him out of having authorized the order. It's very important for this Court to understand. Mr. Patrick is one of these entities. Mr. Dondero can holler and scream all he wants to. Mr. -- and look, did he terminate Grant Scott? If I'm Grant Scott, and this is my best friend and I was in his wedding and I was his roommate and I was his best friend and I'm doing this stuff for $5,000 and I do something and $5,000 a month and I do something and I get hollered at and I've got a full a

law practice, I'm an IP lawyer, why don't I just tell him to go jump in a lake, which is the other way you could look at Grant Scott leaving. I want you to jump in a lake. I'm out of here. I don't need this.

Thank you.

THE COURT: All right. Thank you.

MR. DEMO: Your Honor, how much time do they have left, --

THE COURT: Um, --

MR. DEMO: -- to be honest?

THE COURT: Nate, are you -- 26 minutes? All right.

MR. TAYLOR: I'll go way under, Your Honor.

THE COURT: Okay.

CLOSING ARGUMENT ON BEHALF OF JAMES DONDERO

MR. TAYLOR: Your Honor, Clay Taylor. I'm here on behalf of Mr. Dondero. He was named as an individual alleged violator within the order.

THE COURT: Okay. I'm getting lawyers mixed up. Mr. Anderson, who did you represent?

MR. ANDERSON: Mr. Patrick. Mr. Phillips and I represent --

THE COURT: You're Mr. Patrick?

MR. PHILLIPS: We're Mr. Patrick.

THE COURT: You're both --

MR. PHILLIPS: Mr. Patrick.

THE COURT: Okay. I'm sorry. I'm getting my Fort Worth law firms mixed up. Okay.

MR. TAYLOR: That's quite all right. Clay Taylor from Bonds Ellis here on behalf of Mr. Dondero. And we're here because he was named in the alleged violator motion within the order as an alleged violator. We don't think that he is, for the reasons that we're about to explain, but we were ordered to appear --

A VOICE: No.

MR. TAYLOR: -- and so therefore we are appearing and telling you why we're not an alleged violator.

First of all, for all the reasons that Mr. Sbaiti and Mr. Bridges and Mr. Phillips and Mr. Anderson said, the court order was in effect. We agree with that. It required certain conduct to be done. Yes, it did. It said you couldn't commence something. It said you couldn't pursue it. I think we have gone through what the pursuit and commence. Nobody is arguing that anything was commenced. It comes down to pursuit.

But let's talk about what the evidence shows about Mr. Dondero. It shows that Mr. Dondero believes that there have been breaches of fiduciary duty. He thinks that there has been negligence committed. He believes that actions should be taken. We don't run away from that. He, frankly, told you that.

But here, he didn't take any action to pursue it. The DAF did. CLO Holdco did. It's undisputed that he's not an officer, director, or control person for either of those entities. The act we're here on is a motion for leave to file an amended complaint to include Mr. Seery. That's -- Mr. Dondero didn't take any of those acts. He believes it should have been done, but he's not the authorizing person.

He might have -- let's just pretend that he thought he was authorizing something. It doesn't matter that he thought he could authorize something or that he was trying to push for it. The fact remains he can't authorize it. You know, he can say, I declare war on Afghanistan. Well, he can't. Congress can't. He can write a letter to his Congressman. He already wrote a letter to his Congressman. He talked. He talked with the head of the acting CLO -- CLO Holdco and he said, I think there's something wrong here. I think you should be looking into it. You know what, he goes, you might be right. Go talk with Mazin about it. Give him some data. Conduct an investigation. They did. And then they went to the authorizing person and they filed a motion for leave to include Mr. Seery. Mr. Dondero did nothing wrong in that.

Now, there is some personal animosity. I think that Your Honor has probably seen there seems to be some personal animosity between Mr. Seery and Mr. Dondero, and that's unfortunate. But just because there's some personal animosity

doesn't mean that maybe something wasn't done wrong. Maybe that Mr. Dondero -- he's certainly allowed to at least tell people, well, I think there was something done wrong. And if there is an action to be had, then those appropriate entities can take it. But he didn't do those things.

And so even if he says, just like Michael Scott, "I declare bankruptcy," it doesn't matter. You have to take the certain actions.

THE COURT: I got it. I don't know if everyone did.

MR. TAYLOR: Yes, well, yeah, you have to be a *The Office* fan.

But so that's where we stand. And for all the reasons the prior people have discussed, I don't think that there was any violation of this Court's order. But even if there was, Mr. Dondero in this situation was not the one. We're going to have to deal with the other order that came out yesterday in due course, but for this discrete issue that is before this Court today, Mr. Dondero didn't violate anything.

Thank you.

THE COURT: All right. Mr. Morris, you get the last word.

REBUTTAL CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. MORRIS: Thank you, Your Honor. These are going to be discrete points because it's truly rebuttal. I'm going to try to respond to certain points.

Mr. Bridges and Mr. Phillips made extensive arguments about why they believe the order is wrong, why it's overreaching. They tried to get into your head to think about what you intended or what you thought. The fact of the matter is, the answer to all of those questions -- first of all, none of it's relevant to this motion because we've got the order -- but the answer is very simple. Forget about coming here to seek leave to amend to add Mr. Seery. We can avoid Mr. Sbaiti's concerns about judicial estoppel or something. Why didn't they just file the motion for reconsideration? They filed that after they filed the motion for leave to amend, after we filed the motion for contempt. Only then did they file the motion for reconsideration.

Now, we think it's ill-thought-out. We think it's problematic. Probably not today, is my guess, we'll argue to you as to why we think that motion ought to be denied. But if they truly believed that the order was infirm in any way, wouldn't the proper thing to have been to come here and tell you that? Wouldn't the proper thing to be to come to the court that issued the order that you have a problem with and ask the court to review it again? And if Your Honor overruled the motion, to appeal it.

Why are we even doing this? Why did they do it? It's not we. Why did they do it? Right? And that solves almost everything they've said. That's point one.

Point two, the January order. The January order is very important. It's important not just because it applies to directors, but it's important because Mr. Dondero agreed to it, and it also applies -- I want to get it -- Paragraph 10. It's Exhibit 15. It applies to the independent directors and the independents directors' agents. If a CEO is not an agent of an independent director, I'm not sure what is. The independent directors are the body that appointed the CEO. The CEO, Mr. Seery, is acting on behalf of the board. This is the order that Mr. Dondero agreed to. It's the order -- take out the word independent director; put in Mr. Seery -- it's the order everybody's complaining about. But even the January order certainly applied to Mr. Seery. That's point two.

Point three. I've heard a lot of concerns about the slippery slope and what does pursuit mean and does talking to a lawyer mean pursuit and doing an investigation being pursuit. I don't know, Your Honor, and I don't care, because that's not what we're here to talk about. We're here to talk about a specific act -- not a hypothetical, not a slippery slope. We're talking about the filing of a motion for leave to amend a complaint to add Mr. Seery as a defendant. That's all we're talking about. So, you know, the rest of it, it's just noise. And the only question is whether, and I think it's pretty clear, that means pursuit.

Another version on the theme of was there any alternative

to filing the motion in the District Court, I think there was. The Sbaiti firm did file that suit against Acis in New York. And if Your Honor checks the docket in the Acis bankruptcy, I think you'll find that there's a motion from Mr. Rukavina, for a comfort order, basically, saying that -- asking the court to declare that the filing of the complaint in New York against Acis didn't violate the plan injunction. I think I have that right.

But I point that out, Your Honor -- it's not evidence in the record, but the Court can certainly take judicial notice of what's on its docket -- I point that out because there's another example of a lawyer who is very active in this case who actually -- now, he already commenced the suit, so he did -- they did both simultaneously, so I don't want to suggest that that's the perfect thing to have done, but at least he's here asking for -- he's bringing it to your attention, he's telling you it's happened, he's asking for a comfort order, and someday Your Honor may rule on it. I don't know.

Number six, what's with the pursuit of Mr. Seery? What is with the pursuit of Mr. Seery? Is there any doubt in anybody's mind that the Debtor is going to have to indemnify Mr. Seery and will bring in another law firm? And while I don't think it will ever happen in a hundred billion years, if there is a judgment against Mr. Seery, isn't that going to be the Debtor's responsibility? Why are they even bothering to

do this? I think it's a fair question for the Court to ask.

I think Mr. Taylor came up and talked about animosity. How do you explain going after Jim Seery? How do you do it? He's going to be indemnified. It's in -- it's in like three different orders. It's in the confirmation order. It's in the CEO order. It's -- it's probably as a matter of law. It's in the Strand partnership agreement. It's -- he's been indemnified like 12 different times. What is the purpose, other than to make Mr. Seery's life miserable? There is none. You'll never hear a rational explanation for why they're doing this.

THE COURT: Just so you know, I've not looked at any of the pleadings in the District Court --

MR. MORRIS: And I'm not asking you to.

THE COURT: -- other than what has been presented to me today.

MR. MORRIS: Yeah. That's fine, Your Honor.

THE COURT: But I'm very flipped out about the causes of action against the Debtor, --

MR. MORRIS: Yeah.

THE COURT: -- who hasn't reached an effective date.

MR. MORRIS: Well, --

THE COURT: And I'm most interested to know what the defenses, motions --

MR. MORRIS: We'll get to that.

THE COURT: -- are going to be raised in that regard.

MR. MORRIS: We will get to that in due course.

I do want to point out, just to be clear, because we keep hearing that they learned about, you know, all of these horrible things after the fact. In the complaint, which I think is Exhibit 12, --

THE COURT: I'm there.

MR. MORRIS: -- at Paragraph 127, the Plaintiffs allege, "Mr. Seery was informed in late December 2020 at an in-person meeting in Dallas, to which Mr. Seery had to fly, that HCO" -- excuse me "HCLF and HCM had to suspend trading in MGM Studios' securities because Seery had learned from James Dondero, who was on the board, of a potential purchase of the company. The news of the MGM purchase should have caused Seery to revalue."

I cannot begin to tell you the problems with that paragraph. We're not going to discuss them today. I made a promise to these folks that we wouldn't get into the merits of the complaint. But Your Honor was onto something before, and those issues, you know, may see the light of day one day. And if they do, folks are going to have to deal with it. But I will point out that at the time the communication was made, the other TRO was in effect. We didn't bring that one to the Court's attention. But the important point there, Your Honor, is December 2020. It is December 2020. That is the

allegation that's being made against Mr. Seery. And the fact of the matter is, because I've done the research myself, the Court will find that on December 23rd, the day the HarbourVest settlement motion was filed, it was fully public knowledge that Amazon and Apple, I think, had shut down negotiations with MGM at that time. Right? So the big secret information, it was in the public domain on December 23rd.

There will also never be any evidence ever that Mr. Seery got on a plane and flew to Dallas in December 2020, but that's a minor point.

I'd like to just conclude, Your Honor, by saying I've heard pleas that they understand. They understand, Your Honor, now they understand. It would be good if they promised the Court that they won't seek to assert claims against Mr. Seery anywhere but in this Court and comply with the order as it's written. That, that, that would be taking a little bit of responsibility.

I have nothing further, Your Honor.

THE COURT: Okay. Thank you.

All right. Let me give you some clue of when I'm going to be able to rule. I've been glancing at my email in hopes that something set tomorrow would go away, but that's not happening. I've got a hearing that I've been told will take all day tomorrow on a case involving a half-built hotel, luxury hotel in Palm Springs, California. So I have to spend

the next I don't know how long getting ready for that hearing tomorrow, and then I have what looks like a full day of hearings Thursday, including you people coming back on something.

MR. POMERANTZ: Your Honor, I was going to address that. We have Dugaboy's motion to enforce compliance on the 2015(3) reports.

THE COURT: That's what it was.

MR. POMERANTZ: Since we haven't gotten to the motion to modify the Seery order, my suggestion would be we use that time -- of course, Dugaboy, I'm not sure if they're on the phone. They're not here. I'm not sure that's time sensitive. But if Your Honor wanted to have a hearing on that motion, which was contemplated to take place today, the Debtor would be okay having that motion heard on Thursday, perhaps by WebEx, unless Your Honor wants us to stay here, which we would if you do, and then reschedule the 2015(3) motion.

But again, that wasn't my motion. It's Dugaboy's. I'm not sure Mr. Draper is on. But we obviously have some calendar issues.

MR. MORRIS: And Your Honor, just to complete it, I think also on Thursday the Court is supposed to hear HCRE and Highland Capital Management Services motions for leave to amend their complaint in the promissory note litigation against each of them. I think that's also on the calendar for

Thursday. I don't expect that -- I hope that doesn't take very long, but that's also, I believe, on the calendar.

THE COURT: Okay. Mr. Draper, are you out there?

MR. PHILLIPS: I didn't see him on the list, Your Honor. I was just looking. But --

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

MR. PHILLIPS: What is the question? I can send him a text real quick.

THE COURT: Well, just have -- if you all could follow up with Traci Ellison, my courtroom deputy, tomorrow, I am perfectly happy to continue the motion to modify the Seery order to Thursday morning at 9:30 if Draper is willing to continue the 2015 motion.

MR. POMERANTZ: I know, if I was him, my first question would be is what times does the Court have available? We could work that through Ms. Ellison.

THE COURT: Yes. And I'm just letting you know -- talk to her. Okay. Number one, I'll do these by video, okay? WebEx. But I know I don't have any time Wednesday, and Thursday's a busy day.

We have court Friday morning at 9:30 in--?

THE CLERK: Cici's Pizza.

THE COURT: Cici's Pizza? That's not going to take very long, right?

THE CLERK: I don't think so.

THE COURT: I can potentially do something, you know, 10:00 o'clock Friday morning. Other than that, then you've got to wait a while, because I have a seven-day trial, live human beings in the courtroom starting next Monday. And so my point is mainly to tell you, as much as I would like to rule very, very fast, it's going to be, it looks like, a couple of weeks or so before I can give you a ruling on this.

MR. BRIDGES: Your Honor?

THE COURT: Yes?

MR. BRIDGES: May I? It's our motion. I would propose, if counsel would agree, that we just submit it on the papers.

THE COURT: Everybody good with that? I'm certainly good with that.

MR. POMERANTZ: Your Honor, I'd like there to be argument. I have a lengthy argument. I think I'd like to address a number of the things that -- Mr. Bridges made his argument today. Okay?

THE COURT: Okay.

MR. POMERANTZ: His deck, it was entitled, Motion to Modify.

THE COURT: Okay.

MR. POMERANTZ: So that's very nice of him, but I would like to make my argument.

THE COURT: Okay. Let's try to nail this down right

now. Friday at 10:00 o'clock, can we do the oral argument WebEx?

MR. POMERANTZ: On that one, yes, Your Honor.

THE COURT: On that one? Everybody good? Okay. So we'll come back Friday, 10:00 o'clock, WebEx, for that motion.

You know, I'm going to say a couple of things where -- I've leaned toward thinking this is a pretty simple motion before me, the motion for contempt, but when people offer into evidence documents, I read your documents. Okay? That's my duty. And so I have however many exhibits I admitted today that I am going to look at and see how they sway me one way or another on this issue. But I will tell you that my gut is there has been contempt of court. Okay? I don't see anything ambiguous at all about Paragraph 5 of my July 16th, 2020 order. Somebody may think I overreached, but if that was the case, someone should have argued at the time I was overreaching. Someone should have appealed the order. And I think it's a *Shoaf/Espinosa* problem at this point for anyone to argue about the enforceability of that order.

I think there's nothing ambiguous in the wording. Pursue is not ambiguous. There's nothing confusing about the requirement that any entity who wanted to sue or pursue a claim, you know, commence claim, pursue a claim against Mr. Seery, had to come to the Bankruptcy Court. Standard-fare gatekeeping order.

So what I'm going to be looking at is, do these documents I admitted into evidence change my view on that, and then the harder question is who of the alleged contemnors am I going to think it's clear and convincing committed contempt and -- who are the contemnors, and then, of course, what are the damages? Coercive or compensatory damages?

So, again, you know how I feel, to the extent that's helpful in your planning purposes. I'm pretty convinced contempt of court has occurred. It's just a matter of who's a contemnor and what are the damages.

I'll say a couple of remaining things. I continue to be frustrated, I think was the word people used, about unproductive ways we all spend our time. I am going to spend I don't know how many more hours drafting another ruling on a contempt motion, and attorneys' fees are through the roof. And, you know, I dangled out there a question I couldn't resist about MGM.

And I will tell you, I mean, someone mentioned about their stomach aching. Personal story, I could hardly sleep the night it became public about the Amazon purchase, because, silly me, maybe, I'm thinking game-changer. This is such potentially a windfall, an economic windfall. Maybe this could be the impetus to make everyone get in a room and say look, we've got this wonderful windfall of money. I don't know how much is owned directly or indirectly by the Debtor of

MGM stock. I don't know how much the Debtor manages. I don't know how much, you know, some other entity. I know it's probably spread out in many different entities. But I know, I know because I listen, that one or more of the Highland-managed CLOs has some of this, and I think I read -- remember that HCLOF, which now Highland owns more than 50 percent of, has some of this stock. Right?

MR. DONDERO: Do you want to know what happened?

THE COURT: Oh.

A VOICE: No.

THE COURT: Well, okay. So, you know, I can understand I'm getting into maybe uncomfortable territory in a public proceeding, so I'll stop.

But, you know, do we need to set up a status conference? Do you all need to like talk about this? Am I just being naïve? Couldn't this be a game-changer, where maybe it would give new incentive to --

MR. POMERANTZ: Your Honor, I would -- he's been pretty quiet through the whole hearing, Mr. Clemente. He has the Committee, that a couple of people you've heard have sold claims. They're now held by other parties.

You know, the door is always open. I don't think this is going to be game-changer, unfortunately. We would like nothing more, as Debtor's counsel. We don't enjoy coming to Your Honor for contempt hearings.

Mr. Clemente said that it was productive. We would sure participate. But right now, we have creditors who are very angry that millions and millions of dollars have been spent on really a waste of time and a waste of the Court's time and a waste of everyone's time and eating into the creditors' money. So I would ask Mr. Clemente to address that.

MR. CLEMENTE: I'm here.

THE COURT: Yes, he's way in the back, hoping to be ignored.

MR. CLEMENTE: It's too cold, Your Honor, where I was sitting. For the record, Your Honor, --

THE COURT: I noticed some entity called Muck Holdings bought HarbourVest, according to the docket.

MR. CLEMENTE: That's correct. Muck Holdings bought HarbourVest, and I believe also the Acis claim, and then there's a different entity that bought the Redeemer claim.

THE COURT: Uh-huh.

MR. CLEMENTE: So, as we mentioned in our -- one of our pleadings, I think it was the retention pleading for Teneo, the Committee consists of two members currently, Meta-e and UBS.

THE COURT: Uh-huh.

MR. CLEMENTE: Obviously, Your Honor just approved the UBS settlement recently. The U.S. Trustee is aware of the make-up of the Committee, and is currently comfortable with

the Committee maintaining a two-person membership at this point.

In terms of whether the MGM transaction is a game-changer, we've not yet seen, to Your Honor's point, how all of that rolls up through the various interests that the Debtor may or -- you know, may have --

THE COURT: Okay.

MR. CLEMENTE: -- that would be implicated by the MGM transaction. If ultimately the MGM transaction has to actually occur, right? I mean, so, you know, just based on what I read in the public documents, we're not sure when that transaction may actually happen. But obviously it's a good thing for the Debtor's estate because it's going to recognize value for the estate.

In terms of whether it ultimately changes how Mr. Dondero, you know, wishes to proceed, that's entirely up to him, Your Honor. But we don't see it as something at this point that would suggest that there's an overall back to let's talk about a pot plan because of where the MGM transaction might ultimately come out.

So I don't know if that's helpful to Your Honor, but those are -- that's my perspective.

THE COURT: Well, and I'm not trying to, you know, push a pot plan on anyone.

MR. CLEMENTE: No, I understand.

THE COURT: I'm just saying it looked like an economic windfall. I just -- I don't know how much is Highland versus other entities in the so-called byzantine complex, but, gosh, I just hoped that there might be something there to change the dynamic of, you know, lawsuit, lawsuit, lawsuit, lawsuit, motion for contempt, motion for contempt.

MR. CLEMENTE: Agreed, Your Honor.

THE COURT: Uh-huh.

MR. CLEMENTE: And like I said, it was a very positive development obviously for the creditors for the Debtor. But whether it's the game-changer that Your Honor would envision, I'm not sure that I can suggest at this point that it is.

I think that, you know, obviously, we don't like to see these lawsuits continue to be filed. That's the whole point of the gatekeeper order, Your Honor.

THE COURT: Uh-huh.

MR. CLEMENTE: I didn't say anything during the hearing, but obviously the January 9th order, as Your Honor has said many times, was in the context of a trustee being appointed.

THE COURT: Right. Right.

MR. CLEMENTE: Right? So, and the July 16th order, very similar vein, it's an outshoot of that. In fact, it was contemplated in the January 9th settlement that a CEO could be

appointed.

So I think, again, it's just -- it's important, the context in which that January 9th order came into play, for this very reason, so we could avoid this type of litigation, Your Honor.

THE COURT: Uh-huh.

MR. CLEMENTE: And so again, I didn't -- I obviously didn't rise to mention that during the hearing, but Your Honor is already aware of that. I didn't need to remind Your Honor of that.

THE COURT: Uh-huh. Okay.

MR. CLEMENTE: Anything else for me, Your Honor?

THE COURT: No. Thank you.

MR. CLEMENTE: Okay, then, Your Honor.

THE COURT: Sorry I picked on you. But, all right. Well, again, I hope the message has landed in the way I hope will matter, and that is I'm going to look at your documents but I feel very strongly that, unless there's something in there that, whoa, is somehow eye-opening, I'm going to find contempt of court. It's just a matter of who and what the damages are. There's just not a thing in the world ambiguous about Paragraph 5 of the July 9th, 2020 order. So I'll get to it as soon as we humanly can get to it.

Mr. Morris, anything else?

MR. MORRIS: Nothing. No, thank you.

THE COURT: I guess I'll see you Thursday on the WebEx. Thank you.

THE CLERK: All rise.

(Proceedings concluded at 6:00 p.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 **06/09/2021**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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

In Re: Highland Capital Management, L.P.	§	Case No. 19-34054-sgj11
James Dondero et al	§	
Appellant	§	
vs.	§	
Stacey G Jernigan	§	3:21-CV-00879-K
Appellee	§	

[2083] Order denying motion to recuse (related document #2060) Entered on 3/23/2021

APPELLANT SUPPLEMENTAL RECORD
VOLUME 2

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

In re:	§	**Chapter 11**
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**Case No. 19-34054-sgj11**
	§	
Debtor.	§	
In re:	§	
	§	
JAMES DONDERO, *et al.*,	§	
	§	
Appellants,	§	
	§	
v.	§	**Case No. 3:21-cv-00879-K**
	§	
HON. STACEY G. C. JERNIGAN,	§	
	§	
Appellee.	§	

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MOTION FOR LEAVE TO SUPPLEMENT RECORD ON APPEAL

James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware limited liability company (collectively, "*Appellants*") file this Motion for Leave to Supplement Record on Appeal.

MOTION FOR LEAVE TO SUPPLEMENT

As the Court is aware, this is an appeal from the denial of a motion to recuse. The core issues on appeal are: (a) whether "a reasonable man, cognizant of the relevant circumstances surrounding [the Bankruptcy Court's] failure to recuse, would harbor legitimate doubts about that judge's impartiality;"[1] and (b) whether the Bankruptcy Court should be recused from sitting as the judge and jury in the various Adversary Proceedings listed above. Respectfully, Appellants, like

[1] *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir.1999).

every litigant, are entitled to a full and fair opportunity to make their case in a fair and impartial forum.[2] As an appellate court, this court has the discretion to order supplementation of the record on appeal.[3]

Here, Appellants timely filed their notice of appeal, statement of issues and designated the record that existed at that time to show the Bankruptcy Court's bias and prejudice to Appellants. However, since Appellants designated the record, the Bankruptcy Court has taken additional positions that further support a finding that the Court's impartiality is likely to be reasonably questioned. Debtor, who has just now intervened, will not suffer any prejudice, as it is just now preparing its own designation of record.

These hearings show the Bankruptcy Court's continued appearance of bias, lack of impartiality, and establish findings against Appellants that lack any evidence. For example, at one of these hearings the Bankruptcy Court suggested causes of action that the Debtor could bring against Appellants, namely Dondero, if Dondero's defenses were successful and ordering relief that no party had requested.

Appellants respectfully request the Court grant leave to supplement the record, including by adding the following:

Main Case

Vol. 1

000001

000010

Vol 2

000308

Docket No.	Date	Description
2256	4/29/21	Dugaboy Motion to Compel Compliance with Bankruptcy Rule 2015.3
2440	6/10/21	Transcript of hearing held on 6/8/21
2445	6/10/21	Transcript of hearing held on 6/10/21

[2] *Miller v. Sam Houston State Univ.*, 986 F.3d 880, 893 (5th Cir. 2021).
[3] *Huddleston v. Nelson Bunker Hunt Tr. Est.*, 102 B.R. 71, 75 (N.D. Tex. 1989).

Adversary No. 20-03190

Vol. 2

Docket No.	Date	Description	
175	5/10/21	Transcript of hearing on trial docket call and defendant's emergency motion to stay	000399
182	5/18/21	Order Resolving Adversary Proceeding	000454
185	5/21/21	Transcript of Hearing on Ruling Resolving Adversary Proceeding	000459
190	6/7/21	Memorandum Opinion and Order Granting in Part Plaintiff's Contempt Motion	000474

Adversary No. 21-03003

Vol. 3

Docket No.	Date	Description	
21	4/15/21	Defendant's Motion to Withdraw Reference	000529
22	4/15/21	Defendant's Motion to Stay Pending Motion to Withdraw Reference	000549
23	4/15/21	Motion to Expedite Motion to Stay	000558
	4/20/21	Email from courtroom deputy regarding request for expedited hearing on motion to stay	000566
35	5/14/21	Motion to Compel Seery Deposition Testimony (including exhibits)	000569
36	5/14/21	Motion to Expedite Motion to Compel	000586
	5/14/21-5/17/21	Email chain between B Assink to Courtroom deputy re: filing of motion to compel and motion to expedite and setting of hearing on motion to compel, dated 5/14/21 – 5/17/21	000593
	5/14/21-5/18/21	Additional Email chain between B Assink to Courtroom deputy re: filing of motion to compel and motion to expedite and setting of hearing on motion to compel, dated 5/14/21 – 5/18/21	000596
49	5/24/21	Order Denying Motion to Compel	000598
50	5/25/21	Transcript of hearing held on motion to compel on 5/20/21	000600
58	5/27/21	Transcript of hearing held on Motion to Stay and Status Conference on Motion to Withdraw Reference	000686
64	6/4/21	Order Granting In Part James Dondero's Motion to Stay	000772

Adversary No. 20-03195

Vol. 4

Docket No.	Date	Description

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000774
000783
000801
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000975

45	5/19/21	UCC motion to expedite motion to stay
46	5/19/21	UCC motion to stay proceeding for 90 days (as re-filed)
47	5/19/21	Notice of Hearing setting hearing on motion to stay for 5/20/21
48	5/19/21	Order Granting UCC motion to expedite
50	5/19/21	Highland Dallas Foundation and CLO Holdco's Objection to UCC's emergency motion to stay
52	5/20/21	Highland Dallas Foundation and CLO Holdco's W&E List for Hearing on Motion to Stay (with exhibits attached)
54	5/20/21	Court admitted exhibits SEE # 52
57	5/21/21	Post-hearing memorandum suggesting error by the Court
62	5/24/21	Order staying adversary proceeding
65	5/25/21	Transcript of hearing held on UCC's motion to stay on 5/20/21
67	5/27/21	Order addressing post hearing memorandum suggesting error

CONCLUSION

For the foregoing reasons, Appellants respectfully request the Court grant leave to supplement the records and award Appellants such other and further relief to which they may be entitled.

Dated: June 16, 2021

Respectfully submitted,

By: */s/ Michael J. Lang*
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Counsel for Movants

CERTIFICATE OF CONFERENCE

The undersigned certifies that on June 15, 2021, Appellants conferred with opposing counsel who indicated that they are opposed to the relief requested.

/s/ Michael J. Lang
Michael J. Lang

CERTIFICATE OF SERVICE

The undersigned certifies that on June 16, 2021, a true and correct copy of the above and foregoing document was served on all parties of record via the Court's e-filing system.

/s/ Michael J. Lang
Michael J. Lang

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

In Re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	**Case No. 19-34054-sgj-11** Chapter 11 Dallas, Texas Thursday, June 10, 2021 9:30 a.m. Docket MOTION TO COMPEL COMPLIANCE WITH BANKRUPTCY RULE 2015.3 FILED BY GET GOOD TRUST AND THE DUGABOY INVESTMENT TRUST (2256)
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., Defendant.	**Adversary Proceeding 21-3006-sgj** DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND BRIEF IN SUPPORT [15]
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, TO v. HCRE PARTNERS, LLC N/K/A NEXPOINT REAL ESTATE PARTNERS, LLC, Defendant.	**Adversary Proceeding 21-3007-sgj** DEFENDANT'S MOTION FOR LEAVE TO AMEND ANSWER TO PLAINTIFF'S COMPLAINT [16]

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

WEBEX APPEARANCES:

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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

DALLAS, TEXAS - JUNE 10, 2021 - 9:44 A.M.

THE COURT: All right. Let me change my stacks here. I will now hear what was Matter No. 1 on the docket, Highland Capital, Case No. 19-34054. We have a motion from the Dugaboy and Get Good Trusts seeking compliance with Bankruptcy Rule 2015.3.

Who do we have appearing for the trusts this morning?

MR. DRAPER: Douglas Draper, Your Honor.

THE COURT: All right. And for the Debtor this morning?

MR. POMERANTZ: Good morning, Your Honor. Jeffrey Pomerantz; Pachulski Stang Ziehl & Jones; on behalf of the Debtor.

THE COURT: All right. Do we have any other parties wishing to make an appearances? These are the only parties who filed pleadings, but I'll go ahead and ask if anyone wants to appear for any reason.

MR. CLEMENTE: Good morning, Your Honor. It's Matt Clemente at Sidley on behalf of the Committee. I'm here.

THE COURT: All right. Thank you, Mr. Clemente.

All right. Mr. Draper, how did you want to proceed?

MR. DRAPER: I'd just -- I think the issue is primarily a legal issue, Your Honor.

THE COURT: Uh-huh.

MR. DRAPER: So we've filed with the Court our

response to the Debtor's opposition, I have some comments I'd I like to make, and just leave it at that. I think -- as I said, I believe the issue is purely a legal issue --

THE COURT: Uh-huh. Okay.

MR. DRAPER: -- and can go from that.

THE COURT: All right.

MR. DRAPER: All right. We are here -- thank you, Your Honor. Can I start?

THE COURT: Yes, you may.

MR. DRAPER: Thank you. We're here before the Court today on what should be a rather routine matter. All I'm asking the Court to do is to require the Debtor to do what it should have done when the case was filed and is required pursuant to Bankruptcy Rule 2015.3.

2015.3 uses the term "shall" and requires the Debtor to file an official form -- and this is important, because I'm going to come back to the official form -- with respect to the value, operations, and profitability of each entity in which the Debtor has a substantial or controlling interest.

The reports, the Rule says, shall be filed seven days before the first meeting of creditors and every six months thereafter.

Under 2015.3(d), I recognize a court may, after notice and a hearing, modify the reporting requirement. No request has been made by counsel for the Debtor, who I will stipulate

knows the Rules, are experienced, and understand that the rule existed the day they came into the case. And quite frankly, what we have now is, from what I can see, an intentional decision not to file the report.

As the Court knows, this matter was brought before this Court in February, when the confirmation hearing was held. And if the Court will recall, Mr. Seery's comment was (a) it slipped through the cracks; and (b) he implied that it would be done. That was February. I had hoped, and I think everybody had hoped, that Mr. Seery, Highland, and Debtor's counsel would be so embarrassed by the fact that they didn't file [sic] the rule that they would have either (a) filed [sic] the rule; or (b) sought -- sought a waiver of the rule. They did neither.

Now, let's -- let's go through the 2015.3(d). There are two items that are not exclusive, and so I recognize it. The first is that they can't do it, and second is with respect to the information is publicly available. If you look at the cases that the Debtor has cited in support of their position that courts have waived compliance with the rule, you'll note that three of the four cases deal with first day motions when in fact they ask for extensions of time to file their schedule, Statement of Financial Affairs, and other things. These are normal first day motions. I understand the extension in that case. And quite frankly, those extensions

are -- fall into the "I can't do it."

The only excuse the Debtor has offered, other than their response to date, was, oh, I forgot, or it slipped through the cracks. That is not a legitimate excuse. It never has been and never will be, and should not be countenanced by the Court.

And so let's start with the after-the-fact excuses offered by the Debtor. The first is the bad guy defense -- *i.e.*, Dugaboy is a Dondero entity; they're asking for this information for nefarious purposes. That has to -- that should be completely disregarded by the Court. This is a systematic issue that neither you nor I nor the Debtor's counsel put in the Code or put in the Rules. It is a requirement, it's systematic, and we, as counsel and people acting on behalf of the estate and sort of people who oversee the system, should insist that this be filed. The bad guy defense is not an excuse. And quite frankly, this is information that is required.

So what I'm asking for today is not gamesmanship. I don't think it is ever gamesmanship when you ask for the compliance with a rule that says shall. Again, it's systematic, and we are here -- and I don't know why -- either the U.S. Trustee was asleep at the switch or anybody else was asleep at the switch -- that this matter hadn't been brought to the Court's attention.

So the word "shall" is not strained in any fashion. It's not limited in any fashion. The word "shall" is absolute.

So, again, had -- was there some secret deal between the Trustee -- U.S. Trustee and the Debtor? I don't know. That may have been. But quite frankly, --

THE COURT: A secret deal?

MR. DRAPER: -- the Code, in 2015 --

THE COURT: Did you just use the term "a secret deal"?

MR. DRAPER: Well, some --

THE COURT: What --

MR. DRAPER: I'm not using the term. What I --

THE COURT: That's highly charged, that --

MR. DRAPER: No, --

THE COURT: -- choice of words.

MR. DRAPER: What I mean, what I really mean is sometimes we go to the U.S. Trustee and say, look, can we have an extension? Can we have -- can we do this a little bit later? And the U.S. Trustee, in fairness to them, basically says, okay, you can do this or that. I don't know if that occurred in this case. But quite frankly, what we have are 20 months of noncompliance. And so I don't know if they said, look, --

THE COURT: Okay.

MR. DRAPER: -- you don't have to file it now.

THE COURT: So you meant an informal deal, not secret deal?

MR. DRAPER: Yes.

THE COURT: A secret deal, that sounds like something nefarious. Okay? So, --

MR. DRAPER: No, it is not intended in that -- it's --

THE COURT: Okay.

MR. DRAPER: Judge, it's not intended in that fashion.

THE COURT: Okay.

MR. DRAPER: This goes to my issue that it's systematic. It's a systematic compliance.

And let's also go the fact that the Bankruptcy Code requires complete and open disclosure. It does not matter who or why compliance is requested.

The next objection is I waited too long. And they offer an excuse, Judge, we're going to go effective. Let's look at what the Code requires -- the rule requires. It says it shall be filed, it has to be filed at certain points, through the effective date of a plan. It doesn't say after the effective date of a plan is filed or after the effective date of a -- of a plan occurs, your compliance is not required.

And I'll point out something where you ruled against me, and we've contrasted that in our motion -- in our opposition.

If you look at the examiner statute, which I know the Court has looked at and completely disagreed with my reading of it, it basically says after confirmation you don't have to do it. This statute doesn't say that. This statute says you have to file these through the effective date of a plan.

And so, you know, that "You waited too long" is really not a legitimate excuse.

The next issue is -- and --

THE COURT: Well, on that point, --

MR. DRAPER: And let's look at the cases.

THE COURT: On that point, can I just ask, what is the utility? I mean, let's say we're one -- okay. Let's say we're one month away from the effective date. Let's say we're three months away from the effective date. What is the utility at this point? There's a confirmed plan. Now, granted, it's on appeal. But, you know, what -- what would you --

MR. DRAPER: Well, --

THE COURT: What would you do with this information at this point? We have a confirmed plan.

MR. DRAPER: Well, there are two responses to that. First of all, the rule says you have to file it through the effective date of a plan. Somebody in rulemaking authority made that determination. And so it's not for you or I to question. That's the rule.

The second is the utility may be for further actions in the case that occur after the effective date. We just don't know.

And so the rule is designed to require things to be filed --

THE COURT: Wait. What did that last statement mean, --

MR. DRAPER: -- through the effective date.

THE COURT: -- for actions that might occur after the effective date?

MR. DRAPER: It may be --

THE COURT: What does that mean?

MR. DRAPER: After the effective date of a plan. There may be some -- some matter that comes up before the Court. And I'll give you the best example --

THE COURT: Well, --

MR. DRAPER: -- of all of them.

THE COURT: Okay.

MR. DRAPER: If you look -- if you look at the form, all right, and what I'd ask the Court to look at is -- I think it's Exhibit E that's required on the form. And what Exhibit E requires is disclosure of information where one of the subsidiaries has either paid or has decided -- has incurred a liability to somebody who would have an administrative expense against the Debtor.

The utility of that post-effective date is important, because post-effective date you'll be dealing with fee applications and other things. So the rule envisions disclosure --

THE COURT: Okay, I -- say that again for me slowly. How --

MR. DRAPER: Okay.

THE COURT: How could there be an administrative expense --

MR. DRAPER: If you'll --

THE COURT: -- claim against the estate in your scenario, again?

MR. DRAPER: Well, my scenario, if you look at Exhibit E that's required in the form, --

THE COURT: Do I have that, Nate?

MR. DRAPER: -- it basically requires a disclosure.

THE COURT: Okay. I don't know if I have it in my stack of paper. I --

MR. DRAPER: Well, let me read it to -- I can read it to you, Your Honor. It's easy. Let me pull it up.

Exhibit E, "Describe any payment by the controlled nondebtor entity of any claim, administrative expense, or professional fee that have been paid or could be asserted against the Debtor or the incurrence of any obligation to make such payments, together with the reason for the entity's

payment thereof or the incurrence of any obligation with respect thereof."

That is clearly a post-effective date issue that the Court should be concerned about, all parties should be concerned about, and so if that occurred, then everybody needs to know about it.

So E envisions something that is absolutely after the effective date that will be -- has a utility after the effective date.

Let's look at B. Again, something that may have something to do with after the effective date. That deals with tax-sharing agreements and tax-sharing attributes.

So -- and then C, which also has something to do with after the effective date and how things sort out through the liquidation, is described claims between controlled debtor, controlled nondebtor entity and any other controlled nondebtor entity.

So there needs to be a disclosure of due-to's and due-from's between the entities. This is -- this is not secret stuff. This is stuff that transcends the effective date of a plan.

And so when I focused on the rule, what I think the Court really needs to look at for the utility of this is exactly what the -- is required by a 2015.3 disclosure.

Does that answer the Court's question?

THE COURT: Yes.

MR. DRAPER: Now, my favorite excuse that's been offered is really what I'll call the secret sauce dispute -- excuse, or the former lawyers for the Debtor. Again, let's break this down and let's look at the form.

What the form requires is there's nothing the Debtor's former lawyers did or who were working for Mr. Dondero. If you look at Exhibit A that's required, is contains the most readily-available balance sheet. That's not a legal issue. Statement of income or loss. That's -- that's just an accounting concept. Statement of cash flows. That's also an accounting concept. And statement of changes in shareholders or partners equity for the period covered by the entire report.

B again has nothing to do with the lawyers, is describe the controlled nondebtor business entity's business operations.

So the information that's here is purely accounting information and it is not secret.

Let's, again, let's focus on A, which -- which I think just deals with financial information. The first one is balance sheet. All right. They've argued that this tells what the value -- what we think the value of an asset is. That's not true. A balance sheet may have a fair market value. A balance sheet may have a book value. I don't know

what they have here. But quite frankly, if you or I sell my house, our house, we go to our agent and we say, hey, look, agent, you know, this is my listing price. That's my opinion as to value. It may not be somebody else's opinion as to value. And quite frankly, when somebody asks or wants to buy an asset, what they come to, don't they ask, hey, what do you want for it?

You know, book value does not equal value. And I know the Court has held -- has had before it many clients or many debtors, and I've represented a lot of debtors, who think a Bic pen that they have is not worth ten cents but is worth a gazillion dollars.

So that issue doesn't go to any secret information. The statement of income doesn't go to secret information. Statement of cash flows does not. And changes in shareholders does not. There's no secret information. The only person who this may be kept away from, possibly, and that -- that, I don't think applies, is a competitor who may want to look at these. And a court can fashion that relief and say, okay, let's put this under seal. If somebody signs a confidentiality agreement, they can have access to this.

But this is purely accounting information. It's nothing more.

And the reference to trade secrets that the Debtor attempts to make is just not true. This is not a trade

secret. There's no confidential research or development or commercial information that's being disclosed. And 9018 that they cite is truly an evidentiary rule. We're not -- this -- this requirement does not go to customers. It does not go to pricing. It does not go to business processes. It just goes to financial information.

So the global argument that they're making is undercut significantly by the -- by what is required under the rule. I'm just asking for mere compliance with the rule, nothing more.

And so, you know, what -- I still don't understand what the issue is, why it hadn't been done. And quite frankly, again, this is systematic. It has nothing to do with who is requesting it, what is requesting it. It should have been done. It should have been done probably by the U.S. Trustee. You know, somebody -- you know, and quite frankly, I've been in this case since December. It was raised in February. You know, I don't understand why, from February to the time I filed this motion, they didn't come in and either (a) file the reports, which on their face appear to be benign; or (b) ask for some reason other than, oops, I forgot.

And so I'd ask the Court to require compliance. I don't think the information here falls into any category of for cause. They can do it. This -- and the cases -- any case they cite does not support their proposition that it shouldn't

be done.

Does the Court have any questions for me?

THE COURT: Well, I do. My brain just constantly goes to standing. And remind me again, the trusts you represent have each filed proofs of claim, correct?

MR. DRAPER: Yes. And they're objected to, --

THE COURT: They are objected to.

MR. DRAPER: -- just so the Court's aware.

THE COURT: Okay. Remind me again what the substance of the claim is about.

MR. DRAPER: The substance of the claim is I have a -- I have a $17 million debt owed to me by Highland Select. And it is our position that this Debtor is also liable for the Highland Select debts through its general partner status, through its comingling of things, and how these assets fit together, between Highland Select, which is a hundred percent owned by the -- ultimately owned by this Debtor. So I'd -- again, the standing issue --

THE COURT: And the debt is --

MR. DRAPER: And I am also an equity holder.

THE COURT: And the debt is pursuant to a note?

MR. DRAPER: It's pursuant to a loan agreement between my client and Highland Select.

THE COURT: All right. And was an administrative expense filed by your client?

MR. DRAPER: Not by my client. No. And I'm also an equity holder in the Debtor that, when the plan goes effective, I ultimately have, at best, a residual interest when the Star Trek Enterprise returns.

THE COURT: Okay. And what is that residual interest? Remind me again. Isn't it less than one percent --

MR. DRAPER: After the --

THE COURT: -- of a subordinated --

MR. DRAPER: After all the class --

THE COURT: Go ahead.

MR. DRAPER: Right. Well, after all the classes are paid in full plus a hundred cents on the dollar -- get a hundred cents on the dollar plus some interest factor, and the -- there's another party who has an equity interest that's ahead of me get paid, I get some -- some money.

Again, I have a residual interest. It's very tangential. And I'll be very frank to the Court and honest, I think ultimately I will receive nothing under that residual interest.

However, my -- the standing is not really an issue here. Honestly, this is a systematic issue. I've tried to make that clear for the Court. It's something that should be employed, and who is asking for it is irrelevant. The Code requires -- the Rules require it. There is no excuse that they've given that should absolve them of that. And whatever excuse they've

given basically falls in -- falls in the face of what the rule -- the official form requires.

I'm not asking for a variance of the official form. I'm asking that this Court not allow a "Oops, I forgot" or "It slipped through the cracks" excuse.

THE COURT: All right. And who is the current trustee of these trusts now?

MR. DRAPER: My trusts? Nancy Dondero is the trustee of the Dugaboy Trust, and I think Grant Scott is the trustee of the Get Good Trust.

THE COURT: Okay. I'm asking because we heard earlier this week that Grant Scott has resigned from certain roles.

All right. Mr. Pomerantz, do you have evidence, --

MR. POMERANTZ: Yes, Your Honor.

THE COURT: -- or argument only?

MR. POMERANTZ: Argument only, Your Honor.

THE COURT: Okay.

MR. POMERANTZ: As with -- as with many of the other motions that have been filed with this -- in this case and has burdened the Court's docket over the last several months, I really can't help to wonder why we are here.

Eighteen months after the case was filed, after plan confirmation, and with the effective date that's set to occur soon, Dugaboy and Get Good, the family trusts, ask the Court

to compel the Debtor's compliance with 2015.3. It reminds me of the motion that Mr. Draper mentioned that he filed on the eve of confirmation, the eve of confirmation, fourteen months after the case had been filed, seeking an examiner. And the Court denied that motion without a hearing.

Now they're back again with, as Your Honor mentioned and I'll get to in a little bit, with the same tangential connection to the bankruptcy case and the same tenuous standing that the Court has alluded to on several occasions, including just a couple minutes ago.

It's clear that the motion, which is not supported by any other creditor in the case and is actually opposed by the Official Unsecured Creditors' Committee, is not about financial transparency, as Mr. Draper would like Your Honor to believe, but it's filed as a further litigation tactic to gain access to information that Mr. Dondero would not be able to obtain through discovery, who has tried to obtain through other means, and that the Debtor believes will be used for improper purposes.

One of the Movants, Dugaboy, is actually the holder of two claims against the Debtor. I guess Mr. Draper forgot about his administrative claim, which really goes to the validity of it. One is the claim against the Select Fund, a subsidiary of the Debtor, for which Mr. Draper says they should be liable, including under an alter ego theory.

Yes, Your Honor heard me right. Dugaboy is saying that the Debtor is an alter ego with a nondebtor entity. One would think that, given the recent disclosures and commencement of litigation -- and I'm talking about the UBS litigation -- that Mr. Dondero would be the last one to raise alter ego. In any event, that claim is disputed.

The second claim is an administrative claim that Mr. Draper filed on account of their 1.71 percent interest in Multistrat, saying they were damaged by decisions Mr. Seery made by selling certain life insurance policies in the spring of 2020.

There is a theme here, Your Honor: Claims that Mr. Seery made decisions that harmed -- in this case -- Dugaboy's 1.71 percent interest.

The claim has no merit. The Debtor will contest it. But even if it was allowed, the claim would be paid a hundred cents on the dollar under the plan. And accordingly, the information under 2015.3 is not relevant.

Get Good filed a claim which alleges they may have a claim from its limited partnership interest in the Debtor. But for the record, Get Good is not a limited partner of the Debtor.

So, how did we get here, Your Honor? The Dondero entities sandbagged the Debtor by raising the issue for the first time during the confirmation trial. Not in their briefs, not in communications to the Debtor in advance of the confirmation,

but while the Debtor had its witness on the stand.

And why did they do it that way? Because they wanted to be able to argue, and they did argue to Your Honor, that the Court couldn't confirm the plan because the Debtor did not comply with Rule 2015.3, was in violation of 1129(a)(2), and the Court could not confirm the plan.

Of course, the Court rejected that argument. And when the Debtor entity -- when the Dondero entities raised it as a reason for Your Honor to enter a stay pending appeal, Your Honor commented that that claim bordered on frivolous. And of course, that issue has been raised to the Fifth Circuit as one of the reasons to overturn Your Honor's confirmation order.

And why are the Dondero entities persisting now in their effort to obtain disclosure? It's because they're desperate to obtain financial information about the Debtor because they want to become involved in the Debtor's future asset dispositions at the nondebtor affiliates and they want to get information.

As Your Honor will recall, Mr. Dondero filed a motion in January asking for this Court to require the Debtor to bring affiliated -- affiliated entity asset sales to the Court. The Debtor opposed the motion, and before the hearing it was withdrawn.

Your Honor has heard testimony from Mr. Seery throughout the case that Mr. Dondero previously interfered with the

Debtor's asset sales and that -- and on that basis, the Debtor was not comfortable including Mr. Dondero in sale processes. And I'm not talking about the AVYA and the SKY stock from the CLO funds, but rather certain transactions regarding SSP and OmniMax which were subject to a motion made by, I believe, the Funds or the Advisors -- I get them confused sometimes -- accusing the Debtor of mismanaging the CLOs. And if Your Honor recalls, Your Honor denied that motion based upon a directed verdict.

So, having been rebuffed by the Debtor in its attempts to obtain financial information that they're not entitled to, the trusts have one last effort. Press 2015.3 arguments, because, of course, they're very interested in the integrity of the process, in the institution, in the following of the Bankruptcy Code. That is exactly what their motivation is.

But there's yet another reason, Your Honor, the Debtor believes Mr. Dondero, through the trusts, is pursuing this motion. As Your Honor is aware, the Debtor recently discovered some extremely troubling information regarding a massive fraud involving a previous --

(Audio cuts out.)

THE COURT: Uh-oh.

THE CLERK: He froze up.

(Pause.)

THE COURT: All right. Mr. Pomerantz, you're frozen.

Is everybody frozen, or is it just him?

MR. POMERANTZ: There'll be some judicial estoppel.

THE COURT: Okay. Mr. Pomerantz?

MR. POMERANTZ: Yes.

THE COURT: You were frozen for about one minute. So I am sorry, --

MR. POMERANTZ: Uh-huh.

THE COURT: -- you're going to need to repeat the past minute for me.

MR. POMERANTZ: Just to check if you were listening, Your Honor, what was the last thing you remember me saying?

THE COURT: I was listening.

MR. POMERANTZ: Okay. So I will -- did you hear me talk about Mr. Seery's testimony throughout the case?

THE COURT: No. No.

MR. POMERANTZ: Okay. I'll go back a paragraph before. Okay. Okay.

And why are the Debtor -- why are the Dondero entities persisting now in their effort to obtain disclosure? It's because the Dondero entities are desperate to try to obtain financial information, information they would not otherwise be entitled to under discovery rules, because they want to become involved, he wants to become involved in the Debtor's asset dispositions in the future regarding affiliated nondebtor entities.

If Your Honor will recall, Mr. Dondero made a motion in January seeking an order from this Court requiring the Debtor to bring to this Court asset sales from nondebtor affiliates. The Debtor opposed the motion, and before the hearing on the motion it was withdrawn.

Your Honor has heard testimony from Mr. Seery throughout the case that Mr. Dondero previously interfered or tried to interfere with the Debtor's asset sales, and on that basis the Debtor was not comfortable inviting Mr. Dondero into its asset sale processes.

And I'm not talking about the AVYA and SKY stock from the CLOs, but rather certain transactions regarding SSP and OmniMax, which were closed for fair value, which were subject of a motion that the Advisors or the Funds -- and I often get them confused -- that they made, accusing the Debtor of mismanaging the CLOs. And I'm sure Your Honor recalls. Your Honor denied that motion on a directed verdict basis.

So, having been rebuffed in their attempts to try to get the information that they weren't entitled to, they're now proceeding under 2015.3. And, of course, Mr. Draper say he is a protector of the process, the integrity of the system demands it. It has nothing to do with Mr. Dondero's interests, of course, because Mr. Draper is just there to make sure everything runs on time and everything is done according to the law, notwithstanding the fact that the U.S. Trustee

hasn't brought this motion, notwithstanding the fact that the Unsecured Creditors' [Committee] supports our position, and notwithstanding the fact that not one creditor, not one unaffiliated creditor, has asked this Court for that information and relief.

There's yet another reason, Your Honor, the Debtor believes that the trusts are pursuing this motion. As Your Honor is aware, the Debtor recently discovered some extremely troubling information regarding a massive fraud involving a previously-unknown entity called Sentinel Reinsurance. And that information is the subject of an adversary proceeding filed by UBS, which Your Honor heard substantial information about both in connection with hearings on that motion practice and also at the UBS 9019 motion.

The Debtor believes that the 2015.3 motion is a veiled or pretty transparent effort of Dondero trying to find out what the Debtor knows and what the Debtor doesn't know and trying to get the Debtor to go on record with information that later in litigation they will use as a judicial estoppel.

Your Honor, that's not an appropriate predicate for the motion. Mr. Draper will deny that that's the reason, of course, but I leave it for Your Honor to look at the circumstances and make your own conclusions.

As the Court has mentioned many times, context matters, and the Court should take this context into account in looking

at the motion and the requested relief.

In our opposition, we argue that the Court should either waive the 2015.3 compliance, given the anticipated effective date, or continue the hearing to September 1 for a further status conference if the effective date doesn't occur.

The burden on the estate if it was required to comply with 2015.3 is significant, and this goes to the issue Your Honor mentioned, that, really, what's the point at this stage of the case? There are more than 150 entities that arguably meet the definition of substantial or controlling interest for which the Debtor would be required to file reports under 2015.3. As the Court knows, the Debtor is down to 12 staff, 13 if you include Mr. Seery. And if those employees working with the Debtor's financial advisors were required to devote the necessary time and effort to prepare the reports, the time and the cost it would take would be substantial. The Debtor just doesn't have the bandwidth to comply.

More importantly, Your Honor, as we mention in our opposition, Mr. Seery and the board are extremely concerned with the quality of information it has received from the Debtor's employees who have since been terminated by the Debtor and now most of them are working for Mr. Dondero and his related entities in one form or another. It's not just the lawyers, as Mr. Draper says. It's the financial advisors, who, in other contexts, and you'll hear a little later, are

coming up with new information, new defenses on notes, et cetera. The Debtor has no confidence that the information in its records is accurate from a financial perspective or from a legal perspective.

As I mentioned, the Court is aware of the Sentinel cover-up. And uncovering just the facts regarding Sentinel was a very difficult process and required the Debtor to essentially conduct discovery against itself. It just couldn't rely on its information. So conducting the diligence that would be required to provide accurate information for 150 entities, intercompany claims, administrative claims, back and forth, due-to's, due-from's, tax issues, all the stuff required by the forms would be an extremely arduous task. It would take millions of dollars of forensic accounting. And it wouldn't -- and for what purpose? There is no purpose.

In addition, Your Honor, to waiving filing the reports, 2015.3 also allows the Court to modify the reports requirement for cause when the debtor is not able, in making a good faith effort, to comply with the requirements. Your Honor, in this case, cause is clearly established under 2015.3.

Dugaboy spends a lot of time in their reply attacking the cases that the Debtor cites in its opposition. While the facts in those cases are different from the case here, they all share something in common which is the key point: All of the cases involve a waiver of the 2015.3 requirement for plans

that will be confirmed or will soon become effective.

Mr. Draper doesn't contest that this Court has the power to waive. He says, well, those requests were made in the first 30 days of the case or in the initial part of the case. But they all granted relief where the effective date -- where either the confirmation date occurred and they were waiting for the effective date, or the confirmation case was -- was pending.

And Your Honor, we would ask the Court to treat the Debtor's opposition as a motion to waive the requirement under 2015.3. We could file a separate motion after this hearing. It would be a waste of time. But we would ask Your Honor, treat our opposition as a motion.

Dugaboy spends the rest of its time, in the papers and its argument that Mr. Draper made, challenging several arguments, other arguments the Debtor makes in its opposition. First, they argue that there is no deadline for seeking compliance and that the insinuation that we made that this is gamesmanship is off base. I'll acknowledge, Your Honor, 2015.3 does not contain a deadline for a party seeking compliance. But as I said before, context matters. And given how this motion has come to be before your court, I will leave it for Your Honor to determine which party is the true one playing games here.

Second, Dugaboy argues that there's nothing confidential

in any of the information required to be filed in the 2015.3 reports and that the disclosure of information will facilitate interest in the assets and maximization of the Debtor's assets. Twenty months into this case, Your Honor, no party other than Mr. Dondero or his related entities has complained to the Court that the Debtor is not being transparent or forthcoming.

And there's good reason for that. Even during the early stages of this case, when the Debtor and the Committee had their differences, the Debtor was entirely forthcoming with information about its assets, nondebtor affiliates, and strategy for maximizing assets of the Debtor and its affiliated entities. That collaborative effort continues today, and I suspect is one of the reasons that the Committee has joined in the Debtor's opposition here.

Similarly, the Debtor's nondebtor affiliates have transacted business with third parties postpetition. The Debtor has provided information to those parties as appropriate, subject to nondisclosure agreement, and several successful processes have been run that have maximized value.

And just to make clear, Your Honor, we do not believe that Mr. Dondero or his related entities signed a nondisclosure agreement that they would comply with the obligations. So we have no interest and no desire, unless ordered by the Court, either in this context or another context, to provide Mr.

Dondero or his related entities with information that the Debtor believes would prejudice its ability to monetize assets.

The alleged transparency that Mr. Draper and the trusts seek is not borne out of a desire to open the playing field and make it level and put financial information in the public domain for the good of the case. It's about getting access to information that the Debtor, in the exercise of its business judgment -- should not be disclosed.

Lastly, Mr. Draper again, during oral argument, harped on Mr. Seery's testimony that the reason the reports were not filed is that they fell through the cracks. It's misleading. He also stated that Mr. Seery said they would file the reports. I've looked at the testimony. That's not what he said. But he did say at confirmation that it slipped through the cracks. No doubt. That's in the transcript.

And yes, the Debtor stands behind the fact that, in the months leading to the confirmation hearing, neither Mr. Seery nor the Debtor's professionals even thought about 2015.3.

But Your Honor, it's what has happened since that justifies the Debtor's request for a waiver. The plan is soon to become effective. As I said, the Debtor is down to 12 employees, who could not possibly prepare this information without substantial time and effort. Their effort and their time should be focused on monetizing assets that will put

money in creditors' pockets, hopefully sooner than later.

And on top of that, given the massive fraud that management has uncovered, and continues to uncover information to this day, Your Honor, on matters separate from the Sentinel matter -- every week, we are finding out new information that has not been made public that causes us real concern, and at the appropriate time that information will be brought before the Court -- the Debtors simply can't rely on that information. And to be required to go through the effort to put that information out in the public record so Mr. Dondero can later say that the Debtor was judicially estopped, or use that information for an ulterior purpose or a litigation strategy, just does not make sense.

Based upon the foregoing, Your Honor, we would ask that the Court deny the motion and grant the Debtor a waiver of the 2015.3 requirements.

Does Your Honor have any questions?

THE COURT: I do not think so. Well, I just -- am I correct in remembering the Debtor had somewhere around 75 employees at the beginning of this case? And I didn't know it was down to 12. I knew it was down very low. But that's what we're talking about?

MR. POMERANTZ: Yeah, that -- that sounds about right, Your Honor.

THE COURT: Okay.

MR. POMERANTZ: And I should mention, you know, I was there at the beginning. I was there before the board. The first couple months of the case, it was extremely difficult to get the Debtor's employees focused on trying to get the information for the 2015.3. They did not want that information disclosed. And it's sort of a -- sort of a little ironic that now they're here asking for disclosure.

But, look, we're not going to walk away from the fact that, yeah, it slipped through the cracks. After the board took over, Your Honor has heard many times what they did, the efforts they went to. If the U.S. Trustee had approached us, if Mr. Dondero had approached us early on, we would have figured out a way to address that and deal with that. The fact of the matter, it wasn't. The fact of the matter, it was brought up as a litigation tactic on confirmation, to defeat confirmation of the plan. And as I mentioned, for the reasons, it's being used as a tactic now as well.

THE COURT: All right. Thank you.

MR. DRAPER: Your Honor, I -- can I -- can I make a few comments?

THE COURT: No, not --

MR. DRAPER: I'll be short.

THE COURT: Not yet. Mr. Clemente, --

MR. DRAPER: Okay.

THE COURT: -- I neglected to mention when I was

taking appearances, you filed a joinder on behalf of the Committee with regard to --

MR. CLEMENTE: That's correct, Your Honor.

THE COURT: So I need to hear from you next, and then I'll circle back to Mr. Draper.

MR. CLEMENTE: That's correct, Your Honor. And just for the record, Matt Clemente from Sidley Austin.

THE COURT: I should say, a joinder in the opposition. That was a confusing statement I just made.

MR. CLEMENTE: Yeah, that's correct, Your Honor.

THE COURT: Uh-huh.

MR. CLEMENTE: And so I will be very brief, because Mr. Pomerantz was obviously very thorough. But just to echo what he said, you know, the Committee is comfortable with the information that it has received. And as Your Honor knows, we haven't been and won't be shy about coming to the Court if we felt that that was not the case.

You know, we obviously had our issues early on in the case, including with respect to getting information from the Debtor. But, again, the Committee, you know, has been comfortable with the information that it's received from the Debtor.

Therefore, at this point, Your Honor, from the Committee's perspective, there doesn't seem to be any bona fide purpose to making the Debtor go through the cost and the expensive effort

that Mr. Pomerantz said would be required to create the Rule 2015.3 reports. And, again, I -- without casting aspersions, it would suggest, based on previous activity, that there's really only a nefarious purpose for what is being pressed before Your Honor today.

So, Your Honor, again, we support the Debtor's position. I absolutely agree with Mr. Pomerantz's arguments. We would request that Your Honor, you know, enter the relief that the Debtor is requesting today.

THE COURT: All right. And Mr. Clemente, I just --

MR. CLEMENTE: Yes?

THE COURT: I just want to seal in my brain the context that I think applies here. The January 2020 corporate governance settlement order. In there, we all know there were lots of protocols about lots of things, but one of them or a set of the protocols dealt with transfers of assets in these nondebtor subs or entities controlled by the Debtor. And, of course, Mr. Pomerantz alluded to this, but I'm just going to make sure I'm crystal clear on what I remember. You know, the whole -- well, it was a protocol that the Committee would have to be consulted on transfers of assets of those nondebtor subs, those nondebtor controlled entities, and, you know, there was a discussion that 363 doesn't apply, of course, to nondebtor assets, and you could really argue all day, even if it did apply, about whether these are ordinary course or non-

ordinary course because of the business Highland is in. But the Debtor negotiated with you and your clients: We're going to have full transparency to let you all get notice of transfers of assets of these subs, and you could even object and bring a motion. I mean, you can file some sort of pleading, even though we were not so sure 363 under any stretch might apply.

Am I correctly restating the context that -- you know, Mr. Pomerantz alluded to it, but I just want to make sure I'm clear and the record is clear.

MR. CLEMENTE: Your Honor, you are -- you are absolutely correct. There's a very complex set of protocols that we painstakingly negotiated with the Debtor that had different categories depending upon the asset --

THE COURT: Uh-huh.

MR. CLEMENTE: -- and the Debtor's ownership and its relationship with respect to the nondebtor entities or the related parties. That required the Debtor to come to the Committee in certain sets of circumstances and explain a potential transaction and get the input from the Committee, and either the Committee could consent to the transaction, or if the Committee did not consent to the transaction, the Debtor could seek relief from the Court.

Your Honor will remember that, in fact, one of the hearings we had with respect to the monies that were placed in

the Court registry arose out of the protocols. So the protocols worked from that perspective in requiring the Debtor to come to the Committee, allow the Committee to make an evaluation, and then the Debtor would make a decision from the perspective of how it wished to proceed.

So, Your Honor is absolutely correct. That was all part of the governance settlement that was negotiated back in January. And from the Committee's perspective, again, it hasn't always been lemon water and rose petals, but we believe that those protocols worked, and worked to provide the Committee with information so it could appropriately evaluate what the Debtor was doing.

THE COURT: All right. So I'm correct, you would say, in thinking there was a lot of transparency built in? It didn't always work smoothly in the beginning, and as we know, there were document production requests, many of them from the Committee. That all came to a head last July, with more protocols put in place. But lots of transparency was negotiated by the Committee with regard to all of these controlled entities and subs?

MR. CLEMENTE: That was a critical, Your Honor, that was a critical component of the governance settlement.

THE COURT: Okay.

MR. CLEMENTE: Because that was obviously the impetus for us wanting that governance settlement, so we could get

that transparency.

So, to answer your question, Your Honor, yes, the protocols served that function of providing the Committee with information on transactions that the Debtor was proposing to enter into.

THE COURT: Okay. And of course, there was a waiver of the privilege -- I don't know if that's the word; I guess that is the right word -- with regard to possible estate causes of action. Maybe I'm getting into something unrelated. Maybe I'm not. But that was part of the protocol, too, right, the Debtor would waive its --

MR. CLEMENTE: That's correct, Your Honor.

THE COURT: -- privilege with regard to --

MR. MORRIS: Your Honor, I apologize for interrupting. This is John Morris from Pachulski Stang. I just want to recharacterize that a bit.

THE COURT: Okay.

MR. MORRIS: It's not a waiver of the privilege. We agreed to share the privilege --

THE COURT: Share the privilege. Okay.

MR. MORRIS: -- with the Debtor. The Debtor --

MR. CLEMENTE: I --

MR. MORRIS: I'm sorry to -- sorry to correct you, but it's a --

THE COURT: Well, no, --

MR. MORRIS: -- very important point.

THE COURT: -- that's why I hesitated on that word. I wasn't sure if that was the word, the concept.

MR. MORRIS: There's no waiver.

THE COURT: Okay. Okay. I'm not always --

MR. CLEMENTE: That is -- and that is correct, Your Honor.

THE COURT: Okay.

MR. CLEMENTE: Mr. Morris is correct. As are you.

THE COURT: Okay. So I'm asking you, is all of this protocol that was in place, I mean, is it reasonable for me to think maybe that's the reason you all never pressed the 2015.3 issue, because you were getting a full look, as best you could tell, and more? You were getting more information, perhaps, than these reports would have provided, even. Is that fair for me to think?

MR. CLEMENTE: It is fair for you to think that, Your Honor. We viewed the protocols as our mechanism to get the information that was necessary for the Committee to evaluate the transactions that the Debtor wanted to engage in. And so we were looking to the protocols, and in fact, I think the protocols were very broad in certain respects, and we were not thinking about the Rule 2015 reports, nor would we have said that that would have been a substitute for negotiating those protocols and implementing them.

THE COURT: Uh-huh.

MR. CLEMENTE: So that's how the Committee was looking at it, Your Honor.

THE COURT: Okay. All right. Well, okay. Mr. Draper, I'm going to come back to you. You get the last word on that.

MR. DRAPER: Thank you. First of all, the answer is yes, there are extensive protocols between the Debtor and the Committee. I one hundred percent agree with you. And the other point I'd make with that is this information is a scaled-down version of what they're giving the Committee on a regular basis. So the argument that it would take hundreds of man hours and millions of dollars to do that is absolutely not true. This information, in large measure, even vaster portions of it have already been given to the Committee. Number one.

Number two, we as lawyers are literalists --

THE COURT: But I presume not in this format. I presume not in the format of filling out the form A through E exhibits. I mean, maybe it's an email.

MR. DRAPER: Well, --

THE COURT: Maybe it's a phone call.

MR. DRAPER: -- it's not in a form -- no, there is -- there is -- they both have financial advisors who I'm sure you're going to see whopping fee applications from who have

pored through all of this. My bet, and I'd bet big dollars on this, is that financial -- balance sheets are given to them on a regular basis, statements of financial information for subsidiaries and changes in cash flow are given to them. Otherwise, there's no way the Creditors' Committee could monitor what's going on and what's happening.

So, really, this is -- this is not a phone call thing. There is real financial data that's being given that is available and can be given on a scaled-down basis.

My real point of this is we as lawyers are literalists until it suits our purposes not to be literalists. There is no exception in 2015.3 for information being given to a creditors' committee. In fact, when you look at 2015.3, it basically figures there is information going to a creditors' committee. This is for the others who don't have access to that information.

And the interesting part of that is, as the Court's aware, the Bankruptcy Code was amended that if I had gone to the Creditors' Committee and made a request as a creditor, I probably have a right to get even more information than 2015.3 allows me to get.

Next, which is the giant smokescreen. We're basically dealing now with the gee, Mr. Dondero's a bad guy; gee, they want this information because they want to uncover what we know. That's just not true with respect to these reports. If

you look at what the reports do, the reports start from the day that the case was filed and ask for changes in financial condition from the day the case was filed going forward. It is all postpetition in its effect. And to the extent they've uncovered things that are incorrect in the Debtor's schedules, the truth is the amendment of the schedules is warranted. 2015.3 does not deal with prepetition activity in any way, shape, or form. They are balance sheets that ask for -- or changes in financial condition that go from the filing of the case, or seven days before, and require reports every six months.

So this giant smokescreen that there's a massive fraud, there's all this other stuff that's been uncovered, is just not true. It is an attempt to cover up or give an excuse that is unwarranted with respect to why they haven't done the 2015.3.

Next point. There is no secret stuff that's being done. There's no valuation that we're asking for. 2015.3 asks for balance sheet information. So, in fact, if they own ten pieces of property, 2015.3 would bind them together in a balance sheet and say, this is the total real estate that we have. If an entity has 15 entities under its umbrella, it would have a balance sheet entry. Assets and liabilities. It's not broken down. The assets are probably at book value or some sort of mark to market.

But honestly, this is -- there is no way that this information gives anybody any benefit in terms of any bidding.

And the other point that's problematic is anybody who wants to buy these assets would walk in and say, look, I want a data room, let me look at this. If what Mr. Pomerantz is saying, which I don't understand, is that we're not going to let a Dondero entity buy an asset, notwithstanding the fact that they may pay more for the asset than somebody else would, I think that's -- I have a huge problem with that. We're here for monetization of assets. We're here to maximize the value. And if, in fact, somebody walks in that may be a tangentially-related Dondero entity and is willing to pay more, they should be thrilled with that fact, not jettison it or disregard it. That is -- their job is to maximize value, not minimize value through a controlled sale process.

Again, I'm looking at the Code section. I'm looking at 2015.3. It basically says what it says. It's designed to give basic financial information. It has nothing to do and offers no disclosures of anything Mr. Pomerantz has thrown up before the Court or that Mr. Dondero or any of his entities or people are alleged to have done.

And the last is, if in fact there's financial information that's incorrect in any of these entities, I question what the Debtor's financial advisors have been doing for the last months. Honestly, they should be poring over these books. If

they find a problem, they should correct 'em and address them. And so there's no basis under the Code. We've -- what's been given to you and what their argument is is an excuse for not doing something they should have done. It can't be couched as to who's asking. It is systematic in nature. And what's been thrown up before the Court in Mr. Pomerantz's arguments are just not true when you look at what the form requires.

THE COURT: You know, I can't remember ever being in a contested matter involving this rule. And I was kind of pondering before coming out here, I wonder why that is. And, you know, I'm thinking the vast majority of our complex Chapter 11s that involve many, many, many entities, they all file. Okay? You know, they're kind of a different animal, if you will, from Highland.

You know, we know how it normally works. You've got maybe the mothership, holding company, and many, many subs, and you've got asset-based lending, right, where, you know, maybe the majority of the entities in the big corporate complex are liable, so you just put them all in. Okay?

We don't have -- I have not experienced a lot of Chapter 11s where you have basically just the mothership and then you keep subs and lots of affiliates out. Okay? So I'm thinking that's one reason.

Another thing, I can't remember how old this rule is. Does anyone -- can anyone educate me? How long has this rule

been around?

MR. DRAPER: Your Honor, this is Douglas. I think it came in after Lehman Brothers. And it came --

THE COURT: Uh-huh.

MR. DRAPER: It was put in to deal with off-balance sheet items.

THE COURT: Uh-huh.

MR. POMERANTZ: 2008, Your Honor.

THE COURT: 2008?

MR. DRAPER: Which is exactly right. It --

THE COURT: Okay.

MR. DRAPER: Yep.

THE COURT: Okay. So that, that's another reason. Because I was thinking like *Enron* days. You know, that's a big giant, a gazillion entities, and, of course, a whole huge slew of them were all put in.

So, there's not a lot of case law. And you know, maybe there are other situations where a judge ruled on this issue but without issuing an opinion. So, anyway, that's neither here nor there.

Mr. Draper, you've urged me to focus on the literal wording of the rule. It's "shall" language. You've talked about essentially the integrity of the system as being the reason for the rule. You've told me not to accept the Debtor's "bad guy" defense, you know, as an excuse. This is

just Dondero, you know, wanting the information, and therefore I should discount the motivations here.

But let me tell you something that is nagging very, very much at me, and I'll hear whatever response you want to give to this. I just had an all-day hearing a couple of days ago, and this involved the Charitable DAF entities and a contempt motion the Debtor filed because those entities went into the U.S. District Court upstairs in April and filed a lawsuit that was all about Mr. Seery's alleged mismanagement with regard to HarbourVest.

So what I'm really worried about is the idea that your client wants this information to cobble together a new adversary alleging mismanagement. How can I not be worried about that?

MR. DRAPER: It's real simple. Because the information that's here doesn't go to management decisions. The information that's requested here has balance sheet items. It has to do with changes in cash flow. It is not something that you can cobble together a claim, because it doesn't deal with discrete transactions. It deals with only transactions between affiliated entities. It only deals with disclosure of administrative expenses that are incurred by a subsidiary for which the Debtor is liable. It only deals with changes in condition on a go-forward basis and a balance sheet. It doesn't say, gee, we have to disclose that, with respect to

HarbourVest or with respect to the MGM stock or whatever, we're doing A, B, or C. It doesn't go there.

That's why I asked the Court in my opening, look at the form. Because the form is what I'm asking for adherence to. I'm not asking the form to be varied. I'm just asking the form to be approved -- to be addressed. And the form controls. It is not something you can cobble together a complaint with.

THE COURT: Well, you left out when I asked, you know, did your client have an administrative expense claim in this case, and Mr. Pomerantz corrected the record on that. Your client, while it's not a lawsuit in another court, has filed an administrative expense that there was mismanagement of a nondebtor sub or nondebtor controlled entity, --

MR. DRAPER: That -- that's --

THE COURT: -- Multistrat.

MR. DRAPER: No, that's not -- if -- if I understand the claim -- again, I didn't file it, and I forgot, that's an oops on me as opposed to an oops on Mr. Seery for not filing, and I apologize for the Court for that. But if I understand that claim, is when he acquired whatever he acquired, he should have offered it to the other -- to the other members of the -- that group. Again, I'm not -- that's not -- I'm a bankruptcy lawyer, as the Court's well aware. This other stuff is beyond me.

But the truth is, my understanding of the claim, it goes to who should have benefited by the transaction and whether the Debtor got CLO interests or got cash for it is irrelevant and that it should have been offered. That's what I understand the claim.

THE COURT: Okay. So the same sort of theory --

MR. DRAPER: So, the claim --

THE COURT: -- as HarbourVest? The same sort of theory as HarbourVest?

MR. DRAPER: No. No. Well, no, I'm just saying, that's -- that's what -- again, you're asking me for something that's outside my expertise.

THE COURT: Okay.

MR. DRAPER: Yes, we may have filed a claim.

THE COURT: Who filed a proof of claim?

MR. DRAPER: And the point I'm making --

THE COURT: Who filed the proof of claim?

MR. DRAPER: What? I did not -- I have not filed the proof of claims that were asserted by Dugaboy.

THE COURT: I mean, --

MR. DRAPER: I think that was --

THE COURT: -- request for administrative expense. Who filed this? You say you don't -- you didn't file it.

MR. DRAPER: I did -- I don't think I did.

MR. POMERANTZ: Your Honor, to clarify, it was filed

as a proof of claim, but it related to postpetition actions. And, again, I don't have it before me. This has been raised --

MR. DRAPER: I --

MR. POMERANTZ: -- several times in the confirmation hearing when Mr. Draper was there, so I guess he must have just forgotten about it. But I don't know who actually filed it. But it is -- it is -- it is a proof of claim that is on the record.

MR. DRAPER: Mr. Pomerantz, God forbid that I should forget something. I'm sure you never have.

THE COURT: Okay. Well, here's what I'm going to do. I'm not going to grant the relief being sought today, but I will continue the hearing to a date in early September. And Mr. Draper, you can coordinate with my courtroom deputy, Traci Ellison, with regard to a setting in early September.

I can assure you it's not going to be until after Labor Day. I think Labor Day falls on the 6th, maybe, and I plan to be far away the first few days of September, far away from this country.

But here are a few things I want to say. First, I care about transparency, and I tend to strictly construe a rule like this. I think, you know, it should be very clear for anyone who's appeared before me that I really like -- I say open kimono. I probably shouldn't use that expression, but I

use that expression a lot. You know, when you're in Chapter 11, the world changes and you have to be very transparent.

But while I generally feel that way, we have -- as I also always say, facts matter, contexts matter -- and here we are twenty months into a case and we're post-confirmation. This motion was filed post-confirmation. So I acknowledge that the Rule 2015.3(b) has the requirement of filing reports as to these nondebtor controlled entities until the effective date of a plan. We're so -- we're presumably so very close to the effective date that I think I should exercise my discretion under Subsection (d) of this rule to, after notice and a hearing, vary the reporting requirements for cause. I think there's cause, and that cause is I think we're oh so close to the effective date. That's number one. Number two, we're down to 12 staff members. And I've heard that 150 entities may be implicated, and I don't think that is a necessary and reasonable use of staff members at this extremely late juncture of the case.

And my third reason for cause under Subsection (d) of this rule is we have had an active, a very active Creditors' Committee in this case with sophisticated members and sophisticated professionals who negotiated getting more information, I think more useful information than this rule even contemplates with the various form blanks.

Now, obviously, I'm continuing this to September because,

if we don't have an effective date by early September, well, context matters, maybe that causes me to view this in a whole different light. But that is the ruling of the Court.

You know, I just want to say on behalf of the U.S. Trustee, I don't know if anyone's listening in, but it was an unfortunate use of words earlier, I think, saying, you know, secret deal with them. And I use unfortunate words all the time. I'm not being critical. But I just want to defend their honor here. Oh my goodness, they --

(Phone ringing.)

THE COURT: -- exercise integrity in every case I see to the utmost degree, and I suspect they were satisfied that the Committee was getting so much access to the Debtor, with the sharing of the privilege and the protocols, that it just didn't seem necessary in the facts and circumstances of this case to require strict compliance with 2015.3.

So I'm going to ask Mr. Pomerantz to upload a form of order reflective of my ruling. And, again, if --

Whose phone is ringing? Is there something going on with our equipment?

THE CLERK: No.

THE COURT: I don't know where that phone ringing is coming from.

THE CLERK: I can hear it.

THE COURT: Okay. So, you'll get a day from Ms.

Ellison in -- after labor day, and we'll see where we are. This will be a moot matter as far as I'm concerned if we've had an effective date at that point.

(Continued phone ringing.)

MR. POMERANTZ: Your Honor, one clarification I would ask to have. I don't think -- I think Your Honor intends that to be a status conference, so to save the Debtor from, you know, spending time in doing a pleading, and Mr. Draper as well, and Your Honor from reading them, I would say that there should be no pleadings filed in advance. We will appear before Your Honor with a status conference. And to the extent Your Honor determines there's further briefings or further issues that need to be decided, you could decide at that point. But no further briefing.

THE COURT: Okay. I think that is a fair request.

(Ringing stops.)

THE COURT: And so that -- that is the way we'll set this up. Status conference. No further pleading.

MR. DRAPER: Your Honor?

THE COURT: All right? Mr. Draper?

MR. DRAPER: Can I make a request, Your Honor? Can I change -- can I make a comment about the Court's ruling? Because I want to be transparent about this. And I think the Court's ruling, I would request that you shapeshift it a little bit.

If, in fact, you're going to take the position that if the plan goes effective, this issue -- this -- this motion is moot and will be denied, I think, quite frankly, why don't we enter that order now, rather than waiting. Because that at least gives me the ability to address the issue.

I don't think the rule has a waiver of it on the effective date. Let's -- let's get the issue before the -- before everybody. Because, again, as I said, if in fact your position is that if it goes effective I'm going to deny the relief and claim it's -- and assert it's moot in a ruling, I'm fine, let's get the ruling now. Because -- because my position is that that waiver -- there is no basis for that waiver due to time. The rule requires being filed through a point.

And, look, again, that way I'm not wasting the Court's time. We're not rearguing it. If we're not having new pleadings, let's get it over with.

MR. POMERANTZ: Your Honor, I would reject that. It's pretty transparent what Mr. Draper wants. He wants another appeal --

THE COURT: Uh-huh.

MR. POMERANTZ: -- because he wants to go to another court, and he's unhappy that Your Honor has essentially given an interlocutory order that he will be stuck with.

So we have, I think, close to a dozen appeals. We're

spending millions of dollars. And I find -- I find Mr. Draper's request, quite honestly, offensive, that it would require us to -- a lot more time and money on an issue we shouldn't. So, I would ask Your Honor to reject Mr. Draper's request.

THE COURT: All right. I do --

MR. DRAPER: And again, my --

THE COURT: -- reject it. That's exactly where my brain went, Mr. Draper. This is an order continuing your motion. Okay? And we'll have a status conference in early September on your motion.

And you know, again, I'm just letting you know my view it will be moot if the effective date has occurred, and then we'll get some sort of order to that effect issued at that time. And then I guess you'll have your final order that you can appeal if you want at that point.

The last thing I'm going to say is this. Mr. Draper, as I'm sure you remember, at some point many weeks back -- I think it was in January, actually -- I ordered that Mr. Dondero should be on the WebEx, or if we're live in the court for a hearing, live in the court, any time there's a hearing where he, his lawyers, have taken a position, filed an objection or filed the motion himself. If he and his lawyers are requesting relief or --

MR. DONDERO: I'm here.

THE COURT: -- objecting to relief, that he has to be in the courtroom.

I am now going to make the same requirement with regard to the trusts. Any time the trusts file a pleading seeking relief, object to a pleading seeking relief, file any kind of position paper, I'm going to require a trust representative to be in court.

Now, I don't know if that's the trustee, Nancy Dondero. I don't know if that's Mr. Dondero's wife, a sister, who that is. But it'll either be her or whoever the trustee is or Mr. Dondero as beneficiary. But it has gotten to that point. Okay? And --

MR. DRAPER: Your Honor?

THE COURT: And it's not -- it's not personal. I have said this before. I've done this in many cases. If we have a party who feels so invested in what's going on that they're waging litigation, litigation, litigation, at some point very often I will make this order. Like, okay, we're all spending a lot of time on what you want, so you need to show you're invested in it and be here with the rest of us. And, you know, potentially we're going to want testimony in certain contexts. Okay?

So I don't know who that human being is for the trusts, but I'm now to the point where I'm making that same order that I did with regard to Mr. Dondero personally. All right?

MR. POMERANTZ: Your Honor?

THE COURT: Yes?

MR. POMERANTZ: Your Honor, just to clarify, that's Mr. Dondero and the trustee.

And I would also ask Your Honor, I know Mr. Dondero will say that he was on, and that's what Mr. Taylor is going to say, he was on audio. I think, in order to have them actively participating, they should be on the video the entire hearing. Because if they're just on the phone on mute, Your Honor is not able to really tell if they are really listening. So I would ask Your Honor to clarify to both Mr. Draper and Mr. Taylor that, for both the trustee and Mr. Dondero, they should be on video.

THE COURT: All right.

MR. DRAPER: Your Honor, Mr. Dondero is on. You can see him down in the lower screen.

THE COURT: All right. Just so you know, I mean, the screen I'm looking at is not quite the same screen you're looking at. We have this Polycom. And I show that there are, you know, thirty-something people, but I only see the people who have most recently talked. Okay? So, I see you, Mr. Draper. I see Mr. Pomerantz. I see Mr. Clemente. A few minutes ago, I saw Mr. Morris. But, you know, we've set it up where I'm not overwhelmed with blocks; I'm just seeing the people when they speak.

MR. POMERANTZ: Your Honor, and those were the only four people whose videos were on during the entire hearing.

THE COURT: Oh, okay.

MR. POMERANTZ: So I hope Mr. Draper is not going to say that Mr. Dondero was on video, because he was not.

THE COURT: Okay.

MR. DRAPER: No, you can see -- Mr. Pomerantz, what I said is you can see him on the screen here. You can see that he has dialed in. I don't see him jumping up and down or his person.

THE COURT: Oh, okay.

MR. DRAPER: But it is clear that somebody dialed in on his behalf.

MR. POMERANTZ: Well, --

MR. DRAPER: Or he dialed in. He is -- he is present.

MR. POMERANTZ: Exactly. That's my point, Your Honor, that someone may have dialed in on his behalf. And I think Mr. Dondero, for them to have active, meaningful participation, because I think that's what Your Honor is getting at, that they should be here, engaged. And if we were in court like we were the other day, Mr. Dondero would have had to sit in Your Honor's courtroom. And if he is going to take up the time of Your Honor and all the parties, he and the trustee should be really engaged, which you cannot be if

you're only on the phone.

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

MR. DRAPER: Your Honor?

THE COURT: Go ahead, Mr. Draper.

MR. DRAPER: Mr. Dondero just talked a few moments ago, so Mr. Pomerantz heard him. This is -- this is truly unwarranted. He's appeared, he's here, and he's made a comment to the Court. So, again, we are invested. He was present at this hearing. He heard the hearing. And so, you know, I just don't know where this is coming from. I understand he missed a hearing before, but he is here for this one.

THE COURT: Okay. Well, I'm not going to get bogged down in this issue. I am going to issue an order, though, that is going to be reflective of what I said, and we'll just -- we'll make sure we have him check in or whoever the representative is of the trusts in future hearings and turn the video on and we'll make sure.

Again, this is -- I used the word frustrated the other day. I'm very frustrated. This is just -- this is -- it's out of control. Okay? I ordered mediation earlier in this case. I believed that an earnest effort was put in. But if we're not going to have settlement of issues, you know, I'll address these issues, but everyone who files a pleading, whether it's Mr. Dondero personally or the trusts, the family

trusts, and, of course, we're going to get -- I'm going to go the same direction, actually, with all these other entities. You know, it's -- I've gotten to where I had my law clerk the other day prepare me basically what was like a program from a sports event, you know, who represents which entities, because it's gotten overwhelming. And --

MR. POMERANTZ: Your --

THE COURT: And I mentioned the other day, I'm very close to requiring some sort of disclosures about the ownership of each of these entities, because I -- you know, the standing is just so tenuous, so tenuous with regard to certain of these entities. And I've erred on the side of being conservative and, you know, okay, we maybe have prudential standing, constitutional standing, even if it's kind of hard finding statutory standing under the Bankruptcy Code. But it's gotten to the point where it's just costing too much time and expense for me to not press some of these issues and hold people accountable.

So, Mr. Pomerantz, were you about to say something? I know that we had talked at another hearing about the Court maybe requiring some sort of disclosures for me to really understand party in interest status maybe better than I do.

MR. POMERANTZ: That, Your Honor, was where I was going to go before Your Honor made the comment. Your Honor made that comment a few weeks ago. I think, since then, quite

honestly, nothing really has changed. And I think it would be helpful -- it would be helpful for the Debtor, and more importantly, I think it would be helpful to the Court to have a list that you can refer to every time we are in a hearing of every entity that has appeared that Mr. Dondero has a relationship with, who the lawyers are, what the claims they filed, what the status of the claims they filed, and maybe even what litigation they are in pending with the Debtor.

We're happy with -- part of it we could prepare. But I would think Your Honor should order that from Mr. Dondero's related entities, because it might cut through a lot of it, and give Your Honor the information Your Honor needs and the context and perspective as you're hearing a lot of these motions.

THE COURT: All right. Well, is there anything else before we move on to the other matter? I'm about to close the loop on this by saying I am --

MR. TAYLOR: Your Honor? Your Honor?

THE COURT: Who is that speaking?

MR. TAYLOR: This is Clay -- this is Clay Taylor, Your Honor, --

THE COURT: All right.

MR. TAYLOR: -- representing Jim Dondero individually.

THE COURT: Okay.

MR. TAYLOR: And I just wanted to be heard. I've just listened in, even though Mr. Dondero was not the movant, because sometimes issues like this do come up where his name is thrown about.

First of all, Jim Dondero was indeed, as Mr. Draper said, was indeed present. He did indeed try to speak. I kind of overrode him. And because, you know, he needs to speak through his lawyer most of the time and shouldn't address the Court directly. But I wanted to let you know that Mr. Dondero was indeed on the line, was actively listening, and was participating.

As far as additional disclosures, it would be, I would just note, somewhat ironic if the Court denies the motion for what appears to be mandatory disclosures under Rule 2015.3 but then imposes additional disclosure requirements on somebody -- on another party, without any rule stating that there is such disclosures. It just -- it strikes me as ironic, and I would like Your Honor to consider that, at least, as Your Honor says, context matters.

You know, that's the context in which this arises. And we would just ask Your Honor to reflect upon that before she imposes additional duties upon my client.

But there is -- and the Debtor has asked for the response to be taken as a motion for leave to not comply with a rule, but yet Mr. Seery is not here. The UCC regularly

participates. Its members are not here. And so I just, to the extent Your Honor is going to impose duties upon certain parties, then what's good for the goose is good for the gander, Your Honor.

THE COURT: All right.

MR. POMERANTZ: Your Honor, I would point out that Mr. --

THE COURT: I respect your argument. I always respect your arguments, Mr. Taylor.

By the way, you aren't wearing a jacket. You know, next time you need to wear a jacket. And forgive me if I seem nagging, but I'm letting you all know, if you all are soon going to be having lots of litigation in the District Court, I promise you the district judges are way more formal than me and sticklers for every rule. You'll also be doing everything live in the courtroom, too. I'm just letting you know that.

But while I respect your argument, apples and oranges. I mean, the 2015.3 rule, not only is it not -- not -- I wouldn't say mandatory, since the Court has discretion for cause to waive the requirement. But it's a very onerous set of forms that would have to be filled out for 150 entities by 12 staff members. I don't really consider that the same as the disclosure that I'm now going to require.

But my law clerk and I will -- we'll craft a form of order that will be specific as far as what I'm going to require.

And, again, I think it's way beyond the point of this being necessary. And just so -- again, I'm wanting to explain this thoroughly. You know, standing -- for the nonlawyers; I don't know how many nonlawyers are on the phone, WebEx -- it's a subject matter jurisdiction thing. Okay? And, you know, if there's a dispute and someone involved in a dispute technically doesn't have standing, that means the Court didn't have subject matter jurisdiction to be adjudicating it. Okay? That's first year law school concept.

And it's been mentioned we have lots and lots of appeals, and I can promise you, if you've never been through the appellate process, that's the very first thing they'll look at -- you know, District Court, Fifth Circuit, any Court of Appeals -- because they have an overwhelming docket. And if there's a reason to push out this appeal before then because of lack of subject matter jurisdiction, which would include lack of standing, of course they are going to quickly get it off their plates because they have other things to get to, like criminal matters that are, you know, their top priority because of the Constitution.

So this has been an evolving thing with me. At some point, I feel like the Courts of Appeals that are involved with all of these appeals, they might be really, really zeroing in on the standing of parties more than perhaps even I have. So I want to do my job and I want it clear on the

record, this is why this person has standing or doesn't have standing. Okay? I just feel like we've gotten to that point. And so we'll issue an order in that regard, and it will, I promise you, be crystal clear.

Anything else?

MR. POMERANTZ: Your Honor, one last point. Mr. Taylor insinuated that the board is not present here, which is incorrect. A member or two members or three members of the board have been present at every hearing before Your Honor. And that's without an order requiring them to do so, because they are -- they are interested, they are engaged. Mr. Dubel is on the phone. He has been on the phone. I think this may have been only the second hearing that Mr. Seery has missed, felt it wasn't necessary to take him away from his running the company. So the Debtor has been, through its board members, fully engaged, and I just wanted Your Honor to know that, that we would never have a hearing before Your Honor without at least one member of the independent board listening in and participating as necessary.

THE COURT: All right. Thank you.

All right. Well, let's move on to the other contested matters, or adversary proceeding matters, I should say. And they're Adversary 21-3006 and 21-3007. We have Motions for Leave to Amend Answers. And do we have Ms. Drawhorn appearing for that motion or those motions?

MS. DRAWHORN: Yes, Your Honor. Lauren Drawhorn with Wick Phillips on behalf of Highland Capital Management Services, Inc. and NexPoint Real Estate Partners, LLP, formerly known as HCRE Partners, LLC.

THE COURT: All right. And who will be making the argument for the Debtor on this one?

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

THE COURT: All right. Are there any other appearances on this?

Okay. Ms. Drawhorn?

MS. DRAWHORN: Yes, Your Honor. We are -- so, my clients are seeking leave to amend the answer to add two affirmative defenses. As you know, under Rule 15(a), there is a bias towards granting leave, and leave should be freely granted unless there's a substantial reason to deny it.

The main factors that are considered in determining whether there is a substantial reason to deny a motion for leave to amend are prejudice, bad faith, and futility.

Here, there is no prejudice to the Plaintiff. Under the case law, if the -- as long as a proposed amendment is not presented on the eve of trial, continuing deadlines or reopening discovery does not constitute sufficient prejudice to deny leave.

Here, discovery does not close until July 5th for Highland

Capital Management Services, and it does not close until July 26th for NexPoint Real Estate Partners.

The Plaintiff has not -- neither party has taken any depositions in this case. And we are open and willing to extend the discovery deadlines if necessary. We think that discovery can be extended as necessary without extending any dispositive motion deadline or the docket call which are set in August. Dispositive motions are August 16th for Highland Capital Management and September 6th for NexPoint Real Estate Partners, with docket call in those cases being October and November.

So there's significant time. If the -- if the party just wants to conduct additional written discovery, I think that that -- they would be easily be able to do that.

We're also open to continuing all the deadlines in this case, and practically speaking, those -- the deadlines may be continued depending on what happens with the pending motion to withdraw the reference and the motion to stay.

So we don't think -- we don't see any reason why our amended additional affirmative defenses will result in any prejudice to the Plaintiff, and don't see that as a reason -- a substantial reason to deny the motion for leave.

There is no bad faith here. The motion for leave was filed two months after our original answer. Again, this is not a situation where we're trying to add a new defense on the

eve of trial. We're not even waiting until after discovery is closed to try and add this new defense. And it's not after one of our prior defenses failed. Instead, we've been conducting additional investigations, preparing for written discovery. And as set forth in more detail in the Sauter declaration that was filed yesterday, we discovered these additional defenses through that additional investigation.

So there's certainly no bad faith here in adding these two defenses. We are just trying to make sure that we can prove up our defenses and prove up our case on the merits, as we need to.

And then the last factor, the new affirmative defenses we're seeking to add, they're not futile. I cited some cases in the pleadings. There are some judges in the Northern District of Texas that refrain from even evaluating futility at this stage, at a motion for leave to amend stage, preferring to address those on a motion for summary judgment situation. But even when it is considered, futility looks more at is there a statute of limitations that prevents the claim from being successful, or does the court lack subject matter on its face, based on this defense? And that's not the case here.

The Debtor -- the Plaintiff tries to argue on the merits of our affirmative defenses, and a motion for leave to amend is not a basis for that. This isn't a motion for summary

judgment. This is just -- just a motion for leave to add these defense, and they can certainly address the merits later on in the case.

So we think we provided sufficient notice in our proposed amendment. I mean, our proposed amended answer. To the extent we need to add any specifics, we are certainly open to. We've noted them in our reply. The ambiguity is -- is to the notes as a whole. We noted the Highland Capital Management, there's two notes that are signed by Frank Waterhouse without indication of corporate capacity, which creates some ambiguity. The notes reference other related agreements, which create some ambiguity. So we think there's sufficient pleading of these new defenses to support leave to amend and address those on the merits.

And then the condition subsequent defenses, while we -- the schedules and the SOFAs, the notes related to that reference that some loans between parties and related -- to affiliates and related entities may not be enforceable, we think that supports our position and this defense here, now that we've furthered our investigation and heard about this additional subsequent agreement that supports the condition subsequent.

And the opposition, the Plaintiff's opposition notes that there has been some discovery on this defense. It's similar to one that's asserted in a related note adversary. And

while, again, they try to assert the merits and the credibility of certain testimony, that's -- that's a decision, credibility of a witness is a decision for a fact finder and not for this stage of the proceedings and not for a motion for leave to amend.

So we don't believe there's a substantial reason to deny leave. Again, under Rule 15, leave should be granted freely. And so we would request that the Court grant our motion for leave to amend so that we can have our amended answer and affirmative defenses in this case.

THE COURT: All right. Well, Mr. Morris, you know, the law is not too much in your favor on this one. So what do you have to say?

MR. MORRIS: I have to say a few things first, Your Honor. The notes are one of the most significant assets of the estate. As the Court will recall at the confirmation hearing, Mr. Dondero and all of his affiliated entities objected to confirmation on the ground -- challenging, among other things, both the liquidation analysis as well as the projections on feasibility going forward.

One of the assumptions in those projections and in the liquidation analysis was indeed the collection of these notes in 2021. They all sat on their hands, attacked the projections, attacked the liquidation analysis, but never on the grounds that the notes wouldn't be collectable in 2001

[sic], never informing the Court that there was some agreement by which collection would be called into question, never ever disclosing to anybody that the plan might not be feasible or the liquidation analysis might not be accurate because these notes were uncollectable.

So what happened after that, Your Honor? We commenced these actions. Actually, before the hearing. We actually commenced these actions before the confirmation hearing, when they sat silently on this.

And Mr. Dondero's first answer, because this is all very important because they say that they're -- they're piggybacking on Mr. Dondero. Mr. Dondero's first answer to the complaint said, I don't have to pay because there is an agreement by which the Debtor said they would not collect. It's in the record. It's attached to my declaration. And that was it. Full stop. I don't have to pay because the Debtor agreed that I would not have to collect.

So we served a request for admission. Admit that you didn't pay taxes. He realized, okay, that defense doesn't work, so he changes it completely and he amends his answer. Now the amended answer says, I don't -- the Debtor agreed that I wouldn't have to pay based on conditions subsequent.

And we said, what are those conditions subsequent? Please tell us in an interrogatory response. And under oath, Mr. Dondero said, I don't have to pay if the Debtor sells their

assets in the future. At a favorable price, I think it says. Again, this is in the record. And we asked him under oath, who made that agreement on behalf of the Debtor? And he said, I did.

And Your Honor will recall that we had a hearing on that very defense, on the motion to compel, where they said Mr. Seery has to come in and testify to the defense that Mr. Dondero made this agreement with himself. And then the following week, on a Tuesday, we had the hearing on the motion to withdraw the reference, and Your Honor said finish discovery, because we told you discovery was going to be concluded on Friday with Mr. Dondero's deposition. You know what they did, Your Honor? The night before the hearing, they amended Mr. Dondero's interrogatory. Again, these are sworn statements. They amended it again to say he didn't enter the agreement on behalf of the Debtor; Nancy Dondero, his sister, did.

And then I took his deposition. And we're going to get to that in a moment, because I'm going to put it up on the screen so you can see these answers, Your Honor. And I say this by way of background because it goes to both good faith -- or, actually, bad faith -- as well as the lack of a bona fide affirmative defense here.

This is -- there are five notes litigation. One against Mr. Dondero. So that's package number one. And they're

represented by the Stinson firm, who is signing all of these things. The Stinson firm is out there claiming that in good faith each of these -- each of these amendments, each of these amendments to the interrogatories, are in good faith. They're not in good faith, Your Honor. They're just not.

And the Bonds firm.

Then bucket two is what we have here today. That's HCRE and Highland Capital Management Services. They're represented by Ms. Drawhorn. I think the Stinson firm has now also entered an appearance in those two adversary proceedings.

And the other two are against the two Advisors. More entities controlled by Dondero. And Mr. Rukavina, I believe, last night filed his motion to amend to add these same defenses.

Okay? Is this good faith? I don't think this is good faith.

Let's look at Mr. Dondero's testimony so that the Court has an understanding of what we're talking about here. I think I have Ms. Canty on the phone, and I'd ask her to go to Page 178. 3. Just going to read (garbled) so you can see. This was Mr. Dondero's testimony the day after telling me that he amended his interrogatory -- sworn interrogatory answer to say that he didn't enter the agreement on behalf of the Debtor but Ms. -- but Ms. Dondero, his sister, did.

Question. Are we -- 178, please.

MS. DRAWHORN: Your Honor, I would --

MR. MORRIS: Question. Please --

MS. DRAWHORN: This is not testimony in this adversary and I was not -- my clients were not present at this deposition that Mr. Morris is referring to, so I --

MR. MORRIS: Your Honor, with all due respect, she's interrupting me, and I would ask her to allow me to finish my presentation and then she can make whatever comments she wants. Because -- because --

MS. DRAWHORN: Well, I'm objecting to this testimony --

THE COURT: Okay.

MS. DRAWHORN: -- coming into evidence.

THE COURT: Okay. So your objection is -- if you could just articulate your objection for the record, please, Ms. Drawhorn.

MS. DRAWHORN: I would object to this -- this deposition is not in this proceeding, this adversary proceeding, either of these two the adversary proceedings, and my client was not present at this deposition, so I would object to it as hearsay.

THE COURT: Response?

MR. MORRIS: Your Honor, if I may, I think this -- this points to just one of the fundamental problems that we have here. As we pointed out in our objection, the Debtor, as

we sit here right now, still has no notice of the facts and circumstances surrounding this alleged agreement. We still don't know who entered into the agreement on behalf of the Debtor. We don't know what the terms of the agreement were. We don't know when the agreement was entered into. We don't -- right?

If they're going to assert that there's an agreement -- and they seem to be piggybacking on this conversation between Mr. Dondero and his sister. If there's a different one, they need to say that right now. They need to put their cards on the table and they need to inform the Debtor who entered the agreement on behalf of the Debtor pursuant to which the Debtor agreed to waive millions and millions of dollars without telling anybody.

THE COURT: Okay. I overrule the objection. We can go through the transcript.

MR. MORRIS: So, I'm just going to use part of it, Your Honor. But on Lines 3 to 7:

"Q Did anybody else participate -- did anybody participate in any of the conversations other than you and your sister?

"A I don't believe it was necessary. It didn't include anybody else."

Go down to Line 19, please.

"Q Was the agreement subject to any negotiation? Did

she make any kind of -- any counterproposal of any kind?

"A No."

Page 179, Line 2.

"Q Do you know if she sought any independent advice before entering into the agreement that you have described?

"A I don't know."

Line 23, please.

"Q Do you know if there were any resolutions that were adopted by Highland to reflect the agreement that's referred to in the -- in the answer?

"A Resolutions that -- no. Not that I'm aware of."

Page 180, Line 5.

"Q Did you give Nancy a copy of the promissory notes that were a subject of the agreement?

"A No."

Continue.

"Q Did she ask to see any documents before entering into the agreement that's referred to?

"A I don't remember."

Page 181, Line 19.

"Q Under the agreement that you reached with Nancy that's referred to in Paragraph 40, was it your understanding that Highland surrendered its right to

make a demand for payment of unpaid principal and interest under the notes?

"A Essentially, I think so."

Page 219. I'll just summarize 219, Your Honor. Mr. Dondero has no recollection of telling Mr. Waterhouse, the chief financial officer, or any other employee of Highland that he'd entered into this agreement with his sister pursuant to which the Debtor agreed to not collect almost $10 million of principal and interest.

Now let's -- let's go -- I think it's really -- because it took me an awfully long time to get there. On Page 214 at Lines 16 through 24. This is what the agreement was, because this is -- this is -- this is his third try to describe the agreement. Right? The first time -- it's just his third try, and this is what the agreement is, Your Honor.

"Q Did you and Nancy agree in January or February 2019 that if Highland sold either MGM or Cornerstone or Trussway for an amount that was equal to at least one dollar more than cost, that Highland would forgive your obligations under the three notes?

"A I believe that is correct."

That's -- that's the agreement. It took him three times to get there, but look at -- look at that. He and his sister did that.

And I do want to point out, Your Honor, that in their

opposition that they filed last night, the Defendants claim that Ms. Dondero was authorized because she was -- she was the trustee of Dugaboy and Dugaboy holds the majority of the limited partnership interests in the Debtor and therefore she had the authority to enter into the agreement on behalf of the Debtor.

There is that flippant -- there is just that unsupported statement out there. Section 4.2(b) of the limited partnership agreement says, and I quote, "No limited partner shall take part in the control of the partnership's business, transact any business in the partnership's name, or have the power to sign documents for or otherwise bind the partnership, other than as specifically set forth in the agreement."

So I look forward to hearing what basis there was to submit a document to this Court that Nancy Dondero had the authority to bind the Debtor in an agreement with her brother pursuant to which tens of millions of dollars was apparently forgiven.

Can we go to Page 238? This is the last piece, Your Honor. The Debtor's outside auditors were PricewaterhouseCoopers. There's management representation letters signed by both Mr. Dondero and Mr. Waterhouse attesting that they had given their auditors all of the information necessary to conduct the audit. We will get to that in due course, but these are very important questions

right here.

What page are we on? Is it 238? Okay. So, Line 16, I believe.

"Q You knew at the time -- you knew at the time the audited financials were finalized that Highland was carrying on its balance sheet notes and other amounts due from affiliates?

"A Yep."

And if we could just keep going, Your Honor, you will see:

"Q Did you personally tell anybody at PricewaterhouseCoopers in connection with the preparation of the audited financial statements for 2018 that you and your sister had entered into the agreement with your sister Nancy in January or February of 2019?

"A Not that I recall."

There's a lot more here, Your Honor. I'm really just touching the surface. I am going to take Nancy's deposition later this month. But there is -- this is wrong. This is just all so wrong. For three different reasons. At least. This is not a viable defense and will never be a viable defense.

The audited financial statements carry these loans as assets on the books, without qualification, and they were subject to Mr. Dondero and Mr. Waterhouse's representations.

There is partial performance. These entities that we're talking about today, they made payments on these notes. How do you make payments on the notes and then come to this Court and say the notes are ambiguous? How do you -- how do you make payments on the notes and come to this Court and tell this Court, I just learned that there was an agreement by which I don't have to pay, subject to conditions precedent in the future.

Mr. Sauter submits a declaration in support of this motion. He has no personal knowledge. He states in Paragraph 14 that his review of the Defendants' books and records did not reveal any background facts regarding the notes. Mr. Dondero is the maker on all of the notes except for two of them. Mr. Dondero owns and controls the Defendants. Mr. Dondero was not employed or otherwise affiliated with the Debtor after these actions were commenced. Mr. Sauter takes Mr. Seery to task for telling the Debtor's employees not to take actions that were adverse, and he uses that as his excuse for not knowing these facts. He is the general counsel. He was served with a complaint that alleged that his clients were liable for millions and millions of dollars. His boss is James Dondero. He had unfettered access to James Dondero. Mr. Dondero is the one who signed the notes, except for two of them. There is absolutely no excuse for not doing the diligence to find out from Mr. Dondero that this defense

existed.

And you know why it didn't happen? Because the defense is not real. It is completely fabricated. It continues to change and evolve every single time I -- every single time I talk about these note cases, it's a new defense, it's a different defense, the contours change, somebody else is involved. This is an abuse of process, Your Honor. It is bad faith. It just really is. And somebody's got to start to take responsibility and say, I won't do this. I won't do this.

Somebody's got to stand up and say that, because, I'm telling you, it's not enough, Your Honor, that the Debtor is going to collect all of its fees under the notes at the end of this process. It's not enough, because we're now giving an interest-free loan. These are -- these are notes that are part of the Debtor's plan that nobody objected to, that nobody suggested were the subject of some condition subsequent.

This is not your normal, you know, gee, I'd like leave to amend the complaint. They're simply following what Mr. Dondero did. And I would really ask the Court to press the Defendants to identify specifically who made the agreement on behalf of the Debtors, when was the agreement made, is there any document that they know of today that reflects this agreement, and what were the terms of the agreement? Is it really that he would sell -- if he sells MGM for a dollar over

cost, $70 million of notes get forgiven? How is that possible? How is that possible? It doesn't pass the good faith test. The Court should deny the motion.

Thank you, Your Honor.

THE COURT: Mr. Morris, in all of your listing of allegedly problematic things, one trail my brain was going down is this: Is this adversary going to morph even further to add fraudulent transfer allegations? I mean, if notes --

MR. MORRIS: Here's the --

THE COURT: -- were forgiven or agreements were made --

MR. MORRIS: Yeah, I --

THE COURT: -- that they would be forgiven if, you know, assets are sold at a dollar more than cost, is the Debtor going to say, well, okay, if this is an agreement, there was a fraudulent transfer?

MR. MORRIS: Your Honor, that is an excellent question, one which I was discussing with my partners just this morning. You know, we have to -- we're balancing a number of things on our side, including the delay that that might entail; including, you know, what happens if we go down that path. You know, the benefit of suing under the notes, of course, is that he's contractually obligated to pay all of our fees.

And so we're balancing all of those things as these -- as

these defenses metastasize. But it's something that we're considering, and we reserve the right to do exactly that, as these defenses continue to get -- and it would be fraudulent transfer, it would be breach of fiduciary duty against Nancy Dondero, it would be breach of fiduciary duty against Jim Dondero. I'm sure that there are other claims, Your Honor. But if they want to -- if I'm forced to go down that path, I'm certainly going to use every tool that I have available to recover these amounts from the -- for the Debtor and their creditors. This is just an abuse of process.

How do you -- how does one enter into agreements of this type without telling your CFO, without telling your auditors, without putting it in writing? And I asked Mr. Dondero, what benefit did the Debtor get from all of this? And you know what his answer was, Your Honor? Because it's really -- it's appalling. It was going to give him heightened focus on getting the job done because of this agreement that he entered into with his sister, Nancy, acting on behalf of the Debtor, with no information, with no documents, with no notes, with no advice, with no corporate resolutions. The Debtor was going to get Mr. Dondero's heightened focus to sell MGM, Trussway, or Cornerstone for one dollar above cost.

I think the fraudulent transfer claim is probably a pretty solid one. But why do we have to do this? Why do we have to do this?

THE COURT: Well, one of the reasons I'm asking is I would not set the motion to withdraw the reference status conference on an expedited basis, which I was asked to do a few days ago in these two adversary proceedings, and I can't remember when I've set it, but now I'm even worried, if I grant this motion, is it going to be premature to have that status conference in a month or so, whenever I've set it, because if I grant this motion I'm wondering, am I going to have your motion to amend to add fraudulent transfer claims? It's -- you know, I want to give as complete a package to the District Court as I can whenever I have that motion to withdraw the reference.

All right. Ms. Drawhorn, back to you. As I said --

MS. DRAWHORN: Yes.

THE COURT: -- before inviting Mr. Morris to make his argument, I know the law is very much on your clients' favor as far as the law construing Rule 15(a). But my goodness, I'm wondering if your client needs -- your client needs to be careful what they're asking for here, after what I've just heard.

Anyway, what -- you get the last word on this.

MS. DRAWHORN: Yes. Thank you, Your Honor. My response is that Mr. Morris's argument was all on the merits of the defenses, and certainly he is free to argue on the merits, but that's not a determination for today and that's

not a determination for the motion for leave to amend. That's a determination for if he files a dispositive motion.

Like I said, we are still in the discovery phase. Mr. Morris mentioned at least three parties that will be -- likely be deposed and potentially give us the additional information that he's asking for to support this defense. He mentioned PricewaterhouseCoopers; Nancy Dondero, who he's already got scheduled in a different adversary; Frank Waterhouse.

So it's too early, as you know, to look at the merits. That's not -- that's not what's the focus of a motion for leave to amend.

As to the -- the what amendment, what agreement, what are the conditions subsequent, I believe we provided sufficient information in our reply. And if the Court would like us to update our proposed amended answer, if the Court is inclined to grant our motion, we can certainly do that. But I think the Plaintiff seems to be well aware of what the defenses are, especially after his argument today on why he thinks it's not a valid defense.

And then, on the due diligence, we did -- we did do due diligence. That's why we're seeking to amend the answer, obviously, and add these claims.

If the Court -- if the Plaintiff wants to file a motion to amend later, then we can address those amendments then.

But I think, on the Rule 15 standard, we have met our

burden and there's no substantial reason to deny the motion to amend to add these defenses.

THE COURT: All right. By the way, have your clients, have they filed proofs of claim? And I'm asking for a different reason than maybe I was asking earlier. NexPoint Real Estate Partners?

MS. DRAWHORN: They're -- NexPoint Real Estate Partners, LLC, formerly known as HCRE Partners, does have a proof of claim on file. It's unrelated to the notes. And it is subject to a contested matter that's pending -- that's a separate matter that's before the Court being addressed.

And then HCMS initially filed a proof of claim that was objected to in the Debtor's first omnibus objection and then was disallowed. There was no response to that omnibus objection, so there's no longer a proof of claim for Highland Capital Management Services.

THE COURT: Okay. Again, I'm just thinking ahead to this report and recommendation I'm eventually going to have to make on the motions to withdraw the reference. And as I alluded to, if this morphs to the point of including fraudulent transfer claims, that certainly --

MS. DRAWHORN: And Your Honor, one --

THE COURT: It's going to affect the report and recommendation. And, you know, proofs of claim affect that, too. So, --

MS. DRAWHORN: Uh-huh. Yes. And I understand that, Your Honor. And the issue, I think, with you -- we need to have this motion resolved, because it -- unless the Court is going to continue discovery or stay. You know, one of the reasons why we had initially requested the expedited hearing was because of the discovery is continued -- continuing to -- discovery deadlines are continuing to move. And obviously whatever the Court decides on this motion for leave to amend will determine what the scope of that discovery is.

Similarly, if the Debtor decides to amend, that could change the scope of discovery as well.

So we are open to continuing deadlines, and I think, you know, might end up filing a motion to continue. I haven't conferred with Mr. Morris yet. I suspect he's opposed, based on our prior conversations. But that's something that might be helpful, especially if the Court is concerned on how it will affect the motion to withdraw the reference, to -- maybe we continue some of these upcoming deadlines, and that might appease, you know, solve some of your concerns.

THE COURT: All right. Well, Rule 15(a), of course, is the governing rule here, and the case law is abundant that courts "should freely give leave when justice so requires." And the law is also abundantly clear that the rule "evinces a bias in favor of granting leave to amend." And again and again, cases say that leave should be granted unless there's

substantial reason to deny leave, and courts may consider factors such as delay or prejudice to the non-movant, bad faith or dilatory motives on the part of the movant, repeated failure to cure deficiencies, or futility of the amendment.

While the Debtor has presented arguments that there might be bad faith here on the part of the Movants and there might be futility in allowing the amendments because of various strong arguments and defenses the Debtor believes it has to this issue of agreements with regard to the notes that allegedly provide affirmative defenses, the Court believes the rule requires me to allow leave to amend the answer.

Now, a couple of things. I am going to require, though, that the amended answer be more specific than has been suggested. I am going to agree that if new affirmative defenses are made that there was this agreement to forgive when certain conditions happened, then there does need to be identification of who the human beings were that were involved in making the agreement, the date of any agreement or agreements, and disclose what documents substantiate the agreement or reflect the agreement. All right? So if that could --

MR. MORRIS: Your Honor?

THE COURT: Yes?

MR. MORRIS: John Morris. I apologize for interrupting, but just a fourth thing is what is the

agreement? I mean, what is the agreement?

THE COURT: Well, okay. That's fair enough. What is the agreement? I guess --

MR. MORRIS: And -- and --

THE COURT: -- that needs to be spelled out. I mean, I guess I was assuming that that would be spelled out in -- but maybe it's not. So we'll go ahead and add that.

As far as extension of the discovery, Ms. Drawhorn has offered that. I think it would be reasonable if the Debtor or Plaintiff wants that. Do you want an extension of discovery?

MR. MORRIS: What I really want, Your Honor, is a direction for them to serve this amended answer within 24 or 48 hours and grant leave to the Debtor to promptly file written discovery. We've got Nancy Dondero -- if it turns out -- and maybe Ms. Drawhorn can just answer the question right now. Who entered the agreement on behalf of the Debtor? Because I'm already taking Nancy Dondero's deposition on the 28th. And it seems to me, if they would just answer the question of whether Ms. Dondero is the person who did that, I could just add a notice of deposition and take the deposition on that date, too, and it would be, really, more efficient for everybody.

THE COURT: Ms. Drawhorn, who was the human being?

MS. DRAWHORN: Yes. It was -- yes, Nancy Dondero entered into the -- the subsequent agreement.

MR. MORRIS: Okay. Super.

THE COURT: All right. You said you've already --

MR. MORRIS: So, --

THE COURT: -- got a depo scheduled of her?

MS. DRAWHORN: Well, what's the date --

MR. MORRIS: I do --

MS. DRAWHORN: -- Mr. Morris?

MR. MORRIS: I believe it's the 28th. Your co-counsel can confirm, but I think it's the 28th.

And I'll just get another deposition notice for that one, and we'll figure out a time to take Mr. Sauter's deposition, too.

But I don't think that there is a need, frankly, for -- having been told by Mr. Dondero that there's no documents related to this, having the Court just ordered the Defendants to disclose the identity of any documents that relate to this agreement, I don't think we need to extend the discovery deadline at all. I can take Ms. Dondero's deposition, I can take Mr. Dondero's deposition, and I can take Mr. Sauter's deposition in due course over the next four weeks.

THE COURT: All right. Well, Ms. Drawhorn, we'll say that this amended answer needs to be filed by midnight Friday night, 11:59. That gives you a day and a half to get it done. All right. If you could please --

MS. DRAWHORN: Yes, Your Honor.

THE COURT: Please upload an order, Ms. Drawhorn, granting your motion with these specific requirements that I've orally worked in.

I think clients need to be careful what they ask for. I'm very concerned. And I know it was just argument and I'll hear evidence, but of all of the things that I guess -- well, I'm concerned about a lot of things, but do we have audited financial statements that didn't disclose these agreements with regard to --

MR. MORRIS: Yes, Your Honor.

THE COURT: I mean, that's -- I'm just -- you know, there's a lot to be concerned about on that point alone, I would think. But, all right. If there's nothing further, we are adjourned. Thank you.

THE CLERK: All rise.

(Proceedings concluded at 11:58 a.m.)

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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 **06/12/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

INDEX

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
	Monday, May 10, 2021
	1:30 p.m. Docket
Debtor.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 20-3190-sgj**
Plaintiff,	- TRIAL DOCKET CALL - DEFENDANT'S EMERGENCY MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF DEFENDANT'S PETITION FOR WRIT OF MANDAMUS [154]
v.	
JAMES D. DONDERO,	
Defendant.	

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

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

DALLAS, TEXAS - MAY 10, 2021 - 1:40 P.M.

THE COURT: All right. The other matter we have set on this docket is Highland Capital Management, LP versus Dondero, Adversary 20-3190. We had docket call, trial docket call set, as well as Defendant's emergency motion to stay the proceedings. So I'll ask, first for Plaintiff Highland, who do we have appearing today?

MR. MORRIS: Good afternoon, Your Honor. It's John Morris from Pachulski Stang Ziehl & Jones on behalf of the Debtor.

THE COURT: All right. And for Mr. Dondero, who do we have appearing today?

MR. WILSON: John Wilson and Clay Taylor.

THE COURT: All right. And I assume we have Mr. Dondero out there listening in?

MR. TAYLOR: Yes, Your Honor. He's next to me.

THE COURT: Okay. Thank you. All right. Thank you. Well, we'll start with the motion to stay proceedings. Mr. Taylor, will you be making that argument, or Mr. Wilson?

MR. WILSON: I will, Your Honor.

THE COURT: Okay. You may proceed.

MR. WILSON: Well, Your Honor, this motion to stay is, as you've seen in our papers, it's largely based on the pending proceeding at the Fifth Circuit on a writ of mandamus. And as you are probably aware, that motion or that writ was

filed on the 8th of March. The -- late in the evening, actually. The next morning, shortly after business hours opened, the Fifth Circuit requested a response from the Debtor by March 16th. The Debtor timely filed that response, and we are awaiting a ruling from the Court.

And due to all of the overlapping issues between the preliminary injunction and the permanent injunction that's sought by the Debtor, we thought it would be appropriate to stay the trial on the permanent injunction for reasons of, you know, potential inconsistent rulings or, you know, judicial economy. It only seems to make sense to, you know, give the Fifth Circuit a little bit longer to consider these issues and see what they're planning to do.

And I've got the -- Your Honor, my brief covers the factors that the -- for a stay pending appeal. Some courts say that you have to apply those factors in this situation. Other courts say that the Court -- the Fifth Circuit's mandamus jurisdiction, there's inherent power to stay. But in any event, you know, we think that that factors are met here.

The four factors would be the showing of a likelihood of success on the merits, and the courts, you know, are uniform in saying that that doesn't mean the showing of a probability of a success, just a likelihood.

I think the fact that the Fifth Circuit could have easily denied this without an opinion quickly but instead has

requested a response and is now -- I think tomorrow will be eight weeks since it's had full briefing in front of it -- you know, we believe that we meet that test because obviously the Fifth Circuit is considering the merits of this.

And this is, of course, a serious legal question, because it's the entire issue in this case, is the appropriateness of the injunctive relief that the Debtor seeks.

Of course, the second issue, irreparable injury, I think anytime that you're dealing with an injunction, whether, you know, you grant an injunction or are seeking to overturn one or whatever, I mean, irreparable injury to one or the other parties is always at issue.

You know, I think that we've raised some serious concerns about Mr. Dondero's constitutional rights and his First Amendment rights specifically. You know, and being under a -- being under an order, a permanent order, is, of course -- you know, exacerbates the seriousness of those matters.

Substantial harm to the debtor. We believe there is none to pushing this proceeding back. As has been stated, there is a preliminary injunction in place that runs until the effective date of the plan. That was the way the Debtor chose to seek that relief. And we think that, you know, the Debtor's rights, if, you know, if they are potentially going to be infringed on, are protected by the preliminary injunction and the plan injunction itself.

And then finally, Your Honor, you know, this would stay -- granting of a stay would serve the public interest due to just consistency and judicial economy. You know, it's going to be a lengthy trial with multiple witnesses. You know, those witnesses have to give up time out of their schedule to attend the trial. You know, there's going to be a lot of attorney time involved. And, of course, the Court's time.

So we just think that a, you know, a brief, appropriate stay or continuance to allow the Fifth Circuit to issue a ruling on this matter would be appropriate.

THE COURT: All right. Well, I have several questions for both sides.

My first question is this. You've -- with your last comment, you know, we think there's going to be a lengthy trial and whatnot, it's really a judicial efficiency and judicial economy, economy of the parties argument, right? I mean, that's really what I'm hearing. Right?

MR. WILSON: Yes, Your Honor. I mean, that's certainly -- that's certainly a big part of this. And, you know, we're respectful of the Court's time and, you know, we appreciate that the witnesses would have to give their time as well. So, --

THE COURT: Okay. Well, here is a question I have. I'm trying to think through the ifs -- if we do go forward, if we don't go forward -- and here's how I come out on this one.

If we do go forward, doesn't that lead to judicial efficiency? And here's why I ask. Because then you've got a permanent order. A final order, I should say. There is either a permanent injunction or no injunction. It's final. Somebody can appeal it without the procedural problems of, oh, it's only interlocutory, need motion for leave. And, in fact, if I rule, the Fifth Circuit petition for mandamus becomes moot, right? Because now --

MR. WILSON: Well, I don't know --

THE COURT: -- forget about that preliminary injunction, good, bad, or indifferent. Now we have a final order that someone can appeal without needing leave. And so what -- you know, my brain gravitates towards efficiency: If I just rule on a final basis in this adversary, then people can go on about their way and appeal the final ruling, whatever it is.

MR. WILSON: Well, Your Honor, it's hard to know if the Fifth Circuit's consideration of the former injunction would be moot without -- without knowing, you know, how they're going to rule. You know, they could -- you know, as I said, the underlying issues in the preliminary injunction and the permanent are, you know, largely if not wholly overlapping. And you know, I just can't -- I can't speak for the Fifth Circuit what, you know, what they're intending to do with this thing and how they're intending to rule. And, you

know, I think that their -- you know, they do have jurisdiction over this and they can protect their jurisdiction.

So, you know, I just can't really -- I can't really agree that a trial on the permanent injunction would moot the preliminary in this case, given the issues that are on mandamus at this point.

THE COURT: Well, I'm going to ask you to be more specific on that, because I'm not -- I'm not on the same page at all. I mean, two ways I can rule. I can say, grant a permanent injunction. Okay? And so then you have a final ruling of this Court that, if you appeal, the District Court has to hear it because it's final. And then if you appeal beyond that, the Fifth Circuit has to hear it because it's final.

On your -- meanwhile, on your petition for writ of mandamus, what you have asked is: Fifth Circuit, make the District Court hear our appeal of an interlocutory order. Okay? They didn't grant leave. It was interlocutory and they wouldn't grant leave to hear the appeal. Well, at that point, the preliminary injunction that you wanted the District Court to review on appeal has been replaced by a permanent injunction.

So, what am I missing? There's nothing --

MR. WILSON: Well, I --

THE COURT: At that point, it's moot. Isn't that classic mootness?

MR. WILSON: Well, that's the second part of the relief that we asked for that you just described, Your Honor, at the Fifth Circuit.

So, the primary focus of the mandamus was on an order dissolving the preliminary injunction on the issues that are -- you know, were raised in this brief. And they -- the issues that we've raised in this Court before, but -- the overbreadth and the constitutional concerns and vagueness and those types of things. And to the extent that the exact same relief is sought in the permanent injunction, while the Fifth Circuit is, you know, considering -- you know, I can't speak for them because they haven't -- they haven't spoken yet, but to the extent that they are considering that aspect of the mandamus, and that's the primary relief we sought, then that's where I have a problem saying that the -- that the preliminary injunction would become moot or the issues related to the preliminary injunction would become moot when a final injunction is issued.

And then I would, if Your Honor was to say that, you know, no final injunction will issue and Your Honor was to say that the preliminary injunction is over and ended, then I would agree that the issues would be mooted. But that's only one scenario that would result from this -- that could result from

this trial.

THE COURT: Okay. So it will be moot if I deny the permanent injunction, but it might be useful to wait, you're saying, because the Fifth Circuit may say, you know, Subsection (d) of the preliminary injunction -- you know, 2(d), let's say, hypothetically; I'm just plucking one out of the year -- that went too far. We're ordering in mandamus fashion for you to vacate that order as to, you know, whatever provisions they may say went too far. And then we would have a hearing on the permanent injunction, and you would say, well, that could be guidance to the Court. You know you can't do this. They've already said that goes too far. Is that what you're saying?

MR. WILSON: So, I think that's -- you know, that's certainly part of it, Your Honor.

THE COURT: All right. My next question is I assume you've told me everything you know as far as what you've heard from the Fifth Circuit? You know, the petition for writ of mandamus was filed March 8th. You said the next day they asked Debtor to respond by March 16th. The Debtor responded. And it's just been silence since then?

MR. WILSON: That is -- that is correct, Your Honor. I mean, we -- we've actually called the Clerk's Office and, you know, just made a generic inquiry as to the matter in connection with filing this writ -- or, I'm sorry, this motion

for stay. But we -- you know, of course, there was no -- you know, no response other than the Court is still considering it.

THE COURT: Okay. So your view is I ought to stay this until the sooner of the Fifth Circuit ruling one way or another or 60 days? You're saying at 60 days, well, --

MR. WILSON: Well, that --

THE COURT: -- holy cow, who knows how they're going to rule, so we'll just go forward?

MR. WILSON: I think that was just -- well, yeah, and I don't -- I don't know if there's any -- anything behind that 60 days. I think that was just -- just an example of what, you know, the Court could do that we gave in our brief.

But, you know, I think that -- I think that probably the most appropriate way to handle it would be to say that it's going to be set, you know, for docket call, you know, say, 30 days after the Fifth Circuit's ruling, you know, if appropriate. Something like that. But, you know, I -- 60 days wasn't like a magic number.

THE COURT: My next question is, what would a trial look like if we do go forward next week or whenever? You said it would be a "lengthy" trial. The pretrial order says, "no more than two days." I'm just trying to figure out why it would be a lengthy trial.

MR. WILSON: Oh, I mean, I -- I agree that probably

two days is in the realm of where it will be. I thought that the joint order actually said two and a half days. But I kind of considered -- kind of, you know, estimated that between the witnesses that we wanted to call and then the Debtor's witnesses and then the cross-examinations and all that, that we would have about two days of testimony, and then -- and then argument after that.

THE COURT: Okay. Well, --

MR. WILSON: And so when I say lengthy, I mean, I was -- I was considering that to be lengthy.

THE COURT: Okay. Well, this is maybe more of a question for Mr. Morris, but maybe you have an answer as well. I am wondering what a potential permanent injunction would even look like at this point. Again, this is probably more of a Mr. Morris question, but I'll ask you.

I presume the shared services agreements are terminated at this point, so, looking at the preliminary injunction, Columns 2C and 2D I'm guessing might go out the window. You know, maybe, maybe not. But, again, I'm -- maybe this ties in to why such a lengthy trial. I'm guessing that the Debtor is probably going to have a skinnied-down request at this point, but maybe not. What -- have you talked to Debtor's counsel about that? Do you have a response to that?

MR. WILSON: The Debtor is not telling us any different than what they've put in their papers at this point,

Your Honor.

THE COURT: Okay. Well, thank you. I will turn to Mr. Morris now. Mr. Morris?

MR. MORRIS: Good afternoon, Your Honor. John Morris; Pachulski Stang Ziehl & Jones.

Let me just start by pointing out several things that Mr. Wilson overlooked in terms of what's been told to the Fifth Circuit.

At Page 5 of their petition, which was filed on March 9th, two months ago, the Fifth Circuit was told, "The trial concerning the Debtor's request for a preliminary injunction is currently set for the week of May 17th, 2021." So the Fifth Circuit knows exactly when this trial is being conducted.

Indeed, the Fifth Circuit was told by Mr. Dondero and the Bonds Ellis law firm on March 9th that the Court was going to hold a contempt hearing on March 22nd, and the Fifth Circuit took no action to intervene to stop that. I think that is a much better indicator of their lack of interest in this petition for writ of mandamus. It's been sitting there for two months. They didn't act, despite having knowledge of the contempt motion and the hearing that was going to be held. They know exactly when this hearing is going to happen next week.

And you know why they know that? It's been -- they've

been told that again, because Mr. Wilson didn't tell you that he also filed a motion in the Fifth Circuit for a stay of these proceedings. We responded to that this morning, Your Honor, but I don't understand how you can ask him the question of what the Fifth Circuit knows and Mr. Wilson forget to tell you that he has made the exact same motion in the Fifth Circuit.

Now let's talk about what their petition for writ of mandamus really is. There is two parts. Your Honor focused on one part, and that is they're trying to get the Fifth Circuit to order the District Court to exercise its discretion to hear an interlocutory appeal. I ask you, Your Honor: What is the likelihood of success on that?

The second thing they're asking the Court to do, the Fifth Circuit Court of Appeals, they're asking the Fifth Circuit to simply throw out the preliminary injunction. We argued very strongly in our opposition to the petition that the Fifth Circuit doesn't even have jurisdiction to do that. Yet in their plea for a stay, a last-minute stay of this permanent injunction proceeding, Mr. Dondero doesn't refute that argument at all.

In fact, he doesn't address it. He proffers no facts in support of his position. He gives no argument as to why the Fifth Circuit is likely to direct the District Court to exercise its discretion to hear an interlocutory appeal. They

make no argument at all. There's no factual, legal, or equitable basis upon which this Court can find that Mr. Dondero is likely to succeed on the merits.

The second prong, the harm. You know exactly what the harm is going to be to the Debtors here, Your Honor. They asked for 60 days. What happens if the Fifth Circuit hasn't responded in 50 days? Are you going to conduct the trial then? Why would you do that? You would have to wait longer.

What if the Fifth Circuit actually rules and they direct the District Court to exercise its direction [sic] to hear the interlocutory appeal, and the District Court hears it and overrules the appeal? Then what? They're going to say we have to wait further so that they can appeal the District Court's rejection of the interlocutory order to the Fifth Circuit. We will be here for years, and that is exactly what the game is.

Your Honor had it exactly right. It was in our brief, it's never been rebutted by the Bonds Ellis law firm, that if we simply have a trial next week and the Court -- if the Court rules in Mr. Dondero's favor, everything's gone. If the Court issues the permanent injunction, he will have a final order. There will be no waste of time, no waste of money, no waste of effort dealing with judicial discretion, dealing with issues of interlocutory orders. He will have a final order. And what we have asked for is set forth very clearly in our

proposed findings of fact and conclusions of law. The order that we're asking for is set forth in Paragraphs 11, 12, and 13, and they largely mirror what's in the preliminary injunction.

One tweak is exactly what Your Honor picked up on, and that is there's no longer any shared services agreements so there's no longer any exception for talking to the Debtor's employees about shared services because there are no such things anymore. So we took that out. Okay?

So, likelihood of success on the merits, I've addressed.

Irreparable injury. You know, the Debtor is going to be forced into a quagmire of Mr. Dondero's own making, and it should not be required to do that. Mr. Dondero, ironically, if he was really here for justice, if he was really here for justice, he would want the quickest possible trial he could get in order to vindicate himself, or, if there's an adverse judgment, to get that judgment reversed as soon as possible. And the best way to do that is to have a speedy trial.

If he was honest, if their motives were pure, they would be asking you for the quickest trial possible. And that, Your Honor, would be consistent with the public interest. The public interest is served by the speedy administration of justice, and that's what we're looking for here. Consistent with ample Fifth Circuit precedent, trial courts are permitted to proceed with trials on permanent injunctive relief,

notwithstanding a pending appeal of an interlocutory order on a preliminary injunction. We've cited a legion of cases. Silence from the Bonds Ellis law firm. Silence. For good reason. There is nothing to say about it. That is the law. And we urge the Court to deny the motion.

Thank you, Your Honor.

THE COURT: All right. Mr. Morris, so just to clarify, I do have up on the screen your proposed findings and conclusions, but it might be a little easier for me to just focus on the preliminary injunction that is dated January 12th. I'm looking at Paragraph 2, decretal Paragraph 2, which is where most of the injunction language is. Are you saying that you would seek the very same sort of permanent injunction, only at Subsection (c) you would cross out the "except as it specifically relates to shared services currently provided to affiliates owned or controlled by Mr. Dondero"? Everything else would remain --

MR. MORRIS: I don't have a -- yes.

THE COURT: Okay. So I'm looking --

MR. MORRIS: As would the next paragraph, you know, using his affiliated entities or other people who are acting on his behalf. That would be enjoined as well. And from the preliminary injunction, we would also adopt -- actually, it should say permanently enjoined, so there's a typo there. But it should be permanently enjoined from entering the Highland

offices.

I think the only two things that -- the only changes that we made were to delete the requirement that he appear at all hearings. That was something that I think Your Honor very appropriately included, but I'll leave that to the Court. We also deleted the reference to shared services, as I indicated. And frankly, we've eliminated the reference to Ellington and Leventon because they're no longer employees of ours.

THE COURT: Okay.

MR. MORRIS: And we think that that prohibition ought to stay in effect until further order of the Court. But until there's a -- when there's a further order of the Court, that's not a particular piece that we'll be seeking going forward.

THE COURT: Okay. I got a little lost. So, Paragraph 4, you would propose comes out? Or no?

MR. MORRIS: Is that -- I'm sorry, I don't have it in front of me.

THE COURT: That's the --

MR. MORRIS: Is that Ellington and Leventon?

THE COURT: -- Scott Ellington/Isaac Leventon paragraph.

MR. MORRIS: Yeah. Right. Now, they, of course, would still be bound by their -- by their ethical and legal obligations with respect to attorney-client privilege and they couldn't disclose, because we hold the privilege. So it

doesn't matter that Mr. Dondero is the former CEO. We have the privilege. And so obviously they are duty-bound not to disclose privileged information.

But other than that, given that they're no longer employees of the Debtor, we'd rather not get tied into the morass of that. It's going to be very difficult to police, in any event.

THE COURT: Okay. All right. So my next question is, what do you think a trial will look like? Two days? A lengthy trial? I mean, I'm baffled --

MR. MORRIS: I'll be perfectly honest. I am, too, Your Honor. Because we've had this trial twice already. Your Honor, at -- I think our proposed findings of fact and conclusions of law are at Docket 156 of the adversary proceeding. And I don't know if you've had a chance to look at that yet, Your Honor, but from Paragraph -- I think it's one -- Paragraph 30 to Paragraph 149 -- so, 120 paragraphs long -- we set forth the evidence that was adduced at the preliminary injunction hearing and at the contempt hearing. We have a citation to every single exhibit and every single page and line that we rely upon from the testimony. And because of that, Your Honor, we plan on relying on that. I wouldn't anticipate more than 30 or 45 minutes for an opening statement, perhaps an hour of direct testimony from Mr. Seery and Mr. Dondero, which will cover, I promise you, I promise

you, only topics that have not been previously covered. And then an hour for closing. I could do this in two and half hours, Your Honor.

THE COURT: Okay. You've named Seery and Dondero as potential witnesses. And Mr. Dondero has named Seery, Dondero, Ellington, Leventon, Jason Post, Dustin Norris, and JP Sevilla as potential witnesses.

MR. MORRIS: Sure.

THE COURT: Well, let me ask you this.

MR. MORRIS: Can I address that issue first, Your Honor?

THE COURT: Okay. Go ahead.

MR. MORRIS: Because back in March, we actually served an interrogatory that asked the Bonds Ellis firm to identify the witnesses that Mr. Dondero intended to call at trial. And we were told that because we had served the interrogatory near the end of the discovery deadline and they didn't have 30 days, they had no obligation to answer.

I reached out to the Bonds Ellis firm and asked them, if they needed more time, I had no problem with that. I believe I offered to accept the exact same interrogatory and to serve it three days after they did, and they agreed. Hadn't heard from them again until I got their witness list and I saw this litany of people on it. And I wrote to them last week and I expressed considerable concern about that list, witness list.

And I pointed out that Mr. Dondero has a history of including a laundry list of people on a witness list and never calling them.

Specifically, at Docket 83 and Docket 85, they identified Ellington, Leventon, and Rothstein, and never called them. But meanwhile, I have to prepare for all of that, right? At Docket 106, they put down Ellington, Leventon, and Post, and, again, never called the people associated with that hearing.

Now we've got Ellington, Leventon, Post, Norris, and Sevilla for this. So I said, what are you doing? Can't you just tell me who you intend to call? This isn't a case, for example, where you're having a trial for the first time and you're a defendant and you say, gee, I want to see how the evidence comes in. I can't really tell you for sure because I have to see what the plaintiff's case looks like.

Mr. Dondero knows what the Plaintiff's case looks like because we had a trial on January 8th. We had another trial on March 22nd and March 24th. And he has my proposed findings of fact and conclusions of law, which go into more detail than you probably wanted to see.

And so I asked them again, can you just tell me who you intend to call? And they declined to tell me.

So I will just say at this point, and I will speak more about this in my opening statement, whoever is called at this point on the third try of these issues by definition has no

credibility. Their credibility has to be called into question. Where were they the first time? Where were they the second time? And why are they just being called now, after you see the proposed findings of fact and conclusions of law?

And if you look at Mr. Dondero's exhibit list, you will not find any documents that are going to support any testimony by any of these people who are now employed, directly or indirectly, by Mr. Dondero.

So I really think you asked the perfect question. How could this possibly be a lengthy trial and why are all these people on the witness list? And I would ask Mr. Wilson to answer those questions.

THE COURT: My last question for you is I presume the plan has not gone effective yet?

MR. MORRIS: No. The plan has not gone effective yet. And I'll address that by just saying I'm not the right person to answer that, but I will say, while there is no basis -- the Debtor believes there is no basis to grant a stay here, if Your Honor disagreed and the plan went effective, the order specifically says that the preliminary injunction terminates upon the effective date unless otherwise ordered by the Court. And before -- before that effective date happens, I assure you Mr. Dondero is not getting to -- not getting the benefit of a stay and being unburdened by the preliminary injunction. That

will never happen. Okay?

So I don't think there's any basis to grant a stay. I think for purposes of judicial economy we should just get this over with already and let the -- let him take his appeal wherever he wants to take his appeal. But if Your Honor disagrees and the effective date occurs before there is a final order on the interlocutory appeal of the preliminary injunction, we'll be back with a motion to extend the preliminary injunction until that happens.

THE COURT: Okay. All right. Thank you.

All right. Mr. Wilson, first, what would you like to say in reply to Mr. Morris?

MR. WILSON: Well, I really want to make a few comments in reply. I mean, the first thing that struck me was that Mr. Morris stated that the Fifth Circuit did nothing to halt the contempt hearing proceeding, which I would agree with, but on the other hand, no one ever asked them to. We did not make that request to the Fifth Circuit and they did not do it on their own accord.

With respect to the motion to stay filed in the Fifth Circuit, we did make a -- I don't think I improperly answered your question. I think your question was directed to what have we heard about the mandamus. We have not heard anything about the mandamus.

We did file a kind of companion motion to this in the

Fifth Circuit after receiving the setting for this -- for this hearing today. Just in the interest of time, we -- we did tell the Fifth Circuit the entire situation, that we filed this motion, when it's set, and let them know that, you know, we were seeking this stay. But we also believe that the Fifth Circuit has inherent authority to grant a stay in any event, and so we just wanted to keep them, you know, in the loop, in the interest of time. And so -- but they have not responded, though. The Debtor has filed a response to that motion, but the Fifth Circuit has not given us any --

THE COURT: When --

MR. WILSON: -- guidance on that, either.

THE COURT: When did you file the motion for stay --

MR. WILSON: I believe it was on --

THE COURT: -- with the Fifth Circuit?

MR. WILSON: I believe it was on Thursday of last week, Your Honor.

THE COURT: And let me be clear about the jurisdictional basis for that?

MR. WILSON: Well, there is a -- there is a rule, I think it's Federal Appellate Rule 8, that deals with stays pending appeal. And like I said, there's a difference in interpretation of whether that applies to mandamus or not and whether you have to go through the step of moving in the trial court first. And -- but in an abundance of caution, just

given the timing of all this, we went ahead and made that filing in the Fifth Circuit, telling them that we've made this filing but that it would not be heard until today, and told them that -- that they had the jurisdiction to issue that stay, should they want to, under their inherent authority, but also they have the freedom to wait and see what Your Honor does with it first, which they've apparently chosen to do.

THE COURT: You know, if I had known you filed that, I might have canceled this hearing. Let the Fifth Circuit rule. He's asked for someone, you know, with higher authority than me for a stay. Why should I spend my time?

MR. WILSON: Well, Your Honor, like we said, we filed this motion -- I don't recall the date. But we filed it well over a week ago, and we -- we sought an emergency hearing, to which the Debtor did not object. And it wasn't until we found that this hearing would not be until the 10th that we -- that we decided that we needed to notify the Fifth Circuit --

THE COURT: You filed it April 30th. And you decided I didn't --

MR. WILSON: Okay.

THE COURT: -- move fast enough by setting it ten days out, --

MR. WILSON: No, --

THE COURT: -- so you'd go to the Fifth Circuit?

MR. WILSON: Well, no, it was -- the timing is more

about the -- about the relation to the trial date than -- than the date we filed the motion.

THE COURT: All right. Well, just so you know, I think you should have told me you filed that. I don't know how I phrased my question about what have you heard from the Fifth Circuit, but, again, if I had known you had filed that, --

MR. WILSON: Well, --

THE COURT: -- I would have just canceled the hearing. Just let them rule at this point.

MR. WILSON: I apologize for that, Your Honor. I honestly thought you were aware of this, but --

THE COURT: Why would I be aware of it?

MR. WILSON: Well, --

THE COURT: Just FYI, the Fifth Circuit doesn't notify the lower courts, oh, by the way, this pleading was filed in an appeal or something affecting you. That's not the way it works.

MR. WILSON: I apologize, Your Honor. And like I said, we -- we fully intended to give this Court the opportunity to rule on this first, but in the interest of time, we wanted to go ahead and get the process rolling at the Fifth Circuit.

So, like I said, we hadn't heard anything from them in two months, so we, you know, we didn't know if maybe that would

prompt a quick opinion or what, and maybe just, you know, end the need for this whole proceeding today.

THE COURT: That's really not the way these things work. I will just let you know, that's really not the way these things work. Anyway, I don't know why I'm telling you that. It isn't going to have repercussions on me. But I don't know if you know, you know, they have death -- execution appeals and, you know, all kinds of really serious life-and-death things. So, you know, the fact that they haven't ruled --

MR. WILSON: Well, I understand, Your Honor.

THE COURT: -- in two months on something involving a bankruptcy injunction is not shocking, really.

MR. WILSON: I understand, Your Honor. It's just that this -- it's a mandamus proceeding, and, you know, there was quick action by the Court right off the bat, and, you know, and, you know, a quick briefing schedule. So, you know, it's a little different than your standard Fifth Circuit procedure.

THE COURT: All right. Well, address this length of trial thing again. You know, I had a hearing on or about December 10th on the TRO. That wasn't a really lengthy all-day hearing, but we heard evidence then. Then we had the preliminary injunction hearing in the second week of January. Lots of evidence that day. I think that was all day. We have

had the contempt motion on March 22nd and 24th. And I have pulled up the proposed findings and conclusions of the Debtor, and it is a lot of cross-referencing the evidence I've already heard.

So, again, I'm really, really, really trying to understand why we would have a lengthy hearing. I'm just telling you right now, I'm leaning towards setting this for trial next week, and I'm leaning towards setting it for Friday. Okay? Partly because we have lots of Highland stuff Monday and Tuesday next week, and so that's just what I'm leaning towards doing. But I'm trying to understand why Friday, an all-day Friday, we could start at 9:00 o'clock, why wouldn't that be plenty of time? Maybe three hours of evidence each, plus argument. That's just where my brain is leaning right now.

So, again, help me to understand why that wouldn't be enough time.

MR. WILSON: Well, I think that, you know, as Mr. Morris mentioned earlier, we've had witnesses on exhibit and witness lists for prior hearings, and for various reasons they did not end up being called.

I mean, you may recall at the contempt hearing that the Debtor decided to release Ellington and Leventon and not call them, on an agreement with their counsel, and we subsequently decided that we could -- we could go without calling them as well. However, at the end of that hearing, we'd wished we'd

had their testimony in there, and we asked you to reopen the evidence and allow them to testify.

My point is, is that this is a permanent trial --

THE COURT: To be exact, it was not at the end of the day of evidence. It was when we came back two days later that you wanted to reopen the evidence, after we made it very crystal clear the evidence had closed. Okay? I just -- I don't like things to get incorrectly in the record.

MR. WILSON: I mean, you stated that correctly, Your Honor. It was -- it was on March 24th that we asked you to allow those witnesses to testify.

But in any event, you know, we deserve an opportunity to put on our evidence and to make our record, which, you know, as Mr. Morris told you, has not been done. And I think Mr. Dondero has that right. And, you know, we're currently evaluating the relief the Debtor is seeking, and of course we're taking into consideration the comments Mr. Morris just made. We haven't had an opportunity to talk to my client about that.

But, you know, we -- we should have a right to call witnesses. They've been on the witness and exhibit list, you know, now for the appropriate amount of time. Mr. Morris has been aware of them. And, in fact, he's deposed nearly all of them, if not taken them on examination in a hearing as well. And I don't think there's any surprise or whatnot to Mr.

Morris if any of these guys testify.

But, you know, I think that Mr. Dondero has the right to evaluate, you know, what these witnesses could say and to put on their testimony to the extent that we need to to rebut what the Debtor is trying to -- what the -- the case the Debtor is trying to make.

THE COURT: All right. So, Seery, Dondero, Ellington, Leventon, Jason Post, Dustin Norris, JP Sevilla? Your current plan --

MR. WILSON: And I may be --

THE COURT: Your current plan is to call seven witnesses?

MR. WILSON: I would say up to seven, but my current plan is to call more than just Mr. Dondero and Mr. Seery, as Mr. Morris intends to do.

THE COURT: All right. I think you were alluding to this, but let me double-check. Now that you've heard Mr. Morris explain how the permanent injunction he would be requesting is skinnied-down from the preliminary injunction, and that is, you know, taking out references to shared services agreements because those aren't in place anymore and taking out the prohibition on Dondero communicating with Scott Ellington and Isaac Leventon, does this impact the trial at all, from your standpoint?

I mean, I know a big issue has been, you know, First

Amendment, prohibiting him from talking. But with Paragraph 4 coming out, the Ellington/Leventon prohibition, and with the fact that there's no shared services agreement in place, so, you know, I don't know why he would need potentially to be talking to Debtor personnel, is this -- does this skinny down the trial, at least, in your view?

MR. WILSON: I think it -- I think it very well may, Your Honor. I mentioned that a minute ago. Unfortunately, I haven't had the opportunity to visit with my client about that so I can't commit to anything at this moment. But I think you may very well be right on that.

THE COURT: All right. Well, I'd like you to have good faith discussions with Mr. Morris in the next 24 hours. You know, Mr. Dondero is there in your office, so I would think you all could caucus and get back with him in 24 hours on that point.

MR. WILSON: Well, yeah, with due respect, Your Honor, Mr. Dondero is in the middle of a deposition with Mr. Taylor, and they're at a separate office than I am at this moment. They took a break from their deposition to attend this hearing.

THE COURT: Okay. They're not in your office? I see Mr. Taylor. He's in some other office. Mr. Dondero is waving.

MR. TAYLOR: Yes. I'm in Dallas, Your Honor.

THE COURT: I thought they were all there at Bonds Ellis, but they're not all there at Bonds Ellis.

MR. TAYLOR: Your Honor, Clay Taylor on behalf of Mr. Dondero. Just so that you know, we've been in depositions for -- where Mr. Dondero was subpoenaed as a third-party witness in the UBS versus Highland Capital case where we moved for a protective order on that but that was denied. And so we are appearing pursuant to that -- to that notice, and we're going right back to it after this. Mr. Clubok has, as counsel for UBS, has indicated that it might be a lengthy day today. I'm hoping that that doesn't turn out to be the case. But it's -- we've already been going at it for some time, and he indicates that he has quite a bit more to ask. So, just so you know. And then we do have -- Mr. Wilson does indeed need to talk with Mr. Dondero about a few things that we heard that we weren't totally anticipating from Mr. Morris that might -- might skinny this down.

THE COURT: Okay. All right. Well, thank you, Mr. Taylor.

Here's what I'm going to do. I'm going to deny the motion for a stay. I just don't think there is the required showing here to stay trial in this adversary proceeding pending the mandamus ruling. You know, at this point, it's been over two months since the petition for mandamus was filed. I don't know what that means, just like none of you know what that

means. But particularly with a stay pending mandamus pending before the Fifth Circuit right now, I mean, they'll do what they feel is appropriate to do, but I think it's appropriate for this Court to move forward in this trial until ordered otherwise.

Again, when looking at the four prongs here, I think one of the most significant prongs here on evaluating should we stay this or not is the, does the stay serve the public interest?

And, again, I view the argument largely to be about judicial economy and efficiency of the parties. And at this point, however I rule at trial, I feel like the mandamus becomes moot and it's much more efficient for everyone to -- if someone wants to appeal my final ruling in this adversary, there are not going to be the impediments of needing to seek leave of needing to get mandamus. It'll be a final ruling one way or another. That's the only way I can view this.

And, again, looking at the other prongs for a stay pending appeal, likelihood of success on the merits. You know, is there a significant legal issue on a serious legal question? I just don't see that prong having been met. It's important to people. I know this litigation is important to people. But it doesn't, in my estimation, meet that high hurdle.

So, the stay is denied. I don't find the other prongs met here.

I am, as I suggested, going to go ahead and set this for trial a week from Friday. So what's that, the 21st?

MR. WILSON: Your Honor?

THE COURT: Yes? Who's speaking?

MR. WILSON: Yes, Your Honor. Is Friday the only day next week where trial is available?

THE COURT: Do you have a conflict?

MR. WILSON: Well, I just got asked to participate in a proceeding out in Midland on Friday, that we have to go Thursday night. If -- you know, if that -- if there's another day around there that would work better, that would work better for me personally.

THE COURT: There's really not. I'm looking at next week, and I have Highland all day on Monday. As far as I know, a full-day setting is what I have down for the UBS settlement. Anyone disagree with that going all day?

MR. MORRIS: We haven't gotten objections yet, Your Honor, but that's what we're going to plan for.

THE COURT: Okay.

MR. MORRIS: It's John Morris. John Morris for the Debtor.

THE COURT: Okay. So, Tuesday at 9:30, I have Highland matters. Motion to disqualify Wick Phillips and then various fee applications. I show a three-hour time estimate on the Wick Phillips matter. Is that --

MR. MORRIS: You know, Your Honor, this is John Morris. And I know that they're not here, or at least I don't think they're on, I don't think there's representatives, so I want to caveat what I'm about to say. We received their objection to the motion the other day, and I think it's going to require discovery, and so I do intend to reach out to them before the hearing to see if we could simply have a status conference on Tuesday and just set a scheduling order that will allow us to take some discovery, because we're a little surprised at some of the positions that they're taking and we're certainly not prepared to have an evidentiary hearing.

So, you know, I don't have their agreement to say that. I'm just saying that that's what our intention is. I don't know what the Court's calendar looks like for the balance of the day, but if the balance of the day is free, it's conceivable we could be prepared to try this on Tuesday as well.

THE COURT: All right. Well, I would be willing to do that. If the Wick Phillips thing comes off, that leaves one, two, three fee applications. So we could set the trial for 9:30 and do the fee applications first on Tuesday and then roll into this trial.

How does that sound? Mr. Wilson, does that work better for you?

MR. WILSON: Is there time to roll into Wednesday if

that becomes necessary?

THE COURT: There is actually some time to roll into Wednesday, if that happens. All right? I still want you all to talk about limiting your evidence. I kind of spit-balled a minute ago three hours each side of evidence, plus opening, plus closing. I want you to think about is that doable, but I will commit to give you Wednesday morning next week as well if we don't finish on Tuesday. All right? Work for everyone?

MR. MORRIS: That's fine with the Debtor, Your Honor. That's fine with the Debtor.

I do have one other issue to raise, if I may. I don't know if there's anything else on your agenda, Your Honor.

THE COURT: Well, there is something else on my agenda, but I'll let you go first. But just to make the record clear, trial is set on this matter next Tuesday at 9:30, and then I'll give you a half a day Wednesday, Wednesday morning as well, if you need it.

So, could I ask -- I'll split up the job. Mr. Wilson, if you could upload an order denying your motion for stay. And then, Mr. Morris, if you could upload an order setting this for trial next week at 9:30.

All right. So what is your issue, before I get to mine?

MR. MORRIS: Sure. Just prior to this hearing, the Bonds Ellis firm filed on behalf of Mr. Dondero objections to the Debtor's exhibits. We had filed our witness and exhibit

list a couple weeks ago, I believe. Maybe it was just a week ago. And every -- I think maybe all but two or three of the exhibits on our exhibit list are exhibits that were previously admitted into evidence, mostly without objection, maybe a couple over their objections. But they've all been admitted into evidence in this case in either the temporary restraining order proceeding, the preliminary injunction proceeding, or the contempt proceeding. So all of it's happened in this adversary case with these lawyers representing the Defendant. And nevertheless, they filed objections to almost every single exhibit. On authentication grounds. On relevance grounds. And I just -- I was struck by that because I've never seen anything like that before, Your Honor. And I was looking at Rule 11. Rule 11(b)(2) requires anybody filing a paper with the Court to represent that the legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law. And I just, I just don't understand what existing law there is that would allow a party to object to evidence that has already been admitted in the adversary proceeding. And before the Debtor pays me money that it shouldn't, I think -- I think -- I'd like to just raise this issue with the Court because they've objected literally -- they've objected, for example, to one of our exhibits that they cite in their proposed findings of fact and conclusions of law. Now, mind you, they have a totality

of four citations to the record in their proposed findings of fact and conclusions of law, but two of them are to the January 26th transcript. Now, it is on our exhibit list, but as Your Honor may recall, that hearing didn't have to do with this adversary proceeding. It actually had to do with the injunction proceeding against the Advisors.

But so they've included -- some of the stuff there -- included in their proposed findings, they're objecting to the exhibit on our exhibit list that has it.

But that's just, that's just kind of a funny fact. What's really not so funny is I don't understand how they can object to evidence that's already been admitted in this adversary proceeding. And it would take -- this trial would be very lengthy if I had to bring in a witness to authenticate documents or to prove relevance for documents and evidence that have already been admitted.

Not only has it been admitted, Your Honor, it's been relied upon by the Debtor, as set forth in our proposed findings of fact and conclusions of law.

Not only has it been only relied upon by the Debtor, it's been relied upon by the Court in issuing the preliminary injunction order.

And moreover, I just -- yeah, so -- so it's out there. It's been out there forever, and I just don't understand how, consistent with Rule 11, somebody could object to that

evidence now, because I don't know of an existing law and I would really -- you know, it's going to create -- I don't think this is done in good faith. I really think it's, you know, pursuant to Rule 11(b)(1), it's actually being presented -- these objections are being presented for an improper purpose and to needlessly increase the cost of litigation. And I just -- I look for guidance from the Court, because I don't want to do this unless the Court says I really need to respond.

THE COURT: First off, what time was this filed? Because I thought my law clerk and I checked the docket right before coming in here. What time was this filed?

THE CLERK: 12:50 this afternoon.

THE COURT: 12:50?

THE CLERK: Yes.

THE COURT: Okay. Shame on us for preparing early, because we prepared before 12:50 for the 1:30 hearing. This was filed at 12:50. And it shows Brian Assink filed it, Mr. Wilson. What do you have to say? I'm looking at it. This is really the darnedest thing I've ever seen. You have objected to every exhibit except Exhibit #1, whatever #1 was. You didn't object to that. You objected to Exhibits 2 through 65, and most of them are, quote, hearsay, lack of foundation, lack of authentication, relevance. That's most of them. Sometimes you have merely hearsay, relevance. Or relevance.

What are you doing? I've already admitted most of these. And, by the way, you stipulated to the admissibility of a lot of these.

MR. WILSON: Well, Your Honor, if I may, I understand that, you know, a permanent injunction trial is a separate proceeding, and that everything that may have been admitted for a different purpose during the adversary or even some other adversary proceedings, you know, is not part of the record unless it's admitted in this proceeding. And the way we understood the requirements --

THE COURT: Wait. We're not talking about other adversary proceedings. We're talking about this adversary proceeding.

MR. WILSON: Well, we are, Your Honor, because --

THE COURT: And the whole adversary proceeding is about an injunction. A TRO, preliminary, and now permanent.

MR. WILSON: Well, but Your Honor, as Mr. Morris mentioned, he's trying to also incorporate some testimony and evidence from a separate adversary proceeding, the -- I think it was the January 26th hearing. But, you know, we understood that --

THE COURT: What hearing? What hearing is that? I don't know.

MR. WILSON: That was the hearing on the preliminary injunction against the Funds and Advisors.

MR. MORRIS: Your Honor, I don't believe there's one citation in our proposed findings of fact and conclusions of law to that transcript. It's actually Mr. Dondero who cites to that transcript twice in his proposed findings of fact and conclusions of law. At the same time, they're trying to exclude the transcript from evidence.

THE COURT: Mr. Wilson, got that one wrong?

MR. WILSON: Well, no. It's on their exhibit list so it's one of the things that we noted an objection to.

But my point was, is that, you know, to the extent these -- some of these items or maybe most of these items have been admitted for one purpose or another in a different proceeding, that was for a different purpose. And, you know, we -- we kind of thought we were starting with a clean record for our permanent injunction trial and that we would, you know, make more objections because there's a different purpose. There's more at stake and there's different issues. And so that doesn't mean that we're going to object to every single one, but --

THE COURT: What do you mean, there are different issues? Elaborate on that.

MR. WILSON: Well, the whole --

THE COURT: They're slightly narrower, I think is what we established earlier. What's new and different?

MR. WILSON: Well, the whole preliminary versus

permanent. I mean, I understand the -- well, right, I mean, with respect to the relief being sought, but with respect to preliminary (garbled) in attendance at the preliminary injunction hearing.

THE COURT: Okay. Unfortunately, you have connectivity issues suddenly.

MR. WILSON: You know, I've got -- I've got a different view on those things. I mean, the contempt hearing has some things --

THE COURT: Mr. Wilson, I don't know if --

MR. WILSON: And I think we lost Mr. Morris on the screen. Can you hear --

THE COURT: -- you can hear me, but we suddenly have very bad connectivity.

MR. WILSON: Can you hear me?

THE COURT: Your screen is frozen, your video is frozen, and I really didn't get any of the last two minutes.

MR. WILSON: Is it better now, Your Honor?

THE COURT: Well, I heard you say, "Is it better now?"

MR. WILSON: I'm going to log off and log back on.

THE COURT: Okay. We're going to have to -- we're going to have to cut this --

MR. WILSON: I'm going to try to log off and log on.

THE COURT: No. I'm ready to be finished with this

hearing. You need to go back and look at this, because I am leaning towards what Mr. Morris is arguing, and that is that this is really bad faith. Okay? There is no change of issues. It's been the same issue at the TRO hearing, at the preliminary injunction hearing. Okay. The motion for contempt, we were looking backwards a little at behavior. But the issues are not expanded. Okay? It's just duration of the injunction. And now a slightly skinnied-down injunction.

So, of course, I am willing to consider evidence I've heard at the TRO hearing and the preliminary injunction hearing. And I would note that on many, many, many of these exhibits, you didn't object. Or if you did, you argued it and I overruled it.

So you need to go back and look at this and think hard whether you're really going to press these issues at the trial. Okay? This is -- again, *Dondi*, we require counsel to work in good faith to streamline trials and work with people. If you can agree, if you can stipulate to evidence, that's what you need to do. And this looks like -- I don't know what it looks like. But if this is any guidance to you, it should be, if I admitted it at the TRO hearing, if I admitted it at the preliminary injunction hearing, it's fair game to consider it now.

Here's the last thing I want to say, and this is very big-picture, not unique to this adversary proceeding.

Can everyone hear me okay? I don't know if we're having connectivity issues. Can everyone hear me?

MR. MORRIS: Yes, Your Honor.

THE COURT: Can you hear me, Mr. Wilson?

MR. MORRIS: Yes, Your Honor.

MR. WILSON: Yes, Your Honor.

THE COURT: Okay. I have been pondering something the past few days. And I haven't figured out how I want to address it, but maybe Mr. Dondero's counsel and counsel from some of the Dondero-controlled entities, maybe they can listen to what I'm about to say and figure out a solution.

As you all know, there are so many law firms, so many lawyers involved now that are basically singing the same tune at a lot of these hearings as far as objections, me too, me too, me too. And so just quickly eyeballing what we have, we obviously have Mr. Dondero represented by Bonds Ellis. There is another firm that represents Mr. Dondero that filed a motion asking that I recuse myself. I can't remember the name of that firm, but I think they appealed my denial of that motion. So, I can't remember who that was. Then we have the various affiliates. We have -- well, I'll just start chronologically. Highland CLO Funding, Ltd. has historically been represented by King & Spalding. I don't know if that's -- I know there were some changes there with the ownership of that entity, so maybe they're gone. But then we have NexPoint

Advisors and Highland Capital Management Fund Advisors. We call them the Advisors and then the Funds. Originally, they were all represented by K&L Gates, but now they've divvied it up and Munsch Hardt is representing, I guess, the Advisors, and the Funds are represented by K&L Gates. CLO Holdco, Ltd., it was Kane Russell Coleman & Logan representing them, but I now think I'm seeing Kane Russell is representing Grant Scott and -- individually. I'm not sure if Kane Russell is still representing CLO Holdco. We have Dugaboy and Get Good Trusts represented by Doug Draper, Heller Draper. We have now Louis Phillips representing the Charitable DAFs, Highland Dallas Foundation. We have NexPoint Real Estate Partners represented by Wick Phillips, although there's the motion to disqualify them. And then I guess I'll just throw in we've had Baker & McKenzie and Ross & Smith representing certain groups of employees, but now I guess those proofs of claim have been bought by Dondero entities and so I'm not sure who's representing who there.

I'm not even sure I got everyone just now, but here's what I'm getting at. You talk about judicial efficiency and judicial economy and economy of the partners. We can't go on efficiently with 12 law firms or whatever I just named filing the very same type of motion or objection. You know, I almost -- if we were in different circumstances, I'd say we need to have an ad hoc committee of these Dondero-controlled

affiliates, something like that.

But I've been thinking about this for a few days because I see, like in one adversary, I think we now have three motions to withdraw the reference. And I haven't studied them all, but I'm pretty sure they're going to tell me the exact same thing. And again, I'm just doing some predictions that the UBS settlement, I wouldn't be surprised if I get eight or ten or twelve objections that say the very same thing.

We're going to have to work something out. Okay? This is not efficient. It's not useful. I would think a person such as Mr. Dondero would want to rein in legal fees, but maybe not.

Do you all have any ideas, Mr. Taylor, Mr. Wilson? How can we rein this in? There's got to be a better way --

MR. TAYLOR: Your Honor?

THE COURT: -- than twelve different law firms filing almost identical pleadings.

MR. TAYLOR: Your Honor, I understand what you're saying, on the one hand. On the other hand, each of these entities do have -- are separate corporations. They have different duties to various stakeholders, and they are controlled by different stakeholders. And that is one of the things that has been a consistent, at least from what I understand from my limited understanding and length of time in the case, that that is one thing that is very important to Mr.

Dondero and those related entities, is that those duties do run to different parties. So each party has to preserve its individual rights.

Sure. Could it be more efficient? Of course. But Mr. Dondero has a different set of duties than do the Advisor, than do the Funds, than do the Trusts that are controlled by a separate trustee. And while of course there's some interrelated cooperation amongst them, amongst the joint defense agreement, it is very important that they maintain their separate corporate identities and act independently from each other, because they truly do have to act independently from each other in many different circumstances. They don't want to lose sight of that.

So that is my initial explanation. Of course, I can talk with my client about it further, about seeing what can be done, because he does indeed want to make it more efficient. Has been hammering on me and my firm every month to try to do so, and I'm sure he has with the other professionals.

But we do hear Your Honor, but we do want to make sure that that -- those different separate corporate identities of these entities is both recognized and laid out in this case. It is very important to us and just integral to a lot of the things that we've done in this case.

THE COURT: You know what would help me understand that better? Is if in every case I had this entity is owned

by, you know, 25 percent by this, this. If I knew the owners, if I knew the equitable owners. But I don't. That's just all kind of glossed over. And so that's how perceptions get created that Dondero, Dondero, Dondero, Dondero. You know what I'm saying?

MR. DONDERO: Your Honor?

THE COURT: And I don't know if you want to share that information or not, but that's why I can't just accept a generalization that, oh, we have very different stakeholders behind --

MR. TAYLOR: Your Honor? Wait, hold on a second. Your Honor, --

THE COURT: -- this entity versus this one versus this one.

MR. TAYLOR: Your Honor, if you would allow my client, he would like to very briefly address the Court on those points, if he may.

THE COURT: Okay.

MR. DONDERO: Your Honor, just a brief history from my perspective, okay? We filed with $450 million of assets and $110 million of estimated, as presented by the independent board and Pachulski to the Court, trying to do a quick settlement the first three or four months into bankruptcy. The claims, the awards, the Class 8, the Class 9 awards, the people who didn't even have standing, have all of a sudden

ballooned to $300-some-odd million. And the assets in the estate, which we haven't had an examiner go through all these no-process asset sales at a loss, when I would have bought them for more, has driven the estate value down to less than $250 million.

We made an offer to try and settle this thing a few months ago at 20 percent more than the estimated value in the recoveries. But Seery and the UCC are emboldened because they feel in this Court there's going to be no respect of third-party investors, no respect of other Dondero entities, and they've been told that they can get more than a hundred cent recovery by going after me and all my other entities going back ten or twelve years.

So there's no chance that this case ever settles. And what you're going to see is there's a half a dozen or more --

MR. POMERANTZ: Your Honor, I have to -- I have to --

MR. DONDERO: -- there's a half a dozen more law firms coming --

THE COURT: Just a moment.

MR. DONDERO: -- and there's a half a dozen -- there are a half a dozen more --

MR. POMERANTZ: Your Honor, this --

THE COURT: Mr. Morris?

MR. POMERANTZ: This is Jeff Pomerantz.

THE COURT: Mr. Morris?

MR. POMERANTZ: This is Jeff Pomerantz, Your Honor.

THE COURT: Oh, Mr. Pomerantz?

MR. POMERANTZ: This is Jeff Pomerantz, Your Honor.

THE COURT: Uh-huh.

MR. POMERANTZ: You know, I think what Mr. Dondero is doing is totally inappropriate. We're not here to relitigate the history of the case. We're not here to relitigate or determine why a settlement hasn't been reached. Your Honor raised some important questions, (garbled) gave an answer, you pushed him, but what Mr. Dondero is doing is just inappropriate, and we shouldn't -- don't think he should be doing this in this manner.

If he wants to at some point be put on to testify, he could be cross-examined. But he's testifying about things that actually just happen not to be true and it's totally inappropriate for this context.

THE COURT: Okay. Well, I understand --

MR. DONDERO: But Your Honor, there's going to a half dozen --

THE COURT: -- that -- I understand, you know, Mr. Pomerantz is concerned because I asked a specific question aimed at how do we rein in all the lawyers, and the answer was, well, they all are separate entities with separate interests and separate stakeholders. And my question was, well, could I maybe see a list, a breakdown on all of these

entities? Because, you know, in so many cases, --

MR. DONDERO: But Your Honor, --

THE COURT: -- in almost every case I have, I get a big giant what I call spaghetti chart at the beginning of the case where I get a breakdown of debtor affiliates and who owns what. And this hasn't been clear to me with all of these affiliates.

But I do very much have the impression, Mr. Dondero, that all roads lead back to you. So I let you speak to this, and we've kind of gone down a different trail. And I want you to know, I know --

MR. DONDERO: Right.

THE COURT: I know where you stand on this because you have told me before. You have huge concern that Highland had *x* hundred million dollars of assets at the beginning of the case and now it's a lot lower. I know you have concerns with liquidation at what you think were very inappropriate times. I know you have all kinds of beefs, beefs about the settlement with Acis, and probably UBS and the Redeemer Committee. I understand that. But what I'm talking about right now is going forward. Going forward, how do we rein this in where we don't --

MR. DONDERO: But going forward, there's going to be more lawyers. There's going to be more defense. Because the Debtor is just going to keep trying to broaden, because they

feel empowered and enabled to go after anything related to Highland, me, et cetera. But there's probably half a dozen more attorneys coming into this case. I don't know what to tell you. It's a circus.

THE COURT: Okay. Well, I'm going to let you all think about this out of court. Is there a way you can streamline? I mean, I know -- I almost chuckle at myself at saying ad hoc committee of Dondero-controlled entities. I know that that sort of sounds, I don't know, unworkable, maybe. Maybe not. I'm not going to read 14 different objections to the UBS settlement that say the very same thing. I'm not going to read a different motion to withdraw the reference by every single defendant in every single adversary that gets filed. This is just not an efficient way to go forward.

So I want you all to think about how you can make this more efficient. You know, it -- a perception could exist that you're trying to carpet-bomb us all with paper, the Court included. I mean, it's my job. I'm going to read everything that's put before me. That's what I do. That's what I'm supposed to do. But it's out of control. So you all think of a way to get it in control or I might impose something. The wheels are turning. What could I do? You know, page limits.

MR. POMERANTZ: Your Honor, this is Jeff Pomerantz. One suggestion might be, following up on what Your Honor made

some comments about, and Your Honor has used the word ad hoc committees, and obviously it's sort of a different animal here. But as Your Honor knows, that every time an ad hoc committee comes in, they have to file a 2019 statement. So I think it would at least provide Your Honor with information, as it would provide all of us with information, to really understand and know, when people are appearing, is it all roads leading back to Dondero, or, as Mr. Taylor says, what are the different constituents? Who are the different people?

As Your Honor has heard from us, we lump them all together because we believe the evidence has shown throughout this case that it all leads -- the road leads back to Dondero. But Your Honor may consider asking them to file sort of the equivalent of a 2019 statement to provide Your Honor with that information under oath that Your Honor could then see, when you get several objections to the same thing, whether you really need to be dealing with them as seven different matters or whether dealing with them as one.

THE COURT: Okay. All right. Well, I'm giving this thought. And again, I'll let you all think about it and make a proposal. But I may or may not accept any proposal you make. And I am leaning towards requiring information to be filed of who owns what, who are the stakeholders. That'll help me understand, is it necessary to have this entity filing a separate objection or motion from this other entity or not?

Can we just have an hoc committee each time?

I don't even think I listed all the law firms. I know a new law firm filed a lawsuit in front of Judge Jane Boyle recently. We've got a hearing on that coming up in June. I mean, and now you're -- I'm hearing there are going to be more. Well, if you don't figure out a way to rein it in, then I'm just going to have to get that list of who are the stakeholders in these entities, under oath, because I don't understand it. I don't understand why we need these many lawyers filing position papers.

So, all right. Well, we're going to adjourn, and I guess I'll see you next Monday, right?

MR. MORRIS: Thank you, Your Honor. Yes.

THE COURT: Okay. Thank you.

THE CLERK: All rise.

(Proceedings concluded at 3:07 p.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 **05/11/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

INDEX

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

Signed May 18, 2021

United States Bankruptcy Judge

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
vs.	§	No. 20-03190-sgj
	§	
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

ORDER RESOLVING ADVERSARY PROCEEDING

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

This matter having come before the Court on the joint request of Highland Capital Management, L.P. ("Plaintiff" or the "Debtor") and James Dondero ("Defendant" or "Mr. Dondero"), all of the parties (together, the "Parties") in the above-captioned adversary proceeding (the "Adversary Proceeding"); and this Court having considered (a) the *Debtor's Proposed Findings of Fact and Conclusions of Law* [Adv. Pro. Docket No. 156], (b) the *Joint Pre-Trial Order* [Adv. Pro. Docket No. 157], (c) *James Dondero's Proposed Findings of Fact and Conclusions of Law* [Adv. Pro. Docket No. 158], (d) *James Dondero's Trial Brief Opposed to Plaintiff's Complaint for Injunctive Relief* [Adv. Pro. Docket No. 159], (e) the stipulated facts, the proposed factual findings, the proposed conclusions of law, and the arguments and law cited in the foregoing documents, and (f) all prior proceedings arising in and relating to this Adversary Proceeding; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that there is a factual basis for the relief requested and that the requested relief is appropriate under sections 105(a) and 362(a) of the Bankruptcy Code; and after due deliberation and sufficient cause appearing therefor and for the reasons set forth in the record, it is **HEREBY ORDERED THAT**:

1. James Dondero is enjoined and restrained from the following conduct until the Court enters an order granting a motion made by the Debtor or its successors or assigns, seeking to close of the above-captioned Chapter 11 Case (the "Case Closing"):

(a) communicating directly or indirectly with (i) any member of the Independent Board,[2] (ii) any current or former member of the Claimant Trust Oversight Board,[3] (iii) the Claimant Trustee, or (iv) the Litigation Trustee ((i)-(iv) collectively, the "Protected Entities"), any communication with the Protected Entities must be conducted directly through respective counsel;

(b) making any express or implied threats of any nature against the Debtor, the Reorganized Debtor, any of the Protected Entities or any of their directors, officers, employees, professionals, or agents, in whatever capacity they are acting;

(c) communicating with any person then employed by the Debtor or the Reorganized Debtor; and

(d) interfering or otherwise impeding, directly or indirectly, with the Debtor's, the Reorganized Debtor's or the Protected Entities' business, including, but not limited to, any decisions concerning their respective operations, management, treatment of claims, disposition of assets owned, controlled or managed by the Protected Entities, and the implementation of the Plan (collectively, the "Prohibited Conduct").[4]

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[2] "Independent Board" means the board of directors at Strand Advisors, Inc., the Debtor's general partner, appointed on January 9, 2020, and their successors. The current members of the Independent Board are John Dubel, James P. Seery, Jr., and Russell Nelms.

[3] All capitalized terms used but not defined herein have the meaning given to them in *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [Docket No. 1808] (as amended, the "Plan"), which included certain amendments. *See Debtor's Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)*, Ex. B [Docket No. 1875].

[4] For the avoidance of doubt, this Order does not enjoin or restrain Mr. Dondero from seeking judicial relief upon proper notice, from objecting to any motion filed in this Bankruptcy Case, or from the exercise of all rights at law, contract, or equity made in accordance with any "gatekeeper" provision then in place, including those in the Plan, the *Order Approving Settlement With Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 339], and the *Order Approving Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative Nunc Pro Tunc To March 15, 2020* [Docket No. 854] , and no communication conducted through respective counsel will be deemed to violate this Order or constitute Prohibited Conduct unless such communication is found to violate (b) (pertaining to threats) and (d) (pertaining to interference).

2. It is further **ORDERED** that, for the avoidance of doubt, Mr. Dondero is also enjoined and restrained from otherwise violating section 362(a) of the Bankruptcy Code, until such section is no longer in force under its terms or the discharge injunction contained in the Plan after the Effective Date.

3. It is further **ORDERED** that Mr. Dondero is enjoined and restrained from causing, encouraging, or conspiring with (a) any entity owned or controlled by him, and/or (b) any person or entity acting with him or on his behalf, to, directly or indirectly, engage in any Prohibited Conduct until the Case Closing, ***except*** that this Order does not enjoin or restrain Mr. Dondero's employees or any of his affiliates' employees from communicating with the Debtor, the Reorganized Debtor, or the Protected Entities or any of their directors, officers, employees, professionals, or agents in connection with any requests for data or information made pursuant to that certain *Order*, Adv. Proc. No. 21-03010-sgj [Docket No. 24] (Bankr. N.D. Tex. Feb. 24, 2021), or in connection with the Shared Resources Agreement, dated March 1, 2021, by and among Highland Capital Management, L.P. and NexPoint Advisors, L.P. and Highland Capital Management Fund Advisors, L.P. (as may be amended or restated), subject to the limitations of (b) and (d) of the Prohibited Conduct.

4. It is further **ORDERED** that Mr. Dondero is enjoined and restrained from physically entering, or virtually entering through the Debtor's computer, email, or information systems, the Debtor's offices located at 200 Crescent Court, Suite 700 Dallas, Texas or 300 Crescent Court, Suite 700 Dallas, Texas, or any other offices in which the Debtor operates, or offices or facilities owned or leased by the Debtor(the address(es) of which the Debtor will provide to Mr. Dondero's counsel), regardless of any agreements, subleases, or otherwise, held by the Debtor's affiliates or entities owned or controlled by Mr. Dondero, without the prior written

permission of Debtor's counsel made to Mr. Dondero's counsel. If Mr. Dondero enters the Debtor's office or other facilities or systems without such permission, such entrance will constitute trespass.

5. It is further **ORDERED** that the *Order Granting Debtor's Motion for a Preliminary Injunction Against James Dondero* [Adv. Pro. Docket No. 59] is deemed dissolved and superseded by this Order.

6. The Court shall retain exclusive jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

END OF ORDER

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE:	.	Case No. 19-34054-11(SGJ)
	.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	.	Earle Cabell Federal Building 1100 Commerce Street Dallas, TX 75242-1496
	.	
Debtor.	.	
. . . . .	.	
	.	Adv. No. 20-03190(SGJ)
HIGHLAND CAPITAL, MANAGEMENT, L.P.,	.	
	.	
Plaintiff,	.	
	.	
v.	.	
	.	
JAMES D. DONDERO,	.	
	.	
Defendant.	.	May 18, 2021 9:37 a.m.
. . . . .		

TRANSCRIPT OF HEARING ON RULING RESOLVING ADVERSARY PROCEEDING FILED BY PLAINTIFF HIGHLAND CAPITAL MANAGEMENT, L.P.
BEFORE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT JUDGE

TELEPHONIC APPEARANCES:

For Highland Capital Management:	Pachulski Stang Ziehl & Jones LLP BY: JOHN MORRIS, ESQ. 780 3rd Avenue, 34th Floor New York, NY 10017
For James Dondero:	Bonds Ellis Eppich Schafer Jones LLP By: JOHN WILSON, ESQ. 420 Thockmorton Street, Suite 1000 Fort Worth, TX 76102

(TELEPHONIC APPEARANCES CONTINUED ON NEXT PAGE.)

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Proceedings recorded by electronic sound recording, transcript produced by a transcript service.

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For Official Committee of Unsecured Creditors:	Sidley Austin, LLP By: MATTHEW CLEMENT, ESQ. One South Dearborn Chicago, IL 60603

THE COURT: -- now in session. The Honorable Stacey Jernigan presiding.

THE COURT: Good morning. Please be seated.

Well, I came in here not with a giant stack of paper but a very small stack of paper. We have a setting in Highland Capital Management, Case Number 19-34054 and Adversary 20-03190.

Let me get appearances first from the main parties. For the debtor this morning, who is appearing?

MR. MORRIS: Good morning, Your Honor. Can you hear me? It's John Morris from Pachulski Stang Ziehl & Jones for the debtor.

THE COURT: Thank you.

All right. For Mr. Dondero, who do we have appearing?

MR. WILSON: John Wilson with Bonds Ellis Eppich Schafer Jones for Mr. Dondero.

THE COURT: All right. And I'll ask for an appearance from the Creditors Committee, please. Who do we have appearing?

MR. CLEMENTE: Good morning, Your Honor. Matthew Clemente, Sidley Austin, on behalf of the Creditors' Committee.

THE COURT: All right. Thank you.

Well, I guess I should ask for an appearance from Wick Phillips. I think we're going to have a status conference

maybe on a motion that was set. Who is appearing for I guess I should say HCRE Partners and/or Wick Phillips?

MR. MORRIS: There may not be anybody here, Your Honor. We filed -- I think we filed notice of cancellation of the status conference.

THE COURT: Okay.

MR. MORRIS: And that's an item I was going to address, but --

THE COURT: Okay. Thank you.

MR. MORRIS: -- that we have cancelled that conference (indiscernible).

THE COURT: All right. Well, let's -- I'll stop with appearances at this point, and let me just say for the record where we are this morning.

We did have four interim fee applications of professionals for the Unsecured Creditors' Committee. We did not have any objections on those. I reviewed them in chambers and signed orders approving those on an interim basis yesterday evening. So we have no business to accomplish on those four fee applications.

The main event that I thought we had going today was the final trial in the injunctive relief sought against Mr. Dondero in Adversary 20-03190. And much to my delight and surprise, I saw that at 8:38 this morning a proposed consensual order resolving the adversary proceeding has been submitted.

So, Mr. Morris, do you want to start with that?

MR. MORRIS: I would, Your Honor. But just to make sure the record is clear with respect to the Wick Phillips matter. I believe at Docket 2321 we did specifically file a notice of cancellation of today's status conference. I have sought from Your Honor's clerk yesterday a trial date in the matter, and I was able to back into that with Wick Phillips on a proposed scheduling order, which if we haven't already done so, we'll be uploading later today. And that's the reason for the cancellation of that conference.

THE COURT: Okay. Thank you. And you've reminded me. I remember late-ish yesterday afternoon getting that communication and seeing the proposed, I think, October -- it's an October trial setting you've agreed to with them?

MR. MORRIS: That's the date that we were told was convenient for the Court.

THE COURT: Okay.

MR. MORRIS: But we had agreed to the balance of the schedule.

THE COURT: Okay. Very good. So there's no business to accomplish there. I'll be looking for that order to sign it today -- the scheduling order, I should say.

All right. So now, again, turning to the main event, Mr. Morris?

MR. MORRIS: Yes. Thank you, Your Honor. John

Morris, Pachulski Stang Ziehl & Jones. We were scheduled today, as Your Honor pointed out, for a trial on the merits of the debtor's claim for permanent injunctive relief. We did file at Docket 180 this morning in the adversary proceeding notice of a consensual proposed order that we'd like to present today.

As Your Honor knows as well as anybody, this has been a very long road. You know, our only goal, the debtor's only goal as I tried to make clear was to be left alone, was to be free from threats and interference and related improper conduct. We're pleased that we've gotten to this point. I can't tell you that I know what's motivating Mr. Dondero. But I can tell you that from the debtor's perspective, that we believe that the evidence supporting the requested relief and relief now obtained is overwhelming.

We've put forth substantial proposed findings of fact and conclusions of law, including 120-numbered paragraphs that cited to dozens of documentary exhibits and expensive trial testimony. And so we believe that on the strength of that evidence, we were able to come to this agreement, an agreement that we believe protects the debtor in the ways that the debtor believes it needs to be protected.

I'd like to just highlight some of the changes in the proposed order of what the debtor had originally sought in its proposed findings of fact and conclusions of law so that Your

Honor is familiar with, you know, the substantive changes that have been made.

The first change, Your Honor, I'm just taking them in the order in which they appear, and I don't know if Your Honor has the blackline or the clean copy.

THE COURT: I do.

MR. MORRIS: But the first change -- okay, the first change is that this is no longer a permanent injunction. It's an injunction that will stay in effect until the Court grants a motion by the debtor to close its Chapter 11 case. So that's the first change.

The second change is that while we believe it was implicit in the earlier draft, this proposed order now expressly applies the debtor's successors including, as you can see, the Claimant Trust Oversight Board, the claimant trustee, the litigation trustee, which are defined as the protected entities, as well as the reorganized debtor. And I think that's the relief that we would have obtained had we gone to trial. But it is helpful that that is qualified in this version of the order.

As we discussed at the docket call conference, there are no longer any shared services agreements between the debtor and any related entity and, therefore, there is now a blanket prohibition preventing Mr. Dondero from communicating with any person employed by the debtor or the reorganized debtor.

But there are new arrangements in place between the debtor and some of the entities controlled by Mr. Dondero, and this order reflects that. Specifically, if we can go to the next page.

You'll see at the end of the second ordered paragraph, Mr. Dondero is still enjoined from working with entities or people under his control, but the exception now is no longer to shared services agreements. They're to a prior order of this Court and something that's known as the shared resources agreement because, you know, frankly, and this was a constructive part of the negotiations over the last 24 or 48 hours.

There are still ongoing communications between the debtor's employees or certain of the debtor's employees and certain employees in Mr. Dondero's companies. And we need those communications to continue. So we wanted to make it clear that all of that is permitted except as it says at the very end of that paragraph, except for threats or acts of interference. Even if it's under the guise of the shared resources agreement, that kind of conduct is not acceptable.

Also, in footnote 3 there, we've also made it clear that communications between and among counsel are -- will not be a violation of this order, again, unless it violates (b) pertaining to threats or (d) pertaining to interference.

The last I think substantive change, which is

consistent with what we believe to be the law, is you'll see at the bottom of the document we make it clear that the prior preliminary injunction will be deemed dissolved and superseded by this order upon entry.

Those are really the substantive changes, Your Honor. I think it actually does improve the document. I think it provides some clarifications that are worth -- that were worth negotiating, and I do appreciate the Bonds Ellis firm's efforts in that regard.

A couple of other things, we have agreed, and I'd like Mr. Wilson to come on the record that upon entry of this order, Mr. Dondero will as soon as practicable withdraw with prejudice his petition for a writ of mandamus that is pending in the Fifth Circuit. He will withdraw with prejudice his motion for a stay of these proceedings pending a determination on the petition for a writ of mandamus. And he will withdraw with prejudice his interlocutory appeal that's now pending in the United States District Court for the Northern District of Texas.

The debtor is pleased, as I said, to resolve this particular proceeding. As Your Honor knows too well, this is just one aspect of a much larger landscape that we're dealing with here. And I just -- I need to emphasize that the debtor will always look to work cooperatively, but at all times, it is determined to continue to take all steps necessary to protect

its estate and the integrity of this bankruptcy process.

That's all I have, Your Honor, unless Your Honor has any questions.

THE COURT: All right. Not yet. I want to hear from Mr. Wilson and see if I have any questions after I hear from him.

Mr. Wilson, would you confirm these statements and add anything you think needs to be added?

MR. WILSON: I apologize, Your Honor. I have a mouse problem. But, yes, I agree with -- largely with what Mr. Morris stated. It was actually upon the status conference hearing when we heard that the relief that the debtor was seeking would be narrowed that I suspected that we could resolve this matter because, in truth, I've visited with my client about this.

Mr. Dondero has no intention of threatening the debtor or interfering with their business and, therefore, does not -- is not concerned with these provisions in this injunction to that effect.

Our main concern was simply that the order provided enough clarity and also, you know, provided for the necessary transitioning things that needed to occur between Highland and the Dondero-related entities to complete the unwinding that is there.

And, of course, there's agreements in place, as

you've heard, and those agreements need to be carried out. And so, therefore, we feel like we were able to achieve a working version of the order that both sides could live with. And so we are -- we're pleased that we were able to reach this agreement.

And as to the point about the Fifth Circuit proceedings, we have notified the Fifth Circuit this morning about the -- that we will be withdrawing the mandamus seeking its dismissal and the accompanying motions. And at the conclusion of the proceeding upon entry of this order, yes, we do intend to file those documents.

THE COURT: All right. Thank you.

All right. A follow-up question I have, I'm looking at my computer screen, you cannot see what's on it, but what is on it is a draft so far 29-page ruling, order, and opinion on the motion for contempt that, as you know, I've had under advisement since March 24th. No one has said anything about whether this is an intention to resolve or withdraw that.

So can I assume that I should continue forward and issue my ruling on this?

MR. MORRIS: The debtor would urge you to do so, Your Honor. This -- that was implicit in what I was trying to say is that this resolves solely the debtor's motion for permanent injunctive relief. The debtor hopes and expects that the Court will continue to work on and ultimately issue its ruling on its

motion for contempt.

THE COURT: All right.

Mr. Wilson, any misunderstanding on that part?

MR. WILSON: Your Honor, the motion for contempt was not discussed in our negotiations that were this final objection.

THE COURT: Okay. All right. Well, then I expect to get this done now that I have today freed up and tomorrow, unless I have an emergencies I don't know about right now. I think I can get this out in the next few days.

No judge likes to keep things under advisement more than 60 days. You've probably heard that before. That's kind of our internal deadline we give ourselves. So I guess Monday would be May 24th. I'm going to try very hard to have this out to you by then and just so you know, if you've been wondering where things stood on that,

My other question, I mean, this is just curiosity. So obviously, a big part of the injunction request had to do with the debtor's management of the CLOs and the debtor's liquidating certain assets in those CLOs and the alleged interference with Mr. Dondero. I mean I presume that part of what's going on outside of the Court is maybe a transition of that or no? Is that not something happening?

MR. MORRIS: That's not happening, Your Honor.

THE COURT: Okay. I just wasn't sure where things

stood on that.

MR. MORRIS: And I just do want to make it clear because now I recall that at 4 o'clock this morning I think I wrote somewhere that this settlement resolves the adversary proceeding. Obviously, the debtor does not intend and, by Mr. Wilson's comments, I think he does not intend that the adversary proceeding is going to be closed upon the entry of the order resolving the claim for injunctive relief.

I just don't want to have any argument later that somehow the resolution of this claim precludes the Court from issuing its ruling on the contempt motion. I think Mr. Wilson has made that perfectly clear that it wasn't part of the discussions, and I just want to make sure and nip that in the bud so that somebody doesn't make any argument at some future point that because there's a statement in a title of a document that addresses the adversary proceeding, that the Court still has -- that the case -- that the adversary proceeding is not closed and that the Court has the full authority to render its ruling on the motion for contempt.

THE COURT: All right. Let me look at the order real quick on that point.

(Pause)

THE COURT: And there is the final paragraph that: "Court retains exclusive jurisdiction with respect to all matters arising from or relating to the implementation,

interpretation, and enforcement of this order." And the paragraph before that, it's a resolution of the injunctive relief and not any broader than that.

All right. Well, anything else anyone wants to put on the record?

(No audible response)

THE COURT: No?

MR. MORRIS: Nothing from the debtor, Your Honor.

THE COURT: Mr. Wilson, anything?

MR. WILSON: No, Your Honor.

THE COURT: All right. Well, again, I appreciate these good-faith efforts outside of the courtroom. And in light of, you know, where things are today, it seems like, you know, this is reasonable. So I will happily sign this order. And I guess the next time I will see you is Friday morning at 9 o'clock Central Time, right, on the UBS compromise motion?

MR. MORRIS: Yes, Your Honor. That's the only thing -- that's the next item scheduled.

THE COURT: All right. Well, thank you all. And I hope we all have a good day doing other things than trying this matter. And I'll see you Friday morning, okay.

(Proceedings concluded at 9:57 a.m.)

* * * * *

C E R T I F I C A T I O N

I, DIPTI PATEL, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Dipti Patel
DIPTI PATEL

LIBERTY TRANSCRIPTS DATE: May 21, 2021

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

Signed June 7, 2021

United States Bankruptcy Judge

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,[1] Debtor.	§	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. JAMES D. DONDERO, Defendant.	§	Adversary Proceeding No. Case No. 20-03190-sgj11

MEMORANDUM OPINION AND ORDER GRANTING IN PART PLAINTIFF'S MOTION TO HOLD JAMES DONDERO IN CIVIL CONTEMPT OF COURT FOR ALLEGED VIOLATION OF TRO[2]

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

[2] This Order addresses the Motion filed at DE # 48 in above-referenced Adversary Proceeding.

You know, this is -- I hate to say it, but I feel like I've been in the role of a divorce judge today. We have very much a corporate divorce that has been in the works . . . and I'm a judge having to enter interim orders keeping one spouse away from the other, keeping one spouse out of the house, keeping one spouse away from the kids. It's not pleasant at all.

Transcript from 1/8/21 Hearing at 194:1-9. [DE # 80, Exh. 36].

I. Introduction.

The above quote aptly describes the above-referenced 20-month-old corporate bankruptcy case: it has, at times, become very much like a nasty divorce—in which one spouse (here, the company) is very much at odds with the other spouse (here, the company's former CEO). It is contentious, protracted, and unpleasant.

For a while, things were a bit like a situation where one spouse has filed for divorce, but both spouses remain living under the same roof for a while—rather than physically separating—for the perceived best interests of the family. This co-habitation eventually became untenable.

Next, things developed similarly to a situation in which one spouse wants to keep the family vacation home, boat, or mutual funds (*i.e.*, the husband), but the other spouse (*i.e.,* the one who happens to have custody and control over them) thinks the assets need to be liquidated to pay off the family's expenses or debt.

Also, this corporate divorce, sadly, is similar to a situation in which one spouse criticizes the other's new partner who has moved into the family home and also bears animus towards the spouse's lawyers. He thinks they are, collectively, mismanaging everything and taking actions towards him out of pure spite.

It's also similar to a situation in which one spouse is endeavoring to have members of the other spouse's household assist or cooperate with him in various ways, in his efforts to get what he perceives to be his fair share in the divorce.

And, finally, it is similar to a situation in which one spouse finally decides to seek a TRO against the other—for fear (legitimate or not) that the ex-spouse is about to burn the house down.

There is a bit of irony in all of this because the spouse (*i.e.,* former CEO) who is the alleged antagonist is the one who signed the divorce (*i.e.,* bankruptcy) petition to start the proceedings.

Divorce metaphors aside, this Order relates to a request by Chapter 11 Debtor Highland Capital Management, L.P. (the "Debtor" or "Highland"), made shortly before its Chapter 11 plan was confirmed,[3] that its co-founder, former President, former Chief Executive Officer ("CEO"), and indirect beneficial equity owner—Mr. James Dondero ("Mr. Dondero")—be held in civil contempt of court for allegedly violating a temporary restraining order ("TRO") of this court.[4] The TRO that Mr. Dondero is alleged to have violated arose in the above-referenced adversary proceeding ("Adversary Proceeding") that the Debtor filed December 7, 2020. A brief summary of the circumstances leading up to the Adversary Proceeding and the TRO is set forth below.

[3] As of the date of issuance of this Order, the Debtor's confirmed plan has not yet gone effective.

[4] In addition to being the former CEO, Mr. Dondero represents that he is a "creditor, indirect equity security holder, and party in interest" in the Debtor's bankruptcy. This court has stated on various occasions that this assertion is ostensibly true, but somewhat tenuous. Mr. Dondero filed five proofs of claim in the Debtor's bankruptcy case. Two of those proofs of claim were withdrawn with prejudice on November 23, 2020 [DE # 1460 in main bankruptcy case]. The other three are unliquidated, contingent claims, each of which stated that Mr. Dondero would "update his claim in the next ninety days." Ninety days has long-since passed since those proofs of claim were filed and Mr. Dondero has not updated those claims to this court's knowledge. With regard to Mr. Dondero's assertion that he is an "indirect equity security holder," the details have been represented to the court many times to be as follows (undisputed): Mr. Dondero holds no direct equity interest in the Debtor. Mr. Dondero instead owns 100% of Strand Advisors, Inc. ("Strand"), the Debtor's general partner. Strand, however, holds only 0.25% of the total limited partnership interests in the Debtor through its ownership of Class A limited partnership interests. The Class A limited partnership interests are junior in priority of distribution to the Debtor's Class B and Class C limited partnership interests. The Class A interests are also junior to all other claims filed against the Debtor. Finally, Mr. Dondero's recovery on his indirect equity interest is junior to any claims against Strand itself. Consequently, before Mr. Dondero can recover on his indirect equity interest, the Debtor's estate must be solvent, priority distributions to Class B and Class C creditors must be satisfied, and all claims against Strand must be paid.

II. Background: The Chapter 11 Case.

On October 16, 2019 (the "Petition Date"), Highland filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Highland is a registered investment advisor that is in the business of buying, selling, and managing assets on behalf of its managed investment vehicles. It manages billions of dollars of assets—to be clear, the assets are spread out in numerous, separate fund vehicles. While the Debtor has continued to operate and manage its business as a debtor-in-possession, the role of Mr. Dondero *vis-à-vis* the Debtor was significantly limited early in the bankruptcy case and ultimately terminated. The Debtor's current CEO is an individual selected by the creditors named James P. Seery.

Specifically, early in the case, the Official Unsecured Creditors Committee ("UCC") and the U.S. Trustee ("UST") desired to have a Chapter 11 Trustee appointed—absent some major change in corporate governance[5]—due to conflicts of interest and the alleged self-serving, improper acts of Mr. Dondero and possibly other officers (for example, allegedly engaging, for years, in fraudulent schemes to put Highland's assets out of the reach of creditors). Under this pressure, the Debtor negotiated a term sheet and settlement with the UCC (the "January 2020 Corporate Governance Settlement"), which was executed by Mr. Dondero and approved by a court order on January 9, 2020 (the "January 2020 Corporate Governance Order").[6] The settlement and term sheet contemplated a complete overhaul of the corporate governance structure of the Debtor. Mr. Dondero resigned from his role as an officer and director of the Debtor and of its general partner. Three new independent directors (the "Independent Board") were appointed to govern the Debtor's general partner Strand Advisors, Inc.—which, in turn, managed the Debtor. All of the new

[5] The UST was steadfast in wanting a Trustee.

[6] *See* DE ## 281 & 339 in main bankruptcy case. *See also* Dondero Exh. 8 (DE # 106 in the Adversary Proceeding).

Independent Board members were selected by the UCC and are very experienced within either the industry in which the Debtor operates, restructuring, or both (Retired Bankruptcy Judge Russell Nelms, John Dubel, and James P. Seery). As noted above, one of the Independent Board members, James P. Seery ("Mr. Seery"), was ultimately appointed as the Debtor's new CEO and CRO.[7] As for Mr. Dondero, while not originally contemplated as part of the January 2020 Corporate Governance Settlement, the Debtor proposed at the hearing on the January 2020 Corporate Governance Settlement that Mr. Dondero remain on as an unpaid employee of the Debtor and also continue to serve as and retain the title of a portfolio manager for certain separate ***non-Debtor*** investment vehicles/entities whose funds are managed by the Debtor.[8] The court approved this arrangement when the UCC ultimately did not oppose it. Mr. Dondero's authority with the Debtor was subject to oversight by the Independent Board.[9] Mr. Seery was given authority to oversee the day-to-day management of the Debtor, including the purchase and sale of assets held by the Debtor and its subsidiaries, as well as the purchase and sale of assets that the Debtor manages for various separate non-Debtor investment vehicles/entities. Significant to the court and the UCC was a provision in the order, at paragraph 9, stating that "Mr. Dondero shall not cause any Related Entity to terminate any agreements with the Debtor."

To be sure, this was a complex arrangement. Apparently, there were well-meaning professionals in the case that thought that having the founder and "face" behind the Highland brand

[7] "CRO" means Chief Restructuring Officer. *See* DE # 854 in main bankruptcy case, entered July 16, 2020.

[8] Although not discussed at the time, the court has become aware that Mr. Dondero has been a paid employee of the Non-Debtor Highland-Related Entities known as NexPoint and/or NexBank postpetition. *See* 1/8/21 Hearing Transcript, Debtor Exh. 36 (DE # 80) at 107:20-23.

[9] "Mr. Dondero's responsibilities in such capacities shall in all cases be as determined by the Independent Directors . . . [and] will be subject at all times to the supervision, direction and authority of the Independent Directors. In the event the Independent Directors determine for any reason that the Debtor shall no longer retain Mr. Dondero as an employee, Mr. Dondero agrees to resign immediately upon such determination." *See* Debtor's Exh. 2, at Exh. 1 thereto, at 3 of 62 (DE # 80).

still involved with the business might be value-enhancing for the Debtor and its creditors (even though Mr. Dondero was perceived as not being the type of fiduciary needed to steer the ship through bankruptcy). For sake of clarity, it should be understood that there are at least hundreds of entities—the lawyers have sometimes said 2,000 entities—within the Highland byzantine organizational structure (sometimes referred to as the "Highland complex"), most of which are ***not*** subsidiaries of the Debtor, nor otherwise owned by Highland. And only Highland itself is in bankruptcy. However, these entities are very much intertwined with Highland—in that they have shared services agreements, sub-advisory agreements, payroll reimbursement agreements, or perhaps, in some cases, less formal arrangements with Highland. Through these agreements Highland (***through its own employees***) has historically provided resources such as fund managers, legal and accounting services, IT support, office space, and other overhead. Many of these non-Debtor entities appear to be under the *de facto* control of Mr. Dondero—as he is the president and portfolio manager for many or most of them—although Mr. Dondero and certain of these entities stress that these entities have board members with independent decision-making power and are not the mere "puppets" of Mr. Dondero (for ease of reference, these numerous entities will be referred to as the "Non-Debtor Dondero-Related Entities"). This court has never been provided a complete organizational chart that shows ownership and affiliations of all 2,000 Non-Debtor Dondero-Related Entities (such a chart would, no doubt, be the size of a football field), but the court has, on occasion, been shown information about some of them and is aware that a great many of them were formed in non-U.S. jurisdictions, such as the Cayman Islands.

Eventually, the Debtor's new Independent Board and management concluded that it was untenable for Mr. Dondero to continue to be employed by the Debtor in any capacity. Various events occurred that led to the termination of his employment with the Debtor. For one thing, Mr.

Dondero prominently opposed certain actions taken by the Debtor through its CEO and Independent Board including: (a) objecting to a significant settlement that the Debtor had reached in court-ordered mediation[10] with creditors Acis Capital Management and Josh and Jennifer Terry (the "Acis Settlement")—which settlement helped pave the way toward a consensual Chapter 11 plan, and (b) pursuing, through one of his family trusts (the Dugaboy Investment Trust), a proof of claim alleging that the Debtor (including Mr. Seery) had mismanaged one of the Debtor's subsidiaries, Highland Multi Strategy Credit Fund, L.P. ("MSCF"), with respect to the sale of certain of its assets during the bankruptcy case (in May of 2020).[11] The Debtor's Independent Board and management considered these two actions to create a conflict of interest—if Mr. Dondero was going to litigate significant issues against the Debtor in court, that was his right, but he could not continue to work for the Debtor (among other things, having access to its computers and office space) while litigating these issues with the Debtor in court.

But the termination of his employment was not the end of the friction between the Debtor and Mr. Dondero. In fact, a week after his termination, litigation posturing and disputes began erupting between Mr. Dondero and certain Non-Debtor Dondero-Related Entities, on the one hand, and the Debtor on the other (as further described below).

III. **The Impetus for the Adversary Proceeding**.

The Adversary Proceeding centers significantly around two Non-Debtor Dondero-Related Entities known as NexPoint Advisors, L.P. ("NexPoint") and Highland Capital Management Fund Advisors, L.P. ("HCMFA," and together with NexPoint, the "Advisors")—both of which, like

[10] The court appointed Retired Bankruptcy Judge Allan Gropper, S.D.N.Y., and Attorney Sylvia Mayer, Houston, Texas (both with the American Arbitration Association), to be co-mediators over multiple disputes in the Bankruptcy Case, including the Acis dispute. The co-mediators, among other things, attempted to mediate disputes/issues with Mr. Dondero.

[11] *See, e.g.,* Proof of Claim No. 177 and DE # 1154 in main bankruptcy case.

Highland, are registered investment advisors. Mr. Dondero is President of NexPoint and has an ownership interest in it.[12] Mr. Dondero is President of HCMFA and has an ownership interest in it as well.[13]

A. Alleged Interference with the Debtor's Management of the Highland CLOs.

The Advisors separately manage three funds ("NexPoint/HCMFA Funds"). The Advisors and these NexPoint/HCMFA Funds own, among other things, equity interests in certain pooled ***collateralized loan obligation*** ("CLO") vehicles that are managed by the Debtor (hereinafter the "Highland CLOs"). A key fact here to remember is that the CLO vehicles are managed by the Debtor (pursuant to contracts and neither the Advisors nor the NexPoint/HCMFA Funds are parties to such contracts).

Generally speaking, the term/acronym "CLO" is loosely used in the investment world to refer to a special purpose entity ("CLO SPE"), in which a manager (here, Highland) purchases a basket of loans to be held in the CLO SPE. The loans in the basket would typically be obligations of large well-known public companies and, collectively, provide a variable rate of interest. The CLO manager typically has discretion to buy and sell different loans to go into the pool of assets, with certain restrictions. There are, meanwhile, tranches of investors who invest funds into the CLO SPE, pursuant to an indenture (with an independent, third-party indenture trustee in place) so that the CLO SPE can purchase the loans, and those investors receive fixed interest from the CLO SPE (with the CLO SPE earning income on the "spread" between: (a) the variable interest being earned on the pool of loans in the CLO SPE's portfolio and (b) the amount of fixed interest the CLO SPE must pay out to its tranches of investors). This description, again, is a bit of a generalization. In

[12] 1/8/21 Hearing Transcript, Debtor's Exh. 36 at 35:9-25 (DE # 80).

[13] 1/8/21 Hearing Transcript, Debtor's Exh. 36 at 36:10-14 (DE # 80).

the case of the Highland CLOs (there are approximately 16 of them), many of them are quite old and do not have the typical diverse portfolio of loans that CLOs commonly have. Many of the CLOs are structured as closed-end investment funds and, in fact, own equity in post-reorganization companies (that are publicly traded and quite liquid) and some even own real estate.[14] In any event, as mentioned, the Debtor serves as portfolio manager on the numerous Highland CLOs (there more than a dozen), pursuant to ***separate portfolio management agreements*** that Highland has with the CLO SPEs. There are about $1 billion of assets in these CLO SPEs that Highland manages.[15] And, to be clear, the Advisors and NexPoint/HCMFA Funds own ***equity*** (*i.e.,* the bottom tranche) in most if not all of these Highland CLOs.

The Debtor has alleged in this Adversary Proceeding that the Advisors, acting under the direction of their President Mr. Dondero, have interfered multiple times with Mr. Seery's attempts to sell various assets in the CLO SPEs, by, among other things, exerting pressure on certain of the Debtor's employees to halt trades that were ordered by Mr. Seery. To be clear, the Advisors have no contractual right to do that—they are not party to the portfolio management agreements that Highland has with the CLO SPEs. The Advisors simply purport to speak for various investors (*i.e.,* the investors in the NexPoint/HCMFA Funds) who have invested in (*i.e.,* own the equity) in the Highland CLOs. However, it appears that the majority of these investors are yet ***other Non-Debtor Dondero-Related Entities***, including but not limited to the entities known as Charitable DAF HoldCo, Ltd. and CLO Holdco, Ltd.[16] In any event, various examples of communications that

[14] *See* 1/26/21 Hearing Transcript, Debtor's Exh. 37 at 155:9-18 (DE # 80).

[15] *See id.* at 202: 3-7.

[16] *See* Debtor's Exh. 2, Exh. 7 thereto (DE # 80). There may be some "mom and pop" or unrelated institutional investors in certain of these Highland CLOs (indirectly through the NexPoint/HCMFA Funds), *see* 1/26/21 Hearing Transcript, Debtor Exh. 37 (DE # 80), at 201:14-22, but ***none*** have ever come forward during the Highland bankruptcy. Moreover, the Debtor aptly notes that there is nothing preventing unhappy investors from simply selling their investments in the Highland CLOs if they are not happy with management decisions of the portfolio manager.

allegedly constituted interference were described in the Adversary Proceeding.[17] The court notes, anecdotally, that Mr. Dondero was continuing, well after his October 9, 2020 termination with the Debtor, to use an email address showing he was an employee of Highland in many of the communications introduced into evidence.[18]

B. Alleged Threats When Debtor Attempted to Collect Demand Notes from Mr. Dondero.

Additionally, the Adversary Proceeding describes that there are certain demand notes on which Mr. Dondero, personally, and certain Non-Debtor Dondero-Related Entities owe significant money to the Debtor. The Debtor made demand upon Mr. Dondero for payment on these demand notes on December 3, 2020, demanding payment by December 11, 2020, so that the Debtor could have these funds to use in its Chapter 11 plan that was set for confirmation in January 2021. Mr. Dondero is alleged to have sent a threatening text to Mr. Seery, just a few hours after the demand letters were sent to him.

After describing Mr. Dondero's alleged conduct, the complaint in the Adversary Proceeding sought injunctive relief preventing Mr. Dondero from interfering with the Debtor's operations, management of assets, and pursuit of a plan of reorganization, to the detriment of the Debtor, its estate, and its creditors, relying on 11 U.S.C. § 105 and Fed. R. Bankr. Pro. 7065. The Debtor has argued that Mr. Dondero's actions have jeopardized the Debtor's ability to effectively wind down its business in the Chapter 11 proceedings—to the detriment of its creditors.

[17] Debtor's Exh. 3, DE # 80 (10/16/20 letter from counsel for Advisors expressing "concerns" about the Debtor's management of the Highland CLOs and a desire that management be transitioned over to the Advisors); Debtor's Exh. 4, DE # 80 (11/24/20 letter from counsel for the Advisors further expressing "concerns" about the Debtor's management of Highland CLOs, especially the selling of assets therein); Debtor's Exh. 5, DE # 80 (11/24/20-11/27/20 emails of Mr. Dondero instructing Highland employee Hunter Covitz not to trade SKY equity as he had been instructed by James Seery); Debtor's Exh. 14, DE # 80 (12/24/20 letter of Debtor's counsel to counsel for the Advisors addressing some of their clients' actions).

[18] *See, e.g.,* Debtor's Exh. 5 (DE # 80).

IV. Motion for TRO [DE # 6].

Almost immediately after filing the Adversary Proceeding, the Debtor sought entry of a TRO enjoining Mr. Dondero from: (a) communicating (whether orally, in writing, or otherwise), directly or indirectly, with any Independent Board member ***unless*** Mr. Dondero's counsel and counsel for the Debtor were included in any such communication; (b) making any express or implied threats of any nature against the Debtor or any of its directors, officers, employees, professionals, or agents; (c) communicating with any of the Debtor's employees, except as it specifically related to shared services currently provided by the Debtor to affiliates owned or controlled by Mr. Dondero; (d) interfering with or otherwise impeding, directly or indirectly, the Debtor's business, including but not limited to the Debtor's decisions concerning its operations, management, treatment of claims, disposition of assets owned or controlled by the Debtor, and pursuit of the Plan or any alternative to the Plan; and (e) otherwise violating section 362(a) of the Bankruptcy Code (collectively, the "Prohibited Conduct"). It was supported by a Memorandum of Law[19] and a Declaration of Mr. Seery.[20]

The court held a hearing on December 10, 2020 on the Motion for TRO.

A. The Evidence at the TRO Hearing.

At the hearing on the Motion for TRO, the Debtor relied upon the Declaration of Mr. Seery and all exhibits that had been attached thereto (which the court admitted with no objection).[21] The court also heard a small amount of additional live testimony from Mr. Seery. Mr. Dondero's

[19] *See* DE # 6.

[20] *See* DE # 4 (with 29 exhibits attached, 177 pages in total length).

[21] *Id.*

counsel appeared and made some statements but did not file a responsive pleading or put on any evidence.

Mr. Seery credibly testified that, pursuant to the January 2020 Corporate Governance Settlement, Mr. Dondero surrendered control of the Debtor to the Independent Board. After that January 2020 Corporate Governance Settlement, Mr. Dondero's responsibilities with the Debtor were to be, in all cases, as determined by the Independent Board and subject at all times to the supervision, direction and authority of the Independent Board. In the event the Independent Board was to determine for any reason that the Debtor should no longer retain Mr. Dondero as an employee, Mr. Dondero agreed to resign immediately upon such determination.[22] By resolution passed on January 9, 2020, the Independent Board authorized Mr. Seery to work with the Debtor's traders and approve trades of certain of the Debtor's and funds' assets.[23] However, up until mid-March 2020, Mr. Dondero controlled certain of the Debtor's managed funds and accounts (as he still maintained the title of portfolio manager). Mr. Seery credibly testified that "[w]e took them away after they lost considerable amounts of money, about ninety million bucks. Real money. So we took over control of those accounts since then, and we've been managing to sell them down to create cash where we think the market opportunity is correct."[24]

Later, however, during the summer of 2020, the Independent Board determined that it was in the best interests of the Debtor's estate to formally appoint Mr. Seery as the Debtor's CEO and CRO (*i.e.,* not just an Independent Board member with trading authority). The bankruptcy court approved Mr. Seery's appointment as CEO and CRO on July 16, 2020.[25] Mr. Seery's appointment

[22] Debtor's Exh. 1, at pp. 2-3 (DE # 80).

[23] Debtor's Exh. 3, at p. 2 (DE # 80).

[24] 12/10/20 Transcript from TRO Hearing, at p. 51:21-25 (DE # 19).

[25] DE # 854 in main bankruptcy case.

as CEO and CRO formalized his role and his authority to oversee the day-to-day management of the Debtor, including the purchase and sale of assets held by the Debtor and its managed investment vehicles, funds, and subsidiaries. Mr. Seery credibly represented that he has routinely carried out such responsibilities during the case.

On August 12, 2020, the Debtor filed its Plan of Reorganization with the court[26] (as subsequently amended, the "Plan"). The Plan provided for, among other things, the gradual monetization of the Debtor's assets for the benefit of the Debtor's creditors. Also in August 2020, the Debtor entered into court-ordered mediation with certain of its creditors which resulted in, among other things, the Acis Settlement (mentioned earlier). After the Acis Settlement was publicly announced, Mr. Dondero voiced his displeasure with not just the terms of the Acis Settlement, but that a settlement had been reached at all. On October 5, 2020, Mr. Dondero objected to the Debtor's motion seeking approval of the Acis Settlement, which the Debtor believed created an actual conflict with the Independent Board and the Debtor.[27] Additionally, one of Mr. Dondero's family trusts also filed a proof of claim alleging the Debtor and Mr. Seery were mismanaging the assets of a subsidiary of the Debtor.[28] Concluding that this situation was untenable, Mr. Dondero was asked to resign from the Debtor, and he did on October 9, 2020.[29]

Subsequent to Mr. Dondero's termination from the Debtor, he began engaging in activities that the Debtor perceived to be interference with its business judgment and management of the Highland CLOs. Approximately one week after Mr. Dondero resigned, the Advisors began writing letters to Mr. Seery requesting, among other things, that "no [Highland] CLO assets be sold without

[26] DE # 944 in main bankruptcy case.

[27] DE # 1121 in main bankruptcy case; Debtor's Exh. 2 (Mr. Seery's Decl.) at ¶ 11; DE # 80.

[28] *Id.* at ¶ 12.

[29] Debtor's Exhs. 4-5 (DE # 80).

prior notice and consent from the Advisors."[30] Not only is the Advisors' consent for Highland CLO assets sales not contractually required, but the Debtor's Chapter 11 plan (then on file, now confirmed) contemplates the gradual wind down of Highland's business over time so that it will have funds to pay its creditors. In fact, Mr. Seery credibly testified that the business model of Highland in recent years (under the direction of Mr. Dondero—and with its web and layers of entities) has not allowed Highland itself to operate at a profit.[31] Thus, interference with assets sales in the Highland CLOs seemed equivalent to interference with, not just the Debtor's efforts to manage the business in ways that allowed it to pay its expenses, but also interference with the Debtor's Chapter 11 plan.

In the November 24-27, 2020 time period (again, just a few weeks after Mr. Dondero's termination from the Debtor), Mr. Dondero sent various emails to both Debtor and Advisor employees (*e.g.,* Matt Pearson, Hunter Covitz, Joe Sowin, and Tom Surgent) telling them he had instructed the Debtor not to engage in trades of Highland CLO assets and that they should not engage in certain trades of Highland CLO assets that Mr. Seery had instructed them to make.[32] A review of this correspondence makes apparent the underlying conflicts of interest present—Highland was attempting to gradually wind down its business and monetize its managed assets for the benefit of its creditors (and this court believes—all the while—balancing its fiduciary duties to investors in such funds) and, meanwhile, Mr. Dondero (wearing his hat as a portfolio manager for, and indirect equity owner in, certain of the Non-Debtor Dondero-Related Entities—*i.e.,* the

[30] Debtor's Exh. 6, p.2 (DE # 80); *see also* Debtor's Exh. 7 (DE # 80).

[31] Apparently, the Debtor even ***offered to assign Highland's CLO management agreements to Mr. Dondero's affiliate, NexPoint (in early December 2020)***, but Mr. Dondero thought the proposed terms were untenable. *See* DE # 50, John Morris Decl., Exh. Z thereto (January 5, 2021 Deposition Transcript of Mr. Dondero, at 101:11-25).

[32] Debtor's Exh. 8 (DE # 80).

Advisors and the NexPoint/HCMFA Funds) did not want assets sold as part of a wind down. Mr. Dondero, it appears to this court, was putting his own and the Non-Debtor Dondero-Related Entities' interests (as investors in the Highland CLOs) ahead of Highland's creditors and the Highland CLOs, as a whole. But, Highland had duties to its creditors and to the Highland CLOs ***as a whole***, and not to the Advisors or their funds (as investors in or equity owners in the Highland CLOs). Mr. Seery further credibly explained the situation, and the harm the interference caused the bankruptcy estate, as follows: "We intend to continue to manage the CLOs, we intend to assume those contracts [*i.e.,* the portfolio management agreements for the Highland CLOs], we intend to manage them post-confirmation, after exit from bankruptcy. And causing confusion among the employees, preventing the Debtor from consummating trades in the ordinary course, deferring those transactions, we thought put the estate at significant risk, in addition to the cost."[33] The Highland CLOs generate fee income for the Debtor. Not all of them have liquid assets that are able to pay quarterly fees. Some owe deferred fees to Highland.[34]

The Debtor thereafter sent communications instructing the Advisors and Mr. Dondero to cease and desist their interference, indicating that Mr. Dondero's actions interfered with the management of the Debtor's bankruptcy estate and the property of such estate, in violation of the Bankruptcy Code and the January 9, 2020 Order.[35]

Meanwhile, around this same time period, the Debtor sent demand letters[36] to Mr. Dondero and certain Non-Debtor Dondero-Related Entities, each of whom are obligated to the Debtor on various demand notes, pursuant to which approximately $30 million is collectively owed to the

[33] Debtor's Exh. 37 at 166:6-13 (DE # 80).

[34] *Id.* 166-167.

[35] Debtor's Exhs. 9 & 10 (DE # 80).

[36] Debtor's Exhs. 24-27 (DE # 80).

Debtor.[37] Collection on these notes was part of the Debtor's liquidity plan, to help pay creditors under its Chapter 11 plan. Mr. Seery credibly testified that Mr. Dondero's response was a text message that stated: "Be careful what you do, last warning."[38]

The next day, Debtor's counsel sent Mr. Dondero's counsel correspondence demanding that he "cease and desist from (a) communicating directly with any Board member without counsel for the Debtor, (b) making any further threats against HCMLP or any of its directors, officers, employees, professionals, or agents, or (c) communicating with any of HCMLP's employees, except as it specifically relates to shared services currently provided to affiliates owned or controlled by Mr. Dondero." The letter put Mr. Dondero on notice that the above-referenced Adversary Proceeding and Motion for TRO would be filed.

B. Entry of the TRO.

After hearing the evidence at the TRO Hearing, the court determined that the Debtor had met its burden of proving the need for a TRO. The court issued the TRO[39] which temporarily enjoined Mr. Dondero from "(a) communicating (whether orally, in writing, or otherwise), directly or indirectly, with any Board member unless Mr. Dondero's counsel and counsel for the Debtor are included in any such communication; (b) making any express or implied threats of any nature against the Debtor or any of its directors, officers, employees, professionals, or agents; (c) communicating with any of the Debtor's employees, except as it specifically relates to shared services currently provided to affiliates owned or controlled by Mr. Dondero; (d) interfering with or otherwise impeding, directly or indirectly, the Debtor's business, including but not limited to the

[37] Debtor's Exhs. 11-23 (DE # 80).

[38] Debtor's Exh. 28 (DE # 80).

[39] *See* DE # 10; *see also* Debtor's Exh. 11 (DE # 80).

Debtor's decisions concerning its operations, management, treatment of claims, disposition of assets owned or controlled by the Debtor, and pursuit of the Plan or any alternative to the Plan; and (e) otherwise violating section 362(a) of the Bankruptcy Code (collectively, the 'Prohibited Conduct')." Mr. Dondero was further temporarily enjoined "from causing, encouraging, or conspiring with (a) any entity owned or controlled by him, and/or (b) any person or entity acting on his behalf, from, directly or indirectly, engaging in any Prohibited Conduct."

V. The Contempt Motion Now Before the Court.

Less than a month after entry of the TRO, on January 7, 2021, Highland filed *Plaintiff's Motion for an Order Requiring Mr. James Dondero to Show Cause Why He Should Not Be Held in Civil Contempt for Violating the TRO* (the "Contempt Motion"),[40] which was supported by a Memorandum of Law[41] and a Declaration of John Morris with Exhs. G, K, L, M, N, P, Q, R, S, U, W, X, Y, Z attached.[42] Highland alleges Mr. Dondero violated the TRO as follows: (a) he willfully ignored it by not reading the TRO, the underlying pleadings, and allegations that supported it, nor did he listen to the hearing at which it was entered or make any meaningful effort to understand the scope of it; (b) he threw in the garbage his Highland-furnished cell phone, in what the Debtor believes was an attempt to evade discovery; (c) he trespassed on the Debtor's property after the Debtor had evicted him because the Debtor believed he was interfering with the Debtor's business; (d) he interfered with the Debtor's trading of Highland CLO assets; (e) he pushed and encouraged the Advisors and NexPoint/HCMFA Funds to make further demands and threats against the Debtor regarding the trading of Highland CLO assets; (f) he communicated with the Debtor's inhouse

[40] DE # 48.

[41] DE # 49.

[42] DE # 50.

counsel, Scott Ellington and Isaac Leventon, before they were terminated from Highland, to coordinate legal his own strategy against the Debtor; and (g) he interfered with the Debtor's obligation to produce certain documents that were requested by the UCC and that were in the Debtor's possession, custody and control.

The court held an evidentiary hearing on the Contempt Motion on March 22, 2021 (with closing arguments March 24, 2021). The court considered dozens of exhibits[43] and testimony from two witnesses (Mr. Dondero and the Debtor's current CEO, James Seery). The Debtor asserted that there were seventeen different violations of the TRO. To be clear, this Contempt Motion ***deals solely with whether Mr. Dondero violated the TRO after its entry on December 10, 2020 at 1:31 pm CST, up through the time of the filing of the Contempt Motion on January 7, 2021***.[44] In fact, the court has subsequently entered a Preliminary Injunction[45] and Agreed Injunction[46] resolving this Adversary Proceeding but reserved jurisdiction to rule on the earlier-filed Contempt Motion.

A. <u>The Evidence Regarding Whether Mr. Dondero Willfully Ignored the TRO by Not Reading It or the Underlying Pleadings and Allegations that Supported It; by Not Attending the Hearing Thereon; and by Not Making Any Meaningful Effort to Understand the Scope of the TRO.</u>

The Debtor argues that Mr. Dondero's willful ignorance of both the TRO, and the underlying evidence presented in connection with the TRO, is in and of itself contemptible.

[43] The court admitted Debtor's Exhibits #1, #2, #7, #8, #9, #10, #11, #12, #13, #14, #15, #17, #18, #19, #20, #21, #22, #24, #25, #26, #27, #28, #33, #35, #36, #37, #38, #39, #47 through #57 (found at DE ## 80, 101, & 128), and Mr. Dondero's Exhibits #1 through #20 (found at DE # 106).

[44] The Debtor initially sought an expedited hearing on the Contempt Motion for January 8, 2021—the same day that the Debtor's request for a preliminary injunction was set for hearing. The court denied the request for an expedited hearing on the Contempt Motion—believing this was not enough notice to Mr. Dondero. So, there was a hearing on a request for a preliminary injunction only on January 8, 2021 (which was granted ultimately). To be clear, Mr. Dondero and his counsel had approximately 75 days to prepare for the hearing on this matter.

[45] DE # 59.

[46] DE # 182.

The evidence on this point is that Mr. Dondero testified multiple times in connection with this Adversary Proceeding[47] that he had not: (a) reviewed the Declaration of James P. Seery, Jr., the Debtor's Chief Executive Officer, in support of the TRO Motion; (b) attempted to learn of the allegations made against him; (c) thought about the fact that the Debtor was seeking a restraining order against him; (d) listened to the hearing where the court admitted evidence and heard argument on the Debtor's motion; (e) read the transcript of the hearing at which the court granted the Debtor's motion for the TRO; (f) read the TRO after it was entered; or (g) made any meaningful effort to understand the scope of the TRO.[48]

But on later examination by his counsel at the Hearing on the Contempt Motion itself, Mr. Dondero testified as follows:

> Q Did you have an opportunity to ask your counsel questions about the TRO?
>
> A Yes.
>
> Q And did you rely on your counsel to explain to you what the TRO meant?
>
> A Yes.
>
> Q And in the weeks that followed the entry of the TRO, did you continue to seek advice from your counsel regarding what you could and could not do under the TRO?
>
> A Yes.
>
> Q And why did you do that?
>
> A Again, to stay compliant, not -- to stay compliant any specific tripwires or any trickery that might have been in the agreement.[49]

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[47] The court will refer frequently herein to three Transcripts and hereinafter use the following defined terms for ease of reference: (a) the January 5, 2021 Transcript from Mr. Dondero's deposition in connection with this matter, found as an attachment to the John Morris Declaration, DE # 50, at Exh. Z ("1/5/21 Transcript"); (b) the January 8, 2021 Transcript from the hearing on the Motion for Preliminary Injunction, which was admitted as Debtor's Exh. 36 at the Hearing on the Contempt Motion ("1/8/21 Transcript"); and (c) the March 22, 2021 Transcript from the Hearing on the Contempt Motion, which is found at DE # 138 ("3/22/21 Transcript").

[48] *See* 1/5/21 Transcript at 12:17-15:14; 1/8/21 Transcript at 23:10-12 and 101:13-14; 3/22/21 Transcript at 30:20-22; 35:6-16. *See also* 1/5/21 Transcript at 84:8-16; 3/22/21 Transcript at 35:20-36:1.

[49] 3/22/21 Transcript at 130:6-19.

Mr. Dondero went on to testify: "Yeah, I -- again, I take seriously anything that comes from the Court, and I did adjust my behavior, but the overall theme, that somehow I was doing something to hurt the creditor or hurt the Debtor or hurt investors I viewed as incongruent with any of my behavior. So I didn't think it was going to require much adjustment."[50]

The court concludes that Mr. Dondero's testimony was very inconsistent on when and how carefully he read the TRO. Whether this amounted to contempt of the TRO will be addressed in the Conclusions of Law section below.

B. The Evidence Regarding Whether Mr. Dondero Disposed of His Highland-Furnished Cell Phone to Evade Discovery.

First, the Highland Cell Phone Policy.

The evidence is undisputed that Highland had a cell phone policy for all of its employees dated March 27, 2012 that still remained in place at all relevant times during this bankruptcy case.[51] Employees could, among other things, have their cell phone expenses reimbursed by Highland. Mr. Dondero participated in this program. To be clear, Highland actually purchased and paid for Mr. Dondero's cell phone (in contrast, some employees used their own cell phones and obtained expense reimbursement). The policy stated as follows:

> Your obligations under this policy shall terminate upon the termination of your employment, ***provided that you will remain obligated to furnish historical call records covering the period through the date of your termination***, as requested following the termination of your employment. Employees participating in this policy should have no expectation of privacy regarding e-mail, voice mail, ***text messages***, graphics, and other electronic data composed, sent, and/or received on their cell phones. Notwithstanding the foregoing, Highland agrees not to review any call records on an employee's bill other than those associated with the phone number of employee. Further, regardless of whether employees choose to participate in this policy, ***all e-mail, voice mail, text messages, graphics, and other***

[50] 3/22/21 Transcript at 129:6-11; *see more generally, id.* at 130-136.

[51] Debtor's Exh. 54 (DE # 101).

> ***electronic data composed, sent, and/or received related to company business remain the property of Highland.***"[52]

Mr. Dondero certified in January 2020 and again on October 7, 2020, that he had read the Employee Handbook.[53] Mr. Dondero testified that he reviewed it and the company's Compliance Manual once a year in connection with required compliance training.[54]

It is undisputed that as of the day that the TRO was entered (December 10, 2020), Mr. Dondero had a cell phone that was bought and paid for by the Debtor.[55] Mr. Dondero testified that he would sometimes use it for business texts.[56]

From this evidence, the court finds that the cell phone that Mr. Dondero used for the majority of the Chapter 11 case (and as of the date of the TRO, December 10, 2020) was property of the bankruptcy estate, as was the data thereon related to company business.

Mr. Dondero's Cell Phone Goes Missing Immediately After Entry of the December 10, 2020 TRO. Coincidence or Not?

Soon after the entry of the December 10, 2020 TRO, on December 23, 2020, Debtor's counsel sent Mr. Dondero's counsel a letter informing him that Highland would:

> terminate Mr. Dondero's cell phone plan and those cell phone plans associated with parties providing personal services to Mr. Dondero (collectively, the 'Cell Phones'). [Highland] demands that Mr. Dondero immediately turn over the Cell Phones to [Highland] by delivering them to [Mr. Dondero's counsel]; we can make arrangements to recover the phones from [Mr. Dondero's counsel] at a later date. The Cell Phones and the accounts are property of [Highland]. [Highland] further demands that Mr. Dondero refrain from deleting or "wiping" any information or messages on the Cell Phone. [Highland], as the owner of the account

[52] *Id.* (emphasis added). *See also* Debtor's Exh. 55, at 12-13 (DE # 101).

[53] Debtor's Exhs. 56 & 57 (DE # 101).

[54] 3/22/21 Transcript at 37:1-23; 42:1-25. *See also* Debtor's Exh. 55 (Employee Handbook); Debtor's Exhs. 56 & 57 (Compliance Certificates) (DE # 80).

[55] 3/22/21 Transcript at 51:17-21

[56] *Id.* at 51:22-25.

> and the Cell Phones, intends to recover all information related to the Cell Phones and the accounts and reserves the right to use the business-related information.[57]

On December 29, 2020, Mr. Dondero's counsel sent a letter replying to the December 23, 2020 letter, stating that Mr. Dondero had recently acquired a new phone and they were not sure where Mr. Dondero's old Highland-provided phone was at the moment.[58] Mr. Dondero was copied on that letter. Nothing was ever mentioned in that letter about the disposal or wiping of the old cell phone. And yet, in discovery that soon unfolded, as well as the hearing on the Contempt Motion, Mr. Dondero testified that his old company cell phone had been wiped of data and disposed.

When Mr. Dondero was asked specifically about what happened to the cell phone he had that was "bought and paid for by the debtor," he testified that it "was disposed of as part of getting a replacement phone in anticipation of potentially a transition."[59] He testified that there was a historical practice at Highland of destroying old phones when he obtained a new one.[60] He testified that "[a]s far as I know, it was disposed of in the garbage, but I don't know if it was recycled or whatever."[61] He said he did not know specifically who threw it away.[62] When asked if he was aware that the UCC had asked for his phone messages, he testified no and that no one had ever told him.[63] He further testified that maybe an employee named Jason Rothstein (an employee in Highland's technology group) was involved with getting him a new phone and disposing of his old phone, but he was equivocal.[64] Mr. Dondero was insistent that disposing of old phones was always

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[57] Debtor's Exh. 12, at pp. 2-3 (DE # 80).

[58] Debtor's Exh. 22 (DE # 80).

[59] 1/5/21 Transcript at 72:5-7.

[60] *Id.* at 72:9-13.

[61] *Id*. at 72:18-20.

[62] *Id*. at 73: 4-18.

[63] *Id.* at 74:19-25.

[64] *Id.* at 75:7-11.

the protocol at Highland and, also, employees routinely kept their old phone numbers (as he had done after leaving Highland and getting a new phone).[65] He further testified that he thought that he and all senior executives had to "move their phones in the next 30 days or next 25 days, based on Seery's termination notice."[66] ("Seery's termination notice" presumably was a reference to Highland sending a letter on November 30, 2020 that Highland was terminating the shared services agreements among Highland and the Advisors effective January 30, 2021.[67] Of course, Mr. Dondero had been terminated as a Highland employee back on October 9, 2020).

An exhibit was shown to Mr. Dondero[68] during a January 5, 2021 deposition which was a text from Jason Rothstein (the aforementioned Debtor employee in the technology group) to Mr. Dondero dated December 10, 2020 at 6:25 pm. The TRO had been entered earlier that same day at 1:31 pm (after a 9:30 am hearing). Jason Rothstein's text stated, "I left your old phone in the top drawer of Tara's [Mr. Dondero's assistant's] desk" to which Mr. Dondero replied "[o]k."[69]

When questioned about this text and asked whether Mr. Dondero had told Jason Rothstein to do anything with the phone, he replied, "I don't—all I know is the phone's been disposed of. That's all I know."[70] He then specifically testified that he did not tell either Jason Rothstein or his assistant Tara to throw the phone in the garbage.[71] When later asked if he disposed of the phone "somewhere around December 10, 2020" he replied "I—I don't know. Probably."[72] Later at the

[65] *Id.* at 76:8-77:2.

[66] *Id.* at 79:25-80:4.

[67] Dondero's Exhs. 4 & 5 (DE # 106).

[68] Debtor's Exh. 8 (DE # 80).

[69] While this timing seems very coincidental, Mr. Dondero testified that he had ordered his new cell phone a couple of weeks before December 10, 2020. 3/22/21 Transcript at 147:17-148:7.

[70] 1/5/21 Transcript at 80:18-81:8.

[71] *Id.* at 81:9-15.

[72] *Id.* at 85:15-17.

hearing on the Contempt Motion on March 22, 2021, Mr. Dondero answered more ambiguously as to what happened to the cell phone: "I don't know what happened to the phone. I don't know what Jason did or did not do."[73] Nobody called Jason Rothstein to testify at the hearing on the Contempt Motion. In any event, Mr. Dondero was insistent that he did nothing wrong—stating that he turned the cell phone over to the "tech group" for the Debtor (Jason Rothstein) as he was supposed to do and that he wiped it in accordance with company protocol.[74] Mr. Dondero further testified:

> Q Do you have any personal knowledge about what happened to your phone after Jason Rothstein texted you that he left it in Tara's desk?
>
> A No.
>
> Q Did you ever look to see if it was in Tara's desk?
>
> A No.
>
> Q Did you -- you -- you didn't take the phone out of Tara's desk?
>
> A No.
>
> Q So did you ever see the phone again after you turned it over to Jason Rothstein?
>
> A No.
>
> Q Do you know where the phone is today?
>
> A But, again, I don't know why this is relevant. They can get the text messages from the phone company if they think it's that big of a deal.[75]
>
> Q When you previously testified that the phone was disposed of, what did you mean?

[73] 3/22/21 Transcript at 57:3-4.

[74] *Id.* at 58:1-16.

[75] The court did not have any expert evidence of this, but the court believes without much doubt that this is incorrect. While this may have been true long ago (in the days before iPhones and WiFi communications), Mr. Dondero testified that he had an iPhone. Whether he uses the iPhone "Messages" text app or some other messaging app such as "WhatsApp" or "Signal," his phone company (which he testified was AT&T) would not have his text messages since text messages are sent through these apps—not the AT&T phone service.

A I mean, that's -- that's the last step. That's what always happens to the old phones. But to say it was tossed in the garbage, I have no idea. I have no idea what happened to it after it went back to Tara's desk.

Q So do you have any personal knowledge that your phone was actually disposed of?

A I don't know.[76]

Is the Missing Phone Any Big Deal?

Mr. Dondero is rather adamant that this is all much ado about nothing. Is the missing cell phone a big deal? The answer is "maybe or maybe not." It depends on what was on it and whether the data on it was responsive to numerous discovery requests in this bankruptcy case. And in any event, the phone and any data on it related to Highland was "property of the estate," pursuant to section 541 of the Bankruptcy Code.

With regard to discovery requests, there have actually been many discovery requests in the bankruptcy case for which ***any relevant data on Mr. Dondero's phone would have been responsive***, starting from almost the very beginning, when the UCC sought, among other things, electronically stored information ("ESI") from the Debtor and key custodians including Mr. Dondero.

For example, back on November 10, 2019 (when the bankruptcy case was still pending in Delaware), the UCC served its first document request ***while Mr. Dondero was still CEO and during which time all original management and inhouse counsel were still intact***.[77] This first UCC document request, in seeking communications about numerous topics, defined "Communications" as including ***electronic communications such as texts***. And the "Instructions" therein to the Debtor

[76] 3/22/21 Transcript at 150:5-151:4.

[77] Debtor's Exh. 15 (DE # 80).

provided at paragraph 4 that: "You are requested to produce not only those documents in Your physical possession, but also those documents within Your custody and control, including, without limitation, documents in the possession of Your agents, employees, affiliates, advisors, or consultants and any other person or entity acting on Your behalf."[78] To be clear, this was approximately two months before the January 2020 Corporate Governance Settlement was reached, with the subsequent installment of the Independent Board. Mr. Dondero was still in control of the Debtor when this document request would have been served. The UCC served a second document request on February 3, 2020 (with the same definitions and instructions);[79] a third document request on February 24, 2020 (same definitions and instructions),[80] and a fourth document request on July 8, 2020 (same definition and instructions).[81]

At the same time as the UCC's fourth request for document production (on July 8, 2020), the UCC also filed a motion to compel.[82] This motion to compel brought to the court's attention for the first time that problems were brewing with the UCC's efforts to obtain documents that might be relevant to estate causes of action, and in particular, the UCC motion to compel sought assistance from the court in the UCC's efforts to obtain ESI from various custodians of documents of the Debtor.

The UCC's motion to compel reminded the court that the January 2020 Corporate Governance Settlement explicitly granted the UCC standing to pursue bankruptcy estate claims, defined as "any and all estate claims and causes of actions against Mr. Dondero, Mr. Okada, other

[78] *Id.*

[79] Debtor's Exh. 30 (DE # 80).

[80] Debtor's Exh. 31 (DE # 80).

[81] Debtor's Exh. 32 (DE # 80).

[82] Debtor's Exh. 33 (DE # 80).

insiders of the Debtor, and each of the Related Entities, including promissory notes held by any of the foregoing."[83] The parties also agreed in the January 2020 Corporate Governance Settlement that the UCC would receive any privileged documents or communications that relate to the "Estate Claims" so that the UCC could bring those claims. In short, the UCC, pursuant to the January 2020 Corporate Governance Settlement, stands in Debtors' shoes with respect to the "Estate Claims." In fact, the January 2020 Corporate Governance Settlement set forth a "Document Production Protocol," which stated that ESI was included within the documents being sought and stated that "***Debtor acknowledges that they should take reasonable and proportional steps to preserve discoverable information in the party's possession, custody or control. This includes notifying employees possessing relevant information of their obligation to preserve such data***."[84] Thus, whether Mr. Dondero and inhouse counsel paid attention or not, they were on notice very early in this case that they had a duty to preserve ESI.

The UCC motion to compel (again, filed July 8, 2020) further stated that for approximately eight months, the UCC had attempted to work cooperatively with the Debtor to obtain documents and communications needed to investigate those claims, and, despite the UCC's efforts, the Debtor had not yet provided the UCC with the ESI it had requested. In particular, the UCC alleged that it had spent a considerable amount of time attempting to obtain "***production of emails, chats, texts, or other ESI or communications from the Debtor."*** In summary, the UCC, in July 2020 (some five months before Mr. Dondero's cell phone was disposed) moved to compel production of documents and communications of nine custodians pursuant to a protocol proposed by the UCC and these nine custodians were Patrick Boyce, Jim Dondero, Scott Ellington, David Klos, Isaac

[83] *Id.* at 4.

[84] Debtor's Exh. 2, Exh. 1.C. thereto (DE # 80).

Leventon, Mark Okada, Trey Parker, Tom Surgent, and Frank Waterhouse. The UCC specifically stated that for "avoidance of doubt," it was requesting "all ESI for the nine custodians, including without limitation, email, chat, text, Bloomberg messaging, or any other ESI attributable to the custodians."[85]

Notably, Mr. Dondero filed a responsive pleading to this UCC motion to compel—which would be some indication that he knew about it.[86] In his response, he argued that he did not want Josh Terry (Acis's manager, with whom he had been in long-running litigation) to get any documents that might be produced pursuant to the UCC motion to compel.

Finally, the Debtor also sought document production from Mr. Dondero including ESI in a formal document request it sent to him dated December 23, 2020.[87] More pointedly, on December 23, 2020, Debtor's counsel sent Mr. Dondero's counsel the letter mentioned above, in which the Debtor specifically asked that Mr. Dondero turn over his Highland-purchased cell phone.[88]

With regard to awareness about discovery requests, Mr. Dondero testified at his deposition on January 5, 2021 that he was aware of a document request sent to his lawyers for documents of his and that he delegated to his lawyers and his assistant, Tara Loiben, the task of responding by saying, "she has full access to my email, and I gave her my phone for the better part of a couple of days in the office."[89] He also testified that he understood that the Debtor's document requests called for the production of all text messages that were responsive to the requests.[90] When asked if he

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[85] *Id.*

[86] Debtor's Exh. 40 (DE # 101).

[87] Debtor's Exh. 7 (DE # 80).

[88] Debtor's Exh. 12 (DE # 80).

[89] *See* 1/5/21 Transcript at 67:20-69:9. *See also* Debtor's Exh. 9 (DE # 80).

[90] *Id.* at 70:1-6.

understood the document request was for the time period of December 10, 2020 to the end of the month, he replied "I didn't need the details of this. I didn't get into it. I didn't do the document production that I believe was completed and responsive. I delegated it."[91]

Mr. Dondero's testimony about awareness as to discovery requests has been inconsistent. Mr. Dondero testified at the hearing on the Contempt Motion that no one ever asked him to preserve his text messages.[92]

The court concludes that Mr. Dondero exercised control over property of the estate (*i.e.,* his Highland-provided cell phone and the company-related data thereon) and potentially spoliated evidence thereon that was responsive to multiple, pending discovery requests. Whether this amounted to contempt of the TRO will be addressed in the Conclusions of Law section below.

The Evidence Regarding Whether Mr. Dondero Trespassed.

In the December 23, 2020 letter that Debtor's counsel sent to Mr. Dondero's counsel mentioned earlier (that demanded turn over of Mr. Dondero's cell phone), it also stated that Highland:

> has concluded that Mr. Dondero's presence at the [Highland] office suite and his access to all telephonic and information services provided by [Highland] are too disruptive to [Highland's] continued management of its bankruptcy case to continue. As a consequence, Mr. Dondero's access to the offices located at 200/300 Crescent Court, Suite 700, Dallas, Texas 75201 (the "Office"), will be revoked effective Wednesday, December 30, 2020 (the "Termination Date"). As of the Termination Date, Mr. Dondero's key card will be de-activated and building staff will be informed that Mr. Dondero will no longer have access to the Office.[93]

[91] *Id.* at 70:17-20.

[92] 3/22/21 Transcript at 152:1-11.

[93] Debtor's Exh. 12 (DE # 80).

The letter went on to warn that: "Any attempt by Mr. Dondero to enter the Office, regardless of whether he is entering on his own or as a guest, will be viewed as an act of trespass. Similarly, any attempts by Mr. Dondero to access his @highlandcapital.com email account or any other service previously provided to Mr. Dondero by [Highland] will be viewed as an act of trespass, theft, and/or an attempted breach of [Highland's] security protocols."[94]

Mr. Dondero testified that he was aware of this and he nevertheless went into the office on January 5, 2021, to give a deposition regarding this Adversary Proceeding:

> I went through my phone, the January 5th deposition that has somehow become important, even though there were no Highland employees in the office other than the receptionist, is memorialized by a calendar invite on my phone -- which will also be in the Highland system -- where it was an invite a week earlier from Sarah Goldsmith, who was one of the Highland employees supporting the legal team that was largely supporting Jim Seery, sent me a calendar invite to the conference room at Highland for the deposition on the 5th. It's right front and center in my calendar. It'll be on the Highland Outlook program. And Sarah Smith -- I mean, Sarah Goldsmith works directly for Jim Seery.[95]

The court concludes that Mr. Dondero was trespassing against the Debtor's wishes and instructions at the Highland offices on January 5, 2020. Whether this amounted to contempt of the TRO will be addressed in the Conclusions of Law section below.

The Evidence Regarding Whether Mr. Dondero Interfered with Trading of Highland CLO Assets.

It is undisputed that Mr. Dondero resigned (at the Debtor's request) completely from Highland on October 9, 2020. About a week later, on October 16, 2020, a law firm representing the Advisors and the NexPoint/HCMFA Funds sent its first of several letters complaining about the Debtor's supposed rush to sell assets in the Highland CLOs at so-called fire sale prices and

[94] *Id.* at 3.

[95] 3/22/21 Transcript at 179:7-18.

expressing a desire that the Debtor not sell the Highland CLO assets without prior notice and consent of the Advisors. The second in this series of letters was sent in November 2020. Mr. Dondero testified that he supported these letters being sent.[96]

What was this about? The Debtor sought during certain times in November and December 2020 to cause the Highland CLOs to sell certain publicly-traded equity securities, including "AVYA" and "SKY' (stock tickers). Mr. Dondero disagreed that these securities should be sold. At issue here, in particular, are the Debtor's attempted sales in late December 2020—after entry of the TRO. Mr. Dondero testified at a deposition on January 5, 2021, that he gave instructions to a Debtor employee, Hunter Covitz, not to sell "SKY" equity after Mr. Covitz had been instructed by Mr. Seery to sell it.[97] He also testified that he communicated with an employee named Matt Pearson, an equity trader, informing him that certain Non-Debtor Highland Related Entities ("HFAM" and "DAF")—who were investors in the NexPoint/HCMFA Funds—had "instructed Highland in writing not to sell any CLO underlying assets. There is potential liability. Don't do it again."[98] Matt Pearson, in response, canceled scheduled sales of SKY as well as AVYA.[99] Mr. Dondero also communicated with an employee of one of the Advisors named Joe Sowin regarding stoppage of trades of CLO assets. Mr. Dondero explained: "My intent was to prevent trades that weren't in the best interests of investors, that investors—the beneficial holders had articulated they didn't want sold while these funds were in transition, and that the–there was no business purpose to benefit the debtor to sell these assets."[100] To be clear, the so-called investors/beneficial holders were Non-

[96] 1/26/21 Transcript at 61:4-18.

[97] 1/5/21 Transcript at 41:22-43:11.

[98] *Id.* at 43:15-44:08.

[99] *Id.*

[100] *Id.* at 50:8-14; *see also, id.* at 89:8-25.

Debtor Highland Related Entities under the control of Mr. Dondero. And the Debtor, indeed, ***did*** have a business purpose—despite Mr. Dondero's belief that Mr. "Seery had no business purpose and he was doing it to tweak myself and everybody else."[101] For one thing, the Debtor is owed fees from managing these Highland CLOs and it cannot just defer them indefinitely—Highland needed liquidity to fund its Chapter 11 plan. Moreover, Mr. Seery credibly testified that he had consulted with many advisors on the Highland and Advisors team, and he concluded it was a good time to sell the AYVA and SKY securities. In any event, Mr. Dondero also communicated with Debtor employee Thomas Surgent, the Chief Compliance Officer, to inform him that he thought Mr. Seery was engaging in improper trades of Highland CLO assets and told Mr. Surgent he might face personal liability over this.[102] Finally, Mr. Dondero communicated with a text to Mr. Seery that stated: "Be careful what you do, last warning."[103] As a result of this conduct, the Debtor notified Mr. Dondero's counsel that they were essentially evicting Mr. Dondero from access to the Highland offices effective December 31, 2020 and terminating his Highland email account.[104]

Mr. Dondero stated that he communicated as he did regarding the Highland CLO asset sales because he thought Mr. Seery was acting improperly with the trades he was attempting to execute.[105] Mr. Dondero testified at the hearing on the Contempt Motion that he may have interfered with trades the week of Thanksgiving, but he did not after entry of the TRO. The evidence does not seem to support this testimony.[106]

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[101] *Id.* at 55:5-6.

[102] *Id.* at 60:23-61-25.

[103] *Id.* at 62:25.

[104] *See* Debtor's Exh. 12 (DE # 80).

[105] 1/5/21 Transcript at 63:1-64:20.

[106] 3/22/21 Transcript at 80-81.

Mr. Dondero testified that he only talked to Jason Post about trades in late December and that Jason Post was not a Debtor employee but rather an employee of NexPoint.[107]

What was at the bottom of this? Mr. Dondero said he "viewed it as a violation of the Advisers Act and the spirit of the Advisers Act, when the beneficial holders have told you they're going to change managers and don't want their account liquidated."[108] Mr. Post inconsistently testified at one hearing that he believed the trades violated Advisors' policies and procedures because they were not initiated through an electronic system called the OMS (Order Management System).[109] It appears to this court that Mr. Dondero wanted these funds to be kept intact and not have any assets liquidated until he could get a new company up and running (or maybe one of his existing companies) to hopefully take over Highland's role of managing these Highland CLOs.

In any event, the Debtor pointed out, in response to Mr. Dondero's "defense" of his interference—that he was looking out for investors—that Mr. Dondero himself, during January-October 2020, while still an employee of Highland, traded a significantly larger amount of the AVYA stock that was held in the Highland CLOs, sometimes at a lower price than Mr. Seery did or attempted.[110] Mr. Seery, in fact, credibly testified that the original impetus to sell AVYA came from Mr. Hunter Covitz, one of the Highland CLO portfolio managers, who had been looking at this security and noticed it had started moving up after performing extremely poorly post its own Chapter 11. Mr. Covitz, during the summer of 2020, believed Highland should "start lightening up" on the AVYA holdings, and Mr. Seery also had the following additional personnel look into it: Kunal Sachdev (Highland analyst); Joe Sowin (head trader at HCFMA) and Matthew Gray (another

[107] *Id.* at 162.

[108] 3/22/21 Transcript at 168:22-25.

[109] 1/26/21 Transcript at 223:11-16.

[110] *Id.* at 106:9-20, 159-161.

senior analyst). They determined (Mr. Sachdev, in particular) that AVYA had reached its peak and even though it could continue to go up, they just did not think the value was there and thought it should be sold. A similar analytical process was undertaken with the SKY equity holdings.[111]

One might wonder, if Mr. Dondero and the Advisors and the NexPoint/HCMFA Funds believed that Mr. Seery and the Debtor were mismanaging the Highland CLOs, why not offer to take them over during Highland's case (or as part of Highland' Chapter 11 plan)? Mr. Seery credibly testified that:

> Q Has the Debtor made any attempt to transfer the CLO management agreements to the Defendants or to others?
>
> A Well, our original construct of our plan was to do that. We've since determined, when we tried to do that, we got virtually no response from the Dondero interests. The structure of the original thought of the plan was if we didn't get a grand bargain we would effectively transition a significant part of the business to Dondero entities, they would assume employee responsibilities and the operations, and then assure that the third-party funds were not impacted.
>
> As I think I testified on the -- I can't recall if it was the deposition or my prior testimony in court -- Mr. Dondero, true to his word, told me that would be very difficult, he would not agree, and he has made that very difficult.
>
> So we examined it. We've determined that we're going to maintain the CLOs and assume them. But we originally tried to contemplate a way to assign those management agreements.[112]

What's really going on here? These Highland CLOs are one of the ways that the Debtor earns revenue. Specifically, the CLO SPEs must pay fees to the Debtor. Highland's management of the CLO SPEs generates about $4.5-$5 million of fees for it per year.[113] That sometimes requires liquidation of assets in the CLO SPEs to pay the fees, since not all of the assets in the CLO SPEs

[111] *Id.* at 156-157.

[112] *Id.* at 163:5-22.

[113] *Id.* at 187:5-12.

are cash-generative.[114] To be more specific, these are very old CLOs that are no longer in a reinvestment period. The manager (Highland) can no longer sell assets and reinvest cash in new assets. Thus, the manager must either hold them or sell them. But the assets are for the most part not loans anymore—they are equity (such as MGM stock) and real estate. Many of the assets, as stated, do not regularly generate cash, so the only way Highland can generate cash to pay management fees is to sell assets (presumably at prudent times). When there is interference with liquidation of assets in the CLO SPEs, it interferes with Highland's revenue stream. Yes, it also reduces the assets in the CLO SPEs ultimately available for the equity tranche. ***But there would appear to be nothing in any contract (or any law presented to the court) that precludes Highland from liquidating assets in the CLO SPEs, from time to time, to pay its fees or otherwise as it deems fit—and the evidence was not at all convincing that there was any sort of bad decision making ongoing in that regard***. Most importantly, it was Highland's decision to make when and how to liquidate assets. It is easy to see a conflict of interest here. To the extent assets in a Highland CLO are not cash-generative, they will not have liquid funds to pay Highland, as portfolio manager, its management fees. That's not optimal for Highland to indefinitely defer/accrue management fees. But it ***would*** be optimal for Mr. Dondero and the Advisors as equity holders—they would rather see assets kept in the Highland CLOs longer to hopefully grow their investment. And it also might be optimal for Mr. Dondero and the Advisors for Highland to decide they do not want to manage these Highland CLOs anymore (because of inconsistent ability to pay management fees) and perhaps agree to assign their management agreements over to the Advisors so Mr. Dondero could once again have ultimate, total control over the Highland CLOs. Conspicuously absent on this issue are the indenture trustees and other ultimate equity holders of the Highland CLOs. Only

[114] *Id.* at 189:12-18.

Non-Debtor Dondero-Related equity holders have complained. The indenture trustees for the Highland CLOs even agreed to Highland continuing to be the portfolio manager on these CLOs post-confirmation.

The court concludes that Mr. Dondero interfered with the Debtor's trading of Highland CLO assets after entry of the TRO. Whether this amounted to contempt of the TRO will be addressed in the Conclusions of Law section below.

The Evidence Regarding Mr. Dondero's Communications with Debtor Employees—in Particular, with Inhouse Counsel—to Coordinate His Own Legal Strategy Against the Debtor.

It is apparent from the evidence (numerous emails) that Mr. Dondero communicated with Highland inhouse general counsel Scott Ellington (who was terminated from Highland in January 2021) about all kinds of things post-TRO ***other*** than shared services, including Mr. Dondero's own personal litigation strategies.[115] As a reminder, Section 2(c) of the TRO stated that Mr. Dondero was enjoined, "from communicating with any of the Debtor's employees, except as it specifically relates to ***shared services provided to affiliates*** owned or controlled by Mr. Dondero" (emphasis added).

Mr. Dondero asserts that after entry of the TRO, he never spoke with any Debtor employees, including Mr. Ellington, regarding anything other than shared services, a "pot plan," and to Mr. Ellington in connection with his role as settlement counsel. In other words, Mr. Dondero's defense is that, yes, he conversed with Scott Ellington regarding things other than shared services provided to affiliates—such as Mr. Dondero's desire to propose a "pot plan" in the case and maybe a few other subjects—but this was permissible because Mr. Ellington was understood by all to be in some

[115] *See, e.g.,* Debtor's Exhs. 17, 18, 21 (DE # 80); Debtor's Exhs. 48, 49, 50, 52, 53 (DE # 101). *See also* 3/22/21 Transcript at 122:1-124:7; 124:15-125:12.

sort of role of "settlement counsel" in the case: "Scott Ellington, as my settlement counsel, or as the go-between with Seery and with the creditors, was an important piece of trying to get something done."[116] But this is simply not accurate. This court never would have approved that role for Mr. Ellington. Moreover, Mr. Seery, the current Highland CEO, credibly testified as follows:

> Q Did you task Mr. Ellington with the role of a go-between between the board and Mr. Dondero?
>
> A No. This -- this settlement counsel is something I'd never heard until Dondero raised it and made it up. It -- it's wholly fictitious.
>
> Now, what Ellington did do is he was on a number of calls with me and Dondero, and he had a communication line with Dondero. This was through the first half of the case and into -- into the summer. But as it started to become more adversarial, particularly around the mediation, he wasn't invited. So, for example, Mr. Ellington was not invited to -- to participate in the mediation. He asked. I said no.
>
> The -- in addition, this idea that he was drafting the pot plan, well, not to my knowledge or understanding, because I drafted it for Dondero and his lawyers because you guys [Pachulski] couldn't.[117]

Mr. Seery further credibly testified as follows:

> Q So you're denying Mr. Dondero's testimony to the contrary?
>
> A Yes.
>
> Q Did Mr. Dondero send messages to you through Mr. Ellington?
>
> A No. Mr. Ellington often came back and gave me messages. They were often critical of Mr. Dondero. I didn't always believe them, because I figured Mr. Ellington had an ulterior motive. But he took a number of, you know, shots at Mr. Dondero and he came back and gave his color of what he thought was going on in Mr. Dondero's mind.[118]

[116] 3/22/21 Transcript at 135:3-5.

[117] *Id.* at 257:6-21.

[118] *Id.* at 258:2-12.

In addition to this testimony, the documentary evidence reflects that just two days after the TRO was entered, Mr. Dondero was communicating with Scott Ellington seeking advice regarding an appropriate witness to support his interests at an upcoming hearing.[119] And just six days after entry of the TRO, Mr. Dondero was emailing Mr. Ellington telling him "I'm going to need you to provide leadership here" and Ellington replies "[o]n it."[120] Additionally, there are emails reflecting that inhouse lawyers Scott Ellington and Isaac Leventon were receiving and responding to information requests from Mr. Dondero[121] and were being copied on draft joint defense agreement prepared by the Dugaboy and Get Good Trusts' counsel.[122] And Mr. Dondero emailed with Scott Ellington on December 24, 2020 regarding his unhappiness and intention to object to a settlement between HarbourVest and Debtor.[123]

The Evidence Regarding Interference with Debtor's Duty to Produce Documents to the UCC.

On December 16, 2020, at 5:18 pm Mr. Dondero sent Melissa Schroth, a Highland employee (executive accountant), a text stating: "No dugaboy details without subpoena."[124] This was a reference to document requests from the UCC in which they were seeking documents that were on the Highland server concerning Mr. Dondero's family trust, the Dugaboy Trust.

[119] Debtor's Exh. 17 (DE # 80) (Scott Ellington email to Mr. Dondero and his counsel on 12/12/20 at 11:55 pm suggesting JP Sevilla for a witness for some unknown hearing). *See also* Debtor's Exh. 26 (DE # 80).

[120] *See* Debtor's Exh. 18 (DE # 80).

[121] *See* Debtor's Exh. 20 (DE # 80).

[122] *See* Debtor's Exh. 24 (DE # 80).

[123] Debtor's Exh. 21 (DE # 80).

[124] *See* Debtor Exh. 19 (DE # 80).

VI. Conclusions of Law

A. Jurisdiction and Authority.

Bankruptcy subject matter jurisdiction exists in this matter, pursuant to 28 U.S.C. § 1334(b). This bankruptcy court has authority to exercise such subject matter jurisdiction, pursuant to 28 U.S.C. § 157(a) and the Standing Order of Reference of Bankruptcy Cases and Proceedings (Misc. Rule No. 33), for the Northern District of Texas, dated August 3, 1984. This is a core matter pursuant to 28 U.S.C. § 157(b) in which this court may issue a final order. Section 105 of the Bankruptcy Code and the cases construing it are the substantive legal authority.

The Contempt Motion seeks for this court to hold Mr. Dondero in civil contempt of court for violating an order of this court (the TRO). It is well established that bankruptcy courts have civil (as opposed to criminal) contempt powers. "The power to impose sanctions for contempt of an order is an inherent and well-settled power of all federal courts—including bankruptcy courts."[125] A bankruptcy court's power to sanction those who "flout [its] authority is both necessary and integral" to the court's performance of its duties.[126] Indeed, without such power, the court would be a "mere board[ ] of arbitration, whose judgments and decrees would be only advisory."[127]

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[125] *In re SkyPort Global Comm's, Inc.,* No. 08-36737-H4-11, 2013 WL 4046397, at *1 (Bankr. S.D.Tex. Aug. 7, 2013), *aff'd.,* 661 Fed. Appx. 835 (5th Cir. 2016); *see also In re Bradley*, 588 F.3d 254, 255 (5th Cir. 2009) (noting that "civil contempt remains a creature of inherent power[,]" to "prevent insults, oppression, and experimentation with disobedience of the law[,]" and it is "widely recognized" that contempt power extends to bankruptcy) (quoting 11 U.S.C. § 105(a), which states, in pertinent part, that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); *Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.),* 108 F.3d 609, 613 (5th Cir.1997) ("[W]e assent with the majority of the circuits … and find that a bankruptcy court's power to conduct civil contempt proceedings and issue orders in accordance with the outcome of those proceedings lies in 11 U.S.C. § 105."); *Citizens Bank & Trust Co. v. Case (In re Case),* 937 F.2d 1014, 1023 (5th Cir. 1991) (held that bankruptcy courts, as Article I as opposed to Article III courts, have the inherent power to sanction and police their dockets with respect to misconduct).

[126] *SkyPort Global*, 2013 WL 4046397, at *1.

[127] *Id.* (internal quotations omitted); *see also Bradley,* 588 F.3d at 266 (noting that contempt orders are both necessary and appropriate where a party violates an order for injunctive relief, noting such orders "are important to the management of bankruptcy cases, but have little effect if parties can irremediably defy them before they formally go into effect.").

Contempt is characterized as either civil or criminal depending upon its "primary purpose."[128] If the purpose of the sanction is to punish the contemnor and vindicate the authority of the court, the order is viewed as criminal. If the purpose of the sanction is to coerce the contemnor into compliance with a court order, or to compensate another party for the contemnor's violation, the order is considered purely civil.[129] It is clear that Highland's intent is to both seek compensation for the expenses incurred by Highland, due to Mr. Dondero's alleged violations of the TRO, and to coerce compliance going forward.[130]

B. Type of Civil Contempt: Alleged Violation of a Court Order.

There are different types of civil contempt, but the most common type is violation of a court order (such as is alleged here). "A party commits contempt when [they] violate[] a definite and specific order of the court requiring [them] to perform or refrain from performing a particular act or acts with knowledge of the court's order."[131] Thus, the party seeking an order of contempt in a civil contempt proceeding need only establish, by clear and convincing evidence:[132] "(1) that a

[128] *Bradley*, 588 F.3d at 263.

[129] *Id.* (internal citations omitted).

[130] Highland seeks the following relief in the Contempt Motion: an order (i) finding and holding Mr. Dondero in contempt for violating the TRO; (ii) directing Mr. Dondero to produce to the Debtor and the UCC within three days all financial statements and records of Dugaboy and Get Good for the last five years; (iii) directing Mr. Dondero to pay the Debtor's estate an amount of money equal to two times the Debtor's actual expenses incurred in bringing this Motion and addressing Mr. Dondero's conduct that lead to the imposition of the TRO and this Motion (e.g., responding to the K&L Gates Clients' frivolous motion and related demands and threats and taking Mr. Dondero's deposition), payable within three (3) calendar days of presentment of an itemized list of expenses, (iv) imposing a penalty of three (3) times the Debtor's actual expenses incurred in connection with any future violation of any order of this Court, and (iv) granting the Debtor such other and further relief as the court deems just and proper under the circumstances.

[131] *Travelhost*, 68 F.3d at 961.

[132] *United States v. Puente*, 558 F. App'x 338, 341 (5th Cir. 2013) (per curiam) (internal citation omitted) ("[C]ivil contempt orders must satisfy the clear and convincing evidence standard, while criminal contempt orders must be established beyond a reasonable doubt.").

court order was in effect, and (2) that the order required certain conduct by the respondent, and (3) that the respondent failed to comply with the court's order."[133]

C. Specificity of the Order.

"To support a contempt finding in the context of a TRO, the order must delineate 'definite and specific' mandates that the defendants violated."[134] The court need not, however, "anticipate every action to be taken in response to its order, nor spell out in detail the means in which its order must be effectuated."[135]

D. Possible Sanctions.

To be clear, if the court ultimately determines that Mr. Dondero is in contempt of court, for not having complied with the TRO, the court can order what is necessary to: (1) compel or coerce obedience of the order; and (2) to compensate the Debtor/estate for losses resulting from Mr. Dondero's non-compliance with a court order.[136] The court must determine that the Debtor/movant showed by clear and convincing evidence that: (1) the TRO was in effect; (2) the TRO required certain conduct by Mr. Dondero; and (3) that Mr. Dondero failed to comply with the TRO.[137] "[T]he factors to be considered in imposing civil contempt sanctions are: (1) the harm from noncompliance; (2) the probable effectiveness of the sanction; (3) the financial resources of the contemnor and the burden the sanctions may impose; and (4) the willfulness of the contemnor in

[133] *F.D.I.C. v. LeGrand*, 43 F.3d 163, 170 (5th Cir. 1995); *see also Martin v. Trinity Indus., Inc.,* 959 F.2d 45, 47 (5th Cir.1992) (same); *Travelhost*, 68 F.3d at 961 (same).

[134] *Am. Airlines, Inc. v. Allied Pilots Ass'n,* 228 F.3d 574, 578 (5th Cir. 2000) (citing Fed. R. Civ. P. 65).

[135] *Id.*

[136] *In re Gervin*, 337 B.R. 854, 858 (W.D. Tex. 2005) (citing *United States v. United Mine Workers*, 330 U.S. 258 (1947)).

[137] *In re LATCL&F, Inc.,* 2001 WL 984912. *3 (N.D. Tex. 2001) (citing to *Petroleos Mexicanos v. Crawford Enterprises, Inc.,* 826 F.2d 392, 400 (5th Cir. 1987)).

disregarding the court's order."[138] "Compensatory civil contempt reimburses the injured party for the losses and expenses incurred because of [their] adversary's noncompliance."[139] Ultimately, courts have "broad discretion in the assessment of damages in a civil contempt proceeding."[140]

E. Knowledge of the Order.

"An alleged contemnor must have had knowledge of the order on which civil contempt is to be based. The level of knowledge required, however, is not high. And intent or good faith is irrelevant."[141] To be clear, "intent is not an element in civil contempt matters. Instead, the basic rule is that all orders and judgments of courts must be complied with promptly."[142]

F. Willfulness of Actions.

For civil contempt of a court order to be found, "[t]he contemptuous actions need not be willful so long as the contemnor actually failed to comply with the court's order."[143] For a stay violation, the complaining party need not show that the contemnor intended to violate the stay. Rather, the complaining party must show that the contemnor intentionally committed the acts which violate the stay. Nevertheless, in determining whether damages should be awarded under the court's

[138] *Lamar Financial Corp. v. Adams,* 918 F.2d 564, 567 (5th Cir. 1990) (citing *United States v. United Mine Workers,* 330 U.S. 258 (1947)).

[139] *Norman Bridge Drug Co. v. Banner*, 529 F.2d 822, 827 (5th Cir.1976); *see also Travelhost*, 68 F.3d at 961 (noting that "[b]ecause the contempt order in the present case is intended to compensate [plaintiff] for lost profits and attorneys' fees resulting from the contemptuous conduct, it is clearly compensatory in nature."); *In re Terrebonne Fuel & Lube, Inc.,* 108 F.3d at 613 (affirming court's decision to impose sanctions for violating injunction and awarding plaintiff costs and fees incurred in connection with prosecuting defendant's conduct); *F.D.I.C.*, 43 F.3d 168 (affirming court's imposition of sanctions requiring defendant to pay movant attorneys' fees).

[140] *Am. Airlines*, 228 F.3d at 585; *see also F.D.I.C.*, 43 F.3d 168 (reviewing lower court's contempt order for "abuse of discretion" under the "clearly erroneous standard."); *In re Terrebonne Fuel & Lube, Inc.,* 108 F.3d at 613 ("The bankruptcy court's decision to impose sanctions is discretionary[]").

[141] *Kellogg v. Chester,* 71 B.R. at 38.

[142] *In re Unclaimed Freight of Monroe, Inc.,* 244 B.R. 358, 366 (Bankr. W.D. La. 1999). *See also In re Norris*, 192 B.R. 863, 873 (Bankr. W.D. La. 1995) ("Intent is not an element of civil contempt.")

[143] *Id.* (citing *N.L.R.B. v. Trailways, Inc.*, 729 F.2d 1013, 1017 (5th Cir.1984)).

contempt powers, the court considers whether the contemnor's conduct constitutes a willful violation of the stay.[144]

G. Applying the Evidence to the Literal Terms of the TRO.

The court concludes that there is clear and convincing evidence that Mr. Dondero violated the specific wording of the TRO in certain ways and, thus, is in contempt of the court as follows.

1. ***The TRO states in Section 2(c) that Mr. Dondero is enjoined, "from communicating with any of the Debtor's employees, except as it specifically relates to shared services provided to affiliates owned or controlled by Mr. Dondero."***

There are several examples of violations of this provision. And many of the communications appeared to be adverse to the Debtor's interests.

First, notably, Mr. Dondero actually admitted that he had conversations with some Debtor employees, including Scott Ellington, after December 10, 2020, regarding things other than "shared services," including a "pot plan" and, more generally, in connection with Mr. Ellington's role as "settlement counsel": "Scott Ellington, as my settlement counsel, or as the go-between with Seery and with the creditors, was an important piece of trying to get something done."[145] As indicated earlier, this court never would have approved that role for Mr. Ellington, and Mr. Seery credibly testified that this was never approved by him or the Independent Board. There was no exception for this in the TRO. As for Mr. Dondero's desire to pursue a pot plan, again, there's nothing in the TRO that allowed Mr. Dondero to speak with any of the Debtor's employees about the pot plan. It is clear that he knew that because on December 16, 2020, just six days after the TRO was entered, Mr. Dondero filed a motion seeking to modify the TRO to allow Mr. Dondero to speak directly with the Independent Board about a pot plan. He later withdrew that motion.[146]

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[144] *In re All Trac Transport, Inc.,* 306 B.R. 859, 875 (Bankr. N.D. Tex. 2004) (internal citations omitted).

[145] 3/22/21 Transcript at 135:3-5.

[146] *See* DE # 24.

Additionally, as noted earlier in this Opinion, it appears that Mr. Dondero communicated with inhouse lawyer Scott Ellington about all kinds of other things such as: (a) reporting to him about his intention to object to the settlement by the Debtor of the HarbourVest claim;[147] (b) reporting to him about his desire to collaborate with UBS and its counsel to give them "evidence of Seery ineptitude" and they would "run with it";[148] (c) forwarding email conversations to Scott Ellington that Mr. Dondero was having with his counsel (and thereby eviscerating attorney-client privilege as to those emails) about various disputes involving certain Non-Debtor Dondero-Related Entities and regarding the Debtor's desire to seek discovery from Mr. Dondero;[149] (d) reviewing a joint defense agreement that the lawyer for his family trusts (Dugaboy and Get Good) had drafted;[150] and (e) "showing leadership"—whatever that meant—but likely meaning coordinating of all the many lawyers involved for Mr. Dondero's interests.[151]

Finally, Mr. Dondero communicated with Highland employee (executive accountant) Melissa Schroth about resisting production of Dugaboy documents that were on the Highland server without a subpoena[152] and Jason Rothstein about his phone.[153]

In summary, Mr. Dondero violated Section 2(c) of the TRO numerous times.[154] His intent does not matter. He knew about the TRO. Thus, he was in contempt for these numerous violations.

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[147] Debtor's Exh. 21 (DE # 80).

[148] Debtor's Exh. 50 (DE # 101).

[149] Debtor's Exh. 52 & 53 (DE # 101).

[150] *See* Debtor's Exh. 24 (DE # 80).

[151] Debtor's Exh. 18 (DE # 80). *See also* 3/22/21 Transcript at 122:1-124:7; 124:15-125:12.

[152] *See* Debtor Exh. 19 (DE # 80) (on December 16, 2020, at 5:18 pm: "No dugaboy details without subpoena.").

[153] Debtor's Exh. 8 (DE # 80); 1/5/21 Transcript at 80-55; 3/22/21 Transcript at 57-58.

[154] The court notes that there was also clear and convincing evidence to suggest various conversations occurred between Mr. Dondero and his assistant Tara Loiben after December 10, 2020. However, it is not clear from the record if Tara Loiben was a Highland employee or an employee of one of the Non-Debtor Dondero-Related Entities. Moreover, there was evidence to suggest Mr. Dondero communicated with Mr. Ellington on December 11-12, 2020 regarding who should be a witness for Mr. Dondero at an upcoming hearing. However, the evidence of this was not

2. ***The TRO states at Section 3(a) that Mr. Dondero is "enjoined from causing, encouraging, or conspiring with (a) any entity owned or controlled by him, and/or (b) any entity acting on his behalf, from, directly or indirectly, engaging in any Prohibited Conduct" (and the "Prohibited Conduct" includes "interfering with or otherwise impeding" the Debtor's "decisions concerning disposition of assets controlled by the Debtor").***

The court concludes that there is clear and convincing evidence that Mr. Dondero violated this provision.

Things had grown very awkward at Highland, to say the least, by October 2020 when Mr. Dondero was terminated. It is clear from the evidence that Mr. Dondero did not like the way the bankruptcy case was playing out (his pot plan was not getting the attention or reception he hoped for from the UCC and the Debtor) and he did not like certain trading decisions that Mr. Seery was making. Conflicts of interest between the Debtor and Mr. Dondero (and the Non-Debtor Dondero-Controlled Entities) were seeming more and more problematic. It was against this backdrop that the TRO was entered. It was also against this backdrop that Mr. Dondero and his Non-Debtor Dondero-Related Entities began hiring armies of lawyers. In the midst of all of this, Mr. Dondero gave instructions to a Debtor employee, Hunter Covitz, not to sell "SKY" equity after Mr. Covitz had been instructed by Mr. Seery to sell it.[155] He also communicated with an employee named Matt Pearson, an equity trader, informing him that certain Non-Debtor Highland Related Entities ("HFAM" and "DAF")—who were investors in the NexPoint/HCMFA Funds—had "instructed Highland in writing not to sell any CLO underlying assets. There is potential liability. Don't do it again."[156] Matt Pearson, in response, canceled scheduled sales of SKY, as well as AVYA. Mr.

clear and convincing that Mr. Dondero spoke directly with Mr. Ellington (as opposed to being copied on conversations among Mr. Ellington and Mr. Dondero's counsel). *See* Debtor's Exhs. 17 (DE # 80), 48 & 49 (DE # 101).

[155] 1/5/21 Transcript at 41:22-43:11.

[156] *Id.* at 43:15-44:08.

Dondero also communicated with an employee of one of the Advisors named Joe Sowin regarding stoppage of trades of CLO assets.[157] Mr. Dondero also communicated with Debtor employee Thomas Surgent, the Chief Compliance Officer, to inform him that he thought Mr. Seery was engaging in improper trades of Highland CLO assets and told Mr. Surgent he might face personal liability over this.[158] Finally, Mr. Dondero communicated with a text to Mr. Seery that stated: "Be careful what you do, last warning."[159]

Mr. Dondero's "defense" of his interference—that he was looking out for investors—is neither relevant nor entirely credible. As earlier indicated, intent does not matter with civil contempt. Moreover, the evidence was credible that Mr. Dondero himself, postpetition, while still an employee of Highland, traded a significantly larger amount of the AVYA stock that was held in the Highland CLOs, sometimes at a lower price than Mr. Seery did or attempted.[160]

In summary, Mr. Dondero violated Section 3 of the TRO. His intent does not matter. He knew about the TRO. Thus, he was in contempt of court for interfering with or otherwise impairing the Debtor's business, including its decisions concerning disposition of assets controlled by the Debtor.

3. ***The TRO states in Section 2(e) that Mr. Dondero shall not violate section 362(a) of the Bankruptcy Code***.

The Debtor has argued that Mr. Dondero's actions with regard to the disappearing cell phone provided to him by the Debtor amounted to a violation of the automatic stay, section 362(a)(3) (as an exercise of control over property of the estate—*i.e.,* the phone and its data thereon) and, thus, a

[157] *Id.* at 50:8-14; *see also id.* at 89:8-25.

[158] *Id.* at 60:23-61-25.

[159] *Id.* at 62:25.

[160] *Id.* at 106:9-20, 159-161.

violation of this provision of the TRO. While the court is more than a little troubled by the mysterious disappearance of the cell phone—just hours after entry of the TRO and after a year of numerous ESI requests by the UCC during the case—the court cannot conclude that the disappearance was a clear and convincing violation of the TRO. There may or may not be a later evaluation of whether a spoliation of evidence has occurred, but for now, this is simply a matter of whether the TRO was violated.

As earlier stated, "To support a contempt finding in the context of a TRO, the order must delineate 'definite and specific' mandates that the defendants violated."[161] While the court need not, however, "anticipate every action to be taken in response to its order, nor spell out in detail the means in which its order must be effectuated,"[162] the court concludes that the TRO simply was not specific enough with regard to the phone. The TRO did not specifically state "turn over your cell phone." A letter on December 23, 2020 from Debtor's counsel to Mr. Dondero's counsel later made such a demand,[163] but this was not the same as there being a mandate in the four corners of the TRO. Additionally, the Highland Employee Handbook made it clear that the phone and its data were the Debtor's.[164] But this, too, is not the same as the TRO's literal terms.

Mr. Dondero should not consider this to be a victory. ***The court reiterates that it is highly concerned about possible spoliation of evidence that may or not be presented in a contested matter later***.[165] At the same time, no one else should consider "spoliation" to be a foregone

[161] *Am. Airlines, Inc. v. Allied Pilots Ass'n,* 228 F.3d 574, 578 (5th Cir. 2000) (citing Fed. R. Civ. P. 65).

[162] *Id.*

[163] Debtor's Exh. 12 (DE # 80).

[164] Debtor's Exhs. 54 & 55 (DE # 101).

[165] *See* Fed. R. Civ. Proc. 37(e) (dealing with failure to preserve electronically stored information); *Hawkins v. Gresham*, No. 3:13-CV-00312-P, 2015 WL 11122118, at *3 (N.D. Tex. Jan. 16, 2015) (dealing with the question of whether a defendant's sale of his phone containing relevant text messages after being notified of a lawsuit was a breach of his duty to preserve evidence); *Paisley Park Enterprises, Inc. v. Boxill*, 330 F.R.D. 226, 230-237 (D. Minn. 2019) (dealing with whether two defendants' loss of relevant text messages resulting from their phones' auto-delete function

conclusion here. The court never heard testimony from Jason Rothstein or Tara Loiben (who seem to have been involved with the disappearing phone). The court never heard evidence as to whether the inhouse lawyers (*e.g.,* Scott Ellington, Isaac Leventon) properly addressed with Highland employees, such as Mr. Dondero, as they should have, the preservation notice and document requests served on the Debtor by the UCC.[166] The court also cannot be sure at this time whether there was even relevant and retrievable information on the phone. The court has many lingering questions, but it cannot find contempt of the TRO based on the TRO's lack of specificity where the cell phone was concerned.

4. ***Other Allegations of TRO Violations***.

The Debtor has cited various other instances of Mr. Dondero's behavior that it believes were violative of the TRO. For example: (a) Mr. Dondero's alleged willful ignorance of it by not reading it or underlying pleadings associated with it; (b) trespassing on the Debtor's property after the Debtor had evicted him; and (c) allegedly interfering with the Debtor's obligation to produce certain documents that were requested by the UCC and that were in the Debtor's possession, custody, and

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constituted spoliation of evidence when the defendants had explicitly discussed the possibility of litigation before the deletion and were principals of the company being sued); *First Fin. Sec., Inc. v. Freedom Equity Grp., LLC,* No. 15-CV-1893-HRL, 2016 WL 5870218, at *3-4 (N.D. Cal. Oct. 7, 2016) (dealing with whether Defendants' intentional deletion of text messages after they had discussed the likelihood of litigation was spoliation of evidence under Rule 37(e); also, whether sanctions were warranted when it was unclear whether the information contained in the deleted text messages would have been critical to plaintiff's claims); *Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.,* No. 14-CV-62216, 2016 WL 1105297, at *1-2, 4-7 (S.D. Fla. Mar. 22, 2016) (dealing with whether the deletion of text messages from Defendant's cell phone as a result of the phone's auto-delete feature after he reasonably anticipated litigation was spoliation of evidence that prejudiced the Plaintiff; also, whether Defendant's failure to disable the auto-delete feature that resulted in the deletion of text messages was evidence of his intent to deprive Plaintiff of relevant evidence.); *Clear-View Tech., Inc. v. Rasnick*, No. 5:13-CV-02744-BLF, 2015 WL 2251005, at *2, 7-11 (N.D. Cal. May 13, 2015) (whether Defendants spoliated text message evidence by purposefully deleting emails and discarding cell phones after receiving messages threatening a lawsuit from Plaintiff and discussing the possibility of litigation); *Kan-Di-Ki, LLC v. Suer,* No. CV 7937-VCP, 2015 WL 4503210, at *30 (Del. Ch. July 22, 2015) (whether Plaintiff's deletion of relevant emails and loss of his cell phone constituted spoliation and whether sanctions were warranted).

[166] Debtor's Exhs. 29-33 (DE # 80).

control. While the allegations are problematic, the court does not conclude these actions constituted civil contempt of the TRO.[167]

With regard to Mr. Dondero's alleged "willful ignorance" of the TRO, it is technically not a violation of any term of the TRO. The most important thing here is that Mr. Dondero cannot claim lack of knowledge of the TRO's contents. As mentioned earlier, "[a]n alleged contemnor must have had knowledge of the order on which civil contempt is to be based. The level of knowledge required, however, is not high."[168] When Mr. Dondero testified that he had not read the TRO (or the underlying pleadings supporting it), maybe he was trying to imply lack of knowledge of its terms as some sort of defense? Or maybe he really did not care to read the TRO and was relying entirely upon his counsel to tell him all of its terms. Whatever the explanation, it really does not matter much. The court determines that Mr. Dondero had the necessary knowledge of the TRO, for purposes of holding him accountable for compliance with it, but—even if he was somewhat cavalier in not actually reading the TRO line-for-line—this alone is not a violation of the TRO's terms.

With regard to Mr. Dondero's trespassing on the Debtor's property after the Debtor had evicted him, the problem here is that the "eviction" of Mr. Dondero occurred pursuant to the letter that Debtor's counsel sent to Mr. Dondero's counsel on December 23, 2010—not pursuant to the actual terms of the TRO.[169] The TRO itself did not specifically enjoin Mr. Dondero from going to

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[167] The court should add that it does not conclude that letters sent by counsel for the Advisors and the NexPoint/HCMFA Funds, seeking to stop the sale of Highland CLO assets, and a motion that they filed to address Highland CLO management issues, constituted contempt of court by Mr. Dondero. *See* Debtor's Exh. 25 (DE # 80). While Mr. Dondero, as the President and portfolio manager of these Non-Debtor Dondero-Related entities, was/is no doubt in control of them, and while it is a very close call as to whether—through these lawyers' actions—Mr. Dondero was causing "(a) any entity owned or controlled by him, and/or (b) any person or entity acting on his behalf," to interfere with the disposition of assets controlled by the Debtor, the court ultimately believes that hiring lawyers to file motions (and those lawyers taking steps leading up to the filing of the motions, such as sending letters previewing that they may take legal actions), should not be viewed as having crossed the line into contemptuous behavior. Again, this was a close call.

[168] *Kellogg v. Chester,* 71 B.R. at 38.

[169] Debtor's Exh. 12 (DE # 80).

the Highland offices. The later preliminary injunction entered on January 8, 2021 for the first time contained such an injunction.[170] Thus, even though Mr. Dondero showed up in the Debtor's offices on January 5, 2021 to sit for the Debtor's virtual deposition of him, the court does not conclude that this violated a term of the TRO.

With regard to Mr. Dondero's allegedly interfering with the Debtor's obligation to produce certain documents that were requested by the UCC and that were in the Debtor's possession, custody, and control, the court understands this to be a reference to Mr. Dondero texting Highland employee Melissa Schroth and instructing her not to turn over documents concerning the Dugaboy Trust (that were on Highland's server) without a subpoena.[171] The court has already addressed this as a TRO violation, ***since it was a communication with a Highland employee regarding matters other than "shared services."*** For the avoidance of doubt, there was no shared services agreement between the Dugaboy Trust and Highland. This clearly was a TRO violation.

V. Damages.

The Contempt Motion requests that the court (i) find and hold Mr. Dondero in contempt for violating the TRO; (ii) direct Mr. Dondero to produce to the Debtor and the UCC, within three days all financial statements and records of Dugaboy and Get Good for the last five years; (iii) direct Mr. Dondero to pay the Debtor's estate an amount of money equal to two times the Debtor's actual expenses incurred in bringing this Motion, payable within three calendar days of presentment of an itemized list of expenses; (iv) impose a penalty of three times the Debtor's actual expenses incurred in connection with any future violation of any order of this Court, and (v) grant the Debtor such other and further relief as the court deems just and proper under the circumstances.

[170] DE # 59 at ¶ 5.

[171] Debtor's Exh. 19 (DE # 101).

As indicated earlier, the court can order what is necessary to: (1) compel or coerce obedience of an order; and (2) to compensate the Debtor/estate for losses resulting from Mr. Dondero's non-compliance with a court order. Here, the court believes compensatory damages are more appropriate than a remedy to compel or coerce future compliance. Compensatory damages are supposed to reimburse the injured party for the losses and expenses incurred because of their adversary's noncompliance. Courts have broad discretion but may consider such factors as: (1) the harm from noncompliance; (2) the probable effectiveness of the sanction; (3) the financial resources of the contemnor and the burden the sanctions may impose; and (4) the willfulness of the contemnor in disregarding the court's order.

As far as the harm from noncompliance, the Debtor presented invoices of the fees incurred by its counsel relating to the TRO and Contempt Motion. The Debtor did not attempt to quantify any potential economic harm to the Debtor from Mr. Dondero's prohibited conversations with Debtor employees and attempted interference with trading. Should this matter? Once again, is this much ado about nothing? In answering this question, context matters. Recall that the Corporate Governance Settlement between the Debtor and UCC from January 2020 was ***all about removing Mr. Dondero from control of the Debtor but avoiding the drastic remedy of a Chapter 11 Trustee***. It was heavily negotiated and extremely detailed in its terms. Ultimately, Mr. Dondero was kept around at the company in a non-control capacity, but eventually conflicts between the Debtor and him (and between the Debtor and the Non-Debtor Dondero-Related Entities) became intolerable. Mr. Dondero was, therefore, terminated. But almost immediately, he essentially began instructing Debtor employees to ignore their boss (Mr. Seery) and do as Mr. Dondero said instead. All of this was occurring at a critical time when the Debtor had filed a Chapter 11 plan, was still negotiating it with creditors, and was set for a confirmation hearing—and, meanwhile, Mr. Dondero was trying

to gain support for his own pot plan that would involve him regaining control of the company and/or transitioning the Debtor's managed funds over to his control. His interference—even if not ultimately resulting in quantifiable harm to the Debtor's balance sheet or cash flow—posed a risk to the Debtor's plan of reorganization that, ultimately ended up being supported by hundreds of millions of dollars-worth of creditors (in fact, all creditors except the Non-Debtor Dondero-Related Entities). The reality is that the Debtor's counsel acted quickly in bringing the Contempt Motion before much damage could be done. The fact that they acted swiftly—before the Debtor had incurred any quantifiable damage other than significant attorneys' fees—should not preclude the Debtor from alleging harm and receiving reimbursement of its attorneys' fees and expenses incurred relating to the TRO and Contempt Motion.

As far as the attorneys' fees incurred relating to the TRO and Contempt Motion, the Debtor presented invoices of the fees incurred by its primary bankruptcy counsel, Pachulski Stang, during December 2020 and January 2021, pertaining to "Bankruptcy Litigation"—much of which it represented related to its attorney time devoted to the Contempt Motion. The Debtor admitted that there were some other litigation matters mixed in these invoices.[172] Total December fees were $526,686. The court has reviewed the December invoice and conservatively estimates that **$170,919** of the fees reflected in the December invoice related to the TRO and Contempt Motion (other fees appeared to relate to other litigation matters such as the HarbourVest settlement, Pat Daugherty issues, UBS, demand note litigation, and Dugaboy claims). Total January fees were $698,770. The court has reviewed this invoice and conservatively estimates that **$195,002** of the fees reflected in the January 2021 invoice related to the TRO and Contempt Motion (again, other

[172] Debtor's Exhs. 38 & 39 (DE # 128).

fees appeared to relate to other litigation matters such as UBS and other litigation). These two sums total **$365,921**.

However, the hearing on this matter (as a result of continuances sought by Mr. Dondero) did not occur until March 22 & 24, 2021. The court was presented with no invoices for February or March. The court estimates that the hearing on this matter (March 22 & 24, 2021) required 10 hours of in-court time. The primary attorney handling this matter for the Debtor (Mr. Morris) charged at $1,245 per hour and his paralegal (Ms. Canty) charged $425 per hour. The court will assume that they each spent 10 hours during the day or two before the hearing preparing for it. This would amount to an additional **$33,400** of fees, bringing the total now to **$399,321**. The court stresses that it used conservative math when scrutinizing the invoices. Moreover, this represents fees only. The court assumes that the various depositions and transcripts required as a result of this litigation resulted in many thousands of dollars of additional expenses. Also, Pachulski had local counsel (Hayward & Associates) whose invoices were not submitted. Additionally, the UCC had counsel monitoring all of this (Sidley & Austin)—whose fees and expenses are reimbursed by the bankruptcy estate—and their fees and expenses have not been included. In summary, the $399,321 number is extremely conservative, and it does not include likely significant add-ons (expenses; local counsel; and UCC counsel). The court determines that it is reasonable to round the $399,321 number up approximately $50,000, to **$450,000** because of these extra items. In considering the probable effectiveness of the sanction, the financial resources of Mr. Dondero and the burden the sanctions may impose, and the willfulness of Mr. Dondero in disregarding the court's TRO, the court believes—based on information it has learned at numerous hearings about Mr. Dondero's compensation and the size of the companies he has been running for almost 30 years—he has substantial resources, and this $450,000 compensatory sanction will not place much of a burden on

him at all. The court believes that there was willfulness with regard to many of Mr. Dondero's actions. The court has no idea about the probability of these sanctions being effective. Time will tell.

The Debtor has asked for the court to impose a penalty of three times the Debtor's actual expenses incurred in connection with any future violation of any order of this Court. The court declines to do this. However, the court will add on a sanction of $100,000 for each level of rehearing, appeal, or petition for *certioriari* that Mr. Dondero may choose to take with regard to this Order, to the extent any such motions for rehearing, appeals, or petitions for *certiorari* are not successful.

Accordingly, it is hereby ORDERED that:

(i) Mr. Dondero is in civil contempt of court in having violated the court's December 10, 2020 TRO—the court having found by clear and convincing evidence that: (1) the TRO was in effect and Mr. Dondero knew about it; (2) the TRO required certain conduct by Mr. Dondero; and (3) Mr. Dondero failed to comply with the TRO;

(ii) In order to compensate the Debtor's estate for loss and expense resulting from Mr. Dondero's non-compliance with the TRO, Mr. Dondero is directed to pay the Debtor (on the 15th day after entry of this order) an amount of money equal to **$450,000;**

(iii) The court will add on a sanction of **$100,000** for each level of rehearing, appeal, or petition for *certioriari* that Mr. Dondero may choose to take with regard to this Order, to the extent that any such motions for rehearing, appeals, or petitions for *certiorari* are pursued by him and are not successful;

(iv) Other sanctions are denied at this time; and

(v) The court reserves jurisdiction to interpret and enforce this Order.

End of Memorandum Opinion and Order

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

In Re: Highland Capital Management, L.P.	§	Case No. 19-34054-sgj11
James Dondero et al	§	
Appellant	§	
vs.	§	
Stacey G Jernigan	§	3:21-CV-00879-K
Appellee	§	

[2083] Order denying motion to recuse (related document #2060) Entered on 3/23/2021

APPELLANT SUPPLEMENTAL RECORD
VOLUME 3

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

In re:	§	**Chapter 11**
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**Case No. 19-34054-sgj11**
	§	
Debtor.	§	
In re:	§	
	§	
JAMES DONDERO, *et al.*,	§	
	§	
Appellants,	§	
	§	
v.	§	**Case No. 3:21-cv-00879-K**
	§	
HON. STACEY G. C. JERNIGAN,	§	
	§	
Appellee.	§	

INDEX

MOTION FOR LEAVE TO SUPPLEMENT RECORD ON APPEAL

James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware limited liability company (collectively, "*Appellants*") file this Motion for Leave to Supplement Record on Appeal.

MOTION FOR LEAVE TO SUPPLEMENT

As the Court is aware, this is an appeal from the denial of a motion to recuse. The core issues on appeal are: (a) whether "a reasonable man, cognizant of the relevant circumstances surrounding [the Bankruptcy Court's] failure to recuse, would harbor legitimate doubts about that judge's impartiality;"[1] and (b) whether the Bankruptcy Court should be recused from sitting as the judge and jury in the various Adversary Proceedings listed above. Respectfully, Appellants, like

[1] *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir.1999).

every litigant, are entitled to a full and fair opportunity to make their case in a fair and impartial forum.[2] As an appellate court, this court has the discretion to order supplementation of the record on appeal.[3]

Here, Appellants timely filed their notice of appeal, statement of issues and designated the record that existed at that time to show the Bankruptcy Court's bias and prejudice to Appellants. However, since Appellants designated the record, the Bankruptcy Court has taken additional positions that further support a finding that the Court's impartiality is likely to be reasonably questioned. Debtor, who has just now intervened, will not suffer any prejudice, as it is just now preparing its own designation of record.

These hearings show the Bankruptcy Court's continued appearance of bias, lack of impartiality, and establish findings against Appellants that lack any evidence. For example, at one of these hearings the Bankruptcy Court suggested causes of action that the Debtor could bring against Appellants, namely Dondero, if Dondero's defenses were successful and ordering relief that no party had requested.

Appellants respectfully request the Court grant leave to supplement the record, including by adding the following:

Main Case

Vol. 1

000001

000010

Vol 2

000308

Docket No.	Date	Description
2256	4/29/21	Dugaboy Motion to Compel Compliance with Bankruptcy Rule 2015.3
2440	6/10/21	Transcript of hearing held on 6/8/21
2445	6/10/21	Transcript of hearing held on 6/10/21

[2] *Miller v. Sam Houston State Univ.*, 986 F.3d 880, 893 (5th Cir. 2021).
[3] *Huddleston v. Nelson Bunker Hunt Tr. Est.*, 102 B.R. 71, 75 (N.D. Tex. 1989).

Adversary No. 20-03190

Vol. 2

Docket No.	Date	Description
000399 175	5/10/21	Transcript of hearing on trial docket call and defendant's emergency motion to stay
000454 182	5/18/21	Order Resolving Adversary Proceeding
000459 185	5/21/21	Transcript of Hearing on Ruling Resolving Adversary Proceeding
000474 190	6/7/21	Memorandum Opinion and Order Granting in Part Plaintiff's Contempt Motion

Adversary No. 21-03003

Vol. 3

Docket No.	Date	Description
000529 21	4/15/21	Defendant's Motion to Withdraw Reference
000549 22	4/15/21	Defendant's Motion to Stay Pending Motion to Withdraw Reference
000558 23	4/15/21	Motion to Expedite Motion to Stay
000566	4/20/21	Email from courtroom deputy regarding request for expedited hearing on motion to stay
000569 35	5/14/21	Motion to Compel Seery Deposition Testimony (including exhibits)
000586 36	5/14/21	Motion to Expedite Motion to Compel
000593	5/14/21-5/17/21	Email chain between B Assink to Courtroom deputy re: filing of motion to compel and motion to expedite and setting of hearing on motion to compel, dated 5/14/21 – 5/17/21
000596	5/14/21-5/18/21	Additional Email chain between B Assink to Courtroom deputy re: filing of motion to compel and motion to expedite and setting of hearing on motion to compel, dated 5/14/21 – 5/18/21
000598 49	5/24/21	Order Denying Motion to Compel
000600 50	5/25/21	Transcript of hearing held on motion to compel on 5/20/21
000686 58	5/27/21	Transcript of hearing held on Motion to Stay and Status Conference on Motion to Withdraw Reference
000772 64	6/4/21	Order Granting In Part James Dondero's Motion to Stay

Adversary No. 20-03195

Vol. 4

Docket No.	Date	Description

Vol. 4
000774
000783
000801
000806
000809
000822
000880
000881
000887
000889
000975

45	5/19/21	UCC motion to expedite motion to stay
46	5/19/21	UCC motion to stay proceeding for 90 days (as re-filed)
47	5/19/21	Notice of Hearing setting hearing on motion to stay for 5/20/21
48	5/19/21	Order Granting UCC motion to expedite
50	5/19/21	Highland Dallas Foundation and CLO Holdco's Objection to UCC's emergency motion to stay
52	5/20/21	Highland Dallas Foundation and CLO Holdco's W&E List for Hearing on Motion to Stay (with exhibits attached)
54	5/20/21	Court admitted exhibits SEE # 52
57	5/21/21	Post-hearing memorandum suggesting error by the Court
62	5/24/21	Order staying adversary proceeding
65	5/25/21	Transcript of hearing held on UCC's motion to stay on 5/20/21
67	5/27/21	Order addressing post hearing memorandum suggesting error

CONCLUSION

For the foregoing reasons, Appellants respectfully request the Court grant leave to supplement the records and award Appellants such other and further relief to which they may be entitled.

Dated: June 16, 2021

Respectfully submitted,

By: */s/ Michael J. Lang*
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CERTIFICATE OF CONFERENCE

The undersigned certifies that on June 15, 2021, Appellants conferred with opposing counsel who indicated that they are opposed to the relief requested.

/s/ Michael J. Lang
Michael J. Lang

CERTIFICATE OF SERVICE

The undersigned certifies that on June 16, 2021, a true and correct copy of the above and foregoing document was served on all parties of record via the Court's e-filing system.

/s/ Michael J. Lang
Michael J. Lang

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ATTORNEYS FOR DEFENDANT JAMES DONDERO

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

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

	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
v.	§	**Adversary No. 21-03003-sgj**
	§	
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

JAMES DONDERO'S MOTION AND MEMORANDUM OF LAW IN SUPPORT TO WITHDRAW THE REFERENCE

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ATTORNEYS FOR DEFENDANT JAMES DONDERO

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Pursuant to 28 U.S.C. §§ 157(d) and (e), Federal Rule of Bankruptcy Procedure 5011 and L.B.R 5011-1, Defendant James Dondero ("Dondero") hereby respectfully moves the district court to withdraw the reference of Plaintiff's Complaint from the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") to the United States District Court for the Northern District of Texas (the "District Court").[1] Withdrawal of the reference is mandatory because: (1) this motion is timely; (2) a non-Bankruptcy Code federal law at issue (here, federal tax law) has more than a *de minimis* effect on interstate commerce; and (3) the proceeding involves a substantial and material question of non-Bankruptcy Code federal law. *In re Nat'l Gypsum Co.*, 145 B.R. 539, 541 (N.D. Tex. 1992); *City of Clinton, Ark. v. Pilgrim's Pride Corp.*, No. 4:09-CV-386-Y, 2009 WL 10684933, at *1 (N.D. Tex. Aug. 18, 2009). The reference should also be withdrawn because Mr. Dondero has a right to a jury trial – which the Bankruptcy Court cannot provide – on the non-core breach of contract claim. Plaintiff's turnover claim does not change the analysis because resolution of the breach of contract claim is fully determinative of the turnover claim (including the amount of offset Dondero is entitled to per 11 U.S.C. §§ 542(b) and 553), and it is improper to bring a turnover claim "as a Trojan Horse for bringing garden variety contract claims . . ." *In re Soundview Elite Ltd.*, 543 B.R. 78, 97 (Bankr. S.D.N.Y. 2016) (citation omitted). Finally, it is most efficient for the District Court to hear the case because the matter will be subject to *de novo* review.

[1] This motion for withdrawal "shall be heard by a district judge." Fed. R. Bankr. P. 5011(a). Under Local Bankruptcy Rule 5011-1(a), motions for withdrawal must be filed with the Clerk of the Bankruptcy Court. Accordingly, this motion is addressed to the District Court, but filed in the Bankruptcy Court.

INTRODUCTION

1. On January 22, 2021, Plaintiff Highland Capital Management, L.P. ("Plaintiff"), commenced this adversary proceeding against Dondero, asserting two causes of action, Count I asserting the state law, non-core breach of contract claim and Count II averring turnover per 11 U.S.C. § 542(b). Dondero, in his subsequent Answer and Amended Answer filed on March 16, 2021 and April 6, 2021, respectively, expressly stated that he did not consent to the Bankruptcy Court entering final orders or judgment, that he did not consent to the Bankruptcy Court conducting a jury trial, and that he demanded a jury trial.[2]

2. The largest $3.82 million note of the three underlying Notes on which Count I is based, attached to the Complaint as Exhibits 1 – 3, states as follows:

> 4. Tax Loan. This Note is paid to the Maker to help satisfy any current tax obligations of a former partner or current partner.

3. Thus, the funds reflected by the largest of the Notes (and others) were advanced to Dondero, at least in part, to address a tax incurred related to federal partnership tax. The Plaintiff recognizes this in the *Declaration of John A. Morris in Support of the Debtor's Objection to Defendant James Dondero's Emergency Motion to Continue Docket Call and Trial and/or Amend Scheduling Order*,[3] which includes the Plaintiff's monthly operating reports and backup for the same reflecting the nature of the Notes being "DUE FROM OTHER – TAX LOANS" and "Partner Tax Loans." Further, the balances of the three Notes were to be forgiven pursuant to certain benchmarks being met, including liquidity events.[4] When forgiven, they would be taxed as compensation.

[2] Dkt. No. 6, ¶¶ 3-5, 44, 45; Dkt. No. 16, ¶¶ 3-5, 46, 47.

[3] Dkt. No. 11, pp. 105, 117, 128, 130/130.

[4] Dkt. No. 16, Amended Answer ¶ 40.

4. Whether the Notes reflect bona fide loans that only become compensation once those benchmarks have been met is a matter determined by federal tax law applicable to the Plaintiff, a Delaware limited partnership, and Dondero, a resident of Texas. To determine the validity of Dondero's defense to the demand for payment on the Notes, the factfinder will have to hear evidence about the use of forgivable notes as a tax-efficient method of compensation in the private equity industry.[5] Whether the criteria for effective (not yet taxable) deferred compensation are met will also be pertinent to determining that payment on the Notes is not yet able to be demanded. Parties "engaging in legitimate tax planning" can design advance agreements with an expectation that the instruments be characterized differently in different jurisdictions for different purposes (*i.e.* "bona fide debt" for U.S. federal income tax purposes while being something else entirely under other law). *See PepsiCo P.R. c. Comm'r,* 104 T.C.M. (CCH) 322, T.C. Memo 2012-269, *P88, 2012 Tax Ct. Memo LEXIS 270, **105 (U.S.T.C. Sep. 20, 2012) (recognizing the legitimacy of "efforts to secure this hybrid dynamic").

5. For example, the existence of a forgiveness agreement, or subjecting a loan to partial or total cancellation upon the occurrence of a subsequent event, does not necessarily invalidate that arrangement as "bona fide debt" for federal income tax purposes, *Salloum v. Comm'r,* 113 T.C.M. (CCH) 1563 (U.S.T.C. June 29, 2017); *Porten v. Comm'r*, 65 T.C.M. (CCH) 1994 (U.S.T.C. Mar. 3, 1993), while that same arrangement could, under Texas law, be something "which appears to be a completely integrated agreement" but for which "[w]e may consider parol evidence ' . . . to establish the real consideration given for an instrument.'"

[5] *See, e.g., Sibarium v. NCNB Texas Nat'l Bank*, 107 B.R. 108, 110 (N.D. Tex. 1989) ("Before withdrawing the reference, the district court must make an 'affirmative determination' that the relevant non-Code legal issues will require substantial and material consideration, and the Court must be satisfied that consideration of these federal laws requires 'significant interpretation' on the part of the Court . . . Withdrawal should not be made base on 'speculation about . . . issues which may or may not arise and may or may not be germane to resolution' of the proceedings"). This proceeding will revolve around the tax justifications for the deferred compensation agreement that incorporated the subject notes.

See Audubon Indem. Co. v. Custom Site-Prep, Inc., 358 S.W.3d 309, 316 (Tex. App. – Houston [1st Dist.] 2011). This proceeding will revolve around expert testimony regarding tax-optimized deferred compensation arrangements such as that between the Plaintiff and the Defendant, and will require the Court to analyze both federal tax law and title 11.

6. Because resolution of this proceeding "requires consideration of both title 11 and other laws of the United States regulating organizations and activities affecting interstate commerce[,]" 28 U.S.C. § 157(d), withdrawal of the reference is mandatory. Federal tax law has more than a *de minimis* impact upon interstate commerce, and was a driving factor in the transaction between the Delaware and Texas parties in this case and any decision regarding the use of such vehicles as potential future income will have large reverberations within the private equity industry, thus affecting interstate commerce.

7. Alternatively, because this case involves non-core proceedings of a state law claim (Count I breach of contract) for which Dondero is entitled to a jury trial, the result of which will wholly control the determination of the turnover claim per 11 U.S.C. § 542, including the amount of offset per 11 U.S.C. §§ 542(b) and 553, and because at a minimum, the District Court will be conducting a *de novo* review, cause exists for permissive withdrawal of the reference. Finally, Dondero submits that the reference should be immediately withdrawn inasmuch as: (1) the Bankruptcy Court has not decided any substantive matters related to these claims yet; (2) the inherent nature of Count I and the federal tax issues are not within the specialized expertise of the Bankruptcy Court; and (3) efficiency and expediency would be served when the District Court can efficiently and cost-effectively address the pretrial matters and jury trial which will revolve around the forgivable loan structure driven by federal tax loan implications.

ARGUMENTS

I. Count I Is Subject To Mandatory Withdrawal Of The Reference.

8. Under 28 U.S.C. § 157(a) and this District's standing order of reference, proceedings arising in, or related to, a case under Title 11 are automatically referred to the Bankruptcy Court. *See* Misc. Order No. 33. However, 28 U.S.C. § 157(d) provides for the withdrawal of the reference from the Bankruptcy Court as follows:

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

9. Withdrawal of the reference is mandatory in this case. Under this Court's precedent, a motion to withdraw must be granted when: (1) the motion was timely filed; (2) a non-Bankruptcy Code federal law at issue (here, federal tax law) has more than a *de minimis* effect on interstate commerce; and (3) the proceeding involves a substantial and material question of non-Bankruptcy Code federal law. *In re Nat'l Gypsum Co.*, 145 B.R. 539, 541 (N.D. Tex. 1992); *City of Clinton, Ark. v. Pilgrim's Pride Corp.*, No. 4:09-CV-386-Y, 2009 WL 10684933, at *1 (N.D. Tex. Aug. 18, 2009). All three criteria are met.

10. First, this Motion is indisputably timely, being filed within a few weeks of the Answer, and before the Bankruptcy Court entered any substantive rulings. *In re Liljeberg Enters., Inc.,* 161 B.R. 21, 27 (E.D. La. 1993) (finding the motion to withdraw reference timely when filed fifty-two days after debtor filed motion to assume); *Met-Al, Inc. v. Hanson Storage Co.*, 157 B.R. 993, 998 (E.D. Wis. 1993) (motion timely when filed five days after filing of amended complaint first alleging Federal statutory claim).

11. Second, Count I, the state law, non-core, breach of contract claim based upon the three Notes, the balance owed of which is contested and intertwined with federal tax law, has more than a *de minimis* effect on interstate commerce.

12. Count I necessarily requires the Court to give "substantial and material consideration" to federal tax law – a non-Bankruptcy Code federal law. In Count I, Plaintiff alleges that Dondero failed to pay "the total outstanding principal and accrued but unpaid interest due under the Notes [of] $9,004,013.07," which does not take into effect the related agreements regarding the forgiveness of the Notes that is to occur when certain business benchmarks (which are not in Dondero's control) are met pursuant to an acceptable federal tax plan. [Dkt. No. 1, ¶¶ 20-25.] These allegations independently mandate withdrawal of the reference. *See Great W. Sugar Co. v. Interfirst Bank, Dallas, N.A.,* No. 3-85-1755-H, 1985 WL 17671, at *2 (N.D. Tex. Nov. 7, 1985) (holding that withdrawal of the reference was mandatory because the resolution of the adversary proceeding required consideration of ERISA and the Internal Revenue Code); *see also In re Nat'l Gypsum Co.,* 145 B.R. at 541-42 (withdrawing the reference when the case necessarily involved a determination of patent claims). As noted above, to determine the validity of Dondero's defense to the demand for payment on the Notes, the factfinder will have to hear evidence about the use of forgivable notes as a tax-efficient method of compensation in the private equity industry. Whether the relevant criteria are met will also be pertinent to determining whether the Debtor is entitled at this point to demand payment. Thus, resolution will require consideration of federal tax law that regulates organizations and activities affecting interstate commerce.

13. That the issues mandating withdrawal of the reference are raised in defense to the Plaintiff's Complaint changes nothing here. The need to consider those issues drives the § 157(d) analysis. *Bear, Stearns Sec. Corp. v. Gredd*, 2001 U.S. Dist. LEXIS 10324, 2001 WL 840187 (S.D.N.Y. July 25, 2001) (granting defendant's motion to withdraw the reference of a trustee's

avoidance action because resolution of issues raised by defendant required substantial and material consideration of federal securities laws and regulations issued thereunder). Because resolution of this matter requires material and substantial consideration, interpretation, and application of federal tax law, withdrawal of the reference is mandatory.

II. There Is Good Cause For Permissive Withdrawal Of The Reference On All Counts.

14. If the District Court agrees that withdrawal of the reference on Count I is mandatory, "the interest of courts in trying together all claims arising from the same transaction is adequate cause to exercise discretionary power" to withdraw the reference of the Plaintiff's Complaint in its entirety. *See In re Contemporary Lithographers, Inc.*, 127 B.R. 122, 128 (M.D.N.C. 1991). But even if the District Court does not agree that withdrawal of the reference is mandatory on Count I, it should withdraw the reference "for cause shown"[6] below.

15. While "cause" is not defined, the Fifth Circuit Court of Appeals has identified the following factors to consider in determining whether to withdraw the reference: (1) whether the matter is core or non-core; (2) whether the matter involves a jury demand; (3) whether withdrawal would further uniformity in bankruptcy administration; (4) whether withdrawal would reduce forum-shopping and confusion; (5) whether withdrawal would foster economical use of debtors' and creditors' resources; and (6) whether withdrawal would expedite the bankruptcy process. *Holland Am. Ins. Co. v. Succession of Roy,* 777 F.2d 992, 999 (5th Cir. 1985); *Mirant Corp. v. The Southern Co.,* 337 B.R. 107, 112-113 (N.D. Tex. 2006). As set forth below, the factors weigh heavily in favor of an order to immediately withdraw the reference.

[6] 28 U.S.C. § 157(d).

1. Count I Is A State Law Claim That Is Non-Core, Subject To A Jury Trial, And Entirely Determinative Of The Turnover Claim; Dondero Demands A Jury Trial While Not Consenting To A Jury Trial In The Bankruptcy Court.

16. Count I asserts a breach of contract claim on the Notes. All of the Notes are "governed by the laws of the United States of America and by the laws of the State of Texas . . ."[7] The Texas Constitution guarantees a party to a contract a jury trial, and Mr. Dondero is therefore entitled to a jury trial on Count I. *McManus-Wyatt Produce Co. v. Texas Dep't of Agric. Produce Recovery Fund Bd.*, 140 S.W.3d 826, 833 (Tex. App. 2004) (holding the Texas Constitution, at Art. 1, § 15, and by practice previously, provides a right to jury trial in breach of contract cases, such that a party's "right to defend against [a breach of contract claim], and to bring its own claim for breach of contract, were established rights that could be tried to a jury before the enactment of our constitution in 1876").[8]

17. Plaintiff contends that Mr. Dondero has no right to a jury trial because its claim is a core proceeding. Plaintiff is wrong. Its breach of contract claim is non-core. A claim involving a pre-petition contract (even if the alleged breach is post-petition) is not a core proceeding. *In re Keener*, No. 03-44804, 2008 WL 912933, at *3 (Bankr. S.D. Tex. Apr. 2, 2008) (where a contract entered pre-petition was allegedly breached post-petition, the bankruptcy court, assessing 28 U.S.C. § 157(b)(2), determined the breach of contract claim to be non-core); *In re Bella Vita Custom Homes*, No. 16-34790-BJH, 2018 WL 2966838, at *2 (N.D. Tex. May 29, 2018), report and recommendation adopted sub nom. *In re Bella Vita Custom Homes, LLC*, No. 3:18-CV-0994-N, 2018 WL 2926149 (N.D. Tex. June 8, 2018) (holding the sole cause of action is a breach of contract claim against a non-debtor, which is non-core under 28 U.S.C. § 157(b)(2)). Bringing a

[7] Dkt. No. 1, Exs. 1-3.

[8] We anticipate Debtor may argue that Dondero's filing of proofs of claim (mostly withdrawn) and participation in the Chapter 11 case waived his right to a jury trial in this adversary proceeding. There is substantial authority to the contrary, which Dondero will address if Debtor so argues.

turnover claim – which if free-standing is a core claim – that is wholly derivative of the contract claim does not transform a non-core matter to a core matter; it is improper to bring a turnover claim "as a Trojan Horse for bringing garden variety contract claims . . ." *In re Soundview Elite Ltd.*, 543 B.R. 78, 97 (Bankr. S.D.N.Y. 2016) (citation omitted). As the bankruptcy court in *Germain v. Connecticut Nat. Bank*, 988 F.2d 1323, 1327 (2nd Cir. 1993) observed, citing *Granfinanciara v. Nordberg*, 492 U.S. 33, 61 (1989): "Neither Congress nor the court may deprive litigants of their constitutional rights simply by labeling a cause of action 'core.'"

18. For example, in *In re Soundview Elite Ltd.*, 543 B.R. 78, 82 (Bankr. S.D.N.Y. 2016), the trustee sought turnover of the debtor's investment in the debtor's wholly owned company. When determining whether the bankruptcy court had the constitutional authority to hear the turnover claim, the SDNY found that, while this "matter [was] close" on this issue, the trustee using turnover to pursue non-core claims was constitutionally inappropriate given *Stern v. Marshall*, 564 U.S. 462 (2011), in substantial part because the amount to be turned over was uncertain. *Soundview,* at 97-8.

19. Here the amount to be turned over is similarly uncertain because it depends on the resolution of the breach of contract claim. The result is that Count I must be tried before a jury, in District Court, to determine what (if any) balance is owed, the result directly driving the turnover claim.

20. Compounding the above with Mr. Dondero's clear demand for a jury trial, and express lack of consent to the Bankruptcy Court entering final orders or holding a jury trial, the result is the first two factors are met.

2. Uniformity Favors Withdrawal, Withdrawal Would Not Constitute Forum Shopping or Present Confusion, and Withdrawal Would Provide The Most Efficient, Economical Use of Judicial and Party Resources.

21. With this proceeding being at-issue for only a few weeks, withdrawing the reference would not at all undermine uniformity in the administration of the bankruptcy. This factor favors withdrawal the earlier it is demanded. *In re EbaseOne Corp.,* 2006 WL 2405732, at *4 (Bankr. S.D. Tex. June 14, 2006) (withdrawal favored when motion to withdraw reference is filed shortly after complaint and court has not reached significant level of familiarity). With Dondero maintaining his right to jury trial, the most efficient and cost-effective path for the parties (including the estate should it successfully collect for creditors) is directly through the District Court presiding over the case, rather than the Bankruptcy Court first addressing the case and then either referring the matter to the District Court for the jury trial and/or for *de novo* review.

22. While it is true that any motion to withdraw the reference is "'[i]n some sense . . . forum shopping[,] . . . '[a] good faith claim of right, even when motivated (at least in part) by a desire for a more favorable decision maker, should not on that basis alone be denied as forum shopping.'" *In re Royce Homes, LP,* 578 B.R. 748, 761 (Bankr. S.D. Tex. 2017) (citation omitted). The critical focus is whether the movant is engaging in bad faith or improper forum shopping by, for example, "'lay[ing] behind the log' to determine how [the Bankruptcy Court] would rule before filing its motion to withdraw the reference." *Id.* Given the early stage of this adversary proceeding, Dondero is plainly not engaging in bad faith or improper forum shopping.[9]

[9] *Compare In re Royce Homes, LP,* 578 B.R. at 761 (where party moved quickly to withdraw the reference, before any substantive rulings had been made, party did not engage in bad faith forum shopping) *with In re Lopez,* No. 09-70659, 2017 WL 3382099, at *10 (Bankr. S.D. Tex. Mar. 20, 2017) (holding that confusion was more likely if reference was withdrawn when defendant did not move to withdraw the reference until over one year after adversary proceeding was filed).

23. From the viewpoint of the efficiency and economical use of resources perspectives, while a turnover claim may be core, the turnover claim is the sidecar to the motorcycle of Count I, the breach of contract claim, in that the turnover claim only goes where the jury on the breach of contract claim goes. The District Court adjudicating the breach of contract claim while the Bankruptcy Court simultaneously hears the turnover claim is obviously the most inefficient, impractical, and expensive path forward. The Bankruptcy Court adjudicating both the non-core, state law, breach of contract claim and the turnover claim would be violative of the applicable law cited earlier in this motion, and further, the Bankruptcy Court would need to submit its recommended findings of fact and conclusions of law on the entirely pivotal breach of contract claim to the District Court, which would then conduct a *de novo* review. 28 U.S.C. § 157(c)(1).

24. This leaves the only practical and cost-effective manner of proceeding – the District Court conducting a jury trial on both Count I, the non-core, breach of contract claim, while the turnover claim is tried in that same case.[10]

25. The uniformity, forum shopping, and efficiency factors all favor withdrawal of the reference.

III. Lastly, The District Court, Hearing The Sole Pending And Determinative Breach Of Contract Claim, Is Best Suited To Conduct Pretrial Proceedings.

26. While the District Court does have discretion to allow the Bankruptcy Court to preside over pretrial proceedings, with the District Court then trying the jury trial (*In re Guynes Printing Co. of Tex., Inc.,* No. 15-CV-149-KC, 2015 WL 3824070, at *3 (W.D. Tex. June 19, 2015)), because the case is subject to both mandatory and permissive withdrawal of the reference,

[10] *In re MPF Holding US, LLC,* No. 08–36084–H4–11, 2013 WL 12146958, at *3 (Bankr. S.D. Tex. Apr. 26, 2013) (recommending withdrawal, and noting "immediate withdrawal of [the] reference will serve the interests of judicial economy" because it would allow the District Court to familiarize itself with the matter).

with the District Court necessarily conducting the trial, it would be most efficient for the District Court to conduct all pretrial proceedings.

27. Courts consider the following factors when determining whether the District Court should retain all pretrial matters: (1) does referral promote judicial efficiency; (2) is the Bankruptcy Court familiar with the allegations; and (3) do the allegations require interpretation of federal bankruptcy law.[11] The factors weigh heavily toward the District Court withdrawing the pretrial matters.

28. First, because the contract claim is dispositive of the turnover claim, and the contract claim requires a jury trial, it is most efficient for the District Court to hear the case from the start. Second, the Bankruptcy Court has not decided any substantive issues on this adversary proceeding yet. Therefore the Bankruptcy Court is no more familiar with the substance of the matter than the District Court can be in relatively short order.

29. Second, Count I is a breach of contract claim that will require analysis of federal tax law, to determine whether and when the balance on the Notes may be demanded, and various state law doctrine to determine whether the Notes and/or the side agreement regarding the Notes are enforceable. There is no particular area of bankruptcy law expertise required.

CONCLUSION

WHEREFORE, for the reasons above, Dondero respectfully requests that the District Court enter an order: (1) immediately withdrawing the reference to the Bankruptcy Court per 28 U.S.C. § 157(d), based upon mandatory withdrawal for substantial and material consideration of non-Bankruptcy federal tax laws affecting interstate commerce or permissive withdrawal based on

[11] *See Curtis v. Cerner Corp.,* No. 7:29-CV-00417, 2020 WL 1983937, at *5 (S.D. Tex. Apr. 27, 2020); *see also In re Brown Med. Ctr., Inc.,* No. BR 15-3229, 2016 WL 406959, at *2 (S.D. Tex. Feb. 3, 2016) (exercising its discretion to retain all pretrial matters as a means to maintain an active role in the case, gain familiarity with the issues that will be presented for trial, and ensure the efficient use of judicial resources).

pivotal Count I being a non-core, state law claim for which Dondero is entitled to a jury trial; and (2) granting such further relief as equity and justice requires.

Dated: April 15, 2021

Respectfully submitted,

/s/ Clay Taylor

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ATTORNEYS FOR DEFENDANT JAMES DONDERO

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that, on April 15, 2021, he conferred with counsel for the Plaintiff, who opposed the relief requested in this motion.

/s/ Bryan Assink
Bryan Assink

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on April 15, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Clay Taylor
Clay Taylor

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	**Bankruptcy Court**
	§	**Case No. 19-34054**
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	
	§	**Chapter 11**
Debtor.	§	

	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**Bankruptcy Court**
	§	**Adversary Proceeding No.**
Plaintiff.	§	**21-03003-sgj**
v.	§	
	§	**District Court Case No.**
JAMES D. DONDERO,	§	
	§	_____
Defendant.	§	

ORDER GRANTING MOTION TO WITHDRAW THE REFERENCE

On April 15, 2021, the above-captioned Defendant filed a Motion to Withdraw the Reference of the Plaintiff's Complaint. Having considered the motion and the record of this proceeding, it is ORDERED that the motion is GRANTED. The Court finds that withdrawal of the reference under 28 U.S.C. § 157(d) is mandatory as to Count I of the Plaintiff's Complaint. Because "the interest of courts in trying together all claims arising from the same transaction is adequate cause to exercise discretionary power" to withdraw the reference of the Plaintiff's Complaint in its entirety, *see, e.g., In re Contemporary Lithographers, Inc.*, 127 B.R. 122, 128 (M.D.N.C. 1991), the reference of this adversary proceeding is withdrawn.

SO ORDERED.

Dated _____ , 2021,

_____
UNITED STATES DISTRICT JUDGE

Proposed form of order prepared by:

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IN THE UNITED STATES BANKRUPTCY COURT
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In re:	§	**Case No. 19-34054**
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Debtor.	§	
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Plaintiff.	§	
v.	§	**Adversary No. 21-03003-sgj**
JAMES D. DONDERO	§	
Defendant.	§	

JAMES DONDERO'S MOTION TO STAY PENDING THE MOTION TO WITHDRAW THE REFERENCE OF PLAINTIFF'S COMPLAINT

Pursuant to 28 U.S.C. §§ 157(d) and (e), Federal Rule of Bankruptcy Procedure 5011 and L.B.R 5011-1, Defendant James Dondero ("Dondero") hereby respectfully moves to stay this adversary proceeding pending Dondero's motion to withdraw the reference ("Motion to Withdraw") of Plaintiff's Complaint from the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") to the United States District Court for the Northern

District of Texas (the "District Court"). The Motion to Withdraw asserts that withdrawal of the reference is mandatory because: (1) the motion is timely; (2) a non-Bankruptcy Code federal law at issue (federal tax law) has more than a *de minimis* effect on interstate commerce; and (3) the proceeding involves a substantial and material question of non-Bankruptcy Code federal law. It also asserts that the reference should also be withdrawn because Mr. Dondero has a right to a jury trial – which the Bankruptcy Court cannot provide – on the non-core breach of contract claim. Plaintiff's turnover claim does not change the analysis because resolution of the breach of contract claim is fully determinative of the turnover claim. Finally, the Motion to Withdraw asserts that it is most efficient for the District Court to hear the case because the matter will be subject to *de novo* review.

INTRODUCTION

1. On January 22, 2021, Plaintiff Highland Capital Management, L.P. ("Plaintiff"), commenced this adversary proceeding against Dondero, asserting two causes of action, Count I asserting the state law, non-core breach of contract claim and Count II averring turnover per 11 U.S.C. § 542(b). Dondero, in his Answer and Amended Answer filed on March 16, 2021 and April 6, 2021, respectively, expressly stated that he did not consent to the Bankruptcy Court entering final orders or judgment, that he did not consent to the Bankruptcy Court conducting a jury trial, and that he demanded a jury trial. [Dkt. No. 6, ¶¶ 3-5, 44, 45; Dkt. No. 16, ¶¶ 3-5, 46, 47].

2. Dondero's Motion to Withdraw details the merits in support of the same and the substantial grounds for both mandatory withdrawal and permissive withdrawal.

ARGUMENT

I. A Stay of The Adversary Proceeding Is Warranted, To Further Advance The Most Efficient, Economical Use of Judicial and Party Resources, Avoiding Irreparable Harm, With No Prejudice To The Courts, Parties, or Public.

3. Under Fed. R. Bankr. P. 5011(c), "the bankruptcy judge may stay, on such terms and conditions as are proper, proceedings pending disposition of the [motion to withdraw the reference]."

4. While the Fifth Circuit has yet to set a standard, the Eighth Circuit establishes the following factors that a movant must demonstrate in its request for stay: "(1) that [the movant] is likely to succeed on the merits; (2) that [the movant] will suffer irreparable injury unless the stay is granted; (3) that no substantial harm will come to other interested parties; and (4) that the stay will do no harm to the public interest." *Matter of Interco, Inc.*, 135 B.R. 359, 361 (Bankr. E.D. Mo. 1991).

5. In *Sec. & Exch. Comm'n v. Pension Fund of Am., L.C.,* No. 05-20863-CIV, 2005 WL 8156247, at *1-3 (S.D. Fla. Nov. 7, 2005), the Securities and Exchange Commission and a receiver obtained a temporary restraining order and preliminary injunction freezing the assets of two individual debtors. The SEC and receiver then pursued motions for contempt, seeking turnover, with the individual debtors subsequently filing bankruptcy. *Id.* at *1. The bankruptcy trustee quickly sought orders to sell the property at issue, and the SEC and receiver responded by moving to withdraw the reference as to the property at-issue and stay the bankruptcy. *Id.* Applying the standard above, the district court entered a stay.

6. Withdrawal of the reference is mandatory in this case, and as a result, Dondero is likely to succeed on the Motion to Withdraw. A motion to withdraw must be granted when: (1) the motion was timely filed; (2) a non-Bankruptcy Code federal law at issue (here, federal tax law involving diverse jurisdiction parties) has more than a de minimis effect on interstate commerce;

and (3) the proceeding involves a substantial and material question of non-Bankruptcy Code federal law. *In re Nat'l Gypsum Co.*, 145 B.R. 539, 541 (N.D. Tex. 1992); *City of Clinton, Ark. v. Pilgrim's Pride Corp.*, No. 4:09-CV-386-Y, 2009 WL 10684933, at *1 (N.D. Tex. Aug. 18, 2009). All three criteria are met.

7. Alternatively, the District Court should permissively withdraw the reference "for cause shown" per 28 U.S.C. § 157(d). As detailed in the Motion to Withdraw, Dondero requested and is entitled to a jury trial on the pivotal Count I, state court, non-core breach of contract claim; with this, and with the District Court required to conduct the jury trial, Dondero is very likely to succeed on the merits.

8. When it is likely that the reference will be withdrawn for all purposes, or even just for trial, it would be wasteful for the parties stand to expend time, energy, and money in conducting swift discovery, just to have the District Court both order withdrawal of the reference and move the proceedings to the District Court where a less hurried scheduling order is likely because of the backlog of jury trials. This would lead to irreparable harm to Dondero, and the Plaintiff, because when significant time passes between pretrial proceedings and trial, duplication of preparation is inevitable.

9. Further, the District Court may very well prefer to oversee and familiarize itself with the case by conducting the pretrial proceedings, including any discovery and motion practice. *In re Brown Med. Ctr., Inc.,* No. BR 15-3229, 2016 WL 406959, at *2 (S.D. Tex. Feb. 3, 2016) (exercising its discretion to retain all pretrial matters as a means to maintain an active role in the case, gain familiarity with the issues that will be presented for trial, and ensure the efficient use of judicial resources).

10. Other adversary proceedings in this Bankruptcy Court, Case Nos. 21-03004, 21-03005, 21-03006, 21-03007, that also involve the Plaintiff prosecuting claims based on notes, are currently set for trial docket call dates of September 13, 2021, August 9, 2021, October 4, 2021, and November 8, 2021, respectively, all much further out than this adversary proceeding. There is no particular reason to rush this one ahead of the others. Also, there are pending motions to withdraw the reference in Case Nos. 21-03004 and 21-03005. A stay will allow for the potential to better coordinate proceedings so that efficiencies can be achieved.

11. Adversary proceedings Case Nos. 21-03004 and 21-03005, currently have their status conferences on their respective motions to withdraw the reference set for May 25, 2021. If the Bankruptcy Court were to set a similar schedule in this case, absent a stay, between now and May 25, 2021, the current, amended scheduling order [Dkt. No. 18] would require that nearly all of the fact discovery be completed by May 28, 2021, the deadline for the completion of fact discovery. This would likely be unnecessarily burdensome and rushed, since the schedule in the District Court would be different.

12. Lastly, staying the adversary proceeding presents no harm or prejudice to the parties, District Court, Bankruptcy Court, other interested parties, or the public interest. With the Confirmation Order entered on February 22, 2021, a brief stay of the adversary proceeding would have no effect on numerous interested parties in the underlying bankruptcy. As stated in the Confirmation Order, "Although the Plan projects that it will take approximately two years to monetize the Debtor's assets for fair value, Mr. Seery testified that while the Reorganized Debtor and Claimant Trust will be monetizing their assets***, there is no specified time frame by which this process must conclude***." [Case No. 19-34054; Dkt. No. 1943, p. 47/161].[1] Given this open-ended

[1] References to the Plan in no way constitute Dondero's acceptance of the Plan, or waiver of any rights or arguments of Dondero in the appeal of the Plan.

process, the brief stay requested here could not possibly prejudice consummation. Moreover, the amount at-issue in this adversary proceeding, while not insignificant, is certainly not a lynchpin for consummation of the Plan, and the stay will not hinder further prosecution of other.

CONCLUSION

WHEREFORE, for the reasons above, Dondero respectfully requests that the Bankruptcy Court enter an order: (1) immediately staying the adversary proceeding pending determination of the Motion to Withdraw; and (2) granting such further relief as equity and justice requires.

Dated: April 15, 2021

Respectfully submitted,

/s/ Clay Taylor

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State Bar I.D. No. 02589100
Clay M. Taylor
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ATTORNEYS FOR DEFENDANT JAMES DONDERO

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that, on April 15, 2021, he conferred with counsel for the Plaintiff, who opposed the relief requested in this motion.

/s/ Bryan Assink
Bryan Assink

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on April 15, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Clay Taylor
Clay Taylor

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

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

	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
v.	§	**Adversary No. 21-03003**
	§	
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

ORDER GRANTING MOTION TO STAY ADVERSARY PROCEEDING PENDING DISTRICT COURT RULING ON MOTION TO WITHDRAW THE REFERENCE

On April 15, 2021, the Defendant filed a motion to stay this adversary proceeding pending a ruling from the District Court on the Defendant's April 15, 2021 motion to withdraw the reference of the Plaintiff's Complaint. Because the requested stay will not prejudice Chapter 11 Plan consummation, the motion is GRANTED and this adversary proceeding is stayed pending the District Court's ruling.

END OF ORDER # #

Order prepared and submitted by:

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Clay M. Taylor
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ATTORNEYS FOR DEFENDANT JAMES DONDERO

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

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

HIGHLAND CAPITAL MANAGEMENT, L.P.	§	
	§	
Plaintiff.	§	
	§	
v.	§	**Adversary NO. 21-03003-sgj**
	§	
JAMES D. DONDERO	§	
	§	
Defendant.	§	

JAMES DONDERO'S MOTION TO EXPEDITE THE MOTION TO STAY PENDING THE MOTION TO WITHDRAW THE REFERENCE

Pursuant to 11 U.S.C. § 105, Federal Rules of Bankruptcy Procedure 9006 and 5011 and L.B.R 5011-1, Defendant James Dondero ("Dondero") hereby respectfully moves to expedite ("Motion to Expedite") his motion to stay the above-captioned adversary proceeding ("Motion to Stay") pending the determination of Dondero's motion to withdraw the reference ("Motion to Withdraw") of Plaintiff's Complaint.

1. On April 15, 2021, Dondero filed his Motion to Stay and Motion to Withdraw, with Memorandum in Support included. Dondero seeks to withdraw the reference of this adversary proceeding and to stay the proceeding pending determination of the Motion to Withdraw.

2. By this Motion, Dondero requests that the court hold a hearing on the Motion to Stay and grant emergency consideration of it as soon as feasible in the week of April 19, 2021.

3. There is good cause for an emergency hearing and consideration of the Motion to Stay. This is because if the Motion to Stay is heard in the ordinary course and the Motion to Withdraw is set for a status conference at the same time (May 25, 2021) as other motions to withdraw in the bankruptcy case that are not subject to as abbreviated a schedule as is this adversary proceeding, most of the discovery in the case will have been completed in an extraordinarily rushed manner.[1] If that happens, when the reference is withdrawn, as it must be - at least for a jury trial in the district court - there will be an enormous waste of time for the parties to re-familiarize themselves with the case, since there likely be some delay in getting to trial. In addition, once in the district court, Dondero will likely be compelled to request additional time for discovery because it will not have been possible to adequately prepare for trial in the circumstances and short time provided, given the many existentially critical proceedings pending involving Dondero all coalescing at the same time.

4. Granting this Motion to Expedite will not harm or prejudice any party, the District Court, the Bankruptcy Court, other interested parties, or the public interest. Consummation of a Plan is not imminent and the Debtor has publicly stated in the Confirmation Order that closure is years away [Case No. 19-34054; Dkt. No. 1943, p. 47/161]. In any event, the amount at stake in this adversary is immaterial to consummation, making undue haste unnecessarily prejudicial to

[1] The abbreviated schedule for this case is set out in Exhibit 1.

Dondero, and perhaps also to the Debtor and the Court which have more pressing matters than this adversary proceeding to address.

5. This adversary proceeding is set to track two months or more faster than the similar adversary proceedings, Case Nos. 21-03004, 21- 03005, 21-03006, 21-03007, that also involve the Plaintiff prosecuting claims based on notes. Conducting a hearing the week of April 19 – 23, 2021 would not hinder this adversary proceeding from moving, or moving along a timeframe more generally in line with the similar cases, and only stands to benefit the Bankruptcy Court, Plaintiff, and Dondero by giving all three the opportunity to revisit the current, amended scheduling order to see if it is appropriate in consideration of the similar cases and the Motion to Withdraw.

6. Further, while the administrative case did not have a complex designation, the Local Bankruptcy Rules generally provide for emergency and expedited hearings of this nature, contemplated in the Procedures for Obtaining Hearings in Complex Chapter 11 Cases at subsection IV., Case Emergencies (Other than the First Day Matters), which can even be presented *ex parte* at regular docket calls, to be ruled upon within 24 hours of presentation. A fortiori, the relief requested here is authorized.

7. Lastly, expediting the hearing of the Motion to Stay will allow for the potential to better coordinate proceedings so that efficiencies can be achieved among all of the notes-based adversary proceedings. Adversary proceedings Case Nos. 21-03004 and 21-03005 currently have their status conferences on their respective motions to withdraw the reference set for May 25, 2021. Anticipating the Bankruptcy Court will set a similar schedule in this case, if the Motion to Stay is not heard on an expedited basis, between now and May 25, 2021 or whenever the Motion to Stay is heard, the current, amended scheduling order [Dkt. No. 18] would require unnecessarily

burdensome and rushed discovery to very nearly conclude before the Motion to Withdraw is even considered.

CONCLUSION

WHEREFORE, for the reasons above, Dondero respectfully requests that the Bankruptcy Court enter an order: (1) hearing the Motion to Stay as soon as possible in the week of April 19 – 23, 2021; (2) setting the hearing date as Plaintiff's deadline to respond to the Motion to Stay; and (3) granting such further relief as equity and justice requires.

Dated: April 16, 2021

Respectfully submitted,

/s/ Clay M. Taylor

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ATTORNEYS FOR DEFENDANT JAMES DONDERO

CERTIFICATE OF CONFERENCE

I, the undersigned, hereby certify that, on April 16, 2021, I attempted to confer with counsel for the Plaintiff regarding this motion to expedite. As of the filing of this motion, undersigned has not received a response and therefore Plaintiff's position is unknown. Undersigned will update the Court on Monday, April 19, 2021 if and when the Debtor's position as to this motion becomes known.

/s/ Bryan C. Assink
Bryan C. Assink

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on April 16, 2021, a true and correct copy of this document was served via the Court's CM/ECF system on counsel for the Plaintiff.

/s/ Clay Taylor
Clay Taylor

EXHIBIT 1

Event	Deadline
Deadline for service of Rule 7026(a)(1) initial disclosures	April 15, 2021
Deadline for service of written discovery requests	April 28, 2021
Deadline for service of expert disclosures	May 21, 2021
Deadline for the completion of fact discovery	May 28, 2021
Deadline to file dispositive motions	June 7, 2021
Deadline for completion of expert discovery	June 7, 2021
Deadline to file trial witness and exhibit lists and to exchange trial exhibits	June 28, 2021
Deadline for Parties to file written proposed findings of fact and conclusions of law and to file any trial briefs addressing contested issues of law	July 2, 2021
Deadline for Parties to upload Joint Pretrial Order	July 2, 2021
Trial Docket Call	July 12, 2021 at 1:30 p.m.
Week of Trial	July 19, 2021

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

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

	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
v.	§	**Adversary No. 21-03003-sgj**
	§	
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

ORDER GRANTING JAMES DONDERO'S MOTION TO EXPEDITE THE MOTION TO STAY PENDING THE MOTION TO WITHDRAW THE REFERENCE

On this date, the Bankruptcy Court considered the *Motion to Expedite the Motion to Stay Pending the Motion to Withdraw the Reference* ("Motion to Expedite") of Defendant James Dondero ("Dondero"), the subsequent briefing on the Motion to Expedite, 11 U.S.C. § 105, Federal Rules of Bankruptcy Procedure 9006 and 5011, and L.B.R 5011-1. Upon consideration

of the Motion to Expedite and applicable law, the Bankruptcy Court finds that the Motion to Expedite is well taken and should be granted as set forth herein.

Accordingly, it is hereby ordered as follows:

1. The Motion to Expedite is GRANTED as set forth herein.

2. The hearing on the Motion to Stay is set for April _____, 2021.

3. The Plaintiff's response to the Motion to Stay, if any, is due to be filed and served by the hearing date set forth above.

END OF ORDER

From: Bryan Assink
To: "Traci Ellison"
Cc: Clay Taylor; Deborah R. Deitsch-Perez
Subject: RE: 21-03003-sgj Motion for expedited hearing
Date: Tuesday, April 20, 2021 4:04:00 PM
Attachments: image001.jpg

Traci,

The May 25 setting works for us.

Thank you.

Best,
Bryan

From: Traci Ellison <Traci_Ellison@txnb.uscourts.gov>
Sent: Tuesday, April 20, 2021 3:11 PM
To: Bryan Assink <bryan.assink@bondsellis.com>
Cc: Clay Taylor <clay.taylor@bondsellis.com>; Deborah R. Deitsch-Perez <deborah.deitschperez@stinson.com>
Subject: Re: 21-03003-sgj Motion for expedited hearing

Hello, Mr. Assink:

I apologize if I have not communicated with someone on your team about this. This week has gotten off to a very busy start and my head is spinning!

The court has denied the motion for expedited hearing. Per Judge Jernigan's instructions, we need to set a status conference on the motion to withdraw reference and a hearing on the motion to stay the adversary proceeding at the same time about 30 days out. There are two other Highland matters set on 5/25 at 1:30. Should we set that same day?

Thank you,
Traci

From: Bryan Assink <bryan.assink@bondsellis.com>
Sent: Tuesday, April 20, 2021 1:30 PM
To: Traci Ellison <Traci_Ellison@txnb.uscourts.gov>

Cc: clay.taylor_bondsellis.com <clay.taylor@bondsellis.com>; Deborah R. Deitsch-Perez <deborah.deitschperez@stinson.com>
Subject: RE: 21-03003-sgj Motion for expedited hearing

CAUTION - EXTERNAL:

Traci,

I am just following up on this request. I understand there are numerous matters before the Court right now so it is somewhat convoluted. Do you know if the Court will set an expedited hearing this week on Mr. Dondero's motion to stay this proceeding pending the determination of the motion to withdraw the reference (both the motion to stay and motion to withdraw the reference were filed in this matter on April 15)?

We appreciate your time and the Court's consideration.

Best,
Bryan

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bryan.assink@bondsellis.com

From: Bryan Assink
Sent: Monday, April 19, 2021 9:18 AM
To: 'Traci Ellison' <Traci_Ellison@txnb.uscourts.gov>
Cc: Clay Taylor <clay.taylor@bondsellis.com>
Subject: 21-03003-sgj Motion for expedited hearing

Traci,

Friday evening, on behalf of Mr. Dondero, we filed the attached motion to expedite regarding Mr. Dondero's motion to stay pending determination of the motion to withdraw the reference. We are seeking to have a hearing this week subject to the Court's availability.

We appreciate the Court's consideration.

Best,
Bryan

Bryan C. Assink, Associate

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ATTORNEYS FOR DEFENDANT JAMES DONDERO

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

In re:	§	**Case No. 19-34054**
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	**Chapter 11**
	§	
Debtor.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
v.	§	**Adversary No. 21-03003-sgj**
	§	
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

MOTION TO COMPEL DEPOSITION TESTIMONY FROM JAMES P. SEERY, JR.

James D. Dondero ("Dondero"), the Defendant in the above-captioned adversary proceeding, by and through his counsel, hereby files this motion (the "Motion"), pursuant to Rule 03 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Federal Rule of Civil Procedure 3 , for entry of an order, substantially in the form attached hereto as **E hibit A** (the "Proposed Order"), compelling James P. Seery, Jr. ("Seery"), corporate representative for ighland Capital Management, L.P. (the "Debtor"), to provide deposition testimony in response to certain deposition topics identified in the informal notice Dondero

provided to the Debtor pursuant Federal Rule of Civil Procedure 30(b)(6). n support of the Motion, Dondero respectfully states as follows:

INTRODUCTION

1. Dondero files this Motion in advance of the upcoming scheduled deposition of Seery on May 2 , 2021 at 10:00 a.m. ET (the "Seery Deposition") and in response to the Debtor's ob ection to certain deposition topics noticed by Dondero. As explained below, Seery should be compelled to testify to the Deposition Topics in advance of the Seery Deposition to prevent the unnecessary delay of this proceeding, and because the Deposition Topics are both relevant to the parties' claims and defenses and proportional to the needs of the case.

AC GROUND

2. On April 30, 2021, Dondero provided informal notice via email to the Debtor requesting to take the deposition of the Debtor's corporate representative pursuant to Federal Rule of Civil Procedure 30(b)(6), requesting a date for the deposition, and providing a list of deposition topics for examination (the "Deposition Topics"). Attached hereto as **E hibit** is the email chain between Dondero's counsel and Debtor's counsel regarding the Seery Deposition, which includes a list of the Deposition Topics.

3. Despite Dondero's repeated attempts to communicate with the Debtor regarding Dondero's requests, Debtor's counsel did not respond until May 11, 2021. At that point, Debtor's counsel identified Seery as the Debtor's corporate representative and provided Seery's availability for the deposition. Notably, in its response, the Debtor ob ected to Seery's provision of testimony in response to Deposition Topics 1, 9, 1 -1 , and 20 on the basis that the information sought is not relevant to any party's claim or defense and is otherwise not proportional to the needs of the case. After conferring with Dondero's counsel regarding the Motion, the Debtor withdrew its ob ection to Seery's provision of testimony in response to

Deposition Topic 1. **E hibit** includes an email from Debtor's counsel identifying the Debtor's ob ections to Deposition Topics 9, 1 -1 , and 20.

RELIEF RE UESTED AND ASIS FOR RELIEF

. Federal Rule of Civil Procedure 26(b)(1), applicable to adversary proceedings pursuant to Bankruptcy Rule 026, provides that " p arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. nformation within this scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1).

5. Federal Rule of Civil Procedure 3 (a), applicable to adversary proceedings pursuant to Bankruptcy Rule 03 , governs motions to compel discovery responses. Rule 3 (a)(3)(B) provides that a party seeking discovery may move for an order compelling an answer if the deponent fails to answer a question asked under Rule 30. "An evasive or incomplete . . . answer . . . must be treated as a failure to answer." Fed. R. Civ. P. 3 (a)( ).

6. Further, "the Court may impose an appropriate sanction including the reasonable expenses and attorney's fees incurred by any party on a person who impedes, delays, or frustrates fair examination of the deponent." Fed. R. Civ. P. 30(d)(2).

. hile the deposition has not yet occurred, by its ob ection, counsel for the Debtor has signaled that Seery will not answer questions relating to Deposition Topics 9, 1 -1 , and 20. The Debtor has provided no support for its position that Deposition Topics 9, 1 -1 , and 20 are not relevant to the parties' claims or defenses and are otherwise not proportional to the needs of the case.

. Compelling testimony on Deposition Topics 9, 1 -1 , and 20 in advance of the deposition is necessary to prevent the unnecessary further delay of this proceeding. Should Seery fail to answer questions regarding Deposition Topics 9, 1 -1 , and 20 at the Seery Deposition, Dondero would be forced to move to compel at a time that would also require seeking an expedited order amending the case schedule set by the Court in order to ensure that Dondero and the Debtor can comply with the terms of the Amended Scheduling Order ECF No. 1 , which set the deadline for completion of fact discovery on May 2 , 2021. The potential further delay of this proceeding would again be necessitated by the Debtor's lack of participation with respect to discovery issues. By filing this motion in advance of the Seery Deposition, Dondero simply seeks to prevent the unnecessary additional delay of this proceeding by establishing the parameters of Seery's testimony prior to the Seery Deposition.

9. Moreover, despite the Debtor's unsupported ob ection, Deposition Topics 9, 1 - 1 , and 20 are entirely relevant to the parties' claims and defenses in this matter. The relevance of each Deposition Topic is addressed below.

Deposition Topics 9

10. Deposition Topics 9 strikes at the heart of this proceeding: Dondero's defenses. Testimony regarding Deposition Topics 9 is necessary to establish additional information regarding Dondero's defenses and is clearly within the scope of discovery provided by Fed. R. Civ. P. 26(b)(1) as Dondero's defenses are inherently relevant to the proceeding and proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). Seery should be compelled to provide testimony in response to questions relating to Deposition Topics 9.

Deposition Topics 14 through 17

11. Deposition Topics 1 through 1 are designed to elicit testimony regarding loans and notes the Debtor made that were either forgivable or later forgiven. Deposition Topics 1

through 1 are relevant to Dondero's affirmative defense that the Debtor entered into an oral agreement to forgive the promissory notes that are the sub ect of the Debtor's lawsuit, namely by demonstrating that the Debtor commonly entered into oral agreements regarding loan and note forgiveness. Seery should be compelled to provide testimony in response to questions relating to Deposition Topics 1 through 1 .

Deposition Topic 20

12. Deposition Topic 20 is designed to elicit testimony regarding compensation paid by the Debtor to Dondero and any related agreements. Deposition Topic 20 is relevant to Dondero's affirmative defense that the notes were forgiven as part of Dondero's compensation from the Debtor. nformation regarding Dondero's compensation, and any related agreements, is necessary to establish that Dondero was underpaid and that the notes were forgiven as a result of that underpayment. Seery should be compelled to provide testimony in response to questions relating to Deposition Topics 20.

CONCLUSION

13. EREFORE, for the reasons above, Dondero respectfully requests that the Court enter an order: (1) compelling James P. Seery, Jr. to testify to Deposition Topics 9, 1 -1 , and 20 at his deposition on May 2 , 2021 at 10:00 a.m. ET and (2) granting such further relief as equity and ustice requires.

Dated: May 1 , 2021

Respectfully submitted,

ryan in

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Clay M. Taylor
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Deborah Deitsch-Pere
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Michael P. Aigen
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ST NSON LLP
3102 Oak Lawn Avenue, Suite
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(21) 560-2201 telephone
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Email: deborah.deitschpere stinson.com
Email: michael.aigen stinson.com

ATTORNEYS FOR DEFENDANT JAMES DONDERO

CERTIFICATE OF CONFERENCE

, the undersigned, hereby certify that have conferred with counsel for the Plaintiff, John Morris, regarding the matters and relief requested in this motion on May 1 , 2021. As of the filing of this motion, no agreement has been reached and this motion is opposed.

s *Michae P igen*
Michael P. Aigen

CERTIFICATE OF SERVICE

The undersigned hereby certified that, on May 1 , 2021, a true and correct copy of this document was served via the Court's CM ECF system on counsel for the Plaintiff.

ryan in
Bryan C. Assink

EXHI IT A

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

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

	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
v.	§	**Adversary No. 21-03003-sgj**
	§	
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

ORDER GRANTING MOTION TO COMPEL DEPOSITION TESTIMONY FROM JAMES P. SEERY, JR.

On this date, the Court considered the *Motion to o pe epo ition e ti ony fro a e P Seery r* filed by James D. Dondero, the Defendant in the above-captioned adversary proceeding, on May 13, 2021 (the "Motion").

Upon consideration of the Motion, the Court finds that the Motion is well taken and should be granted as set forth herein. Accordingly, it is hereby ordered as follows:

1. The Motion is **GRANTED** as set forth herein.

2. James P. Seery, Jr. shall testify to Deposition Topics 9, 1 -1 , and 20 at his deposition on May 2 , 2021 at 10:00 a.m. ET.

END OF ORDER # #

John . Bonds,
State Bar .D. No. 025 9100
Clay M. Taylor
State Bar .D. No. 2 033261
Bryan C. Assink
State Bar .D. No. 2 0 9009
BONDS ELL S EPP C SC AFER JONES LLP
20 Throckmorton Street, Suite 1000
Fort orth, Texas 6102
(1) 05-6900 telephone
(1) 05-6902 facsimile

-and-

Deborah Deitsch-Pere
State Bar No. 2 0360 2
Michael P. Aigen
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3102 Oak Lawn Avenue, Suite
Dallas, Texas 5219
(21) 560-2201 telephone
(21) 560-2203 facsimile

ATTORNEYS FOR DEFENDANT JAMES DONDERO

EXHIBIT B

Kugler, Logan R.

From: John A. Morris <jmorris@pszjlaw.com>
Sent: Tuesday, May 11, 2021 5:11 PM
To: 'Bryan Assink'
Cc: Jeff Pomerantz; Hayley R. Winograd; Gregory V. Demo; Clay Taylor; Deitsch-Perez, Deborah R.; Aigen, Michael P.; Lackey, Paul B.
Subject: RE: HCMLP v. Dondero - Adv. Proc. No. 21-03003 - Deposition of Corporate Representative of Highland Capital Management under Rule 30(b)(6)

Thank you, Bryan.

Please be advised that the Debtor objects to the informal Rule 30(b)(6) topics 1, 9, 14-17, and 20 below on the grounds that the information sought is not relevant to any party's claim or defense and is otherwise not proportional to the needs of the case.

Separately, we believe that Mr. Dondero's request to depose Mr. Klos, Mr. Surgent, and Ms. Hendrix is made solely for purposes of harassment. Indeed, we note that in his (a) responses to the Debtor's Interrogatories, Mr. Dondero identified none of them as persons he believes may have personal knowledge of the Debtor's Purported Agreement to forgive the loans, and (b) Rule 26 disclosures, they were only identified as persons who "potentially" may have knowledge about the claims and defenses in this case. Under these circumstances, there is no basis to take these three fact depositions.

Nevertheless, in order to avoid motion practice, the Debtor is willing to make Mr. Klos available for a three-hour deposition. Please let me know if that's an acceptable resolution and we'll propose a date and time.

The Debtor reserves all rights.

Regards,

John

John A. Morris
Pachulski Stang Ziehl & Jones LLP
Direct Dial: 212.561.7760
Tel: 212.561.7700 | Fax: 212.561.7777
jmorris@pszjlaw.com
vCard | Bio | LinkedIn

□

PACHULSKI STANG ZIEHL JONES

Los Angeles | San Francisco | Wilmington, DE | New York | Houston

From:
Sent:
To:
Cc:
Subject:

John,

The 30(b)(6) topics were listed in my first email, which is included on the chain below.

I will have an update to you soon on the document production. We appreciate your patience.

Mr. Dondero's responses to the Debtor's second set of discovery requests were served on the Debtor on Friday. Attached is the email containing Mr. Dondero's responses.

Best,
Bryan

From: John A. Morris <jmorris@pszjlaw.com>
Sent: Tuesday, May 11, 2021 11:39 AM
To: Bryan Assink <bryan.assink@bondsellis.com>
Cc: Jeff Pomerantz <jpomerantz@pszjlaw.com>; Hayley R. Winograd <hwinograd@pszjlaw.com>; Gregory V. Demo <GDemo@pszjlaw.com>; Clay Taylor <clay.taylor@bondsellis.com>; Deitsch-Perez, Deborah R. <deborah.deitschperez@stinson.com>; Aigen, Michael P. <michael.aigen@stinson.com>; Lackey, Paul B. <paul.lackey@stinson.com>
Subject: RE: HCMLP v. Dondero - Adv. Proc. No. 21-03003 - Deposition of Corporate Representative of Highland Capital Management under Rule 30(b)(6)

Bryan,

1. Mr. Seery will be the corporate representative and will be available to be deposed on May 24 at 10:00 a.m. eastern. I don't believe I've seen a list of 30(b)(6) topics. If I missed it, please re-send. Otherwise, send as soon as possible.
2. When will Mr. Dondero complete document production? This the Debtor's last request.
3. I don't believe we have received any response to the discovery served on April 7; it was due on May 7. If I missed it, please re-send. Otherwise, when can you commit to providing complete responses?
4. We will take Mr. Dondero's request for the depositions of Mr. Klos, Mr. Surgent, and Ms. Hendrix under advisement.

The Debtor reserves all rights to object to Mr. Dondero's discovery requests.

Regards,

John

John A. Morris
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Direct Dial: 212.561.7760
Tel: 212.561.7700 | Fax: 212.561.7777
jmorris@pszjlaw.com
vCard | Bio | LinkedIn

Los Angeles | San Francisco | Wilmington, DE | New York | Houston

---

From:
Sent:
To:
Cc:
Subject:

John,

Following-up on this matter one more time. Can you please let me know today when HCMLP's corporate representative is available for a deposition on one of the dates below? If we don't hear back today, we will have to just notice the deposition.

We would also like to take the depositions of Klos, Hendrix, and Surgent that same week. Can you please let me know when they can be made available for a deposition?

Thank you,
Bryan

From: Bryan Assink
Sent: Thursday, May 6, 2021 3:36 PM
To: 'John A. Morris' <jmorris@pszjlaw.com>
Cc: 'Jeff Pomerantz' <jpomerantz@pszjlaw.com>; 'Hayley R. Winograd' <hwinograd@pszjlaw.com>; 'Gregory V. Demo' <GDemo@pszjlaw.com>; Clay Taylor <clay.taylor@bondsellis.com>; 'Deitsch-Perez, Deborah R.' <deborah.deitschperez@stinson.com>; 'Aigen, Michael P.' <michael.aigen@stinson.com>; 'Lackey, Paul B.' <paul.lackey@stinson.com>
Subject: RE: HCMLP v. Dondero - Adv. Proc. No. 21-03003 - Deposition of Corporate Representative of Highland Capital Management under Rule 30(b)(6)

John,

I am just circling back on this as I don't believe we've gotten a response. When you get a chance, can you please let me know when HCMLP's corporate representative is available for a deposition on May 24, 26, or 27? Thank you.

Best,
Bryan

From: Bryan Assink
Sent: Friday, April 30, 2021 4:12 PM
To: 'John A. Morris' <jmorris@pszjlaw.com>
Cc: Jeff Pomerantz <jpomerantz@pszjlaw.com>; Hayley R. Winograd <hwinograd@pszjlaw.com>; Gregory V. Demo <GDemo@pszjlaw.com>; Clay Taylor <clay.taylor@bondsellis.com>; 'Deitsch-Perez, Deborah R.' <deborah.deitschperez@stinson.com>; Aigen, Michael P. <michael.aigen@stinson.com>; Lackey, Paul B. <paul.lackey@stinson.com>
Subject: HCMLP v. Dondero - Adv. Proc. No. 21-03003 - Deposition of Corporate Representative of Highland Capital Management under Rule 30(b)(6)

John,

We would like to take the deposition of HCMLP's corporative representative under FRCP 30(b)(6), as incorporated into this proceeding through FRBP 7030. Can you let us know which of May 24, 26, or 27 works for HCMLP's representative for a deposition? The topics of examination are listed below.

1. All claims asserted by Highland Capital against Dondero in the above-captioned adversary proceeding.

2. All damages sought by Highland Capital against Dondero, including how those damages were computed.

3. All negotiations or communications related to the execution and/or the terms of the Notes.

4. The identity of all individuals involved in negotiations or communications related to the execution and/or the terms of the Notes.

5. All oral agreements related to the Notes.

6. All demands made on Dondero related to the Notes.

7. Any subsequent agreements or modifications related to the Notes.

8. The consideration provided by the parties to the Notes, including the dates such consideration was delivered.

9. Any defenses or affirmative defenses asserted by Dondero.

10. The purpose or reason that the Notes were executed by Dondero for the benefit of Highland Capital.

11. Any payments made on the Notes.

12. Any efforts or documentation by Highland Capital to treat the Notes as assets of the estate, including any book and records and filings in the Bankruptcy Case evidencing that Debtor treated its payment to Dondero as loans and carried the Notes as assets on its financial statements.

13. Dondero's alleged defaults under the Notes.

14. Any loans made by Highland Capital to Mark Okada and the terms of such loans.

15. Any loans made by Highland Capital to any employees or officers that were forgivable in part or in whole.

16. Any loans made by Highland Capital to any employees or officers that were forgiven in part or in whole.

17. Any agreements relating to forgivable or forgiven notes to Highland officers or employees.

18. Any loans made by Highland Capital to Dondero other than the Notes at issue in this case.

19. The $783,000 payment made by or on behalf of Dondero to Debtor on or about December 23, 2019, including how it was applied and which loan(s) it was applied to.

20. All compensation paid by Highland Capital to Dondero or of which Highland Capital was aware and any agreements related to such compensation.

Best,
Bryan

Bryan C. Assink, Associate
Bonds Ellis Eppich Schafer Jones LLP
420 Throckmorton St. | Suite 1000 | Fort Worth, Texas 76102
office 817.779.4297 | fax 817.405.6902
bryan.assink@bondsellis.com

John . Bonds,
State Bar .D. No. 025 9100
Clay M. Taylor
State Bar .D. No. 2 033261
Bryan C. Assink
State Bar .D. No. 2 0 9009
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Deborah Deitsch-Pere
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State Bar No. 2 012196
ST NSON LLP
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(21) 560-2201 telephone
(21) 560-2203 facsimile

ATTORNEYS FOR DEFENDANT JAMES DONDERO

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

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

	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
v.	§	**Adversary No. 21-03003-sgj**
	§	
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

EMERGENCY MOTION TO EXPEDITE THE HEARING ON THE MOTION TO COMPEL DEPOSITION TESTIMONY FROM JAMES P. SEERY, JR.

Pursuant to 11 U.S.C. § 105, James D. Dondero ("Dondero"), the Defendant in the above-captioned adversary proceeding, by and through his counsel, hereby files this Emergency Motion to Expedite the earing on the Motion to Compel Deposition Testimony from James P. Seery, Jr. (the "Motion"), with respect to the *Motion to o pe epo ition fro a e P Seery r* (the "Motion to Compel") and respectfully states as follows:

INTRODUCTION

1. On May 1 , 2021, Dondero filed his Motion to Compel. Dondero seeks to compel testimony from Seery relating to certain deposition topics the Debtor ob ected to in advance of the deposition of Seery on May 2 , 2021 at 10:00 a.m. ET (the "Seery Deposition").

2. By this Motion, the Debtor requests that the court hold a hearing on the Motion to Compel as soon as feasible during the week of May 1 , 2021.

RELIEF RE UESTED AND ASIS FOR RELIEF

3. Section 105(a) of the Bankruptcy Code provides that "the court may issue any order, process, or udgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Further, Bankruptcy Rule 9006(d) permits a court to fix any period of notice by order. Thus, the court has broad latitude to fix the time for presentment of motions, particularly when "necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

. For the reasons set forth herein and in the underlying Motion, good cause exists to consider the Motion on an immediate basis and schedule an emergency hearing for as soon as possible (preferably during the week of May 1 , 2021 May 21, 2021), as the court's schedule allows.

5. As described in the underlying Motion, while the Seery Deposition has not yet occurred, counsel for the Debtor has signaled that Seery will not answer questions relating to certain deposition topics necessary to establish the parties' claims and defenses in this proceeding.

6. f the Motion to Compel is heard in the ordinary course, Dondero will be unable to compel the testimony of Seery with respect to the deposition topics the Debtor ob ected to in advance of the Seery Deposition. f, as the Debtor has signaled, Seery does not provide

testimony with respect to the deposition topics the Debtor ob ected to at the Seery Deposition, the Debtor and Dondero will be unable to comply with the May 2 , 2021 deadline for the completion of fact discovery (the "Fact Discovery Deadline") set by the court's Amended Scheduling Order entered on April 9, 2021. ECF No. 1 . Additionally, if Seery does not provide testimony with respect to the deposition topics the Debtor has ob ected to at the Seery Deposition, Dondero will have only four ( ) days to seek to compel Seery to provide testimony the deposition topics the Debtor has ob ected to prior to the Fact Discovery Deadline. f that occurs, Dondero may again be forced to move to amend the scheduling order to ensure that fact discovery is timely completed and so that Dondero can adequately prepare for trial. Dondero seeks to compel the testimony of Seery prior to the Seery Deposition to avoid unnecessary further delay of this proceeding.

. Further, on April 30, 2021, Dondero provided the deposition topics to the Debtor. The Debtor did not provide its ob ections to the deposition topics until May 11, 2021. As such, the Debtor will not be pre udiced if the court sets an expedited hearing on the Motion to Compel, as the Debtor will have had nearly a month since it was provided with the deposition topics to develop its ob ections thereto.

. Additionally, on May 1 , 2021, the Debtor indicated that it does not oppose the Motion to Compel being heard on an expedited basis, and thus does not oppose this Motion.

CONCLUSION

9. EREFORE, for the reasons above, Dondero respectfully requests that the Court enter an order: (1) hearing the Motion to Compel as soon as possible during the week of May 1 , 2021 May 21, 2021 (2) setting the hearing date as the Debtor's deadline to respond to the Motion to Compel and (3) granting such further relief as equity and ustice requires.

Dated: May 1 , 2021

Respectfully submitted,

ryan in

John . Bonds,
State Bar .D. No. 025 9100
Clay M. Taylor
State Bar .D. No. 2 033261
Bryan C. Assink
State Bar .D. No. 2 0 9009
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Email: clay.taylor bondsellis.com
Email: bryan.assink bondsellis.com

-and-

Deborah Deitsch-Pere
State Bar No. 2 0360 2
Michael P. Aigen
State Bar No. 2 012196
ST NSON LLP
3102 Oak Lawn Avenue, Suite
Dallas, Texas 5219
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(21) 560-2203 facsimile
Email:
deborah.deitschpere stinson.com
Email: michael.aigen stinson.com

ATTORNEYS FOR DEFENDANT JAMES DONDERO

CERTIFICATE OF CONFERENCE

, the undersigned, hereby certify that have conferred with counsel for the Plaintiff, John Morris, regarding the matters and relief requested in this motion on May 1 , 2021. Mr. Morris indicated that the Plaintiff does not oppose this motion to expedite. This motion is unopposed.

s *Michae P igen*
Michael P. Aigen

CERTIFICATE OF SERVICE

The undersigned hereby certified that, on May 1 , 2021, a true and correct copy of this document was served via the Court's CM ECF system on counsel for the Plaintiff.

ryan in
Bryan C. Assink

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

In re:	§	**Case No. 19-34054**
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	**Chapter 11**
	§	
Debtor.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
v.	§	**Adversary No. 21-03003-sgj**
	§	
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

ORDER GRANTING EMERGENCY MOTION TO EXPEDITE THE HEARING ON THE MOTION TO COMPEL DEPOSITION TESTIMONY FROM JAMES P. SEERY, JR.

On this date, the Court considered the *E ergency Motion to Expedite the earing on the Motion to o pe epo ition e ti ony fro a e P Seery r* filed by James D. Dondero, the Defendant in the above-captioned adversary proceeding, on May 1 , 2021 (the "Motion").

Upon consideration of the Motion, the Court finds that good and sufficient cause exists for granting the Motion and scheduling an emergency hearing to consider the Motion. Accordingly, it is hereby ORDERED:

1. The Motion is **GRANTED** as set forth herein.

2. A hearing on the Motion shall occur on **May , 2021 at a. .**

END OF ORDER # #

John . Bonds,
State Bar .D. No. 025 9100
Clay M. Taylor
State Bar .D. No. 2 033261
Bryan C. Assink
State Bar .D. No. 2 0 9009
BONDS ELL S EPP C SC AFER JONES LLP
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-and-

Deborah Deitsch-Pere
State Bar No. 2 0360 2
Michael P. Aigen
State Bar No. 2 012196
ST NSON LLP
3102 Oak Lawn Avenue, Suite
Dallas, Texas 5219
(21) 560-2201 telephone
(21) 560-2203 facsimile

ATTORNEYS FOR DEFENDANT JAMES DONDERO

From: Bryan Assink
To: "Traci Ellison"
Cc: Deitsch-Perez, Deborah R.; Clay Taylor; Aigen, Michael P.
Subject: RE: HCMLP v. Dondero - Adv. Proc. No. 21-03003 - Defendant"s Motion to Compel and Motion to Expedite
Date: Tuesday, May 18, 2021 4:00:00 PM
Attachments: image001.jpg

Traci,

Thank you for the response. If the Court is not available this week, is there any way the Court could hear us first thing in the morning on Monday, May 24 at 9:00 or 9:30 a.m.? As our papers state, Mr. Seery's deposition is scheduled for May 24 and we are trying to get a ruling before then to avoid duplication of time and because the discovery period ends on May 28 absent an extension.

We appreciate the Court's time and consideration.

Best,
Bryan

From: Traci Ellison <Traci_Ellison@txnb.uscourts.gov>
Sent: Tuesday, May 18, 2021 3:35 PM
To: Bryan Assink <bryan.assink@bondsellis.com>
Cc: Deitsch-Perez, Deborah R. <deborah.deitschperez@stinson.com>; Clay Taylor <clay.taylor@bondsellis.com>; Aigen, Michael P. <michael.aigen@stinson.com>
Subject: Re: HCMLP v. Dondero - Adv. Proc. No. 21-03003 - Defendant's Motion to Compel and Motion to Expedite

Mr. Assink:

Judge Jernigan has instructed me to offer you a setting next week. Please provide a court time estimate and I will advise you of the court's availability. Maybe we can add this to the May 25 at 1:30 docket when the court is scheduled to other matters in Highland adversary proceedings?

Thank you,
Traci

From: Bryan Assink <bryan.assink@bondsellis.com>
Sent: Tuesday, May 18, 2021 10:22 AM

To: Traci Ellison <Traci_Ellison@txnb.uscourts.gov>
Cc: Deitsch-Perez, Deborah R. <deborah.deitschperez@stinson.com>; clay.taylor_bondsellis.com <clay.taylor@bondsellis.com>; Aigen, Michael P. <michael.aigen@stinson.com>
Subject: FW: HCMLP v. Dondero - Adv. Proc. No. 21-03003 - Defendant's Motion to Compel and Motion to Expedite

CAUTION - EXTERNAL:

Traci,

I am sorry to burden the Court with another matter, but I did want to follow up on this request for expedited hearing to see if the Court can consider the motion to compel this week.

We appreciate the Court's time and consideration.

Best,
Bryan

Bryan C. Assink, Associate
Bonds Ellis Eppich Schafer Jones LLP
420 Throckmorton St. | Suite 1000 | Fort Worth, Texas 76102
office 817.779.4297 | fax 817.405.6902
bryan.assink@bondsellis.com

From: Bryan Assink
Sent: Friday, May 14, 2021 2:34 PM
To: 'Traci Ellison' <Traci_Ellison@txnb.uscourts.gov>
Cc: Clay Taylor <clay.taylor@bondsellis.com>; Deitsch-Perez, Deborah R. <deborah.deitschperez@stinson.com>; 'Aigen, Michael P.' <michael.aigen@stinson.com>; Lackey, Paul B. <paul.lackey@stinson.com>; 'John A. Morris' <jmorris@pszjlaw.com>; Jeff Pomerantz <jpomerantz@pszjlaw.com>; Hayley R. Winograd <hwinograd@pszjlaw.com>
Subject: HCMLP v. Dondero - Adv. Proc. No. 21-03003 - Defendant's Motion to Compel and Motion to Expedite

Traci,

A few moments ago, on behalf of Mr. Dondero, we filed the attached motion to compel deposition of Mr. Seery as HCMLP's corporate representative in connection with the above-referenced adversary proceeding. We also filed the attached motion to expedite, seeking to have a hearing on the motion to compel next week (week of May 17th). While the Debtor has indicated it is opposed to the underlying motion, the Debtor is unopposed to our request for expedited hearing. Counsel for the Debtor is copied on this email.

Please let us know if the Court needs anything further on these matters.

Best,
Bryan

Bryan C. Assink, Associate
Bonds Ellis Eppich Schafer Jones LLP
420 Throckmorton St. | Suite 1000 | Fort Worth, Texas 76102
office 817.779.4297 | fax 817.405.6902
bryan.assink@bondsellis.com

From: Traci Ellison
To: Bryan Assink
Cc: Clay Taylor; Deitsch-Perez, Deborah R.; Aigen, Michael P.; Lackey, Paul B.; ohn A. Morris; eff Pomerantz; Hayley R. inograd
Subject: Re: HCMLP v. Dondero - Adv. Proc. No. 21-03003 - Defendant"s Motion to Compel and Motion to Expedite
Date: ednesday, May 1 , 2021 :0 :30 AM
Attachments: ebEx Hearing nstructions ebEx hearings on or after March 8, 2021 .pdf

ood morning, Mr. Assink:

The court has agreed to hear the motion to compel deposition E 35 on Thursday, May 20 at 2:30. I will reserve 30 minutes for the hearing. Please select the reserved setting from the dropdown when you e file the notice of hearing.

Please promptly file a notice of hearing and upload an order granting the motion for expedited hearing. For your convenience, I have attached the WebEx Hearing Instructions for Judge Jernigan's court.

If you have any uestions, please let me know.

Thank you,
Traci

Traci A. Ellison, Courtroom Deputy
to the Honorable Stacey G. C. Jernigan
U.S. Bankruptcy Court
Northern District of Texas
(214)753-2046
sgj_settings@txnb.uscourts.gov

From: Bryan Assink <bryan.assink@bondsellis.com>
Sent: Tuesday, May 18, 2021 5:44 PM
To: Traci Ellison <Traci_Ellison@txnb.uscourts.gov>
Cc: clay.taylor_bondsellis.com <clay.taylor@bondsellis.com>; Deitsch-Perez, Deborah R. <deborah.deitschperez@stinson.com>; Aigen, Michael P. <michael.aigen@stinson.com>; Lackey, Paul B. <paul.lackey@stinson.com>; John A. Morris <jmorris@pszjlaw.com>; Jeff Pomerantz <jpomerantz@pszjlaw.com>; Hayley R. Winograd <hwinograd@pszjlaw.com>
Subject: RE: HCMLP v. Dondero - Adv. Proc. No. 21-03003 - Defendant's Motion to Compel and Motion to Expedite

CAUTION - EXTERNAL:

Traci,

Continuing on the original email chain since Debtor's counsel is copied. We have conferred with counsel for the Debtor, and if the Court is agreeable, the parties would respectfully request that the court set the hearing on the motion to compel for this Thursday, May 20. We do not expect the

hearing to take longer than 30 minutes.

Best,
Bryan

From: Bryan Assink
Sent: Friday, May 14, 2021 2:34 PM
To: 'Traci Ellison' <Traci_Ellison@txnb.uscourts.gov>
Cc: Clay Taylor <clay.taylor@bondsellis.com>; Deitsch-Perez, Deborah R. <deborah.deitschperez@stinson.com>; 'Aigen, Michael P.' <michael.aigen@stinson.com>; Lackey, Paul B. <paul.lackey@stinson.com>; 'John A. Morris' <jmorris@pszjlaw.com>; Jeff Pomerantz <jpomerantz@pszjlaw.com>; Hayley R. Winograd <hwinograd@pszjlaw.com>
Subject: HCMLP v. Dondero - Adv. Proc. No. 21-03003 - Defendant's Motion to Compel and Motion to Expedite

Traci,

A few moments ago, on behalf of Mr. Dondero, we filed the attached motion to compel deposition of Mr. Seery as HCMLP's corporate representative in connection with the above-referenced adversary proceeding. We also filed the attached motion to expedite, seeking to have a hearing on the motion to compel next week (week of May 17th). While the Debtor has indicated it is opposed to the underlying motion, the Debtor is unopposed to our request for expedited hearing. Counsel for the Debtor is copied on this email.

Please let us know if the Court needs anything further on these matters.

Best,
Bryan

Bryan C. Assink, Associate
Bonds Ellis Eppich Schafer Jones LLP
420 Throckmorton St. | Suite 1000 | Fort Worth, Texas 76102
office 817.779.4297 | fax 817.405.6902
bryan.assink@bondsellis.com

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

Signed May 24, 2021

United States Bankruptcy Judge

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

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

	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
v.	§	Adversary No. 21-03003-sgj
	§	
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

ORDER DENYING MOTION TO COMPEL DEPOSITION TESTIMONY FROM JAMES P. SEERY, JR.

On this date, the Court considered the *Motion to Compel Deposition Testimony from James P. Seery, Jr.* filed by James D. Dondero, the Defendant in the above-captioned adversary proceeding, on May 13, 2021 (the "Motion").

Upon consideration of the Motion, the Plaintiff's objection thereto, and the arguments of counsel made during the hearing on the Motion, the Court finds that the Motion should be DENIED in its entirety for the reasons stated on the record during the hearing.

IT IS SO ORDERED.

END OF ORDER # #

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UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE THE HONORABLE STACEY G. JERNIGAN, JUDGE

In Re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	Case No. 19-34054-sgj11
OFFICIAL COMMITTEE OF UNSECURED CREDITORS, Plaintiff, v. CLO HOLDCO, LTD., et al., Defendants.	Adv. Proc. No. 20-03195-sgj PLAINTIFF'S MOTION for CONTINUANCE
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. JAMES DONDERO, Defendant.	Adv. Proc. No. 21-03003-sgj DEFENDANT DONDERO'S MOTION to COMPEL DISCOVERY, the TESTIMONY of JAMES P. SEERY, JR. May 20, 2021 Dallas, Texas (Via WebEx)

Appearances in 21-03003:

For Plaintiff Highland Capital Management,	John A. Morris Pachulski Stang Ziehl & Jones LLP 10100 Santa Monica Boulevard, 13th Floor Los Angeles, California 90067
For Defendant-Movant James Dondero:	Michael P. Aigen Stinson, L.L.P. 3102 Oak Lawn Avenue, Suite 777 Dallas, Texas 75219 Bryan C. Assink Bonds Ellis Eppich Schafer Jones LLP 420 Throckmorton Street, Suite 1000 Forth Worth, Texas 76102

Appearances continued on next page.

Appearances in 20-3195:

For the Official Committee of Unsecured Creditors:	Paige Holden Montgomery Sidley Austin LLP 2021 McKinney Avenue, Suite 2000 Dallas, Texas 75201 Matthew A. Clemente Sidley Austin LLP One South Dearborn Chicago, Illinois 60603
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Digital Court Reporter:	United States Bankruptcy Court Michael F. Edmond Sr., Judicial Support Specialist 1100 Commerce Street, Room 1254 Dallas, Texas 75242
Certified Electronic Transcriber:	Susan Palmer Palmer Reporting Services

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I N D E X

Witnesses:

	Direct	Cross	Redirect	Recross
Marc Kirschner				
Declaration:	61			
By Mr. Phillips:		62		
By Ms. Montgomery:			65	

Exhibits Received in Evidence:

Thursday, May 20, 2021 9:40 o'clock a.m.

P R O C E E D I N G S

THE COURT: — settings in Highland Capital adversary proceedings.

Before I start with that, I want to let anyone who is on the line for a different case, RE Palm Springs II, LLC, that the hearing we had on that matter was continued. Certain of the parties filed an agreed motion to continue, and so I continued that to June 9th at 9:30. So to the extent you are on the line only for the Palm Springs matter, that matter is not going forward today.

All right. So turning to Highland, I will start with the first-filed emergency motion. It was in Highland versus Dondero, Adversary 21-3003. Counsel for Dondero filed a motion to compel testimony of James Seery. So who do we have appearing for Mr. Dondero this morning?

All right. So —

MR. [SPEAKER]: I think he's on mute, Your Honor.

THE COURT: Sir, you are on mute. Try again.

MR. AIGEN: Ah, I apologize, Your Honor. Is this better?

THE COURT: Yes.

MR. AIGEN: Okay. Good morning, Your Honor. Michael Aigen from Stinson, representing Mr. Dondero. I apologize for that.

THE COURT: All right. So you are now co-counsel with Bond Ellis, perceive?

MR. AIGEN: That is correct. The lead counsel from our firm is Ms. Deborah Deitsch-Perez. She unfortunately has medical emergencies going on with her family and is unfortunately unable to be here for this hearing.

THE COURT: All right. Thank you.

For Highland, who do we have appearing on this matter?

MR. MORRIS: Good morning, Your Honor. It's John Morris From Pachulski Stang Ziehl and Jones for the debtor.

THE COURT: All right. Thank you. I presume those are the only appearances on this discovery dispute.

MR. AIGEN: That's correct.

THE COURT: All right. Well, Ms. — Mr. Aigen, you're, I guess, new on the scene in the Highland matters. And let me just tell you I've read all the pleadings. So I am aware that of our numerous adversary proceedings, this is the one only involving Dondero as a defendant and only involving three notes. So, to help you find your argument, I'm going to say this. I remember when I was in law school — here comes a story — one of our law professors said a suit on a note is the simplest kind of lawsuit there is. And probably when you are a young lawyer and if you go to a civil business practice type law firm, this is probably where you're going to get your feet wet.

And so, with that in my brain and having read the

pleadings, I'm asking: Why is this going to be complicated where we need extensive discovery from the CRO/CEO who came on the scene post bankruptcy two plus years after the notes?

So that's what's in my brain having read the pleadings. And so convince me why I'm totally misreading the situation.

MR. AIGEN: Thank you, Your Honor. I appreciate that. One thing I want to make sure we understand is this is we're seeking to compel deposition testimony for Mr. Seery in his corporate rep capacity. We're not specifically asking for Mr. Seery. We sent corporate rep depo topics over. They told us Mr. Seery would be the corporate rep but they objected to certain topics, as is their right. The specific topics, as you know, we're seeking discovery on, there's Numbers 9, 14 through 17 go together, Number 20. In that sense what we're seeking discovery on is a defense that we have asserted in this proceeding that's currently pending.

As I'm sure you know from reading the pleadings, one of Mr. Dondero's defenses is that there was a subsequent oral agreement that the home would be discharged based upon certain conditions being met. Highland, as is their right, believes that this oral agreement never happened. And, as a result, it contends that the defense has no merit. In their motion, I think it was, or in their response, paragraph 4, they specifically say that this defense has no basis in fact. That's

their right. The problem, however, is just taking this position, based on this position they're also saying, well, we don't get discovery on this event.

And although we're talking about six different requests, it really comes down to three different areas, and I'll jump into those and explain each one. The first one, which I think is the most straightforward, is topic nine, which asks for testimony regarding Mr. Dondero's defenses. Initially we got a response saying that the objection wasn't relevant and then they filed a response. And I think they realized that might not have made a lot of sense saying it wasn't relevant, so they said it was vague or invalid.

Counsel's well aware, as you are, what are defenses in this case. They served discovery on these defenses. We responded. They never complained that they're inadequate. They know that our defense, at least one of them, is there had been oral agreement on the loan, that it would be forgiven if certain conditions occur, and that's what we want to take discovery on.

I'm confident counsel has interviewed Highland employees to see who knows anything about this agreement. I'm sure it's very possible that no one knows anything about this agreement, and that's fine. But we certainly have a right to ask the corporate rep about this and find out if anyone's going to talk about this oral agreement at trial. This isn't burdensome discovery —

THE COURT: Can I — can I — let me ask a question right there. The defense is based on an oral agreement. I mean your client is the payee on the notes — excuse me — excuse me — the maker. It's easy to get confused here. He's the maker on the notes, but he was the CEO of the payee on the notes. So this is not Bank of America makes a loan to Joe, the plumber, or, you know, I mean this is — he's on both sides of the transaction. So he knows who the oral agreement was made with, right?

MR. AIGEN: Correct, Your Honor.

THE COURT: So, again, I'm trying to understand —

MR. AIGEN: May I follow up —

THE COURT: — the depth of the discovery needed. Presumably, I think I read in here, that you're deposing — or I don't know if it's agreed or not — you're deposing various other Highland former employees. But — but I don't understand why the current CEO that was not around before the bankruptcy would have any personal knowledge about oral agreements. I mean this would all be in Mr. Dondero's head, right?

MR. AIGEN: Your Honor, I absolutely agree. And there are, I guess, two parts to that answer. One is we aren't taking other Highland employees' depositions. We've asked for them, and they have refused to give them to us and said they're irrelevant. We're trying to work that issue out. And we may get one of their depositions. If they go give us one for a

couple hours and drop off, but this is — right now this is the only discovery we're getting. Their doc requests, they're not going to give us any documents related to these topics. So this is our chance to get discovery on it.

As to his personal knowledge, he's their corporate rep. As a corporate rep, he can go figure out what other people know. But they're going to put someone on the stand — and I think it's important, Your Honor, obviously they're going to make a defense in this case — or, sorry — which stops our defense with legal arguments saying even if this oral agreement occurred and took place, it's not legally enforceable. I understand.

THE COURT: Yeah, and what about —

MR. AIGEN: I mean this is —

THE COURT: — what about that? What about that? I mean it's hard not to separate the need for discovery from that, so what about that?

MR. AIGEN: Well, your — yeah. No, that's — if they file a summary judgment on a legal issue, then we will address that in our summary judgment legal issue, but right now we have a pending defense. And, Your Honor, one of their responses to our defense, as they put in their response in paragraph 4, they specifically state that this oral agreement never occurred. So I need to know how they know that, who are they going to put on the stand. I don't know which people are saying that. So we

ask for — to put it down into corporate rep topic. They could have given us anyone. They decided to give us Mr. Seery. But, yes, he may not have personal knowledge, but that's who they chose for their corporate rep to testify on this topic.

He's the only one I'm able to get this information from. And he may come up and say no one knows anything about that. That's fine. But they have already said: We're taking the position that this oral agreement never occurred. I don't know how they know that, I don't know who they're going to put on the stand, but they are taking a factual position on that. So we should have a right to take discovery on it. Whether they don't think this is a legally-valid defense, well, that's fine, they could have moved for summary judgment on day one. They didn't. As of now, this defense is still pending.

We have less than two months until trial. I don't know when the summary judgment's going to come, so there's not going to be a chance to wait until the legal aspects of these defenses are heard and then take discovery. This is our one opportunity to do it.

THE COURT: Okay. So this is topic number nine. And you say why not, let us ask a few questions, it may be five minutes of questioning if he doesn't really know anything. Is that a summary of your position?

MR. AIGEN: Well, yeah, he may not know anything and they may not know anything, or they may, yes. I don't know how

much time it's going to take. The fact that they put in writing that this agreement never occurred makes me think that someone must know something, but I don't know. It could be on that. that —

THE COURT: All right.

MR. AIGEN: — it's certainly possible, Your Honor.

THE COURT: All right.

MR. AIGEN: That — and then the second topic or second, I guess, group is 14 through 17 where we ask about information about loans made by Highland or the debtor that were particular to other people. And the reason these requests are relevant is, once again, — well, not once again — but it's our position that Highland commonly entered into these types of agreements. They're saying: Hey, this never happened, this agreement didn't take place.

So the fact that Highland entered into other similar type loan agreements with similar type business group provisions, although maybe not dispositive, it certainly leads to evidence that this agreement did in fact take place in the situation where they're telling you and putting a pleading and writing in the pleading, hey, this never — this agreement never took place. So this is relevant —

THE COURT: So — so — so —

MR. AIGEN: — and, like I said, —

THE COURT: — on topics 14 through 17 you're saying

it's relevant if loans were made to other employees or officers besides Mr. Dondero and it's relevant if those loans were forgiven or not as to these three notes?

MR. AIGEN: Correct, Your Honor. Because they are challenging that this agreement took place, for the —

THE COURT: Well, —

MR. AIGEN: — fact that other similar —

THE COURT: — what if they did do this with another employee, why is that relevant these three notes?

MR. AIGEN: Well, because they're challenging that our oral agreement took place. The fact that oral agreements like this were routine at Highland would make it more believable and factual that our agreement took place, in light of their challenge to the fact that the agreement took place.

Like I said, if they were just making legal challenges to whether the agreement is enforceable, that would be one thing. So instead they're also taking the position, hey, we don't think this actually took place. So all — if Highland routinely entered into agreements like this for other employees, like I said, I understand that wouldn't be dispositive, but that would tend to show that this pattern and practice of Highland did include oral agreements like this.

THE COURT: Okay. I don't mean to get off on a tangent here, but, you know, are there going to be a lot of fraudulent-transfer lawsuits if in fact there was debt forgiven

in the couple of years or four years leading up to bankruptcy? And are we going to have — well, I just don't understand, you know, the obvious big tax exposure to your client and other human beings if your — if your argument prevails, but I guess I shouldn't — I shouldn't second guess legal strategy, but my brain can't help to go there.

All right. But, again to the relevance, your defense is: There was an agreement to forgive these notes. It was oral and we're entitled to discovery regarding other loans to other employees for which there might have been oral forgiveness because that will help establish our defense; that's the sum and substance of categories 14 through 17?

MR. AIGEN: That's correct, Your Honor.

THE COURT: Okay.

MR. AIGEN: And obviously I don't think there's any need to try the ultimate legal issues here, but we're well aware of these tax issues and we've worked into it, and so there are different tax consequences depending on how conditions are structured and it's my understanding that in situations like this there wouldn't be sort of tax consequences, but that's an issue for another day. But because you raised it, Your Honor, I want to make sure that you know we are aware of that issue and that is something we're prepared to address when it — when it comes before this.

So should I move on to the last — last topic, Your

Honor?

THE COURT: Okay.

MR. AIGEN: The last topic is Request Number 20 which asks for testimony regarding compensation paid by Highland to Mr. Dondero. And I know this might be a little unusual because someone should know what they were paid, but obviously in a situation like this where we don't have control of all the records and the pay structure is complicated, we don't have all of that, so it's a little different than your usual situation. And the reason this is relevant, obviously this goes to the forgiveness aspect of it, and basically information regarding Mr. Dondero's compensation will be helpful or relevant because it shows part of the story here is that if you look at his compensation as a whole, he was underpaid and the notes were forgiven as part of this compensation which goes along with the underpaid. In other words, it puts this oral agreement into context and explains why it is thus. Again, they're saying this never happened, so as part of our presentation of our case, we're going to explain why this was done and why it makes sense. And to put that into context, we want information related to Mr. Dondero's compensation. We're not asking for other people's compensation on this, we said information related to Mr. Dondero's own compensation.

And, again, I understand that counsel thinks that these defenses have no merit. That's their right. That makes

sense. And I assume they will file a summary judgment on these, but they haven't done it. These defenses are currently pending. We're going to trial in less than two months. We may not be getting anyone else's depositions. They're not giving us documents on this topic. And I understand it may be a little unique to have Mr. Seery testify on this, but that's because we just presented them with topics. That's the witness they are putting forward, which is their right. I have no problem with that. But this is our one opportunity to get discovery on this and that's why we're before the Court today. Thank you for your time.

THE COURT: Okay. Just to clarify, I think I heard you saying Mr. Dondero doesn't have access to the records. Mr. Dondero doesn't have records regarding the compensation paid by Highland to him and any agreements related to that?

MR. AIGEN: He — he had some but not all.

THE COURT: Okay. Well, I don't understand that. Why would that be? He's the founder, he was the CEO of this company until three months after the bankruptcy was filed. He — I mean it sounds inconceivable to me that he wouldn't have everything he needs as far as what he was paid in the agreements regarding what he was paid by his company Highland.

MR. AIGEN: Well, Your Honor, fortunately or unfortunately I have not been involved what I understand is sort of disagreements between the parties here on Mr. Dondero's

access to certain documents of Highland, but my understanding is he — Highland now has possession of all its documents. And he — I know there were requests between counsels on Dondero to get particular documents in other matters and other situations going on. But he — Highland is the one that has possession of those documents now, not — not Mr. Dondero.

THE COURT: Okay. He'd at least have his tax returns, right, and files regarding his tax returns?

MR. AIGEN: Correct, correct. Correct. Yes. Yes, Your Honor.

THE COURT: All right. Well, Mr. Morris, now for your responses in — I'm playing devil's advocate with you. If y'all have named Mr. Seery as a 30(b) corporate rep and out of these 20 topics you agree to — two, three, four, five, six — I guess 13 of the subject matters, what's the big deal about a few extra questions?

MR. MORRIS: A few — a few issues.

First, Your Honor, is Mr. Dondero on the line?

THE COURT: Well, that's a good question. I forgot to check that because I have ordered him in the past to be at every hearing.

Mr. Dondero, are you with us this morning?

Mike, did you see him —

MR. ASSINK: No, Your Honor. This is —

THE REPORTER: I haven't seen Mr. Dondero.

THE COURT: Okay. Well, Mr. Aigen, what do you know about that? Or I see Mr. Bryan Assink is out there as well. What do y'all know about that?

THE REPORTER: He's on mute, Your Honor.

THE COURT: You're on mute, sir.

MR. ASSINK: Your Honor, I apologize. This is Bryan Assink of Bonds Ellis. I'm just trying to — I'm just trying to —

THE COURT: Okay. It sounds like someone's speaking, but I can't hear it.

THE REPORTER: Bryan Assink, his voice is low. He's —

THE COURT: Okay. Mr. Assink, please turn your volume up. We can barely, barely, barely hear you.

Mr. Assink.

MR. ASSINK: Your Honor, is that — is that better? I'm sorry. I tested this before —

THE COURT: Okay, it's better now. Go ahead.

MR. ASSINK: — I joined and —

THE COURT: Go ahead.

MR. ASSINK: Your Honor, this was set on an emergency basis, and we just didn't coordinate with Mr. Dondero. We didn't think he needed to attend these kind of nonevidentiary hearings and —

THE COURT: Mr. Assink, you asked for the emergency hearing. And you filed your motion Friday afternoon. We were

in court Tuesday. And I was happy that you resolved our disputes Tuesday. And I remember saying: Preview of coming attractions, I guess I'll see y'all Friday, right. Right, nobody said anything about, uh, we have an emergency setting, we're hoping to have.

But, anyway, be that as it may, an hour or two after I got out of court Tuesday, my Courtroom Deputy was telling me that you were wanting the hearing this week. And I first said it'll have to be Monday. I mean we're — we've got a backlog of stuff in our queue that we're really trying to get out. And — and I understood that you really pressed for having this hearing today. I didn't see the — all the emails, but my Courtroom Deputy said you all really wanted this hearing today, not Monday.

So, with that, why would you press for today if Mr. Dondero wasn't available, number one? And, number two, why would you think he wasn't needed? I mean it was a couple of hearings ago that I said someone pull out my order and see what I said, because I couldn't remember the exact wording —

MR. ASSINK: No, Your Honor, I apologize. I'm sorry, Your Honor. I apologize. There's been a lot going. I think it — the coordination might have just slipped. I'm not sure, Your Honor, I wasn't sure what order required him to be here today with the preliminary injunction dissolves but, you know, it wasn't our intention that he would not — he would not appear.

We — it was more just a coordination thing. We intend that he will be at all hearings before, Your Honor, you know, Friday's hearing and substantive hearings. I just — I think this is more of a coordination issue, Your Honor, and I apologize.

THE COURT: Okay.

MR. ASSINK: There has been a lot going on.

THE COURT: Oh, don't I know. There's two of us, me and my Law Clerk working on this, and there are a bunch of y'all. So, yes, I feel — I feel absolutely what you feel and more as far as a lot going on.

So let me clarify. My language that ordered Mr. Dondero to be at every hearing was in the preliminary injunction that's now superseded by the agreed order y'all announced Tuesday. So are you telling me you thought now that mandate didn't apply? Is that one of the things —

MR. ASSINK: Not — not specifically, Your Honor, —

THE COURT: — I'm hearing?

MR. ASSINK: Not specifically, Your Honor. We thought perhaps the formal mandate in the order was no longer applying, but our understanding was you would want Mr. Dondero at substantive hearings going forward, and that has been our understanding. And we would expect him to be before Your Honor at all such hearings. Part of the basis, the reasoning he's not here today was perhaps as an oversight on my part due to the scheduling, and I had a lot of deadlines yesterday and I think

it just maybe fell through the cracks, and I apologize, Your Honor.

THE COURT: All right.

MR. ASSINK: You know, we — Your Honor, —

THE COURT: Well, I'm going to say a couple of things. You know this could have been raised Tuesday, when we were here on the adversary proceeding, in which the preliminary injunction was issued, okay, it would have been — it would have been wise, it would have been very wise to raise the issue.

Second, it screams irony, if nothing else, that at a time when I have under advisement a motion to hold Mr. Dondero in contempt of Court that there would be a trip-up, the second-recent trip-up, by the way, where he didn't appear at a hearing. There was a time a few weeks ago, two or three weeks ago, can't remember what hearing it was then, but he wasn't here.

Okay. The —

MR. ASSINK: Well, Your Honor, I just want to say —

THE COURT: — the third thing I'm going to say — the third thing I'm going to say is I guess I'll issue an order in the main case now, you know, a one- or two-sentence order in the main case saying repeating the sentence that was in the preliminary injunction, that he's going to show up at every hearing. I never said only at substantive hearings. The only thing I hesitated on at all, because I've done this in other

cases, is sometimes I'll say any hearing at which, you know, the person is taking a position, okay, an opposition, an objection, you know, even if you file a pleading taking a neutral stand, if he's going to file a pleading that requires the Court and all the lawyers' attention to some extent, he's going to need to be in court. So that's something I thought about doing, but then I was reminded, that I said, no, he's just going to be at all hearings in the future.

And procedural, substantive, I never made that distinction and I never would because — because it's taking up time, it's taking up time of the Court, lawyers, parties. And if he is going to use the offices of this Court or, you know, take up the time of any lawyers, then he needs to be a part of it, okay?

MR. ASSINK: Your Honor, yes, I —

THE COURT: So I thought I made that very clear the last time he didn't show up, but I think —

MR. ASSINK: Your Honor, I apologize. You know that's certainly not our intention here. We've been rushing around. I think this is more — this is more on — on me and just the fast pace with everything. We would intend that he would be here at all hearings. We're not trying to make any exception. We're not trying to say that the preliminary injunction got rid of his obligation to be before, Your Honor. You know, we weren't clear exactly what the directive was for these kinds of hearings, or

at least perhaps I wasn't fully, and — but, nevertheless, Your Honor, we would — we would have had him be here. I think the fast pace with the hearing settings and just everything going on, it might have slipped through the cracks. It's not — there was no ill will with him not being here, Your Honor. I apologize. It's just an oversight on our part. We would anticipate that he will be here for all future hearings. You know it's no disrespect to the Court. It was not an intentional thing. We apologize, Your Honor. So I understand the Court's comments. It's — but I just want to make clear it's we're not trying to be cute, we're not trying to say that, oh, the preliminary injunction is gone, he doesn't have to be here. That's not our intention, Your Honor. It was I think just an oversight and a scheduling issue this time, but Mr. Dondero will of course appear before Your Honor in all matters going forward, so I apologize.

THE COURT: All right. Well, again, you're scheduling. You sought the scheduling, you sought the emergency hearing, and this is the second time we've had this discussion in less than a month.

All right. So, Mr. Morris, back to you. I think —

MR. MORRIS: Yeah.

THE COURT: — you were about to answer the question of if Mr. Seery is going to be produced and talk about 13 different topics, why is it a big deal to talk about these other seven

topics.

MR. MORRIS: Because there is no way to prepare a witness for the vague statements that are being offered by counsel. I'll point out that Mr. Aigen is yet another former — a lawyer who formerly represented Highland and is now suing us, but we'll dispense with the disqualification motion right now.

Your Honor, here is the deal. There have to be some limits, there have to be some reasonable limits. As you started, Your Honor, in law school you're taught that a collection case under demand notes is the simplest thing there is. In fact, in New York there's a special provision in state law that permits a plaintiff to file a motion for summary judgment in lieu of a complaint when they have an instrument such as a note, which is exactly what we have here.

Mr. Dondero has already admitted in his answer, in his interrogatories, and in his answers to several requests to admit that the notes are valid, that he received the money contemporaneously with the notes. When he signed the note, he received the money. The debtor has made demand and he hasn't paid, so we will be moving for summary judgment on that basis.

So let's look at what the defenses are and why we just feel like it's a burden on the debtor to even entertain these concepts. His first answer, Your Honor, said that the notes were forgiven based on an agreement. So we asked him in the interrogatory or request to admit, I forget which, show us your

tax returns that you paid the taxes. Of course he didn't pay taxes because of course the note wasn't forgiven. So instead he amends his answers, he amends the affirmative defense to add the words: Pursuant to a condition subsequent. Okay, he didn't say that the first time.

The first time it was — it was forgiven and now it's not forgiven but it's basically deferred until a condition subsequent. So he is not even contending. If you look at his amended answer, he's not even contending that it was forgiven, he's simply saying that the obligation to repay has been deferred pursuant to an oral agreement under which he does have to pay until the debtor completes the liquidation of his assets, basically, if you read it. That's what it says. And that's how we got here.

I don't know if you picked up on it, Your Honor, but in response to an interrogatory, when we said who made the agreement on behalf of the debtor, Mr. Dondero said that he did. Okay, this isn't an oral agreement unless he was talking to himself. This is something that happened, according to him, in his head; that somehow he, as the maker of the note, had a discussion with himself in his capacity as the chief executive officer of the debtor, and the two of them, in his head, agreed that he wouldn't have to pay. Initially wouldn't have to pay at all and now apparently doesn't have to pay until the debtor completes its sale of assets. That is what the defense is here,

so let's be very, very clear about it.

It's not an oral agreement, it's something that he's making up in his head that he didn't make up the first time, that he changed the second time, and that he — that he can't describe at all. One of the interrogatories said: When did this take place. He didn't answer that part of the interrogatory. He hasn't told us.

And here is the interesting thing, Your Honor. He's partially performed. He has admitted in response to — I forget if it was an interrogatory or a request to admit, it's in our papers — he has admitted that in December 2019, after the petition date, and while he was still in control of the debtor, that he made a payment to the debtor, a portion of which was used to pay principal and interest on one or more of the notes, so. So either he made that payment after he made his agreement in his head that it would be deferred, which makes no sense, or he entered the agreement in his head after the time that he made the payment, which would be in violation of the automatic stay, because how did he just get to forgive or to defer payment of an obligation to the debtor without seeking permission from the Bankruptcy Court. Those are the only two possibilities here, okay.

So I don't want to have to prepare my client for such nonsense. I don't think we should be required to prepare my client for such nonsense. And if you take a look at the other

so-called affirmative defenses, he's got waiver, but he doesn't know — he doesn't identify how we waived, when we waived, who waived. And, in fact, it's completely contradicted from the evidence that's already in the record. Every single monthly operating report, all of the debtor's contemporaneous books and records, they're in the record. I actually submitted them in opposition to his first request for an adjournment of this proceeding because I wanted — I put my cards on the table, Your Honor. I really don't — I don't like to play games. I put my cards on the table. They see all of that. All of that is there. The debtor has — can see them. So how could we have waived everything.

Consideration, I'm supposed to prepare my client to answer questions on his defense of lack of consideration, when Mr. Dondero has already admitted that he received the face amount of each note at the time the note was executed? What — we should not be entertaining this.

And let's talk about topics 14 to 17, the so-called other loans that were forgiven. Mr. Dondero was the president and chief executive officer of this company for decades. Has he identified one single person who received a forgiven loan? Nope. Has he identified one loan that was ever forgiven? Nope. Has he ever contended that he had a forgivable loan? Nope. He's got this vague and ambiguous defense that somehow — it's not even a defense, frankly. His defense is that he had an oral

agreement with himself, either he did or he didn't, right. We've got document requests outstanding. They were due weeks ago. Mr. Aigen has promised me in writing tomorrow, tomorrow, Friday. May 21st, he's going to complete his document production.

We've gotten two documents so far, two bank statements that show his receipt of the loan proceeds, right. We don't have — there is no evidence for this. We don't have the identification of a loan that was ever forgiven. We don't have the identification of a person whose loan was forgiven. We have nothing. How can we possibly prepare?

Rule 30(b)(6) actually requires them to describe with reasonable particularity the matters for examination. How do I prepare my client on — on these things? What he's trying to do, I think what they're trying to do is be cute, of course, and they're trying to — they want to ask Mr. Seery and Mr. Seery will say, 'I don't have any knowledge of this.' And then they're going to show up to trial and they're going to put on a case and say, 'Mr. Seery didn't have any knowledge of it, so he can't rebut,' or something — something silly like — I mean I don't really know what they're doing. This is just such bad faith.

Your Honor, you heard counsel say that the loan was forgiven or deferred, but it's not even forgiven. So — so it doesn't even make sense, but you heard him say that he was

underpaid, that Mr. Dondero was underpaid and that there's some connection not with forgiveness because he's admitted that he's now changed his story, it hasn't been forgiven. It was originally forgiven, now it's just deferred, and that that happened because he was underpaid. Does that make any sense at all?

The guy who was in control of this enterprise from day one, and I'm supposed to prepare my client to provide a history of Mr. Dondero's compensation. He doesn't know what he was — did he not pay his taxes? Should we go down that path and should I now start subpoenaing his tax returns? Because I think that's appropriate. If you want to ask what I have, I want to know what you have. So maybe Mr. Aigen can agree on the record that I can have Mr. Dondero's tax returns. If he'll do that maybe I'll reconsider, because this is nonsense, Your Honor. And that's really the point. And I want to nip this in the bud now because this is the first of five note cases for entities owned and controlled by Mr. Dondero, and the same thing is happening in some of these other cases, Your Honor. It is.

And — and if we go down this path, you know you're the Judge, you make the call, but we're going to be having a lot of these because I'm not volunteering putting my client through this process. It's not right. It's just not right.

He made an oral agreement with himself? Please. You either violated the automatic stay or you partially performed,

thereby proving it never happened. Mr. Aigen says, oh, we contest it. We don't sit here and contest it. The proof is in the record. The proof is his client's own words. The proof of the documents that we've already put before the Court. (Briefly garbled audio) — never happened.

And I just — I just want to nip this in the bud. That's really our point, Your Honor. To put forth a client in — in a notes action, the simplest form of action there could possibly be, to answer questions on 13 different topics, but there's a limit to what we'll do, and this is our limit. And that's why we won't — we won't do it in the absence of a court order.

THE COURT: Okay.

MR. MORRIS: Thank you, Your Honor.

THE COURT: All right. So I will give the last word to you, Mr. Aigen. What would you like to say in rebuttal?

All right. You must be on mute.

MR. [SPEAKER]: He's on mute.

MR. AIGEN: Sorry.

THE COURT: Okay.

MR. AIGEN: A few quick points, Your Honor. Number one, counsel has referred to New York procedure on how he could file a quick summary judgment. Well, he can file summary judgment here too. They didn't do it. These defenses are pending, we have a right to take discovery on it. I think

that's pretty straightforward.

Number two, counsel has repeatedly stated, as he states in his pleading, that we changed our position and that first answer it said that the notes were forgiven. It doesn't say that. I'm reading from their pleading at paragraph 16 where they quote our answer, the original one where it says, "Defendant asserts that plaintiff's claim should be barred because it was previously agreed by plaintiff that plaintiff would not collect on the note." There's no change in the position. It wasn't asserted before these notes were actually forgiven, so that's just not true, and his own pleadings reflect that.

We also heard a lot of conversation about what we have given them. We have answered their interrogatories. They didn't ask about other people who may have loans forgiven. They had never asked about that. That's why we haven't told them. They could get that information. They could serve discovery. They're the one that wanted this case on a fast track. So keep talking about discovery or answers he doesn't have because those are answers to questions he never asked. There is no discovery out there where they said to us identify the individual who you believe received loans that are forgiven. They never asked that. That's why they don't —

THE COURT: Let me —

MR. AIGEN: — that answer, so I don't think that's

right.

THE COURT: Let me ask you this. If Bank of America loaned money to Mr. Dondero and he defaulted and they sued him on the note, do you think Mr. Dondero could get discovery regarding all other borrowers or any other borrower that Bank of America may have lent money to and did they forgive some of their indebtedness, did they have special arrangements? Do you think in a million years a state court judge would allow discovery on this?

MR. AIGEN: Not under that hypothetical, but I would — what I would say, Your Honor, if there was an oral condition as part of that loan and it turns out that everyone knew that Bank of America provided those same oral conditions to a subset other group of lenders — or borrowers, for whatever reason, and the parties disputed that, then I think it would be discoverable. So I think the situation here is —

THE COURT: Oral agreements —

MR. AIGEN: — different from your situation. I agree with the hypothetical.

THE COURT: I mean again I — you know, oral agreements. I mean give me examples of case law where oral agreements somehow prevailed at the end of the day. I mean I just...

MR. AIGEN: And, Your Honor, at summary judgment, when we have to present our case, we'll present our case. Like I

said, they could have filed the summary judgment on day one, just like they could do in New York, and said, you know, on the defenses, but we're doing this and we're doing it on a fast track obviously with trial in less than two months. So this is our one opportunity to get discovery. And when they filed their summary judgment, we'll respond with the law. But until they do, for whatever reason they have waived it. They have told you that it would be burdensome to allow him to answer a few other questions. I don't — for one thing, burden was not an objection they made, so he's talking about how it's burdensome and he doesn't want to do it. But this is our one opportunity to get this information. And if they file summary judgment, and, you know, these defenses go away, obviously it won't be an issue later, but this is our one opportunity to get this discovery.

THE COURT: Okay.

MR. MORRIS: Your Honor, if I may? Just one last point. There is zero chance, zero chance that if any loan was ever forgiven by the debtor that it was on the same terms on which Mr. Dondero now claims his loan would be forgiven or deferred. And how do I know that? Because if you look at his response to the interrogatory, the condition subsequent, by them. And Mr. Aigen is just wrong, he did change his answer. His original answer was that he wouldn't have to pay. And then his new answer, his amended answer is that he wouldn't have to pay until a condition subsequent. And when we asked him what

that condition subsequent was, it was the liquidation of certain assets. Since the liquidation of those assets has not been completed, by definition, no other maker could have had a note or an oral agreement or an agreement of any kind of the type that Mr. Dondero has. So yet another reason why it fails to meet the burden, they fail to meet the burden under Rule 26. Nobody could have ever had the same note forgiven or agreement, because the condition subsequent hasn't been met yet.

THE COURT'S RULING ON THE MOTION TO COMPEL

THE COURT: All right. Well, I'm going to deny the motion to compel. I don't think that the burden has been met to establish the relevance of these, I guess it's — one, two, three, four, five — six topics that are now at issue, topics 9, 14 through 17, or 20, and, you know, I don't think the proportionality standard is met here.

I do think it would be not proportionate to the needs of the case for the CEO, who came in place in 2020, postpetition, two years after these notes were executed, to have to go do research about any loans made by Highland to any officers and employees over the years and, you know, I don't know who he's going to question, what policy he is going to look into that might be some substance or evidence as to oral agreements or forgiveness. I don't think he should have any obligation to search files and interview people to figure out what the affirmative defenses and Mr. Dondero are all about or

based in. And, again, no one would have better information about his own compensation than Mr. Dondero himself.

I mean I want to stress that this comes against a backdrop of — well, it seems like some antagonism, to say the least, on the part of Mr. Dondero where Mr. Seery's concerned. It seems like it's always a fight with Mr. Seery. And you say, well, we didn't handpick him as the 30(b)(6) witness, but, you know, the motion to compel names him by name. It just — it feels like another antagonistic move.

You've got him for a deposition next Monday on 13 or so different topics. I think it is appropriate to draw the line on these six or so topics that again just don't seem relevant or proportional to the needs of the case.

All right. So, Mr. Morris, would you please upload just a simple order reflecting the Court's ruling?

MR. MORRIS: I would be happy to, Your Honor.

THE COURT: Okay. Actually I'm going to ask Mr. Aigen to do it. I'm sorry. I need to be thinking about attorney's fees and who should bear the costs of what.

So, Mr. Aigen, would you please electronically submit an order?

MR. AIGEN: Yes.

THE COURT: All right. Thank you.

All right. Well, if there's nothing else on this particular adversary, let me just double check. Any

housekeeping matters before I move onto the other adversary?

MR. AIGEN: Not from the debtor, Your Honor.

MR. CLUBOK: Your Honor, —

THE COURT: All right.

MR. CLUBOK: I don't know if you're about to move on. Your Honor, can you hear me?

THE COURT: I'm sorry, Mr. Clubok?

MR. CLUBOK: Your Honor, —

THE COURT: Were you weighing in on —

MR. CLUBOK: Yeah, I'm — I'm sorry. It's not about that proceeding, but are you about to move on beyond — beyond the Highland matters?

THE COURT: No, no, no.

MR. CLUBOK: There was another Highland matter —

THE COURT: I was next — I was next going to go to the other adversary, the dispute between the committee and seven or so defendants. And, yes, I know we have UBS I guess all day tomorrow unless anything has changed. So we'll — we'll hear before we're done any previews about tomorrow.

All right, so moving on —

MR. CLUBOK: Thank you.

THE COURT: — the Committee versus CLO Holdco, 20-3195. We have a committee motion to basically stay the adversary proceeding for 90 days. So I will get lawyer appearances on that.

Who do we have appearing for the committee, the movant?

MS. MONTGOMERY: Yes, Your Honor. Paige Montgomery for the committee.

THE COURT: All right. And for the defendants, who do we have appearing?

MR. PHILLIPS: Good morning, Your Honor. Louis M. Phillips on behalf of Highland Dallas Foundation and CLO Holdco Ltd., along with my associate Amelia Hurt.

THE COURT: All right. I saw your —

MR. DRAPER: Good morning, Your —

THE COURT: — pleading filed at 9:00 something last night.

Any other defendant appearances?

MR. KANE: Yes, Your Honor, —

MR. DRAPER: Yes, Your Honor. Douglas Draper on behalf of the Dugaboy Investment Trust —

THE COURT: All right. Thank you.

MR. DRAPER: — and Get Good.

THE COURT: Oh, okay. Thank you.

Other appearances?

MR. KANE: Yes, Your Honor. John Kane on behalf of Grant James Scott, III.

THE COURT: Okay. Mr. Kane, your volume was very low. You're — you're Mr. Scott's counsel as trustee for these trusts?

MR. KANE: In — in a sense, Your Honor, and in his individual capacity. I no longer represent CLO Holdco.

THE COURT: Okay. I don't know if you got that at all, Michael. It was so faint.

THE REPORTER: Yeah, I got a little of it, but it —

THE COURT: Okay. you're no longer representing CLO Holdco, Ltd., but you're representing Grant Scott in his trustee capacity for these two trusts?

MR. KANE: Your Honor, Grant Scott is no longer the acting director or trustee of CLO Holdco, but he was a named defendant in this action based on his time as trustee or director of CLO Holdco, and I represent him in that capacity.

THE COURT: Okay. Any other defendant appearances?

MR. ASSINK: Good morning, Your Honor. This is Bryan Assink for Mr. Dondero.

THE COURT: Okay. Any other appearances?

All right. Well, Ms. Montgomery, you may make your argument.

MS. MONTGOMERY: Thank you, Your Honor. And thank you for taking the time to consider our motion so quickly.

I'd like to just briefly address how we plan to proceed today. To make more time, we'd like to give a brief opening statement. I'm not sure who among the defendants intends to be heard specifically today in opening, but at the conclusion of that we would like to proceed to testimony. We

have Mr. Kirschner, who you can see on the screen, Your Honor, and he's here today. We plan, for efficiency sake, to put him on by proffer to the extent that that is acceptable to the Court. And then he will be available to answer any questions that the Court or the defendants may have.

THE COURT: All right.

MS. MONTGOMERY: As you can see in our motion, we're requesting a 90-day stay of the adversary proceeding. And the purpose for that stay is to allow Mr. Kirschner and his firm, Teneo, the time they need to get up to speed on this case.

Stepping back for a moment, it was always the committee's intention have these claims prosecuted by the ultimate litigation trustee. However, due to a disagreement about certain funds that are held in the Court's registry, the clock started ticking on the committee's time to bring this adversary proceeding. So but for the order that the committee commenced an adversary proceeding by a date certain, this action would have been brought at a later time by a litigation trustee post effective date as part of a comprehensive litigation strategy related to all estate claims.

For a variety of reasons the effective date of the plan has been repeatedly delayed, which has necessarily delayed the formation of the litigation subtrust. We're coming up on two years since the filing of the bankruptcy proceeding and there's limited time available for the trust to be formed and

the trustee to develop a comprehensive litigation strategy.

As the Court may have noted, as we are wrapping things up, two of our four committee members have also recently retired/withdrawn from the committee. So as a result last Friday, the committee filed an application —

THE COURT: Just inquiring minds want to know. I mean did they — did they by chance sell their claims or they just were tired of the committee role?

MR. CLEMENTE: Your Honor, if I may? It's Matt Clemente. I'll just jump in on that, Your Honor, —

THE COURT: Um-hum.

MR. CLEMENTE: — very quickly. I don't know how anybody could be tired of being on the committee, but the answer is, Your Honor, that they both sold their claims and claim-transfer notices have been placed on the docket. The United States Trustee is aware and the trustee's position at this point is to keep the committee at the two members, which are Meta E and UBS, as we continue forward here through the case and hopefully to an effective date in the near future.

THE COURT: All right. Thank you.

All right. Ms. Montgomery, continue.

MS. MONTGOMERY: Thank you, Your Honor.

So as a result, last Friday the committee filed an application to retain Mr. Kirschner and his firm as litigation advisor to the committee until the plan goes effective and the

litigation subtrust is formed. At that point Mr. Kirschner will become the litigation trustee under the plan and he'll be responsible for all claims brought seeking recovery on behalf of the estate. So obviously under the terms of the plan, our client, the committee, will cease to exist at that point and responsibility for the adversary proceeding that we're currently being heard in will pass to the litigation trustee. And there will be a new oversight committee, which has not been formed yet either as of the effective date.

So because this adversary proceeding will transfer to the litigation subtrust upon the effective date of the plan, it's imperative that Mr. Kirschner be involved in the prosecution of the adversary proceeding immediately and the development of legal strategy for all of the estate claims as a whole. For a number of reasons, the 90-day stay of the adversary proceeding will provide Mr. Kirschner with the necessary time he needs to get up to speed.

Mr. Kirschner needs to familiarize himself with the Byzantine structure of the debtor and the relationships among the debtor and its thousands of related entities and insiders. The corporate structure, as you have noted on several occasions, is highly complicated. And the ownership and beneficial ownership of entities is confusing enough even before you consider the variety of transfers of estate assets between and among those entities — entities. We've heard these

relationships described as tentacles. I tend to think of them as a web, and the allegations of this adversary proceeding represent only a small section of strands.

Mr. Kirschner also needs time to familiarize himself with the pending motions to withdraw the reference and the motions to dismiss, and to develop the strategy which could significantly change the trajectory of the adversary proceeding and future adversary proceedings. Mr. Kirschner's decisions regarding how to respond to these motions may change the course of the litigation in ways that are material to the pending motions. For example, he could determine to amend the complaint or he could bring additional claims that the committee does not have standing to bring on its own. For example, breach of fiduciary duty. Importantly, there could be arguments surrounding the motion to withdraw the reference and have impacts on the other actions that may be brought by Mr. Kirschner in his role as litigation trustee.

The strategy surrounding plaintiff's response to the motion to withdraw the reference may also depend on facts that have not yet been developed. Mr. Kirschner should be given at least some time to develop that strategy.

It's also worth noting that the notice period on Mr. Kirschner's retention application does not end until June 7th, which is after the current hearing date for the motions to withdraw the reference, which are set for June 3rd. Given his

proposed role as litigation advisor and his future role as litigation trustee, he will be responsible for this adversary proceeding, he should be involved in the strategy to oppose the motions to withdraw the reference.

As you know, Your Honor, the Highland entities have an extremely complex structure involving obscure relationships and ownership structures. Mr. Kirschner not only has to get up to speed with those facts, but he also needs to wrap his hands around the transfer of information obtained from both the debtor and the committee over the course of these proceedings. So this adversary proceeding is just one part of the complexity that is the estate claims, but it's an important part and he should have time to ensure that he's proceeding in the most efficient way and in the way that's best for the debtor's estate.

In addition to needing to get up to speed on the facts giving rise to this case, Mr. Kirschner is also — will be working on a comprehensive strategy for all estate claims. As pointed out in the response that was filed last night, since he is familiar with the adversary proceeding, obviously, we filed it, and we did so after tedious review of thousands of documents, and it took us months to put together a picture of the transactions that are underlying the complaint, and those months were after we had been actively involved in these proceedings for over a year, so it's a very complicated — there's some pretty complicated stuff going on there.

We also believe that we provide competent representation, which is at least tangentially challenged in that response, but we're the lawyers that represent the committee. We're not the party that's responsible for the decisions of the underlying management of the litigation. Obviously lawyers take direction from their clients and ours as of the effective date will no longer exist, and Mr. Kirschner will be the person who's responsible for making those decisions.

So to put it slightly differently, we may be driving the car but we're not deciding, you know, where the car is going. That's the client's decision.

I am at least somewhat offended by opposing counsel's implication that the motion to stay was brought in bad faith because it smelled that there might be some litigation advantage. All I can do in response to that, Your Honor, is assure the Court that the stay is not being sought for such a purpose. To the extent that there's any gamesmanship occurring in these proceedings, it's not us that's engaging in it.

Mr. Kirschner is entitled to gain his own understanding of the issues underlying this adversary and of the litigation landscape as a whole, and to have an orderly transition of responsibilities from the committee, the debtor, and counsel for both before he's asked to make important strategic decisions that could have long-lasting implications on his work.

In short, Your Honor, there is no rush to have the pending motions heard and no prejudice to defendants by a stay of proceedings. As they point out in their response, the Court has delayed the hearing on the motion to dismiss until after consideration on the motion to withdraw the reference. Additionally, as they make clear in their response, discovery is not underway at this point. We still haven't effectuated service as to all defendants. We have some defendants that are foreign entities and we're still working through the service of process. We're not entirely sure how much longer that's going to take, but it has proven to be a lengthy process to date, and we don't really have an estimated time for when that will be done. So, if anything, there is an ideal time for a pause on proceedings that won't prejudice any party.

The only purported harm our opponents have identified is the delay itself, and I have to admit, Your Honor, that this is the first time I've ever heard a defendant argue that they're prejudiced by litigation against them not proceeding. In fact, we reviewed the cases that are cited in the response that purport to support a right of good — to a determination of rights and liabilities without undue delay. Unsurprisingly, both involve instances of a defendant seeking to delay prosecution of a plaintiff's case rather than the reverse, as we see here. And in those cases, the stays that were sought were either indefinite or extremely long. They were not a brief

90-day extension of the sort recognize requested here. There's simply no prejudice to the defendant in the adversary by staying the proceeding for 90 days.

On the other hand, the 90-day stay of the adversary proceeding will provide Mr. Kirschner with the time that he needs to develop an understanding of this adversary proceeding and the litigation strategy as a whole. And moving forward without the stay may very well prejudice the future litigation subtrust and harm the debtor's estate.

That's all I have for now, Your Honor.

THE COURT: All right. A couple of questions. You said there's been no service on certain defendants, and I know that certain of these defendants are said to be Cayman Island entities, these various Charitable — Charitable Daf (phonetic), maybe CLO Holdco Ltd, Charitable Daf Fund, those three in particular, right, right foreign entities? Okay, so they have gone —

MS. MONTGOMERY: Yes, Your Honor.

THE COURT: — they have not — those are the three, I presume, that have not been served?

MS. MONTGOMERY: CLO Holdco has been served, the others have not.

THE COURT: Okay, okay. Thank you. I'm sorry, I'm getting a little mixed up. So there's been money in the registry of the Court and I remember that was why early on I

sort of created a quick time table for you all getting this filed. How much money is still in the registry of the Court? I remember there were agreed orders that some of it could be paid over, I think, to Mr. Rocatta (phonetic). I can't remember who — who all. But is there still a substantial fund in the registry of the Court without me going online and looking that up?

MS. MONTGOMERY: I'm going to have to look and get the exact numbers as well, Your Honor, but it's the portion of the moneys that were purportedly payable to CLO Holdco are still in the Court's registry.

THE COURT: Okay. So it's just that defendant's funds. And am I also correct that now the debtor ultimately has a majority interest in CLO Holdco, the debtor itself, because of that Harbor Vest (phonetic) settlement?

MR. PHILLIPS: No, Your Honor.

THE COURT: Oh, that's not right?

MR. PHILLIPS: I don't think so, no.

MR. KANE: Your Honor, this is John Kane. I can actually provide some clarity on that. The Harbor Vest acquisition by the debtor's affiliate relates to HCLOF, Highland CLO Funding, not CLO Holdco. CLO Holdco is the 49-percent interest owner in HCLOF.

THE COURT: Okay.

MR. DEMO: And this is Greg Demo, Your Honor, from the

debtor. I can confirm what Mr. Kane just said.

THE COURT: Okay, okay. So CLO Holdco is just strictly in that line of the Charitable Daf and as far as who owns — who owns it —

MS. MONTGOMERY: That is — that's my understanding, Your Honor.

THE COURT: Okay, okay, so I — once again I have flipped the organizational structure.

All right. And then my last question for you, Ms. Montgomery, is the effective date of the plan has not occurred. There's obviously an appeal now at the Fifth Circuit, a direct appeal of the confirmation order. Is there still a stay pending appeal — a motion for a stay pending appeal pending out there either at the District Court or Fifth Circuit, or have those been ruled on one way or the other?

MS. MONTGOMERY: Mr. Demo, could you — were you popping on to answer that question?

MR. DEMO: Yes, Ms. Montgomery.

This is Greg Demo, Your Honor, from Highland Capital Management. We still intend to try to go effective after the hearing on the exit financing, which has been postponed until June 25th. That's counsel to NexPoint Advisors, and counsel to Highland Capital Management Fund Advisors filed a motion last night with the Fifth Circuit seeking a further stay of the — of the effective date, pending the resolution of their appeal. So

we don't know how that's going to shake out, but the debtor does anticipate trying to go effective following June 25th.

THE COURT: All right. So has there been a stay of the confirmation order?

MR. DEMO: We've agreed to a short administrative stay —

THE COURT: Okay.

MR. DEMO: — as all this stuff has been going on. I believe the administrative stay — actually I can't remember when it expires, but we have agreed to a short administrative stay.

THE COURT: Okay. And so it's —

MR. DRAPER: Your Honor, this is Douglas Draper.

THE COURT: Okay, go ahead.

MR. DRAPER: Just to give the Court some background, —

THE COURT: Go ahead.

MR. DRAPER: — there were two — you denied the stay pending appeal. There were two appeals taken from your ruling. One by myself on behalf of Dugaboy and one by Devor (phonetic) on behalf of other entities. They both went up to Judge Godbey. He has never ruled on the stays pending appeal. So what was done is inasmuch as the motion — the appeal of the confirmation order is up in the Fifth Circuit, last night Devor filed a motion for a stay pending appeal in the Fifth Circuit, and that's pending. So that's the procedural background of what's gone on.

THE COURT: All right. Thank you, Mr. Draper.

All right. Well, I'll hear opening statements from our defendants. And I ask you please not to be duplicative of each other. So who wants to go first for the defendants?

MR. PHILLIPS: Your Honor, Louis M. Phillips on behalf of Highland Dallas Foundation and CLO Holdco Ltd. We filed a response in opposition to the motion to stay. And we are the ones who, my firm and I, and I'm the one that filed, that sent messages across to counsel for the committee in response to the request for consent or notice of opposition. So I guess since we filed the response we ought to go forward.

We have reviewed the — we laid out a time line in our response. We've laid out communications between counsel and our response. We laid out what we think the burden is. And we've laid out the case law that we think establishes the burden for a stay.

What we are concerned about is the — first of all, the 90-day stay, it might even come around as far as further activity in the lawsuit because we don't know what the Court would do on June 3rd. We know that the Local Rules require that — or set forth that the Court will issue a report after the conference on June 3rd about — to the District Court concerning the motion to withdraw reference. We filed a motion to withdraw reference. We filed a first response to the litigation, A, a motion to withdraw reference; and, B, a motion to dismiss under

Rule 12(b)(6) and a motion for a more definite statement as well. Both our filings were followed by other defendants who sought withdrawal of the reference and also dismissal.

This Court has pushed aside the motion to dismiss pending resolution of the — of the motion to withdraw reference, which we think is entirely appropriate and we're fine with, so where we are, Your Honor, —

THE COURT: And let me — let me just interject there. That is always 100 percent of the time my practice, and I think the other bankruptcy judges here. It's out of deference to the District Court. If the District Court ends up withdrawing the reference, they may want to say, 'I want to withdraw the whole darn thing. We don't even want you doing pretrial matters,' so we don't want to get ahead of them by considering a pretrial matter. So I did what I do in every case and will take the next steps —

MR. PHILLIPS: And we agree a hundred percent with that approach, Your Honor. We didn't really know how we were going to proceed on the motions to dismiss. But we had deadlines to filing and we got very brief extensions for one of our clients to file a response to the complaint after service. On the other client, we didn't get any extension to file a response. So we filed timely responses and we didn't know how the Court was going to handle the motion to dismiss. And the way the Court just handled them is entirely what we — we agreed

that that was the way to do it, because the District Court has several alternatives if it determines to withdraw the reference. And we know the courts, we've looked at the Court's Local Rule. We just don't know how long, and we have no control and we're fine with having no control over how long the Court would — would have to take, given its docket, to issue its report to the District Court. And we have no control over what the District Court would do.

Our problem with the motion for a stay is that we know that the only things really pending now are motions to withdraw reference. Those are subject to being brought before Your Honor at either kind of a hearing/conference where the parties will put forth their legal arguments and any evidence, but the evidence will basically be the nature of a litigation and the situation of the docket. So there's no real factual issues in dispute. We have a lawsuit, we have a motion to withdraw reference that's been briefed. We grant an extension of the response deadline to May 21st in connection with the request by counsel. And we purposely asked the Court for the June 3rd date, all with agreement of all counsel. And then two days we get the emergency motion — or last night, yesterday we get the emergency motion to stay when the litigation assistant was, in fact, retained on the day or two after we filed our responses. And there was no mention in any way, shape, or form of a need to stay at that time.

So we have one thing pending: Motions to withdraw the reference. We have reviewed and set forth in our response the scope of services for which Teneo was being retained. It does look to us like it is — it looks like litigation support and litigation analysis.

And I hear what counsel for the plaintiff is saying, but there have been — she's — we agree that there has been months and months and months of analysis, there have been millions and millions and millions of dollars spent on U.S. — UCC counsel fees. They have gone through thousands and thousands of documents. They came up with this piece of litigation. This is the one I know about. This is the one pending before the Court. And there might be — there is a suggestion that there is an overarching litigation strategy being employed, but this is what we have right here. And that's speculation that we have no idea about and we assume the Court has no idea about.

So we have one thing that we want decided and it's easy for a plaintiff to say — and, look, we're chastised for being defendants who want to move the lawsuit. One of our clients didn't even ask for an extension of the deadline to respond. We have — we asked for one extension for one of clients. And that extension dovetailed into the response date for the other client so that we could file a single response for both clients. That was granted. We appreciate that. And when

the committee asked for an additional time, we granted it with the proviso that we get the June 3rd date so that if we need to file a reply, we'd have three or four days to file the reply.

We have been — we have not been the ones asking for any delay and we're not going to ask for any delay. And so I don't care what other cases say, I don't care what the plaintiff's lawyer says about defendants always want to delay. We're not asking for any kind of delay. We want to move forward. And we think we have the right to figure out and find out what court is going to be handling our litigation. That's what we're asking for.

We've already said in the communications that we've listed on our witness and exhibit list that we'll be more than happy to talk about some type of stay about motions — you know, discovery, whatever, whatever, if there — if the litigation advisor needs to get up to speed on what documents are out there, what documents it would have to review, that's fine. We're probably going to do some discovery. But we're only going to discovery if our motion to dismiss under 12(b) are not granted, because if they are there doesn't need to be any litigation advice or any analysis about alternatives or objectives or overarching strategy to deal with the motion to dismiss under Rule 12(b). That's a legal issue. And the counsel is very adept — we say counsel's adept. We know they're adept. That's why we know that they are ready to proceed in

response to our motion to withdraw reference.

And then if the District Court takes it after Your Honor gives her report, then we'll bring the motions, we'll get with the lawyers for the plaintiff and we'll make — bring our motion to dismiss before the District Court on some kind of agreed schedule, but those are legal issues. There is no advice needed for a motion to withdraw reference. There's no advice needed for a motion to dismiss under 12(b). Those are legal questions and — and the idea that Sidley and Austin needs assistance from an advisor as to how to approach a legal issue, we don't think is meritorious.

So, Your Honor, we have put — we have a witness and exhibit list of six documents. One is — Document 1 is the application to employ the Teneo firm. 2 is the — 2, 3, 4, 5, and 6 are email communications we have provided them. They are between counsel that are before the Court here today, just to show that we granted extension for them to respond, then they ask, and we responded, and so that they were on notice that we opposed the requested stay. And we would like for the motion to withdraw reference to go forward.

The parties will have plenty of time to work out discovery, Rule 26 issues, motion for relief — motion to dismiss under 12(b) in front of whichever court is going to handle it. Certainly this Court is — if the motion to withdraw reference is denied, this Court will be in full control of when we have

hearings on the motion to dismiss. And we understand that. So will the District Court if the District Court grants the motion to withdraw the reference. The District Court will determine hearings on the motion to dismiss under Rule 12(b). And then we have those two things to get past. And those are legal questions, legal questions that are already before the Court or already there. So we don't see how additional time is necessary with respect to that.

We think by the time the stay — quote stay expires we'll have a determination at least on the withdrawal motions. And we can probably have a setting on the dismissal motions. And if there — if the plaintiffs survive dismissal, then we'll have discovery that all litigants will be involved in and agreeing to and with scheduling orders, et cetera, from whatever court is going to try this case.

And I'd like to say also that once we have — CLO Holdco has been involved in the bankruptcy case. We recognize that. I was not the lawyer for CLO Holdco, but I'm representing CLO Holdco now. The Highland Dallas Foundation has not been. And the Highland Dallas Foundation is a charitable organization that has institutional people on the board, has one donor seat on the board, but it's — it's being sued for twenty something million dollars. And the idea that it has no interest in getting this resolved is not correct. It wants to get it resolved and that's why we're opposing this stay. Thank you,

Your Honor.

THE COURT: All right. A couple of follow-up questions. I'm struggling a bit with the fact that we have a couple of defendants, two or three defendants that have not even been served yet. So is it appropriate for this Court to be going forward on a motion to withdraw the reference when I don't know what's going to happen with those two defendants. Are they going to be served? If so, what sort of position are they going to have with regard to the reference being withdrawn?

And, in any event, ultimately I'm going to have to slice and dice this in a report to the District Court saying, you know, these entities filed proofs of claim and that may affect the authority of the Court, you know, maybe it does. I mean a part of me thinks what's going on here and should we just wait till they have been served so we have the ability to report to the District Court: Here is every defendants' position on this.

MR. PHILLIPS: Your Honor, I can't answer the question. I don't — I mean it seems to me like we have — we have — CLO Holdco was served. And it is a foreign entity. We don't know why the other two have not been served. I'm not — we just don't know. So I mean does that mean if we — I mean we had to go forward, we had to answer, we had to respond. We had a deadline to do it. It didn't matter that two hadn't been served. And so we — you know, if we hadn't responded, given our

service, we would have had a default entered against us and a request for a default judgment. So I don't know the answer to the question because I can't imagine that a plaintiff can file a lawsuit and then the lawsuit was filed months ago and not serve two people and keep the defendants hung up.

I don't know if there is a problem of service. There was one entity that got served that is a foreign entity. I don't know why the other ones haven't been served. The Highland Dallas Foundation was served. The other parties who have appeared were served. So we have no control over that because we're not serving anybody. And I would think that the part — I did some looking in the — in the record and it seems to me like we don't have — you know, I can't tell you whether we have — what the arguments would be for the parties who have not been served.

I would assume given that everybody has — my two clients have filed what they filed. CLO Holdco filed a proof of claim, but it was in effect disallowed and converted to a claim for zero. My other client, Highland Dallas Foundation, has not made any appearance in this case. So all I can say is we think two — I think the two clients that I'm currently representing, we know they have been served. We had a deadline to respond. We have responded. And we think we're entitled to a jury trial and withdrawal of the reference.

MS. MONTGOMERY: Your Honor, if I can answer the

question. CLO Holdco was served through its counsel, whereas the other two foreign entities require domestication of the subpoena in the Caymans. And it's our understanding that may take as long as — just having heard — as another two months for that process to be complete.

THE COURT: All right. My other question I guess is maybe more rhetorical than something you could really answer. I — you know — on the one hand, you know, what Ms. Montgomery is arguing: Our true plaintiff contemplated for this lawsuit isn't in place yet because the plan hadn't gone effective and, you know, some — some of the defendants here or affiliates of defendants are wanting to delay, delay, delay further when the plan can go effective. You know last night a motion for stay pending appeal with the Fifth Circuit was filed. So it's like, no, don't let the plan go forward, let's not get Mr. Kirschner in place. But, oh, don't issue a stay on this lawsuit. It just feels a little bit inconsistent, the two positions. What — do you have anything to say to that?

MR. PHILLIPS: I have — all I have to say, all I can say, Your Honor, and that is CLO Holdco, as I understand it, is not an appealing party. My other client that's been served, Highland Dallas Foundation, is not an appealing party. We're a defendant in — in this lawsuit. And so we don't see — we're not in a position to be inconsistent about anything. We're not an appellant. We're not seeking any kind of relief on appeal. And

we — but we are defendants who have been served and who have filed motions to withdraw reference. So you will have to ask other people about that. I'm completely consistent in my position.

MR. DRAPER: Your Honor, this is Douglas Draper on behalf of Dugaboy, who has both —

THE COURT: All right.

MR. DRAPER: — appealed your decision —

THE COURT: Okay.

MR. DRAPER: — and has asked for a stay pending appeal.

THE COURT: Okay.

MR. DRAPER: It's not an inconsistent position because two reasons. Number one, you gave the committee authority to file this suit. The committee took that authority and filed the suit within the time period. So whether the case is going forward or — the stay — the case is stayed and the confirmation order is stayed or not, this action and this entity and this proceeding is going to go forward.

And so all we're talking about here, just so we — it's all clear, we're just talking about who is going to try this suit. We're not talking about a master litigation strategy. We're talking about a location. And, quite frankly, it would surprise the hell out of me if — if the new person, or whoever, says, look, I want to go to the District Court.

This is just a location issue, nothing more. You can sift through each one of these defendants who have been served as to whether we have a right to a jury trial or not. And each one, as the Court recognized, is on a — on a defendant-by-defendant basis. I did file a proof of claim. Whether I have a right to a jury trial, you're going to have to look at to see if in fact my proof of claim relates to this claim.

Mr. — Mr. Phillips is a defendant set of facts. And these other defendants may be a different set of facts. So all we're talking about is location. It is purely procedural. And I don't think the stay at the district — of the confirmation order or not is — is in any way impacts this whatsoever. This is a location question.

THE COURT: All right. Any other opening statements from defendants?

All right. Ms. Montgomery, you may put on your witness. And I'm fine with the proffer, but we'll then swear him in and see if there cross-examination from the others. All right, you may proceed.

MS. MONTGOMERY: Yes, Your Honor. At this point we'd like to proffer Mr. Kirschner's declaration that was submitted in support of our motion for the stay as the content of his proposed testimony. Mr. Kirschner is obviously here to answer any questions you have or on cross-examination after he's been sworn in. And, Your Honor, we would just reserve our right to a

brief redirect should that prove necessary.

THE COURT: All right. So I have in front of me the Declaration of Marc S. Kirschner. It was actually attached to the committee's motion for stay. It's about four pages long.

Let me ask: Are there lawyers who are going to want to cross-examine Mr. Kirschner?

Going once, going twice, no one wishes to cross-examine him?

THE REPORTER: He's on mute.

THE COURT: Oh, Mr. Phillips, —

MR. PHILLIPS: Your Honor, I'm sorry. I was on mute. I'm on mute, as I probably already muted, but I was on mute and I apologize.

Your Honor, this — this is — this declaration, there's no way to cross-examine a declaration that speaks in conclusory language. The declaration, it was mimicked and mirrors — mirrors exactly as the party looking into the mirror, not as the reverse of the party looking into the mirror, argument by — opening statement by counsel. I would ask a couple of questions of Mr. Kirschner, please.

THE COURT: All right. Mr. Kirschner, I need to swear you in. Would you speak up, say, "testing one, two."

MR. KIRSCHNER: Yes. Testing one, two.

THE COURT: All right.

MR. KIRSCHNER: Coming through?

THE COURT: I — I hear you, I don't see —

MR. KIRSCHNER: Okay.

THE COURT: There you are. Please raise your right hand.

MR. KIRSCHNER: I can.

MARC S. KIRSCHNER, COMMITTEE'S WITNESS, SWORN/AFFIRMED

THE WITNESS: I do.

THE COURT: All right. Thank you.

Mr. Phillips, go ahead.

MR. PHILLIPS: Yes, Your Honor. Thank you. Just a couple of questions.

CROSS-EXAMINATION

BY MR. PHILLIPS:

Q. Mr. Kirschner, in paragraph 7 of your declaration, if you could find it. Just let me know when you're there.

A. I'm there. Thank you.

Q. Okay. Thanks. You say that it's important for your firm to gain an understanding of the complex transactions described in the adversary proceeding, particularly in connection with the motion to dismiss and motions to withdraw reference and complex issues before the Court. What does that mean?

A. That means that, as Ms. Paige indicated in her opening statement and as the Court and all the defendants understand, I was — when I was designated as litigation trustee in January, there has been delay after delay after delay in the effective

date of the plan, and now we're even at the Fifth Circuit, so the trust and my role as subtrustee has not yet gone into effect. Prior to April 15th, I had no access to the debtor, to the committee, or any of the attorneys, no access through any protected information. I had no input on the complaint.

I became worried as the passage of time went on about the possible running of statute of limitations later on this year in October. And it was I who suggested to Mr. Clemente to come up with what is an extremely unusual procedure, to permit the committee retain me on an interim basis until the effectiveness of the trust, and then to flip my work effectively into the trust.

This is very unusual. It's not even yet approved by the Court. Nevertheless, I and my firm have worked very diligently since April 15th to get up to speed on this entire complex factual and legal situation. I cannot just look at the Holdco adversary in a vacuum.

There has been as the Court and all the parties here know much better than I, there has been ongoing litigation on many fronts for quite a long time. There has been supplied a Byzantine web of some 1400 entities —

MR. PHILLIPS: Your Honor, Your Honor, —

THE WITNESS: — to accomplish —

MR. PHILLIPS: Your Honor, could I interrupt? He needs to answer the question.

BY MR. PHILLIPS:

Q. What does — what does — what does the understanding about the motion to withdraw reference mean? What do you need to get up to date on the motion to withdraw reference?

A. I'm responding to your question.

THE WITNESS: If I may, Your Honor, I'm responding to the question. I'm almost done —

MR. PHILLIPS: Your Honor, a narrative, a preexisting narrative —

THE COURT: Ah, —

MR. PHILLIPS: We just — I just want to know. We have legal issues.

THE COURT: Okay, I sustain the objection —

MR. PHILLIPS: I want to know what he —

THE COURT: If you could reask the question and we'll see if we can get an answer —

MR. PHILLIPS: All right. I'll reask the question, Your Honor. I'm sorry. I apologize.

Your Honor, I'm going to withdraw any questions. I'm — this is — this is going to turn into just an argument. His declaration and conclusory and it's just going to be more conclusion. So I'm — I'm willing to argue from his declaration in closing.

THE COURT: All right. Any other questions?

No other —

MR. DRAPER: None, Your Honor, from Dugaboy.

THE COURT: Okay. Anyone else?

Ms. Montgomery, do you have any redirect on that brief cross?

REDIRECT EXAMINATION

MS. MONTGOMERY: Yes. I think, Your Honor, I would just ask if there is anything else that Mr. Kirschner feels the Court should be aware of before reaching a decision on today's — on today's motion?

MR. PHILLIPS: Your Honor, we object to that question. That's not even a question.

THE COURT: I overrule. He can answer.

THE WITNESS: Okay. Thank you very much, Your Honor.

As I was saying, there is a Byzantine web here of over 1400 entities, many moving intertwined parts. I have literally and my firm has literally had to triage the monumental amount of work that is necessary to get my hands on this overall situation. There's allegations that money's been flying all over the world —

MR. PHILLIPS: Your Honor, this is not — this is not appropriate testimony. This is — that's hearsay. There's allegations all — money flowing all over the world. This is — this is a narrative that has nothing to do with the pending motion to withdraw reference and is, in essence, an assassination piece. This is — what we —

THE COURT: I overrule. He's trying to explain why he needs 90 days at bottom here, so I think it's relevant.

MR. PHILLIPS: Well, the long —

THE COURT: And I understand everything's an allegation subject to evidence.

MR. PHILLIPS: Well, we're talking about allegations, —

MR. [SPEAKER]: Right.

MR. PHILLIPS: — we're talking about — we just heard they're allegations about money flying all over the world. That's not an acceptable testimony. You know that and everybody on this call knows that. That's absolute abject hearsay and the idea that you could — you could buttress a motion for stay after you've had 30 days to review a legal analysis about a motion to withdraw reference, because there are allegations of money flowing all over the world is ridiculous. Your Honor, we — we firmly and in this way object —

THE COURT: Overruled. I understand you don't like the emotional, if you want to call it, emotional language. You think it's hyperbole, you think it's hearsay, but he didn't — he didn't offer an out-of-court statement. He's just saying the allegations — you know, they're in pleadings, they're allegations in many different adversaries, and so I overrule the objection.

You can complete your answer, Mr. Kirschner.

THE WITNESS: Thank you very much, Your Honor.

All of these complexities in my view potentially impact on the motions to withdraw. I recently realized that I cannot properly perform my fiduciary duty to all creditors by the deadline for a response to the motion to withdraw and the motions to dismiss. I am in fact considering potential amendments to the existing Holdco adversary to possibly other issues that may impact the withdrawal motion.

Your Honor said this morning that it's important to take into consideration both procedural and substantive matters. I am worried about potential impacts of whatever I do. And bear in mind, as Ms. Paige indicated, I am — (brief garbled audio) — no process plan. All of this was supposed to have been put in the litigation trust under my auspices. I am now litigation advisor, not yet approved by the Court. It is the client, I, who direct, after consultation, all strategy by lawyers.

I have a long history, as Your Honor has seen from my C.V., of directing complex billions of dollars of litigations. I rely on lawyers, but I am very involved in every aspect of the case. This is very confusing, not just the CLO Holdco itself but the entire complexity of all of the potential matters here that I need to study in a very short period of time. I'm concerned that dealing just with this in this couple of days is going to be harmful to creditors ultimately and respectfully request the Court to grant the 90-days adjournment.

Maybe I'm being overly cautious and I apologize for that, but I feel strongly about my fiduciary duty and want to do the best I can to understand everything that's going on before we have to respond both to the withdrawal motion and the motion to dismiss. So thank you, Your Honor.

THE COURT: Thank you.

Anything else, Ms. Montgomery, as far as examination?

MS. MONTGOMERY: No, Your Honor. I have no further questions.

THE COURT: All right. Mr. Phillips, or anyone else, any recross on that redirect?

No? All right. Thank you.

All right. This —

MR. PHILLIPS: No, Your Honor. I muted myself again. No, Your Honor.

THE COURT: Okay. Is that all of the evidence you're going to present, Ms. Montgomery?

MS. MONTGOMERY: It is, Your Honor.

THE COURT: All right. Well, I'll turn to our objectors —

MR. PHILLIPS: We —

THE COURT: I'm sorry?

MR. PHILLIPS: We'd like the enter and offer — we'd like to offer and introduce our exhibits that we put on our witness and exhibit list, Your Honor.

THE COURT: Okay.

MR. PHILLIPS: And we've submitted them to the Court, Exhibit 1 through 6, as itemized in our witness and exhibit list.

THE COURT: All right. This is Docket Number 52 in the adversary, correct?

MR. PHILLIPS: Yes. Yes, ma'am.

THE COURT: All right. So let me pull it up here. Okay, we've got the application to employ Teneo and different emails.

Any objection, Ms. Montgomery, to this?

MS. MONTGOMERY: I have no objection to Exhibit 1, Your Honor, the application, and obviously it's a pleading that we filed. I have questions about the relevance of the other exhibits, but I have no objection to their admission. They're emails that went back and forth between the parties.

THE COURT: All right. Well, do you want to address that relevance? I'm not sure if it was an objection or — was it an objection ultimately? Was it —

MR. PHILLIPS: I didn't hear an objection, Your Honor.

THE COURT: Ms. Montgomery.

MS. MONTGOMERY: Your Honor, for purposes of today's hearing, I have — I have no concerns about their admission for your consideration.

THE COURT: Oh, okay, so —

MS. MONTGOMERY: We're not contesting the history of the back-and-forth between the parties.

THE COURT: Okay. I will admit 1 through 6.

(Defendants' Exhibits 1 through 6 received in evidence.)

THE COURT: All right. Any — any other evidence from our defendants?

MR. PHILLIPS: No, Your Honor.

THE COURT: All right. Well, anything in the way of closing argument? Ms. Montgomery, you are the movant. You go first.

MS. MONTGOMERY: Yes, Your Honor, just very briefly to address a couple of points. First of all, I think that there's been some sort of misconstruing of Mr. Kirschner's role as the litigation advisor and ultimately the litigation trustee. He — functionally, the litigation advisor — we're in a very unique situation here.

The parties never expected that the effective date would be delayed in the way that it has been. We're coming up on the two-year anniversary of the filing of the proceedings. There are a number of claims that need to be investigated and decisions make about how they will be pursued in the next couple of months. And so this litigation advisor role, as Mr. Kirschner testified, is somewhere unique in that we're trying to work around the constraints that have been created by the way that these proceedings have moved forward.

The litigation advisor is really functionally a proxy for the role that Mr. Kirschner will have upon the effective date of the plan as litigation trustee. He's not acting in the capacity of a law firm or like and FTI or a DSI, or any of the other professionals that have been specifically retained in the bankruptcy to date because the role isn't the same traditional role. Right, he is functioning in a way that will allow him access that he needs to the data to get up to speed to make the decisions that have to be made so that he can, you know, proceed in the way that is best for meeting his fiduciary duties to the ultimate litigation subtrust.

So to the extent that there is any sort of argument that, you know, he — that his role is duplicative or any of the other things that we've heard today or that we've seen in the response, I think that those are just a misunderstanding of what he will actually be doing. He is going to be the client, Your Honor. He is not going to be the lawyer.

The other thing I think that we talked about a bit is, you know, this argument that Mr. Kirschner has been involved in the case since April 15th and therefore he's had plenty of time to understand everything that he needs to know to be able to move forward. Technically, Your Honor, I think it goes without saying he's not officially retained until after the return date on the motion to withdraw. And even so, just based on the years now that we've spent in this case, I can — I can argue to you

and I think Your Honor will feel the same way, there's too much learn in that short a time period to be able to say that you are proceeding in the way that is going to be best for the estate in that short timeframe.

We're working to get Mr. Kirschner up to speed, the debtor is working to get Mr. Kirschner up to speed, but there is a lot that has happened here and that continues to change on a daily basis, including the stay that was filed just last night.

And then, finally, Your Honor, I would argue that there has been no harm established by virtue of the stay. And, in fact, all of the things we've heard today established the fact that there may be harm if the stay is denied. So, for example, Your Honor you know very correctly pointed out that we have two international defendants who haven't even appeared at this proceeding yet, right. We may not effectuate service for another two months. It may be another 60 of these 90 days that we're requesting for a stay may be required just to get them properly served and into this proceeding.

And, you know, I agree, Your Honor, that there may be issues that surround those two defendants that, you know, we won't be able to take into consideration until they're properly here in the Court and able to file their own motion to withdraw, if that's what they want, or state their position with regard to it.

You know, Your Honor, moreover, there is a lot going

on here and Mr. Kirschner does realistically need time to be able to develop his approach and make decisions about whether or not there will be amendments to the complaint that could impact the motion to withdraw. He needs to make decisions about other claims that may be brought. There are a lot of moving parts. It's a unique situation. And we would urge the Court to allow him the time that he needs to be able to effectuate his duties in the way that he sees fit.

THE COURT: And I know I have it right in front of me, but the employment application for Mr. Kirschner and his firm to potentially be litigation advisor until the plan goes effective, when is that set for hearing?

MS. MONTGOMERY: It's set for June 7th, Your Honor, and the motion to withdraw is currently set for June 3rd. And that — that motion to retain Mr. Kirschner was only filed on Friday of last week, and our motions that you're hearing today were filed on Tuesday.

THE COURT: Okay.

MS. MONTGOMERY: So it's a very short delay of time between the two.

THE COURT: All right. I'll hear other closing arguments.

MR. PHILLIPS: Your Honor, thank you. As far as harm, we have one — we have one client, Highland Dallas Foundation, who has made no appearance in this case, as has very — and

assume they're being sued for $24 million, and that's not a problem.

Under the argument structure we're hearing today, we could never really get until a plaintiff has said, 'I have no further ability to amend the complaint,' a hearing on a motion to withdraw reference. Look, we didn't file the complaint. The complaint was filed four or five months ago. And very able counsel looked, and as counsel has argued, has looked at thousands and thousands of documents, have been paid millions and millions of dollars for its work, and it came up with this lawsuit that was filed — I've forgotten the filing date, but it was filed at least four and a half months ago, January of this year I believe. Ms. Montgomery — counsel for plaintiff can say the exact date.

But we've got two defendants who haven't been served, but I've got one — I've got two that have been served. And we have established a basis upon which we can get — we have a right to a jury trial and a right to withdrawal of the reference. And that motion has been filed. And the idea that I'm going to bring — I'm going to change clients — and it's really complicated. After we've done millions and millions and millions of dollars worth of work, looked at thousands and thousands and thousands of documents, that we may come in and do a different lawsuit that pleads around a motion to withdraw reference is no basis for a stay.

That — that — the narrative about, you know, the hearsay, the narrative about the aspersions, the this and the that, this is really complicated, this is really hard, well, we have a lawsuit in front of you, Your Honor, and it's been pending for months. And it was filed by the committee that had authority to file it and it was filed by the law firm for the committee that had authority to represent the client who filed it. And that's what they came up with after months and months and months of years of looking at stuff and looking at documents and deciding what to bring as far as claims of this nature against these defendants. I'm worried about two of them.

I'm worried about — particularly worried with respect to the stay, I'm worried about both of them for — with respect to the stay, but one of my clients, Highland Dallas Foundation, has had no involvement in this bankruptcy case. And now let's just wait around. It's got a $24 million cloud hanging over its head and it's expected to continue to try to raise money and try to act as a charity while — while Mr. Kirschner gets familiar — refamiliarized and gets familiar with the situation where counsel and the committee have been working for, what, a year and a half, two years, to get ready, and here's what the lawsuit — here's the lawsuit they came up with.

So no harm has been alleged. In fact, harm will be — all you heard about the potential harm to the estate is that notwithstanding millions and tens of millions of dollars of fees

paid to professionals to determine litigation claims and we have barely, what, two months left to bring them? That's 22 months worth of looking into things, millions and millions of fees. The estate might be irretrievably harmed if a motion to withdraw reference moves forward, when the committee and counsel were responsible and filed this complaint, and they were responsible to file the complaint under the transaction and occurrences, standards such that whatever they haven't pled, whatever they haven't pled by the time to plead is gone. And the idea that we need another 22 months for Mr. Kirschner to get up to speed or some other to come up with additional litigation and additional amendments to postpone a withdrawal of reference means that you can never get a hearing on a withdrawal of reference.

We think the pleadings are there. They have been — they have been investigated, we assume. They're subject to motions to dismiss, which are legal questions. They're subject to motions to withdraw reference, which are legal questions. And we're ready for a decision on what court's going to handle this. And by the time that's done, Mr. Kirschner will have whatever rights he has, as if he has any. The plan will either be confirmed and effective or it won't be, but that's not our problem. Thank you.

THE COURT: Any other closing arguments?

Going once, going twice.

MR. ASSINK: Your Honor, I apologize. Just for the

record, this is Bryan Assink for Mr. Dondero. And Mr. Dondero joins in the objections made by defendants in this proceeding and adopts the arguments made by Mr. Phillips. That is all, Your Honor. Thank you.

MR. DRAPER: Your Honor, can the Court hear me?

THE COURT: Yes.

MR. DRAPER: This is Douglas — okay. What I'd like to make, a short comment. The argument that there are unserved parties is a red herring and it's a red herring for the following reason. The Court has to go through each defendant to determine if they have a right to — a right to withdraw a reference. The facts with respect to Mr. Phillips' clients are different than the facts with respect to my clients. So the two unserved parties may have a right to do it, they may not, but it doesn't affect your ruling with respect to Mr. Phillips' clients or mine because we have either waived or didn't waive our right to a jury trial. And so this argument that there's two other parties out there, again, is a red herring. They have their own right and it will not affect Mr. Phillips' right or mine. So I think that needs to be taken into account.

And, again, all we're talking about is location. The — if they want to amend their suit at a later point, that's fine, but we are just talking about who's going to hear the case. And, quite frankly, Mr. Phillips is right, I don't think the Court can in a very short period of time unpack these

withdrawal issues. And so you may be looking at a recommendation that you make that takes 30 or 60 days. We don't know what the District Court's going to do with it. And, quite frankly, you know we may be 90 or 120 days down the road before the location is even determined.

That's all I have to say, Your Honor.

THE COURT: All right. Anyone else?

THE RULING OF THE COURT

THE COURT: All right. I'll just be honest, I've tried hard to understand where everyone is coming from here, but this has been yet another hearing where I just frankly don't understand why the big fight, why all the papers, and why all the Court time used.

I mean I think I hear everyone agreeing that the plaintiff is essentially going to get its/his 90-day stay here. I mean if I were to go forward on the motions, plural, motions to withdraw the reference, let's be real, it's going to take: This Court two or three or four weeks to get a report and recommendation to the District Court, given the complexity here of the parties and, you know, we try to do a very clear roadmap for the District Court, what's this lawsuit about, who are the parties; and then it's going to take a few weeks for the District Court to rule on that. So I mean optimistically, the most optimistic thing I can imagine is 60 days from now you have an order from the District Court saying where the lawsuit's

going to go forward.

I mean so we're fighting, to me, over a big nothing burger. I think the stay is, in effect, going to happen. So all we're talking about here is pushing a plaintiff to go forward, who at this point is working for free because the plan hadn't gone effective and he hadn't been appointed. I mean it seems like from my perspective the defendants — again I'm trying to understand the practicalities here, but I'm going to be honest, it almost feels like defendants tweaking with the future litigation trustee, 'We're going to make you go forward and work for free when at the end of the day you're probably going to get a stay anyway,' because there's no way a district judge is going to rule on this in much sooner than 90 days. It's like you're just forcing him to work for free and move fast on the motion to withdraw the reference.

And it is a red herring? I don't know, maybe. I think likely this is ultimately going to be tried in the District Court since certain parties haven't filed proofs of claim. But if the District Court does what it always does, in my experience, I've never had, I can't remember ever having a district court say, 'I'm withdrawing the whole darn thing.' They almost always use the — they almost always use the bankruptcy judges as their magistrates in a case when they withdraw the reference.

Bankruptcy judge, handle all the pretrial stuff, the

discovery disputes, the motions to dismiss, motions for summary judgment. If you were on a motion to dismiss or a motion for summary judgment in a way that would finally dispose of any claims, well, you have to do that in a report and recommendation to me. So I feel like we all know that's likely where this is heading, so I don't know why we had to have an hour fight.

I don't know why it's any big shakes to just stay the whole darn thing for 90 days, especially when we have the whole reason the plaintiff, liquidating trustee is not in place yet, because of a stay, that some of these defendants or their affiliates have wanted. It just seems silly to me.

And I do want to address one other thing. There has been an argument that Sidley and Austin and the committee have had months to get up to speed on the issues in the lawsuit, they had months to bring it. It's been pending months. But I'll say something for the benefit of those who have not been around for this whole case, in July of last year, July 2020, which by that point was about 10 months into the case, it was front and center to this Court the difficulty the committee was having getting discovery. They had served four requests for production, going back to before this case was even pending before me. When the case was in Delaware, they were already filing, serving requests for production of documents, wanting to get a protocol in place for ESI, and then finally it all kind of came to a head in July.

And I remember saying, 'I'm sure there's a transcript

out there you can access.' Gee, I may not have pressed the issue so much on this lawsuit being filed involving CLO Holdco. I may not have pressed the committee's feet to the fire so much on getting that filed if I had been fully aware at all of these efforts going on outside of the Court to get documents, to get documents, four requests for production, and then finally the protocol order, if you will, that the committee filed, asking this Court to put in place some protocol to get ESI from like nine different custodians of debtor records. So my point is those who have not lived with this case for the whole time, they don't know that I kind of live to regret pressing the committee to get this lawsuit on file. You know I was worried because of Holdco. I had like ordered money to be put in the registry of the Court before I had, you know, litigation pending. So that's why I put pressure. But then I learned and had a multi-hour hearing on what the committee had gone through trying to get documentation. So that's very much in the back of my mind here in my ruling.

And my ruling is going to be that I grant the 90-day continuance. Again, I hope that in 90 days, we — I don't know if we'll know something from the Fifth Circuit on the plan or not, but at least we'll be closer to that point. And, again, we're looming, you know October 16th, 2021 as a deadline for bringing claims, and I think that's relevant here. There's a lot to be focused on that may or may not impact the way this

lawsuit ultimately is mapped out. I think the fact that we have two unserved defendants, I think it does matter.

I think a district court may be a little hesitant, really want to see the complete picture on each defendants' position before it rules. So the 90-day stay is granted.

All right. So please upload the order, Ms. Montgomery.

Thank you, all, for your arguments.

Before we wrap it up, Mr. Clubok, if you're still with us, I think you were hoping to raise something that might pertain to tomorrow's hearing on the UBS debtor compromise. If you're still there, you may speak to whatever it was you wanted to present.

MR. CLUBOK: Good morning, Your Honor. Still — still the morning. Hopefully you can hear me.

THE COURT: I can.

MR. CLUBOK: Your Honor, I'm really just previewing an issue. In light of the comment that you made earlier today about having this motion, discovery, and then folks not previewing it, I just wanted to alert you to the fact that in our adversary proceeding we have sought discovery against five third parties, Scott Ellington, Isaac Ellington, three other folks, all of whom are represented by Ms. Smith, who is here, you can see. And we first sought —

MS. SMITH: This is Frances Smith. Your Honor,

Frances Smith on behalf of Mr. Ellington, J.P. Sevilla, Mr. Isaac Leventon, Matt VRO, and Mary Catherine Lucas (phonetics).

I just received an email earlier this morning from Mr. Clubok that he was going to do this preview for you. To the extent he gets into the substance of any motions that are not filed, that's inappropriate. And so —

THE COURT: Okay.

MS. SMITH: — if he wants to take Your Honor offer of a preview to say what he is going to file, I'm fine with that. But if he's going to start going into the substance, that is not appropriate.

THE COURT: Okay. We'll let Mr. Clubok get a little further into what he was going to say, and then we'll decide do we need to cut it off.

Mr. Clubok, go ahead.

MR. CLUBOK: Thank you, Your Honor. I was about to say that there were five — there's the five individuals that Ms. Smith represents, we sought discovery from in April 2nd, and, namely, depositions. After a long period of time culminating in a meet-and-confer last week, Ms. Smith filed a motion to quash on behalf of these five individuals on Monday and set a hearing date for July 29th.

All I'm — all I'm previewing, Your Honor, is to alert you that in response to that motion to quash, a hearing date set for July 29th, so effectively will end up being, you know,

months and months of delay to these individuals who are needed to move this conjunctive-relief proceeding forward, we are filing our response today to Ms. Smith's motion and a countermotion to compel. And I'm merely flagging this issue for Your Honor because we are going to ask either Your Honor or Ms. Ellison, we're going to style our motion as an expedited request, we would just simply love to have a hearing as early as reasonably practicable on these issues. And I have no intention of getting into the merits now, but happy to do so. I think it will all be familiar to you from their discussions in the Dondero deposition dispute, but we just — or simply I'm just flagging for you, because you raised it this morning, you know, why didn't people tell me, so we just are going to ask the hearing, the soonest-possible hearing, and I don't think it has to be a very long hearing, on whether or not we get third-party discovery, depositions of Mr. Ellington, Mr. Leventon, and the other three individuals that Ms. Smith represents; subject to one of them is on maternity leave, and we're going to be pursuing discovery of that while she's in that state, but —

THE COURT: All right.

MR. CLUBOK: — but other than that we just ask that a hearing to be scheduled. And I'm just alerting you that we're going to be making that request.

THE COURT: Okay. Well, I have been forewarned. I have been forewarned. And I'll wait to see the motion for

expedited hearing and decide if I think it's appropriate to give an expedited hearing, okay? I'll look at the pleadings and likely just rule on the pleadings on the timing, okay?

Thank you.

MR. CLUBOK: Your Honor, —

MS. SMITH: Your Honor, since we're previewing, we will be filing a response to that as well.

THE COURT: All right.

MS. SMITH: Thank you, Your Honor.

COURT SECURITY OFFICER: All rise.

(The hearing was adjourned at 11:45 o'clock a.m.)

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State of California)
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County of San Joaquin)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

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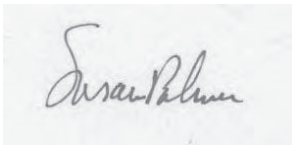

Susan Palmer
Palmer Reporting Services

Dated May 22, 2021

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

In Re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	**Case No. 19-34054-sgj-11** Chapter 11 Dallas, Texas Tuesday, May 25, 2021 1:30 p.m. Docket
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. JAMES DONDERO, Defendant.	**Adversary Proceeding 21-3003-sgj** JAMES DONDERO'S MOTION TO STAY PENDING THE MOTION TO WITHDRAW THE REFERENCE OF PLAINTIFF'S COMPLAINT [22] STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE [21]
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., Defendant.	**Adversary Proceeding 21-3004-sgj** STATUS CONFERENCE RE: MOTION TO WITHDRAW THE REFERENCE
HIGHLAND CAPITAL MANAGEMENT, L.P. Plaintiff, v. NEXPOINT ADVISORS, L.P., Defendant.	**Adversary Proceeding 21-3005-sgj** STATUS CONFERENCE RE: MOTION TO WITHDRAW THE REFERENCE

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

WEBEX APPEARANCES:

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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

DALLAS, TEXAS - MAY 25, 2021 - 1:33 P.M.

THE CLERK: All rise. The United States Bankruptcy Court for the Northern District of Texas, Dallas Division, is now in session, The Honorable Stacey Jernigan presiding.

THE COURT: Good afternoon. Please be seated. All right. We have settings in some Highland adversary proceedings. These are motions to withdraw the reference in three different adversary proceedings. So I will start with Highland versus Dondero, Adversary 21-3003. Who do we have appearing for Movant, Mr. Dondero?

MS. DEITSCH-PEREZ: Deborah Deitsch-Perez. Good morning. Or afternoon, Your Honor.

THE COURT: Good afternoon. All right. For the Debtor, who do we have appearing?

MR. POMERANTZ: Good morning, Your Honor. Good afternoon, Your Honor. Jeff Pomerantz and Greg Demo; Pachulski Stang Ziehl & Jones. Also on the line is John Morris. Greg Demo will be handling the argument today.

THE COURT: All right. Thank you. I'll go ahead and get appearances in the other two adversaries. The next one is Highland versus Highland Capital Management Fund Advisers, L.P., Adversary 21-3004. Who do we have appearing for the Movant on this one?

MR. RUKAVINA: Your Honor, good afternoon. Davor Rukavina for the Movant and Defendant.

THE COURT: All right. Thank you. So, same team appearing for the Debtor on this one, I presume?

MR. DEMO: Yes, Your Honor.

MR. POMERANTZ: Yes, Your Honor. I forgot to mention Jim Seery, the Debtor's CEO and a member of the Independent Board, is also present today as well.

THE COURT: All right. Thank you. And last but not least, we have the adversary Highland Capital versus NexPoint Advisors, L.P., Adversary 21-3005. Who do we have appearing for the Movant, NexPoint?

MR. RUKAVINA: Davor Rukavina again, Your Honor. Good afternoon.

THE COURT: Okay. Good afternoon. And then we have the same team, I presume, for the Debtor for this one as well, Mr. Pomerantz, correct?

MR. POMERANTZ: That is correct, Your Honor.

THE COURT: All right. So, let's be sure the record is crystal clear here. These are status conferences with regard to the three motions to withdraw the reference. As we all know, under Local Bankruptcy Rule 5011, the Bankruptcy Court is required to hold a status conference, hear the parties' arguments, and then make a report and recommendation to the District Court to actually rule on the motions to withdraw the reference.

We do have a motion for stay pending a decision on the

motion to withdraw the reference by Mr. Dondero, so the Bankruptcy Court actually decides that motion.

All right. So, as far as sequence on these, I don't know if you all have talked and reached any agreements. It occurred to me there were two different reasonable ways to do this. We could have, for all three of the adversaries, each of the Movants make their arguments -- in other words, Ms. Deitsch-Perez and then Mr. Rukavina -- and then have the Debtor collectively respond, and then rebuttal at the end, or we could take this where we do Dondero first, argument, you know.

MR. RUKAVINA: Your Honor, Ms. Deitsch-Perez and I had conferred and we had suggested that I begin, since I have a couple arguments that are duplicative of hers, and then I can finish my point, and then I know that her adversary has other issues, and she can follow up with what I have said on those other issues, if that's agreeable to the Court.

THE COURT: Okay. So, joint Movant presentation on all three of these, but you go first and then Ms. Perez, and then Mr. Demo would collectively respond to all three arguments, and then back to you all for rebuttal? Any disagreement with that from the Debtor side? Do you want to argue for anything different?

MR. DEMO: No, Your Honor. That's fine with the Debtor.

THE COURT: Okay. Makes sense to me. All right. Well, with that, Mr. Rukavina, you may proceed.

MR. RUKAVINA: Thank you, Your Honor. And I will be discrete and I will be brief, because I think that the issues are discrete and brief and not evidentiary. And I think we'll talk about evidence and documents some time later. We can talk about that when the Debtor's turn comes.

To me, there's very few facts that are relevant, and those facts appear on the face of the record, nor are they disputed.

My two clients have disallowed proofs of claim. So they did file proofs of claim. Those claims were disallowed by final order months ago. So my clients are not prepetition creditors of the Debtor. Nor under any theory would these two adversary proceedings involve anything having to do with my clients' former claims.

I say that, of course, because we know *Stern v. Marshall* and we know that whether there's a counterclaim or a claim, it changes the jurisdictional analysis. Here, the Advisors have no claims.

These two adversaries are very, very simple. The Debtor has sued my clients on prepetition promissory notes. So the Court's decision or report and recommendation today comes down to, I think, three very targeted issues: Is a suit on a promissory note, the prepetition promissory note, a core claim? One. Two, do my clients have jury rights? And then,

three, what about the Debtor's 542 action?

So, my two adversary proceedings are virtually identical. The Debtor sues my clients for a breach of contract in not paying these promissory notes, and the Debtor seeks a 542(b) turnover.

In its responsive briefing, the Debtor has not contested that the cause of action itself, the breach of contract, is non-core, nor has the Debtor contested that I have jury rights.

The Debtor's sole real argument, other than a bunch of mud being thrown on the wall which I think has no relevance at all today, not to the Court's jurisdiction, the Debtor's sole real argument is that the 542(b) claim, which clearly is a core claim, that the fact that they have sued for that claim somehow now makes this whole adversary proceeding a core claim, one in which I take it that jury rights aren't even involved. So we'll talk about that a little bit. But those are the three issues that I think that the Court needs to focus on for the HCMFA and the NexPoint adversaries.

Obviously, a breach of contract claim, a suit on a promissory note, that exists outside of bankruptcy. That is not a right or a cause of action created by a bankruptcy. Clearly, that's a non-core matter. That's the same as *Marathon v. Northern Pipeline*, where it was a suit on a prepetition contract. And we have given Your Honor plenty of

case law, and I don't think it can really be disputed that, all other things being equal, the Debtor's lawsuit for breach of contract on a prepetition contract is a non-core claim. That means that the reference -- whether the reference should be withdrawn or not is an issue of permissive reference withdrawal, because even though it's non-core, of course, the Court can make a report and recommendation and there's a trial de novo before the District Court. But we begin with that it's a non-core claim.

We add to this mix the *Stern v. Marshall*, which couldn't be clearer in that, when all that a debtor is doing is trying to augment its estate by prepetition causes of action, the Court doesn't have constitutionally core jurisdiction.

So, now we look at the jury right. There's no question that there's a Seventh Amendment jury right when you're being sued for breach of contract. That's as *Bankruptcy 101*, as *Common Law 101*, as it gets. And my clients are being sued for breach of contract. We have asserted our jury right. Again, because the prepetition proofs of claims have been adjudicated and are in no way, shape, or form linked with these two promissory notes, it's impossible to argue that we have somehow waived our jury rights. And the Debtor has not made that argument, to its credit.

So, because the Fifth Circuit holds that when it comes to jury rights reference withdrawal is mandatory, we believe that

the Court must withdraw or that the District Court must withdraw their reference of these two adversary proceedings, the only question then being at what point in time should the District Court do that. And we can talk a little bit about that.

If Your Honor needs to understand the basis of my clients' prepetition proofs of claim, I can certainly go through those in detail. Suffice it to say that those claims led with -- have to do with overpayments and not getting benefits of the bargain for the transiti... I'm sorry, for the prepetition shared services agreements. So even if there was some relation between the disallowed claims and the Debtor's claims in that situation, there is no core nucleus of operative facts. Again, these are standalone promissory notes that have nothing to do in the world with those disallowed claims under the shared services agreements, nor have we asserted any affirmative defense or setoff based on those disallowed claims. So, again, all you're dealing with are prepetition promissory note claims against someone who is not a prepetition creditor of this estate.

Now we go to the 542(b) issue.

THE COURT: Can I --

MR. RUKAVINA: Your Honor, we believe --

THE COURT: Can I interrupt with a question? And this wasn't really argued in any of the pleadings, and yet

it's sticking in my brain as an issue, maybe. This is a NexPoint issue only. Okay? The NexPoint note, unlike the other notes in these three adversaries, is not a demand note. It, as you know, had the annual payments, and the whole complaint of the Debtor is centered around NexPoint missed its December 31, 2020 payment. That was a default. The Debtor was entitled to accelerate and declare the whole amount due. So here's where I'm going. In this adversary, the NexPoint adversary, there's an affirmative defense argued by NexPoint that basically: Debtor, you made us default because you, under the shared services agreement, were doing accounting work for us, and I'm paraphrasing, but that's the argument, that you were negligent in performing your duties under the shared services agreement and made us default.

So here's my question. As I understand it, NexPoint has an administrative expense that it has asserted in this case that we've kicked the can down the road and I can't remember now when we're going to have the trial on that. My question is, even though NexPoint's proofs of claim have now been disallowed, what if your defense in this case is inextricably intertwined with your administrative expense claim? I mean, (a) is that the case, and (b) does that all of a sudden convert the breach of contract to a core matter?

MR. RUKAVINA: Your Honor, I think those are insightful questions, but I think that it's an easier answer,

because they are not inter -- I have a hard time pronouncing that.

THE COURT: Me, too.

MR. RUKAVINA: They're not intertwined.

THE COURT: Uh-huh.

MR. RUKAVINA: They're not inseparable. The base of the administrative claim is that we were billed by the Debtor postpetition for services that the Debtor didn't provide, so we were paying for Debtor employees who weren't there. In other words, we overpaid. The Debtor overbilled us to the tune, between both Advisors, to the tune of $14 million for employees that the Debtor had long terminated ago and wasn't providing.

The basis, therefore, of the postpetition overpayment has nothing to do in the world with the Debtor's own negligence --

THE COURT: Okay.

MR. RUKAVINA: -- in how it provided services to us regarding this promissory note.

THE COURT: Okay.

MR. RUKAVINA: We have chosen, and I -- we have chosen, and I think it's right, it's our right, we have chosen to assert the Debtor's -- obviously, it's alleged at this time -- we have chosen to assert the Debtor's failure to us as an affirmative defense to this promissory note. We have not chosen to assert that as an affirmative cause of action

seeking money damages for negligence or something like that. And we have done that intentionally, to be quite blunt, so as to keep it apart from the admin claim. Because the admin claim clearly is a core matter. We're not arguing that the reference should be withdrawn. That's set for trial in late September. And that body of discovery, really, will be completely separate from this. We have intentionally kept them separate, and perhaps the Debtor has as well, so as to not cloud the issues.

This is a clean promissory note, and do we have an affirmative defense under Texas law because basically the Debtor made us do it?

So that's my answer to the Court. Now, if the Court takes it to the next level and says, well, what you're really saying, Mr. Rukavina, here is that you have an affirmative postpetition cause of action against the Debtor, you're just sprucing it up as an affirmative defense instead of an affirmative cause of action, I would suggest to you that now we're getting too much and too far into the whole *Stern v. Marshall* issues. What we have been sued on is a prepetition promissory note. That's it. And we have no prepetition claim. And I don't think we should be crossing a potential prepetition cause of action against us against a postpetition right that we have against the Debtor.

THE COURT: Okay.

MR. RUKAVINA: Finally, Your Honor, just briefly on the 542(b) issue, it really is purely an issue of law. We have cited to you three opinions from this district -- pardon me -- that go back to Judge Abramson. There's the *Satelco* case, which I think is a very well-known case. It's been cited to many, many times. There's also Judge Lynn's opinion in *Mirant*. And those opinions just basically say, okay, debtor, if you're suing on a prepetition receivable, a prepetition promissory note, you can't use 542(b) to put the cart before the horse. You've got to prove that your counterparty is liable to you, and then, then, 542(b) is really a remedy, it's a collection remedy, the same as any post-judgment remedy.

The Debtor doesn't like these old opinions. It calls them old; I call them *stare decisis*. And the Debtor argues, well, you should do what these other bankruptcy courts from across the country have done and you should basically just use 542(b) to try the prepetition receivable. So, forget about jury rights, forget about core. 542(b), according to the Debtor, is the congressionally-mandated new cause of action that lets the Court actually liquidate a claim even before it collects on that claim.

I have pointed out the absurdity with this argument. The argument is the same as saying, well, Judge, why don't you give me -- you can give me a turnover order, you can give me a

receiver, so because you can do that, let's now just liquidate an actual cause of action in the context of a turnover. That's not how it works. You get your judgment, you get your right to a payment, and then you get your remedies.

It's not just me saying that, Your Honor. I have cited the D.C. Circuit, the Eleventh Circuit, the Eighth Circuit, and a host of lower district court opinions from across the country that confirm that, that 542(b) cannot be used to liquidate a disputed claim.

I submit, respectfully, that if the Court decides to rewrite *Satelco*, if the Court believes that 542(b) can be used as an actual cause of action, one, I would remind the Court that in a case a few years ago against Michael Craig Kelly, where we had a reference withdrawal, Diane Reed, the Trustee, was also trying to use 542(b). The Court, in its report and recommendation to the District Court, basically said that no, as I have pointed out, you can't do that. And I can certainly share with Your Honor that report and recommendation. I just remembered it this morning, so I did not include it in my briefing.

But if the Court decides to revisit the issue, then I would respectfully submit that what we're creating here is exactly a *Northern Pipeline* and a *Stern v. Marshall* issue. As *Northern Pipeline* made it clear, Congress cannot take a common law cause of action, a cause of action between private

litigants, such as a breach of contract, such as a promissory note, which is the most archetypical breach of contract claim that there is, Congress can't take that, slap a different name on it like turnover, and somehow undo the Constitution. You can't strip me of my jury rights on that, you can't strip me of my right to an Article III judge, just because you label this a 542(b) turnover.

And I respectfully submit, Your Honor, that if that is what this Court recommends, and if that is what the District Court does, then what we are really creating here is another *Stern v. Marshall*. And as I've been telling everyone that I've known for the last 10 years, that's the last thing that our practice needs.

So, Your Honor should recommend the withdrawal of the reference for my clients because I believe that it's clear we have a jury right. I believe that the reference should be withdrawn immediately. This Court has more than enough going on in this case. There is no crossover discovery here. And if we're going to go to a jury, then it really ought to be the District Court, that's the expert on jury trials, or its magistrate judge, that's the expert on jury trials, deciding pretrial and prejudgment matters, most of which will have to do probably with what the quality of evidence and what evidence there will be that can be even presented to the jury.

Your Honor, that's my argumentation, in a nutshell. I

really don't have anything to add. But I'm here to answer any questions, and I will at the appropriate time talk about the Debtor's purported evidence for today. Thank you.

THE COURT: All right. Thank you. No further questions at this time.

Ms. Perez?

MS. DEITSCH-PEREZ: Yes. And could I share my screen?

THE COURT: You may.

MS. DEITSCH-PEREZ: Okay. Are you able to see the screen?

THE COURT: Yes.

MS. DEITSCH-PEREZ: Okay. And is the -- the full screen is up there so you can see it?

THE COURT: I can see it. Uh-huh.

MS. DEITSCH-PEREZ: Thank you. Okay. All right. Because I start -- we -- Mr. Rukavina and I started at the same time, there's a little overlap, but where we overlap I will go quickly.

THE COURT: Okay.

MS. DEITSCH-PEREZ: Okay. So a quick summary. We have a mandatory withdrawal of the reference argument because of the involvement of federal nonbankruptcy law, and I'll go into more detail on that in a moment.

Like Mr. Rukavina's clients, we have a required withdrawal

because of Mr. Dondero's jury right, which has not been waived. And I'll address the Debtor's two waiver arguments.

And there is permissive withdrawal because the claim is non-core, it is a prepetition state law breach of contract claim, and this Court could only report and recommend, and so the efficiencies favor immediate withdrawal to the District Court.

All right. The Debtor cites a good number of cases, but there is a Northern District of Texas case that looks at when this Court should recommend immediate withdrawal of the reference, and this is it. And the Debtor says quite a lot about the expertise that this Court has with the matter generally and with Mr. Dondero generally and repeats Mr. Dondero's name, I don't know, a couple dozen times, but that's irrelevant. Because once it's been determined that the action involves non-Title 11 laws that affect interstate commerce, the withdrawal of the reference is mandatory, regardless of the expertise of either court.

And that's why, in *Great Western*, and I think it was Judge Barefoot Sanders, said, if it's not a core proceeding -- and this is not, for all the reasons that Mr. Rukavina noted -- the bankruptcy judge's finding would have to be reviewed de novo, and that would result in duplication of effort and a waste of resources, and that's why the most efficient proceeding would be to go directly to the District Court.

And so the question the Debtor raises, well, there's not -- they make light of the tax law that's involved. So the question is, well, how much nonbankruptcy law does there have to be to implicate mandatory withdrawal of the reference? Well, again, *Great Western* provides the answer. It has to materially affect the disposition of the case -- doesn't have to be dispositive of the case -- and it has to involve substantial consideration of IRS Code provisions. What I took out there was ERISA, not because it was something bad for us but because ERISA isn't implicated here.

And the Debtor's cases don't really dispute that. What they all say -- and if you look at them, and we've pointed that out in our reply brief -- the Debtor points to cases where what the court says is this involves a routine tax matter or something that is typically heard by bankruptcy judges. They make no argument that the issue here, which is what are the tax implications of having a forgivable loan and why does the law on how you create deferred compensation with a loan, how does that relate, that's not something that frequently comes up in a bankruptcy court. In fact, we were unable to find a single case where a bankruptcy judge dealt with that issue.

So the only Northern District case that the Debtor raises is one that's not remotely similar. It's *Ondova*, where the parties sought to withdraw the reference to an entire

bankruptcy case. By contrast is *Great Western*, which says the withdrawal of the reference is mandatory when you have this kind of unusual or atypical tax matter.

So, what is the tax issue? In Mr. Dondero's amended answer and in his discovery responses, he contends that the three notes are subject to a condition subsequent under which they could be forgiven. This is a form of deferred executive compensation that's governed by rules set out in the federal tax law. If you do it wrong, it's deemed compensation immediately and you owe taxes right away. If you do it correctly and the determination of the circumstances under which the loan can be forgiven are not wholly in the debtor -- here, I mean debtor as in obligor's control -- then they can be deferred compensation and then taxes are due at the point at which the loan is forgiven, and then there is forgiveness of debt income.

So, understanding these rules will inform the fact-finder about the strength and the credibility of Mr. Dondero's defense when he says, this is why I did this, this is what I expected, this is how I anticipated the loans could become my compensation and why. So these tax considerations are pivotal to the potential deferred compensation being structured in the way that it was.

And this information was provided to the Debtor. Interrogatory #1 asked Mr. Dondero to identify the condition

subsequent referred to in Paragraph 40 of the amended answer. There were not many questions. This is pretty much it on what the Debtor asked about the defense. They could have asked more. They didn't. I presume they will ask when they depose Mr. Dondero, but they did not yet. So the absence of a fuller record of what consti... of how the tax law works and why it's important, that's because the Debtor simply didn't ask, because they were content to instead make fun of the defense, which is what they did in their papers.

And so the answer in the interrogatories is that the condition subsequent referred to refers to the disposition of the portfolio company interests that were managed or owned, directly or indirectly, by Highland and its affiliates, or managed, the disposition of those on a favorable basis or on a basis wholly outside Dondero's control. So when those things happened and created a liquidity event, then those loans would be forgiven and at that point Mr. Dondero would have income. But those will all be explored further in discovery and in expert testimony, both -- we anticipate a tax expert and a executive compensation expert.

THE COURT: Question for you. Is this going to be an issue that applies to all three loans? Because one --

MS. DEITSCH-PEREZ: Yes, it is.

THE COURT: One of the promissory notes says, this is a tax loan, and the other two do not say that.

MS. DEITSCH-PEREZ: But the records of the company -- and this was something that was submitted by the Debtor -- show that all three loans were recorded on the books as tax loans.

THE COURT: Okay.

MS. DEITSCH-PEREZ: And so it simply -- and then, in addition to that, all three loans, in -- I think it's either Paragraph 8 or 9 of the note -- refer to other agreements, and that would be somewhat baffling but for the fact that there is in fact an other agreement here that presumably the Debtor will explore when it deposes Mr. Dondero.

THE COURT: Okay.

MS. DEITSCH-PEREZ: So, going on to the turnover claim, and I'm not going to beat what Mr. Rukavina said to death because he said it quite well, but I'm just -- rather than add some cases, I'm going to add *Collier's* to the mix, which is certainly the premier authority. And Debtor's logical flaw is so well known that it has its own section in *Collier's*, where it berates and bemoans the practice of some district courts to use orders to turn over property of the estate as an end run around *Marathon*. And it says, in the strongest possible terms -- and there's more cited in our brief -- that an action on a promissory note is not a turnover claim. That's a breach of contract claim, if it's disputed. And simply name-calling, as the Debtor does -- it says

Dondero's claim is spurious and invalid; I think it also says it's a red herring -- the right to a jury trial is not lost because of the strength of the Debtor's disparaging remarks. Instead, the Court should look at *Satelco* because it makes clear that an action to recover a contested debt is not properly the subject of a turnover action. And in a way, the Debtor tacitly acknowledged that, because it didn't just bring a turnover claim, it brought a breach of contract claim, and that's its principal claim, and that's the correct claim here, and that's one on which Mr. Dondero has a right to a jury trial.

So the Debtor then says ah-ha, you filed a proof of claim with respect to the notes, and made a very big deal about it in its response to the motion to withdraw the reference. It then had to sheepishly withdraw that in a supplement because it recalled that the proof of claim regarding the notes was withdrawn, and we've cited for the Court law that says, once it's withdrawn, it's as if -- it's as if it never existed, especially when, as here, it was withdrawn before the adversary proceeding was filed. So it preserved an absolute right to a jury trial.

And there you can look at the *In re Manchester* case that Judge Houser decided. And there, even when a proof of claim was withdrawn after the adversary case was filed, Judge Houser determined that there was a genuine desire for a jury trial.

It wasn't fictional. It wasn't vexatious or designed to harass the debtor.

There's no question here that Mr. Dondero does want and would for obvious reasons want a jury trial. And so certainly the withdrawn proof of claim should not be a barrier.

And then unrelated proofs of claim are also not a waiver of the right to a jury trial. It's only when the adversary and the existing proof of claim are inextricably intertwined -- I got the inextricably in -- that resolution of the -- if resolution of a proof of claim would also resolve the adversary, then there would be a waiver. But we don't have that here because the remaining proofs of claim are all in the nature of contingent contribution or indemnity claims with respect to things that haven't even happened yet. And so they in no way relate to this adversary. They have to do with the 2008 taxes and other potential possible future events where something might cause liability for Mr. Dondero as an officer or director, and those have not arisen.

Okay. In addition, the Debtor says that the setoff affirmative defense causes a waiver. And they only cite cases from outside the jurisdiction. The only case we found on the issue in this jurisdiction is to the contrary. That's *In re Base Holdings*. That's this Court's case. So even a counterclaim, much less a setoff, if it would not be resolved by the adjudication of a party's proof of claim, the

Bankruptcy Court cannot constitutionally finally resolve the setoff or counterclaim if it is in fact a non-core claim, as here.

Here, the issue is even simpler because Mr. Dondero dropped the setoff affirmative defense, as set forth in the Debtor's -- the response to Debtor Interrogatory 3, and that is annexed as Exhibit 4 in Mr. Dondero's appendix to the motion.

So if you look at all of the factors -- and the 2020 *Curtis* case in the Southern District of Texas has a good summary, and we cite that and you can find that in our pleadings -- you look at whether it's core or non-core matters predominate. Here, the determination rests on the breach of contract case. The turnover claim is the remedy. It's the tail of the dog, not the dog. You want to have efficiencies? Well, here, because the Bankruptcy Court can only report and recommend, it's more efficient for the District Court to have the proceeding. There is so much going on in this bankruptcy proceeding that does not have to do with these notes that it would expedite the bankruptcy to take this out.

On the issue of forum-shopping, the question is, who's forum-shopping here? Mr. Dondero has a right to a jury trial, so it is only natural that he would want to be in the District Court because that is the only place he can have a jury trial. It's the Debtor that's forum-shopping because it has expressed

concern about the possibly more favorable District Court. So that's where the forum-shopping is, and so that consideration weighs in favor of withdrawal.

Obviously, a jury demand has been made, so that is another reason why there should be withdrawal of the reference.

So let's look at these factors. The Debtor says this is a simple note case. So if in fact it's a simple note case, which is a state court cause of action, there's no particular bankruptcy court expertise needed. And as we saw, there is some federal law expertise needed on the tax issues.

Also, this issue is not intertwined with other matters in the bankruptcy. It's a core matter. This Court can only report and recommend. The District Court has to conduct the jury trial, so it would be most efficient for it to gain familiarity. As I said, it's the Debtor that's forum-shopping. If in fact, as the Debtor says, this case is so clear, why is the Debtor afraid that the District Court may be possibly more favorable?

And the most analogous case is the *In re Quality Lease* case we cite. There, the reference was withdrawn. It was withdrawn immediately. And the Court indicated it was particularly important for the reference to be withdrawn early because the case was going to be tried to a jury and that would mean there would be motions in limine. These would -- that it would be better for the district court to be familiar

with the case in order to decide evidentiary issues, expert issues, all of the things that are going to come up in this case.

Okay. And *Curtis*, which we cite in the brief, is particularly instructive, and it argues for immediate withdrawal of the reference when a jury trial is requested.

Okay. So I'm briefly going to cover the motion for a stay. This Court has very recently made clear its view on whether a stay should be granted pending the District Court deciding the motion to withdraw the reference. And that was last week, when I was unable to be here. But there, Mr. Phillips was arguing against a stay that was being sought by the Creditors' Committee, and this Court said very clearly it's a hundred percent of the time my practice, and I think the practice of other bankruptcy judges here, and it's out of deference to the District Court, if the District Court ends up withdrawing the reference, they may say I want to withdraw the whole darn thing, we don't want you even doing pretrial matters, we don't want to get ahead of them, and that's why the Court was arguing that Mr. Phillips shouldn't be arguing against the stay that was sought, because since they were seeking to withdraw the reference, nothing should be happening in the case until that was decided.

So there's no reason that Mr. Dondero should not be afforded the benefit of that practice that the Court so

strongly asserted last week. And it would also relive the pressure of the breakneck pace that the Debtor has demanded for this case, and it would allow for consistency between the treatment of the parties in this case and the treatment of the parties in the case involving the Creditors' Committee and the Debtor.

Okay. And just to sum up, we have the mandatory withdrawal issues related to the tax law. Mr. Dondero has not waived his right to a jury trial, and this Court obviously cannot constitutionally conduct a jury trial breach of contract non-core matter, so this Court couldn't even constitutionally make final findings. And the summary judgment motion that the Debtor has threatened, clearly, if the Debtor is going to make a summary judgment motion, it would be better for the District Court to have it. That would most certainly give the District Court the best heads up to be able to conduct the jury trial, because there are factual issues here. And so this combination of factors and the Debtor's not really even tacit admission -- it's pretty overt -- that it has an advantage in the Bankruptcy Court dictates that the reference should be withdrawn for all purposes immediately.

And I thank you, and I'm going to try and see if I could figure out how to turn off the sharing.

THE COURT: Got it.

MS. DEITSCH-PEREZ: Thank you.

THE COURT: All right. Thank you.

Mr. Demo, I'll hear from you next. And I counted four of my own cases that collectively Mr. Rukavina and Ms. Deitsch-Perez argued -- well, three published ones, *JRjr33*, *Ondova*, *Base Holdings*, and then Mr. Rukavina mentioned *Craig Kelly*. So, what are you going to argue? Are you going to tell me I was wrong in all of those cases, or --

MR. DEMO: I was --

THE COURT: I'm sorry, that's not a fair question, but it's -- it is what it is. What would you like to say, Mr. Demo?

MR. DEMO: Well, I think first I'd like to start by introducing some very limited exhibits, because -- and normally I wouldn't do this, because I do think that it's generally a legal matter, but Ms. Deitsch-Perez referenced the notes, referenced tax issues that supposedly were in the notes, referenced arguments that or defenses that Mr. Dondero raised in his answer. And quite honestly, none of that stuff is in those things. So I would like to put those into evidence so that this Court can review them and we can have them on the record.

And if that's all right with Your Honor, I can point you to our witness and exhibit list in this case and have those things admitted.

MR. RUKAVINA: Your Honor, does Mr. Demo propose to have those admitted for my two adversaries?

MR. DEMO: No. I think right now we would plan on doing just a limited admission of Mr. Dondero's notes, Mr. Dondero's first answer, and then his amended answer. And we are going to talk, you know, about a few other limited things, about how the notes are on the balance sheet. So I would like to also admit the Debtor's schedules, which were admitted in the motion to compel last Thursday, and then also to admit the MORs, which were also admitted last Thursday as well.

MR. RUKAVINA: Your Honor, I apologize. Again, are those being offered in my two adversaries or -- again, there's no --

MR. DEMO: I'm sorry, Mr. Rukavina. The answer is -- for the MORs and for the schedules, the answer is no.

MR. RUKAVINA: Okay. And, of course, there was some sound right when you gave me your answer. At least, I didn't hear your answer.

MR. DEMO: The MORs and the schedules, we would admit in your case as well.

MR. RUKAVINA: Your Honor, I have no problem with that.

THE COURT: All right. Well, before I see if Ms. Perez has an objection, let me be a little bit more clear. I am looking at the witness and exhibit list that you filed at

Docket Entry 46. Can you just go through that and tell me which ones you're offering?

MR. DEMO: Yes, Your Honor. So, we filed -- we filed an amended exhibit -- witness and exhibit list at Docket #48. We filed that yesterday. So that's what I'm looking at.

THE COURT: Okay. Let me pull that up. I have the notebook. So what is the docket again?

MR. DEMO: 48, Your Honor.

THE COURT: 48. In the Dondero adversary?

MR. DEMO: Yes, Your Honor. And we did also file witness and exhibit lists in the NexPoint and HCMFA adversary, but all the numbers are the same in those.

THE COURT: Okay. Bear with me. (Pause.) Okay. I have it pulled up now. So which ones are you seeking to offer?

MR. DEMO: 4, 5, and 6, which are the three Dondero notes.

THE COURT: 4, 5, and 6, the three Dondero notes?

MR. DEMO: We would also offer Mr. Dondero's responses to the interrogatories and requests for admission, which are 16 through 20.

THE COURT: Okay.

MR. DEMO: We would offer 28, 29, --

MS. DEITSCH-PEREZ: Wait, wait, could you stop a minute? There is -- which interrogatory answers? Because we

-- they're our Exhibit -- the interrogatory responses are Exhibit 4 in our appendix. Is this something different that you're offering?

MR. DEMO: I'm looking at my witness and exhibit list, Docket #48.

MS. DEITSCH-PEREZ: Uh-huh. And what are the --

MR. DEMO: And I'm looking at Entries 16, 17, 18, 19, and 20.

MS. DEITSCH-PEREZ: Yes, that's five things. What are the five things that you're seeking to admit?

MR. DEMO: Mr. Dondero's objections and responses to Highland's second request for production.

MS. DEITSCH-PEREZ: Uh-huh.

MR. DEMO: Mr. Dondero's objections and responses to the first request for admissions.

MS. DEITSCH-PEREZ: Uh-huh.

MR. DEMO: Mr. Dondero's objections and responses to second request for admissions.

MS. DEITSCH-PEREZ: Uh-huh.

MR. DEMO: Mr. Dondero's objections and responses to Highland's first set of interrogatories.

MS. DEITSCH-PEREZ: Uh-huh.

MR. DEMO: Mr. Dondero's objections and responses to Highland's second set of interrogatories.

MS. DEITSCH-PEREZ: Okay. Thank you.

MR. DEMO: You're welcome.

THE COURT: All right.

MR. DEMO: And then next --

THE COURT: Go ahead.

MR. DEMO: Sorry, Your Honor. Is Docket Entries 20 -- I mean, excuse me -- Exhibits 28, 29, and 30, which are the Debtor's schedules, amended schedules, and Statements of Financial Affairs.

MR. RUKAVINA: And those are the only ones for my case, right, Mr. Demo?

MR. DEMO: Through current, yes. We're going to have MORs which will be in your case as well.

MR. RUKAVINA: Okay.

MR. DEMO: But yes.

THE COURT: Okay. 28, 29, and 30.

MR. DEMO: And then --

THE COURT: Go on.

MR. DEMO: And then 44 through 64, which are the Debtor's MORs and then some limited backup, depending on the --

THE COURT: All right. So, any objection -- I think we've heard from Mr. Rukavina. He's fine with those limited items applicable to his adversaries. Ms. Deitsch-Perez, any objections?

MS. DEITSCH-PEREZ: No. I mean, I would note that

the notes are also annexed to the adversary complaint.

THE COURT: Okay.

MS. DEITSCH-PEREZ: So they're part of this record. So, no objection to those.

THE COURT: All right. So these will be admitted.

(Debtor's Exhibits 4 through 6, 16 through 20, 28 through 30, and 44 through 64 are received into evidence.)

MR. DEMO: Thank you, Your Honor. I'd like to start maybe a little bit out of order and start with the motion for a stay pending resolution of this matter. And I just want to point out, well, first, obviously, that the Debtor is not in favor of a motion for stay pending resolution of this matter, because we've actually done significant amounts of work. You know, we had Mr. Seery's deposition yesterday. Mr. Dondero's deposition is scheduled for Friday. Fact discovery ends on Friday. Discovery has been ongoing. We've produced numerous documents. We've made numerous requests. And Mr. Dondero has made multiple prior requests to schedule -- to extend this matter. And the hearings on this matter are set for the next 90 to 100 days.

There is no basis to stay there, and there is a harm to the estate in staying it, Your Honor. Specifically, these assets are material assets of the Debtor's estate. They were built into the plan projections. And the liquidation and collection on these assets will materially drive creditor

recoveries.

To the extent that there's a delay in that, and there already is a delay because of these matters, but to the extent that there's a further delay in that, there is a substantial harm to the Debtor's creditors by that delay.

THE COURT: Did you say discovery cuts off Friday, this Friday?

MR. DEMO: Yes, Your Honor.

THE COURT: Okay.

MS. DEITSCH-PEREZ: And that is over our objection. We had sought a longer schedule, and the Debtor seems to be trying to do an end run around the withdrawal of the reference by pushing the case to conclusion before the District Court can decide.

MR. DEMO: I would object to that characterization, Your Honor. We're trying to get resolution and we're working quickly towards that, as is generally the matter in bankruptcy.

THE COURT: Okay. My only question is, is there a scheduling order in place right now and discovery cuts off this Friday under the governing scheduling order?

MS. DEITSCH-PEREZ: That is correct.

MR. DEMO: There is a scheduling order, yes.

THE COURT: Okay. Is there a motion to amend the scheduling order pending, by any chance?

MR. DEMO: No, there isn't, Your Honor.

THE COURT: Okay.

MS. DEITSCH-PEREZ: There was -- there was a motion filed, the Debtor opposed it, and the Court granted a much more limited extension than the -- than Mr. Dondero requested.

THE COURT: Okay.

MR. DEMO: Your Honor, I would just ask, you know, I'm arguing. Ms. Deitsch-Perez had her chance. So, to the extent that she has anything to add, I mean, I would --

THE COURT: All right. Well, I asked the question, and I'm fine with both of you weighing in with an answer.

All right. Continue.

MR. DEMO: Yeah. So, yes, so discovery ended Frida, there is damage to the creditors with a delay, and we would oppose the motion to stay.

And that's, you know, quite honestly, Your Honor, all we really have on the motion to stay, because I think it wraps up into the balance of the action, which is a core action which should remain here. It's a core action that doesn't have a jury right and it's a core action that Your Honor can enter a final order on.

And I meant to kind of go through that first, but I do feel like I need to start with the mandatory abstention. Because Ms. Deitsch-Perez has made a lot of references to the Tax Code and a lot of references to tax law and a lot of

references to what Your Honor will have to rule on. But quite honestly, Your Honor, none of that is in the record. Mr. Dondero filed his first answer. It didn't mention the Tax Code. The only affirmative defense was that the note had been forgiven already. Mr. Dondero filed his amended answer. It didn't mention the Tax Code. The only affirmative defense is that there was a condition subsequent that was tied to some sale of assets without any more. There is no reference to the Tax Code. There's no reference to specific code provisions throughout these documents. There's no reference to any code provision in the three notes.

Ms. Deitsch-Perez made reference to somehow incorporating other agreements into those notes. Those notes are each two pages. None of them have that language. They're all standalone.

The only reference in this case, Your Honor, to taxes is a reference in the first note, which is dated February 2, 2018, saying that the proceeds of the note are used to pay Mr. Dondero's tax liabilities. That's it. That is the only actual reference in this case to any type of tax.

The fact that Mr. Dondero used the proceeds of the loan to pay taxes really is irrelevant. I mean, you can use the proceeds of the loan to pay anything. It doesn't implicate the Tax Code.

What Your Honor is going to have to decide here is not tax

law. What Your Honor is going to have to decide here is do the four corners of these promissory notes beg for extrinsic evidence. Is the four -- in the four corners of these promissory notes, is there ambiguity? Did Mr. Dondero agree to repay the Debtor the amounts owed to the Debtor on demand? And all you have to look at for those are the two-page demand notes that are in the evidence right now, Your Honor.

No references to the Tax Code. No need to refer to the Tax Code. In fact, the only case that's been cited from a tax court is the case, I think it's called *Salloum,* which is cited in Mr. Dondero's responsive papers. And in that, the Tax Code -- that case says that what you have to do to determine whether or not these notes are forgivable under tax purposes is a fact matter. It doesn't refer back to the Tax Code.

And what that case said and what the cite that Ms. Deitsch-Perez, excuse me, Mr. Dondero's counsel said, put into the document is that the factual things that you look at is was there a written agreement, was there a promissory note, was collateral issued, does the asset show up as an asset on the Debtor's books and records as a loan or as a forgivable loan? None of those determinations require an analysis under the Tax Code, and there's been no allegations or no statements that it does.

Those factors are the same factors that Your Honor would look at for a motion to recharacterize. It's not a unique

thing.

There is no determination of Mr. Dondero's tax liability. There's nothing. And there's no references to it. We haven't had a case cite yet or a statutory cite yet for a statute that you're going to have to interpret and analyze. There is literally nothing, Your Honor. There are two-page demand notes that make no reference to the Tax Code. The only thing Your Honor will have to do is determine whether or not they're ambiguous and whether or not Mr. Dondero was given the money and has an obligation under those two-page documents to pay that money back.

Moving on from that, Your Honor, because I do think we need to level-set a little bit on the other facts on this case, because there were some things that were said that maybe stretched it a little bit. You know, specifically, Your Honor, the adversary really does deal with demand notes, two-page demand notes, and then one term note which is also two pages. Those demand notes and those term notes are indisputably property of the Debtor's estate. Those demand notes and those term notes at issue here were included on the Debtor's schedules that were filed in December 2019 when Mr. Dondero was in control of the Debtor. They were filed in December 2019 when Mr. Frank Waterhouse, the Debtor's then-CFO, was firmly in control of the Debtor's financial operations. They were included on the schedules. Nobody

objected.

Those notes have been included on the MORs every single month in this case, including the months prior to the appointment of the independent directors. The notes are included as an asset on the Debtor's books and records. And as I mentioned earlier, the notes are included on the plan projections that were filed in support of the Debtor's disclosure statement and plan of reorganization.

Nobody has challenged these notes. Nobody has challenged the MORs, the plan projections, which showed these tens of millions of dollars in notes as a material asset of the Debtor's estate. And that in and of itself is interesting, Your Honor, because everybody in this courtroom objected to the Debtor's disclosure statement and the Debtor's plan, including objections to those plan projections, but they never challenged these notes as an asset of the Debtor's estate.

And Ms. Canty, if you're on, can you please put up Exhibit 1, please, or Slide 1?

As she's doing that, Your Honor, just briefly, Mr. Dondero owes the estate $9 million under three demand notes. The demand notes were issued in 2018, and as I said, they're each two-page notes. They were executed by Mr. Dondero, and there's no dispute that Mr. Dondero got the money. And as you can see, Your Honor, this is the only payment term, the one that's on the screen right now, that says accrued interest and

principal on this note shall be due and payable on demand of the Payee.

On December 3, 2020, demand was made, and Mr. Dondero has refused to pay. The notes are accelerated. The notes are not in dispute. And the amounts due under the notes, Your Honor, are liquidated. It's principal plus interest plus the costs of collection.

If we can turn now to NPA, NexPoint Advisors, which, Ms. Canty, is the next slide.

This term note was issued in May 2017. Pursuant to the term note, NexPoint borrowed $30 million from the Debtor. The term note was executed by Mr. Dondero in his capacity as the control person for NexPoint. As you can see very clearly here, the notes were payable in annual installments on December 31st of each calendar year.

It is not disputed that on December 31, 2020, a payment was not made. On January 7th, the Debtor sent a notice to NexPoint Advisors, notifying them that they were in default and that the notes were accelerated. The notes, which are property of the estate, are due and payable.

It's also not disputed that shortly after the Debtor sent that note, NexPoint Advisors tried to make a payment, and that payment was applied to past-due interest and principal, in accordance with the terms of the notes.

NexPoint controlled the ability to make payments on these

notes, and chose not to. Again, Your Honor, the amounts due under this note are liquidated. Principal plus interest plus the costs of collection.

Finally, Your Honor, -- and Ms. Canty, if you can go to the next slide -- Highland Capital Management Fund Advisors borrowed $7.4 million from the Debtor in May of 2019 under two promissory notes. And as you can see on the footnote here, Your Honor, these aren't the only debts that are owed by Highland Capital Management Fund Advisors to the Debtor. Highland Capital Management Fund Advisors, we'll just call HCMFA, issued two other demand notes in favor of the Debtor, and those were earlier, and there's a prior agreement that says the Debtor would not demand payment on those notes until May 31st of 2020. That's the only reason they're not at issue here. And you'll see in the Debtor's schedules that these notes were included in the aggregate amount owed by Highland Capital Management Fund Advisors.

Again, Your Honor, the Debtor sent a demand note on December 3rd. The notes were not paid. The notes are accelerated. The notes are due. And the damages under the notes are liquidated. Principal plus interest plus the cost of collections.

In each case, Your Honor, and you'll understand that -- excuse me, Your Honor. The underlying agreement in each of these cases is a note instrument. It's a debt instrument.

Has there been a breach? Yes, absolutely.

And Ms. Canty, you could take that down now, if you want.

There has been a breach. The breach is the Debtor's failure to pay. And there are damages. The damages are, again, principal, interest, and costs of collection. And that's all that needs to be determined. There's no need for Your Honor to create a liability here. This isn't a contract where Your Honor has to assess whether or not a supplier supplied widgets. This isn't a contract where Your Honor has to do a factual analysis and determine the damages. There is a debt here, and it's a liquidated debt that is owed to the estate.

That, Your Honor, is how we get to Section 542(b). In each adversary proceeding, the Debtor has --

THE COURT: Let me stop you there. I mean, it's not really liquidated, though, right? You said there is a liquidated debt. Now, you're saying, oh, it's slam dunk, we'll win on the breach of contract. That's your idea of this. So treat it as liquidated.

MR. DEMO: Well, no, I think --

THE COURT: But it's not liquidated. Your opposing counsel says that's a problem.

MR. DEMO: There's an amount owed under the note. Well, Your Honor, I guess there's a slight distinction. The notes are disputed. The obligation to pay the note are

disputed. The amounts that were lent on the notes are just simply on the face of the notes.

And I guess, jumping ahead, Your Honor, the fact -- and you've heard it before, and you, I assume, will hear it again -- the fact that the notes were disputed doesn't take this out of the realm of 542(b). And Mr. Dondero's counsel cited to *Collier's*, and *Collier's* is clear on this and the case law is clear on this. The fact that there is a dispute does not mean that 542(b) is not a correct mechanism to collect on a matured note, a note that's payable on demand and a note that's property of the estate.

And Your Honor, and I'll get into the case law, and maybe I should just jump into it right now, but that's what, for example, the Southern District of Texas found in 2018 in affirming a bankruptcy court case in *Tow*. In *Tow*, the facts were that there was an account receivable owed to the Debtor. The Debtor brought an action under 542(b) to recover that account receivable. The account receivable was challenged. The defendant said he didn't owe the money because there was a settlement agreement in place and he just didn't have to pay. But the Bankruptcy -- I'm sorry, the District Court there, affirming the Bankruptcy Court, said that because the account receivable was property of the estate, that 542(b) was the correct mechanism for the estate to collect on that, despite the fact that there could have been a state law action if the

Debtor weren't in bankruptcy.

THE COURT: Let me stop you there, --

MR. DEMO: In ruling that way, --

THE COURT: -- because I went back and pulled that case earlier today, --

MR. DEMO: Uh-huh.

THE COURT: -- because, you know, I'm going to get a little bit concerned if the Southern District of Texas goes a different way than the Northern District. And of course, we don't have a Fifth Circuit opinion on point. So gee, let's see --

MR. DEMO: Right, Your Honor.

THE COURT: -- different *Tow v. Park Lake* was. There are a couple of nuances I read that I think maybe matter. It --

MR. DEMO: Okay.

THE COURT: The Court talks about -- starts out talking about, in the very first sentence, that there had been a settlement agreement between the bankruptcy trustee and Park Lake, and then Park Lake, who owes money under the settlement agreement, later receives proceeds from a utility company, reimbursement of some sort, and then the Trustee asserted a claim for turnover of that reimbursement under 542. And then, meanwhile, Park Lake files a motion to hold the Trustee in civil contempt for violating the settlement agreement.

So, while Judge Rosenthal didn't make a big deal of these facts in distinguishing her opinion from the Northern District *Satelco* case, these do seem like rather important facts to me, that there was a settlement agreement where account debtor Park Lake is saying, okay, I agree, I owe you *x* amount, and then later Park Lake gets some sort of proceeds of a utility reimbursement, and then now all the Trustee is doing is seeking turnover of that reimbursement. That feels very different than --

MR. DEMO: Well, --

THE COURT: -- a suit on a note, even if --

MR. DEMO: -- it is different.

THE COURT: Even if you think it's slam dunk, no defenses are going to prevail at the end of the day, we do technically have a breach of contract action that you must prevail on first.

MR. DEMO: Well, Your Honor, I mean, yes. Is *Tow* different on the facts? Yes. It's an accountant receivable. It's not a note.

The fact that the amount -- the amounts were arguably owed under the settlement agreement, you know, that was disputed. If it hadn't been disputed, the amounts would have just been turned over to the estate. The fact that there was a fight over it means that there was a fight over it.

But Your Honor, I mean, I think possibly the more

instructive case here is a case called *Faulkner v. Berg*, which is actually out of the Northern District of Texas. And it's a 2006 case from Judge Houser. In that case, there was, Your Honor, a promissory note at issue. The Chapter 11 trustee brought an action against a man named Berg because Berg owed the estate money on a promissory note that was issued to Berg in connection with -- I'm sorry, that -- not -- that Berg owed the estate as compensation for certain services that he received.

The Chapter 11 trustee brought an action on that promissory note, and the complaint that the Chapter 11 trustee filed included a breach of contract claim and a turnover claim under 542(b). Mr. Berg brought a number of affirmative defenses, and Judge Houser still held that that was a core proceeding under 542(b). And it's a 2006 case, a case that was issued after *Satelco*. And notably, Your Honor, it just honestly doesn't discuss *Satelco*. It doesn't address it at all. It just finds that the action on the notes was a core proceeding.

And now, Your Honor, the -- Mr. Dondero, in his responsive papers, --

THE COURT: What case was that again? I just don't remember this case.

MR. DEMO: It was *Faulkner v. Berg*. And I can get you the case cite, if you'd like.

THE COURT: Okay. Maybe I do remember it. I just --

(Pause.)

MS. DEITSCH-PEREZ: If I can direct the Court's attention, there's also a subsequent case that I think the Debtor was about to acknowledge.

THE COURT: Okay. We'll let you have your rebuttal.

MR. DEMO: Yeah. And I can -- instead of --

THE COURT: Okay. Go ahead, Mr. Demo.

MR. DEMO: Yeah. Instead of getting you the case cite, Your Honor, I do think that subsequent case is important, because Mr. Dondero cites it for the fact that the District Court overruled the *Berg* court and found that motion to withdraw the reference in that instance was correct.

But what Mr. Dondero neglects to say is that the action to withdraw the reference that was brought to the District Court was actually the second action. The first motion to withdraw the reference brought to the District Court was denied. The second motion to withdraw the reference was granted, but based on entirely different facts. Because Berg also had third-party claims against a nondebtor, a guy named Kornman. By the time that the case got to the District Court, the debtor's claims on the promissory note against Berg had been resolved. The only parties left in the adversary were Berg and Kornman, non-debtors, and the only actions left in the adversary were non-core actions.

In addition, Your Honor, both Berg and Kornman agreed to withdraw the reference.

So I understand why Mr. Dondero cited it, as kind of a bit of a gotcha case, but it doesn't actually stand for the proposition that the Northern District of Texas withdrew the reference when the underlying complaint was a breach of contract and a turnover claim under 542(b) that was brought in an adversary proceeding to collect on a note.

And Your Honor, these cases aren't outliers. There are cases from other districts that stand for the same thing, and they stand for the proposition that the collection of a note is an appropriate remedy under 542(b), despite the fact that there may be affirmative defenses to that note.

And the case that I would direct Your Honor to and then pivot from real quick is the Second Circuit Court of Opinions [sic] case in *Willington Convalescent Home*. That case was cited with approval in *Tow*.

But the case that I want to focus on, because I just think there is a great quote from it, is a case out of the Eastern District of Virginia. It's a 2020 -- 2012 case, excuse me -- called *In re Connelly*. In that case, the debtor sued, seeking turnover on a series of notes, and the defendants filed answers denying the indebtedness and asserting nine affirmative defenses challenging the validity and enforceability of the notes.

The defendants also argued, as they do here, that a turnover action -- I'm sorry -- that the action couldn't be core because it was disputed. And I want to read a quote from the *Connelly* court, which says:

> "While the Defendants assert that they are not indebted to the Trustee, it is simply not relevant that the Defendants dispute liability on the instrument. The presence of a dispute does not preclude a debt from being matured. It is sufficient if the complaint alleges the existence of matured debt. For an action to be a turnover proceeding, it is not relevant that the Defendant disputes the existence of a debt by perhaps denying the complaint's allegations, as long as those allegations state the existence of a mature debt. A cause of action is a turnover proceeding under 542(b) of the Bankruptcy Code where it seeks the collection, rather than creation or liquidation of a matured debt."

And *Connelly*, Your Honor, is consistent with *Tow*, and it's consistent with case law from other circuits, and it's also consistent with *Collier's*. Mr. Dondero's counsel cited to the 157(b)(2)(E) section of *Collier's*, but Mr. Dondero's counsel neglected to cite to the actual *Collier's* section on 542(b), which says that 542(b) does not on its face say it does not apply to disputed claims and that 542(b) does apply to disputed claims. As long as there is a debt which is property

of the estate which is matured, which is payable on demand, 542(b) is the correct mechanism for the estate to collect on that debt.

Those are exactly the facts here, Your Honor. The fact that there is a breach of contract claim right alongside that doesn't change that, because it's black letter jurisdictional bankruptcy law that just because there are state law issues implicated, if an action is core, if it arises under or arises in a bankruptcy statute, the bankruptcy statute governs and creates the bankruptcy court jurisdiction. State law issues come up in core matters all of the time and it does not make those matters non-core.

That's simply the case here, Your Honor. 542(b) is a bankruptcy court provision that provides that a trustee can seek an action to recover on a matured debt. All of the actions here are matured debts. Do the people have -- or, excuse me, did the Defendants have defenses? Yes. But if you look at our complaints, they were properly pled. We pled the existence of a debt. We pled a proper turnover action. They're payable-on-demand notes, and demands have been made. They fit squarely under 542(b).

And because they fit squarely under 542(b), they are core, they are equitable, meaning no jury trial right exists, and Your Honor has the authority to issue a final order on these matters.

And if you look at, you know, turning briefly to the *Satelco* case that Mr. Rukavina cited and the *Satelco* case that Dondero's counsel cited, that is a 1986 case. It's been cited three times in the Northern District of Texas, and I will concede that it's a Northern District of Texas case. And I'll also concede, Your Honor, that it stands for the proposition that you need a final judgment in order to use 542(b). I think that's very narrow. The majority of cases or courts throughout the United States have found that too narrow, and quite honestly, it just hasn't been followed. *Satelco* has been cited in 1986 in its own -- I mean, not cited. *Satelco* was written in 1986. It was cited in *Fang*, which is a 1993 case, and *Fang* really followed the analysis in *Satelco*. And then it was cited in *Moran* in 2006. The *Moran* cite was basically just a string cite, Your Honor. It gave no real analysis.

2006, Your Honor, was also the year that Judge Houser entered the *Faulkner v. Berg* decision which we discussed earlier, which did not even address the *Satelco* opinion. Since 2006, I haven't found any instances where it's cited in this district with approval.

The only cases in the circuit that I have found are the cases like *Tow*, which address it and distinguish it and say that it's in the minority.

Your Honor also heard cases where Mr. Rukavina said, you

know, you can't use Section 542(b) to collect on a contract claim. And Your Honor, you know, that's right. If this were a breach of contract claim in a traditional sense, or an M&A agreement or a supply agreement, where Your Honor would have to determine the responsible party, who actually breached the agreement, where Your Honor would have to do detailed factual analyses of what the damages would be, okay, you know, I can't not say that that would fall out of 542(b), arguably.

But again, Your Honor, that's just not the case here. The case here is squarely under 542(b). We have two-page notes that are unambiguous. We have two-page notes where the Defendants have admitted that they got money from the estate, with the promise to pay it back on demand or to pay it back in accordance with its terms. And yes, they have defenses. But again, Your Honor, that does not take it out of 542(b).

And *Satelco* is -- it's just not current law and it's just not followed in this circuit and it's not followed, quite honestly, throughout the United States.

THE COURT: Okay. Let me --

MR. DEMO: But even if --

THE COURT: Let me ask you, and maybe I'm interrupting at a time you were about to get into this, but if I accept your argument as correct that, you know, *Satelco* got it wrong and I should follow the courts that have said 542(b) sort of, I don't know, trumps, supersedes, a breach of

contract cause of action on a note, so, following your logic, that would mean this is arising under the Bankruptcy Code, *i.e.*, 542(b) and core matter, we still have the jury trial right problem, correct?

MR. DEMO: No, not correct, Your Honor.

THE COURT: Because even though it's statutory core under your argument, we still look at *Granfinanciera*, *Langenkamp,* and we go back and look at would the court of law versus a court of equity have tried this suit --

MR. DEMO: Yes.

THE COURT: -- and is there legal remedy you're seeking versus an equitable remedy. And so, you know, even in a preference suit, for example, core, core, core, they're entitled to a jury trial --

MR. DEMO: And --

THE COURT: -- if they didn't file a proof of claim.

MR. DEMO: Understood, Your Honor. And I just don't think that's the case here.

I mean, again, looking back to the *Tow* court, the *Tow* court actually addressed this issue, and the *Tow* court found that 542(b) -- and again, this is consistent with other case law and other courts -- creates an equitable remedy. It doesn't create a legal remedy. And because it creates an equitable remedy, the *Tow* court found that the jury trial right did not exist. And it found that a jury trial right did

not exist despite the defendant arguing that the action was a suit for money damages. You know, it wasn't a suit to turn over a car or anything like that; it was actually a suit for money damages. And the District Court in *Tow* said that the suit for money damages did not mean it wasn't an equitable remedy because it arose under 542(b) and a jury trial right did not exist.

So I would, I guess, challenge your premise there a little bit, Your Honor, because I do think that the case law is pretty clear that 542(b) creates an equitable remedy without a jury trial right.

THE COURT: Okay.

MR. DEMO: And with that, Your Honor, I will move on and pivot and say, you know, even if this weren't a core matter and even if a jury trial right existed, that the other *Holland America* factors weigh heavily in favor of Your Honor keeping this case for as long as possible. And I know that wasn't the most elegant pivot, but, you know, I do -- I am conscious of this Court's time.

You know, first, Your Honor, the jury trial right, we didn't press it in our papers. Did Mr. Dondero file a 553 action in his complaint, which arguably creates the claims allowance process, and then recant it? Yes. But leaving that aside, looking at forum-shopping, you know, the Defendants argue that we're the ones forum-shopping here. The Defendants

argue that the Debtors are forum-shopping by having filed these actions in that court. It's difficult to respond to that, Your Honor, because where else would the Debtor have filed these actions?

I can't think of any case I've seen where the debtor is owed money that arose -- that maturity occurred postpetition, and the debtor went out to state court in Texas or state court in Mississippi to collect on those debts. Those actions are always brought in the Bankruptcy Court.

The Bankruptcy Court was created as a court, as a forum, to marshal the assets of the estate, to adjudicate disputes, and then to push those assets out to creditors. It just doesn't make sense to say that the Debtor is forum-shopping by using the forum created for the Debtor under the Bankruptcy Code.

The distinction, Your Honor, and I don't want to belabor this point too much, Mr. Dondero and his affiliate entities have shown that they want nothing more than to not be in this court. They've filed recusal motions. They've filed withdrawal of the reference in this case, in these cases. We anticipate they'll file withdrawals of the reference in the other notes actions. They filed a withdrawal of the reference in the CLO Holdco-UCC dispute. Mr. Dondero's controlled entity, the DAF, recently filed an action in the Northern District of Texas seeking to functionally re-litigate the

HarbourVest settlement and to hold Mr. Seery responsible for breach of fiduciary duties.

We recently found out that Mr. Dondero's other related entity, which was a very, very small LP in the Select Fund, has filed a suit in the Northern District of Texas, seeking to hold the Debtor liable for mismanaging multi -- or, sorry, Select Fund with respect to the sale of Trussway and SSP, two names Your Honor may remember because they came up in December in the context of the hearing you had on the CLOs seeking to prevent Mr. Seery from exercising his authority under the CLO management agreements.

And I do want to be clear, Your Honor, that this new case did not name Mr. Seery as a defendant, but it's still there. This is happening. Mr. Dondero and his related entities do not want to be here. They are forum-shopping.

And I would push Your Honor to look at the Western District of Texas case *Citibank*, which says that the best way to deal with forum-shopping in a withdrawal case is to wait to withdraw the reference until the absolute last moment, so that no party can be said to be forum-shopping. No party can be looking at this Court's orders and saying, oh, this is a good one, this is a bad one, let's withdraw the reference.

This is the appropriate venue for this, and this is where it should be held and should be adjudicated, up until the last minute.

And I should have said this from the beginning, Your Honor, that Your Honor absolutely has jurisdiction. At a bare minimum, related-to jurisdiction, because these assets are a core asset of the Debtor's estate. The Debtor is in a monetization plan. Collecting these assets and distributing these assets out to the creditors is what the Debtor is doing. And so there is, at a minimum, related-to jurisdiction.

There are also efficiency concerns that we really need to address here, Your Honor.

THE COURT: You're fading. Your audio is fading.

MR. DEMO: Oh. Is this any better?

THE COURT: Yes. Uh-huh.

MR. DEMO: Okay. There are also judicial economy issues that favor keeping the case here, Your Honor. I mean, the case has obviously been pending for 20 months. That's not new to anybody. The relationship of all the parties in this case is very important. The case is complicated. The parties in this case are complicated. And understanding those is going to be a key component of actually understanding any action, even a simple two-page note action.

This Court -- there are also 19 separate litigations, I believe, currently pending with Mr. Dondero and his entities, and Your Honor has dealt with all of those in an expeditious manner. When something needs to be heard on an emergency matter, Your Honor has made herself available, and we

appreciate that. Your Honor has entered orders in a timely manner, and Your Honor has dealt with the complicated things in this case in a timely manner. And we would ask Your Honor to keep doing that.

Because, in distinction, the District Court has other things to do. There are criminal cases. There are other cases. The District Court is not a court that wants to focus just on this case. And the District Court's treatment of this case is evident, I think, Your Honor, by the way that they treated the stay motions that were filed. We still don't have a ruling on them and we never will have a ruling on them because we've passed that by and we're in the Fifth Circuit now.

This Court was created to marshal the Debtor's assets and to adjudicate disputes and to allow for the distribution of assets to creditors. We would ask that Your Honor keep it for that reason, among others.

We've also, as we talked about earlier, we are very close to finishing discovery. We've had multiple depositions. We will -- or, I'm sorry, not multiple -- we've had Jim Seery's deposition. We have Mr. Dondero's deposition. There are document productions that are occurring. And Your Honor, these cases are scheduled to be heard within the next 90 to 100 days.

We need a resolution on this matter so that we can make

distributions to creditors. This Court is the best court to do that. There is just literally no time to wait for the District Court to get around to hearing -- in the district -- I mean, to hearing this matter.

And finally, Your Honor, I think, you know, we can draw some inferences here. We can draw some inferences that, you know, there is some forum-shopping going on. There is the desire to burn some assets. That also weighs into the judicial economy, Your Honor, to not allow additional estate assets to be wasted running this Court -- running a very simple proceeding up and down to the District Court. Your Honor has the authority to enter non-final orders, including orders on partial summary judgment, including orders on evidentiary matters. Based on those orders, we quite honestly don't think there will ever be a need for a jury trial, and we would ask Your Honor to keep this case for as long as possible in order to enter those orders, in order to provide for an expeditious resolution of this matter.

Unless Your Honor has any questions, I think that's it for me.

THE COURT: All right. No more questions at this time. I am going to come back to that Trussway matter before we finish today. All right. So, words in rebuttal.

MR. RUKAVINA: Thank you.

THE COURT: Mr. Rukavina?

MR. RUKAVINA: Thank you, Your Honor. Thank you, Your Honor. I'll be brief.

Let me address the case, the *Faulkner v. Berg* case.

THE COURT: Okay.

MR. RUKAVINA: Because I think there's a valuable lesson to learn from this case, Judge. And here is the whole extent, and I mean literally every molecule, of what Judge Houser wrote: "The complaint contains a claim for breach of contract and a claim for turnover of property of the estate under 542. These two are core claims pursuant to 28 U.S.C. 157."

That's it. That's all she wrote. Now, is Judge Houser an inattentive judge? Is she a stupid judge? Absolutely not. But she wrote this in 2006, five years before *Stern v. Marshall*, Your Honor.

Similarly, Judge Felsenthal -- I'm sorry, Judge Abramson wrote the Sel -- the --

THE COURT: *Satelco*.

MR. RUKAVINA: -- the satellite case.

MS. DEITSCH-PEREZ: *Satelco*.

MR. RUKAVINA: Thank you. Two or three years after *Northern Pipeline*. And that's my point. And it seems like trustees and debtors sometimes forget the painful lessons of the Supreme Court's precedent, and then we're all shocked when a case like *Stern v. Marshall* comes down and we're all

shocked, because we've been led down the road for years and years and years of whittling away here and whittling away there, that at least the U.S. Supreme Court finds these things of paramount importance. So that's what we're dealing with today.

So Mr. Vasek, will you please pull up the HCMFA notes?

So, I do not purport, Your Honor, to have a mini-trial today on the merits of anything. That's not what this is about. But Mr. Demo brought up a couple notes, so let me -- let's go look at the HCMFA notes, Your Honor.

MR. DEMO: Are these -- are these notes going to be put into evidence?

MR. RUKAVINA: These are attached to the complaint, sir.

MR. DEMO: And we don't have an objection.

MR. RUKAVINA: These are attached to your complaint.

MR. DEMO: Oh.

MR. RUKAVINA: Didn't you -- didn't you quote from them earlier?

So Mr. Vasek, will you go to the signature page?

Your Honor, look at that. Maker: Frank Waterhouse. That's what these notes are. Maker: Frank Waterhouse. I would survive summary judgment today if all they did was they told you, look, Judge, give me my $7.54 million. I'd say, well, who in the world is Frank Waterhouse? Of course, we all

know who he is. But look at how he signed that. Not as a representative capacity.

So what Mr. Demo is saying, Judge, forget about what Mr. Rukavina just said. Forget about these defenses. Forget about looking at the facts. Forget about looking at Mr. Waterhouse's actual or apparent authority. Here's a note. Pay me. Oh, and if you don't pay me, it's contempt of court. That is what he is trying to get the Court to do, by saying that 542(b) somehow does away with the need to use -- I think Your Honor said it -- to liquidate a claim. And as soon as we start that process of liquidation, we get into the whole issue of who's going to be our fact-finder. Is it going to be a jury? And who's going to be our judge. Is it going to be an Article III or an Article I judge?

I did not create the Article I/Article III distinction. I would love it if every bankruptcy judge was an Article III judge. I think having these hearings and so many contentious adversary proceedings is a gross, gross waste of all of our times. But this is the mechanism that Congress has created. And if we mess with this mechanism, we're just inviting trouble.

And, of course, any party that comes before a judge, whether it's a reference withdrawal or whatever, of course there's always underlying strategy. Of course parties would prefer to be in front of one court or another. That's not

gamesmanship. That's not forum-shopping. The Debtor could have filed a suit and a sworn account in a Dallas court and I bet they would have already had a judgment by now, probably, given how a suit and a sworn account works in Texas. But they probably didn't talk to their local counsel about Texas procedure.

So all of those things wash out. Every litigant in front of you has an ulterior motive, Your Honor, which is that they want to win. What matters is the Court's jurisdiction. What matters is the Seventh Amendment. What matters is the jury right. And what matters is 542(b).

I think Your Honor has, through her questions, suggested that she doesn't buy the argument that 542(b) can be used to liquidate a disputed claim. I hope that the Court will reaffirm that.

And while I understand that the usual practice is that the bankruptcy judge stays on board for pretrial matters, I understand that there's a lot of wisdom to that practice in other cases, here, I think because this Court has so much going on in this case already, and these note cases really are different, they really don't have a large universe of discovery, they really are divorced from the bankruptcy case, I respectfully submit it's in everyone's interest to have the District Court enter its orders throughout this case and not have to revisit potentially every order that this Court enters

in the interim before we get to trial.

Thank you, Your Honor.

THE COURT: All right. Do you have any comment about the -- I think it was Eastern District of Virginia case that Debtor argued? Drawing a blank on the name.

MR. DEMO: No, Your Honor.

MR. RUKAVINA: Your Honor, I do not have any discrete comments on it. I would just point out that you're -- the Court is right. The Fifth Circuit has not addressed this issue. But I have briefed, and it's black letter in those cases, the D.C. Court of Appeals, the Eleventh Court of Appeals, and the Eighth Circuit Court of Appeals. So those are three court of appeals that agree with *Satelco*, and not a single court of appeals holds otherwise. And as Judge Dodd taught us when --

THE COURT: I take it there's a Second Circuit case that holds otherwise, right?

MR. RUKAVINA: That's what the Debtor has briefed, yes. I apologize.

THE COURT: Uh-huh. Uh-huh.

MR. RUKAVINA: That's what the Debtor has briefed. But again, I go back to just thinking about it conceptually. If Congress says, okay, you have a breach of contract case, you have a promissory note case, and Congress says, I want to slap my own label on it and I'm going to assign it to an

Article I court to enter a final order, and I'm going to strip you of your jury rights because it's equitable, Your Honor, that's -- that's exactly what *Northern Pipeline* was. That's exactly what *Stern v. Marshall* was.

With due respect to the Eastern District, with due respect to the Second Circuit, it's common sense, Your Honor. Congress cannot take something that is a constitutional right, that is a common law right, and just give it a label, and because of its label somehow do away with 250 years of constitutional law.

THE COURT: Thank you. All right. Any last words, Ms. Deitsch-Perez?

MS. DEITSCH-PEREZ: Yes. I think I can answer your question about -- I think you were asking about *Willington Convalescent Home*?

THE COURT: Right.

MS. DEITSCH-PEREZ: Which was the case the Debtor referred to. Well, first of all, it's a 1988 case, so pre-*Stern v. Marshall*. And I believe the only claims that were brought in there were turnover and preference. And so it's, in any event, distinguishable from the case here, which is a contested contractual matter.

And to that end, while, like Mr. Rukavina, I'm not trying -- I'm not going to try the case here, I do want to point out that there are defenses, there are real defenses. And so for

that reason I would like to -- let me pull up one of the notes. So, if I can share my screen. Okay. Are you able to see my screen now?

THE COURT: No.

MS. DEITSCH-PEREZ: Okay. Can you see it now?

THE COURT: Yes.

MS. DEITSCH-PEREZ: Okay. So this is one of the three notes. And this is what I referred to earlier and what the Debtor would like to ignore. The Debtor keeps saying these are two-page notes. There's nothing to them. There are no defenses. But what Mr. Dondero has alleged is that there is a subsequent agreement that put conditions, conditions subsequent that would cause the note to be forgiven. And they relate to the sale of the portfolio companies. I don't know if you saw it in the newspaper that MGM may be sold to Amazon for $9 billion. So you will hear, when you hear Mr. Dondero testify, if you hear it, or the District Court will hear that these notes were to be forgiven under certain circumstances.

And so, first of all, the Debtor alluded, without saying so, to the parol evidence rule. Obviously, a subsequent agreement can be proven up. The parol evidence rule does not prevent that. That's a live defense. And in addition to that, you can certainly have parol evidence if your note is ambiguous. And while the note does not say anything about the conditions -- and the reason it didn't is rooted in tax law,

because in order for the note not to be immediately taxable as income to a party, it has to be a valid note at the time and the forgiveness has to be based on events that are not entirely in the borrower's control, and that's -- that's what the fact-finder will hear about.

And if you look at each of the notes -- in the first one it's in Paragraph 8; I think in the others it might be in Paragraph 7 or 9 -- the note refers to the existence of other agreements. And that is consistent with there being a subsequent agreement that the notes would be forgivable under certain circumstances that related to the portfolio companies.

So, to be clear, there are issues to be tried here to a fact-finder. The Debtor admits that the tax determinations are also intertwined with factual determinations. And that's our point, that you have to know the tax law relating to when a note is a bona fide loan at the start but can be compensation under certain circumstances. And we will have expert testimony on that. That is something Mr. Dondero is entitled to try to a jury in the District Court.

Thank you very much for your time and attention.

THE COURT: Thank you. By the way, --

MR. DEMO: Your Honor, with apologies --

THE COURT: -- we both -- well, the Eastern District of Virginia case that I was asking about was *Connelly*. *Shaia v. Taylor (In re Connelly)*. It was a 2012 case. So that was

the one I was wondering if either you or Mr. Rukavina could specifically address.

(Pause.)

MR. DEMO: And Your Honor, that case -- there are other cases that support that proposition as well. I don't need to go through them chapter and verse, but they all stand for basically the same proposition.

MS. DEITSCH-PEREZ: I don't have that one particularly in mind, but this -- this falls right in line with what's in *Collier's*, that there are some courts across the country that have mistakenly and incorrectly used the turnover statute to unconstitutionally exercise jurisdiction over what is a non-core matter that should be able to be tried before a jury in the District Court.

THE COURT: All right. I just wondered if anyone could zero in on the facts of that case, because I --

MS. DEITSCH-PEREZ: No. But may I -- may I have the opportunity to look at it, and if there is a particular distinction we should bring to your attention in a very brief letter, do it after the hearing?

MR. RUKAVINA: Well, Your Honor, --

MR. DEMO: Your Honor, I think --

MR. RUKAVINA: -- I remember -- I have that case in front of me.

THE COURT: Okay. Everybody's talking --

MR. RUKAVINA: I have the case in front of me.

THE COURT: You have the case in front of you? Is that what you said?

MR. RUKAVINA: Yes, Your Honor. And I do remember -- I do remember reading it, and it does stand for the proposition that Mr. Demo says, --

THE COURT: Okay.

MR. RUKAVINA: -- which is that a disputed debt, a disputed claim, does not remove the claim from the operation of 542(b) and from it being core. And I think what Ms. Deitsch-Perez started telling you is that it's just wrong. It's just a wrong case. Because, again, it ignores the -- it looks at is this statutorily core, and it says it's statutorily core, and it doesn't look at the fundamental constitutional issue.

But I will quote this case right now, Your Honor, and here's the -- the key of it. So, again, Mr. Demo is correct that it says that whether the debt is disputed or not doesn't matter. But here's what he -- the Court says: "A cause of action is a turnover proceeding under 542(b) of the Bankruptcy Code where it seeks the collection rather than the creation or liquidation of a matured debt."

That goes to Your Honor's point. You have to have the liquidation of a debt. A promissory note is not a judgment. A promissory note is a means to a judgment. You have to

liquidate that promissory note.

MR. DEMO: Your Honor, this is Greg Demo. I'll take issue with that. That's just impossible, Mr. Rukavina's construction of that case. You can never have a final judgment on a note if that note is also disputed. You have to resolve the dispute first.

What that case says, and it's also in the *Tow* opinion, it's also in the Second Circuit opinion, it's also in the case out of the Western District of North Carolina, I think, what that court says is that 542(b) can be used to collect on a debt even if that debt is disputed. If what that means, that you have to have a final judgment on the debt before you can use 542(b), that language means nothing. Because how can you have a debt that's disputed and also have a debt that has a final judgment on it? The language says what it says, and it applies here.

And Your Honor, I point you to, quickly, the *Tow* case, and I'll read you a quote from the *Tow* case which cites to that Second Circuit case that I referenced. It says, "*See, example, In re Willington Convalescent Home, Inc.*" And the quote from *Willington* is: "The mere fact that Connecticut denies that it owes the matured debt relating to the services because of a recoupment right does not take the Trustee's actions outside the scope of Section 542(b)." That's the quote in *Tow*. That's the quote in in the Southern District of

Texas.

Does it have as much as the case that I cited from Virginia? No. But it has the exact same substance, Your Honor. And what that means is that *Satelco* has to be wrong because you cannot have a dispute on a debt and allow that dispute to be heard under 542(b) if 542(b) requires a final judgment. It just doesn't make sense.

And Your Honor, while I have you, I do want to address the *Stern v. Marshall* issue. Because this Court is not going to cause friction under *Stern v. Marshall*. The *Tow* court addressed *Stern v. Marshall* and found that, despite the fact that there were state law issues, again, the action was a 542(b) action and had no *Stern* implications. There are cases from this circuit, there are cases from other circuits, all of which have found that turnover is an appropriate means to collect on a matured note, even with disputes. If this Court follows that line of cases, this Court is not going to be creating a new *Stern* controversy, because that controversy already exists. Your Honor is not going to be creating a constitutional mess.

THE COURT: Do all of these cases you say support your position, do they say also no jury trial right?

MR. DEMO: Yes. They do, Your Honor.

THE COURT: And forget about *Tow*, because *Tow*, I think, is distinguishable. There was a settlement agreement.

The obligor on the settlement agreement got some sort of recovery. The trustee was seeking to turn over that recovery. That is very distinguishable in my view. Okay? There had already been resolution, liquidation, whatever you want to call it, of the amount due. It was purely, turn over this recovery you're getting, obligor, under the settlement agreement. I mean, that's very different.

But I feel like, even if 542(b) supersedes the breach of contract nature of your lawsuit, we still have this problem of there's -- you know, a suit on a note was tried in a court of law back in Elizabethan times, okay? It's a legal remedy you're seeking as well as an equitable remedy, liquidation of the claim as well.

MR. DEMO: It -- it --

THE COURT: I just feel like they're entitled to a jury trial.

MR. DEMO: And Your Honor, I guess what I would say to that is, well, one, even if they are, Your Honor doesn't need to withdraw the reference today and Your Honor should keep this for --

THE COURT: Okay.

MR. DEMO: -- as long as possible. Make dispositive findings, enter partial summary judgment motions, and all of that.

But what I would also say is that the language in 542(b)

-- and I'm sorry, I'm not facile enough to run through the cases on the fly -- 542(b) is the action that creates the equitable remedy. It doesn't matter what the underlying dispute is. If 542(b) applies, 542(b) is itself an equitable remedy. 542(b) is, per se, equitable, per se arises under the Bankruptcy Code, and it's that that vitiates the right to a jury trial. It doesn't matter what the underlying facts are if 542(b) applies.

THE COURT: Okay. All right. Well, I thank you all for your arguments. We've really gone into great depth here.

Here is what we're going to do. We are going to draft up three reports and recommendation for each of these adversaries, and I am concluding recommending to the district Court that the breach of contract claims here are non-core, and tacking a turnover claim under 542(b) onto them as Count II doesn't change the underlying nature.

So there's a split of authority, I understand, but I think certainly under *Stern*, *Marathon*, I think that's the better answer, that we have a non-core claim and a core claim, with the breach of contract being non-core.

I also think that there are jury trial rights here on behalf of the Defendants. Were it not for the fact that they withdrew their proofs of claim -- I mean, at one time, it appears, at least in the case of Mr. Dondero and, well, and in the case of NexPoint and Highland Advisors -- they had proofs

of claim that involved some overlapping issues with these notes. But they're gone now. And the fact that they're gone changes everything. So I do determine and am going to recommend to the District Court that there are jury trial rights here.

By the way, I'll address this issue with regard to the tax issues that are being raised by Mr. Dondero. I don't think there is substantial or material consideration of other non-bankruptcy federal law that would be involved here. But that's really irrelevant, I suppose, because I'm finding non-core jury trial rights, no consent by the Defendants, and so I'm going to recommend that the reference be withdrawn. But I am going to do what is the usual protocol and recommend that the reference only be withdrawn at such time as the Bankruptcy Court notifies the District Court that the matters are trial-ready, and therefore recommend the District Court defer to the bankruptcy judge to handle all pretrial matters.

The reality is you're either going to get a magistrate handling pretrial matters or you're going to get a bankruptcy judge. And I'm going to follow -- I see no reason not to follow the usual protocol in this district, where I recommend the bankruptcy judge preside over pretrial matters.

Last, with regard to the motion for stay that's only been filed in the Dondero adversary, I am going to grant a 60-day stay that will start after Friday. In other words, I'm not

going to suspend, interrupt discovery that is about to end in three days, okay? But I guess I'll say, beginning at midnight Friday night, I'll impose a stay, and it'll be a 60-day stay, and subject to further extensions, but I'm assuming that might be the approximate amount of time that it takes the district Court to either adopt or not adopt this Court's report and recommendation.

Again, this is -- I was going to say it's consistent with protocol. We don't always stay adversaries pending a decision on a motion to withdraw the reference, but as a practical matter, there ends up being a stay, because I will not rule on a motion for summary judgment until the District Court rules on a report and recommendation, because, for all I know, the District Court will want to yank the whole thing up. So that's my ruling.

MR. DEMO: And Your Honor?

THE COURT: Yes.

MR. DEMO: I'm very sorry to interrupt. Expert discovery, we're supposed to get an expert report from Mr. Dondero's counsel on Friday as well, and we just want to make sure that we have enough time built in to actually do a deposition of his expert and complete that part of the --

MS. DEITSCH-PEREZ: I would --

MR. DEMO: -- discovery process.

MS. DEITSCH-PEREZ: I would suggest that we stay the

provision of expert discovery until the District Court rules. The District Court may rule that it's taking everything, as the Court said, in *Great Western*, and so we ought to hold onto that.

MR. DEMO: Your Honor, we have a scheduling order --

MR. MORRIS: Your Honor -- Mr. Demo, let me just speak for a moment.

Your Honor, this is John Morris. I've listened patiently to all of this, and I apologize for interrupting. But the deadline for serving expert reports was last Friday. I graciously granted an extension until this Friday for personal reasons that I won't get into, but Mr. Dondero should not use our kindness as -- improperly here. We granted a one-week extension of time until Friday. They should produce the report. They should make their witness available. And otherwise, Your Honor, if you're going to stay it, you'll stay it, but they should complete what's been started, particularly since the only reason they have the right to serve the report on Friday is because we gave them that extension of time.

MS. DEITSCH-PEREZ: Yes, but --

THE COURT: All right.

MS. DEITSCH-PEREZ: But that is --

THE COURT: Just a moment while I read this. Okay. I was taking at face value that discovery completely ended this Friday, the 28th, but now I've got the order in front of

me and I see deadline for completion of expert discovery is June 7th, and that was premised on expert disclosures being May 21st, and now you're saying you've pushed that off to May 28th. And I guess, Mr. Morris, you're saying you'd like discovery to proceed on the experts through June 14th. Is that a recap?

MR. MORRIS: Yes, Your Honor. And again, the only reason we're even having this conversation is because the Debtor gave an extension of time, and that shouldn't be used against us. We should complete this discovery right now.

THE COURT: All right. Now, Ms. Perez, you were saying?

MS. DEITSCH-PEREZ: To be fair, Your Honor, --

THE COURT: Go ahead.

MS. DEITSCH-PEREZ: Yeah. To be fair, we asked for a stay long before the request for the extension for the expert report, which was for personal reasons. But we did ask for a stay to start with, and it's not abusing Mr. Morris's courtesy to say we still want that stay. We would have liked to have had that stay earlier. The motion for stay did not get -- was not set for hearing until today. We would have had it earlier. The Debtor would not consent. And then the Debtor didn't even respond to our motion for stay.

We just think it would make sense to include the expert discovery in the stuff that's held in abeyance that the

District Court may want to preside over.

THE COURT: Okay. The motion for stay was filed April 15th, so that was, you know, Lord knows, --

MS. DEITSCH-PEREZ: Long time ago.

THE COURT: -- people seek emergency hearings all the time in this case. What I had intended before I focused on this expert issue, I intended to let discovery play out, because it seemed to me we were close enough to the end of discovery that we ought not to put the brakes on it.

So I am going to let discovery play out as addressed in the current scheduling order. Okay? So the expert -- discovery on facts cuts off this Friday. The expert reports will be due this Friday. And deadline for completion of expert discovery, as I understand it, would be June 14th, pursuant to the one-week extension. Yes or no? Or did you all intend June 7th?

MR. MORRIS: I'm happy to work with counsel, Your Honor. John Morris for the Debtor. I'm happy to work with counsel to get this done before June 14th. It's not a problem.

THE COURT: Okay. So that's the ruling. I'll let discovery play out as we've just announced. But other than that, there is a stay, so no motions for --

MS. DEITSCH-PEREZ: Can I ask for a clarification?

THE COURT: -- summary judgment, no trial filings for

60 days after entry of the order.

And Mr. Demo, I'm going to ask you to upload a form of order on this stay ruling. But, obviously, my law clerks and I will do the three reports and recommendation.

You had a question?

MR. MORRIS: Your Honor?

MS. DEITSCH-PEREZ: Your Honor, I have a question about it, --

THE COURT: Okay.

MS. DEITSCH-PEREZ: -- if I may. We have -- we conferred today about some documents that the Debtor did not produce, and because of the results of the conference, we were about to file a motion to compel. It's very discrete. It's on the Highland audited financial statements that are literally a push of the button for the Debtor but they don't want to produce them.

MR. MORRIS: I can -- I can respond to that, Your Honor. We haven't had a chance to respond. But nevertheless, what I will say is that the Debtor will produce the audited financial statements for the sole purpose of disclosing information related to those notes. And, to the extent it exists, and I don't know that it does, Mr. Dondero's compensation.

We are not giving full audited financial statements. But to the extent that there's any information concerning the

notes or Mr. Dondero's compensation, we'll provide that.

MS. DEITSCH-PEREZ: That -- that -- what we also need, because our expert would like to have it, is the information about the assets under management. So anything that might relate to an executive's compensation. It's broader than what Mr. Morris is saying. So, --

MR. MORRIS: Your Honor, the Debtor will not agree to provide information about assets. It just won't.

MS. DEITSCH-PEREZ: Will it -- this is why we should be conferencing outside. But we would like the information about assets under management. It is not something that Mr. Dondero didn't already have a right to. He had them at the time.

THE COURT: All right. I don't --

MS. DEITSCH-PEREZ: There's no reason to --

THE COURT: I don't know what you want me to do or say, but I've allowed a lot of discussion, but I don't have a motion to compel in front of me and I don't intend to --

MS. DEITSCH-PEREZ: That was my question, Your Honor. May -- may we make that -- I mean, if Mr. Morris and I cannot reach agreement, we would like to be able to make that motion tomorrow so that it's on file before the close of discovery.

MR. MORRIS: Your Honor, if I may just be heard briefly. We're now told that this information is required for the expert. We didn't hear about an expert for the first time

until last week. We were told that they needed an extension of time. It was an understandable reason. We were happy to give the extension of time.

It's now Tuesday. The report is due in three days. And I am literally hearing for the first time that this information is required for the experts. I just don't want this to be used as yet another excuse for delay, because, you know -- I'll just leave it at that.

And we can talk after this, Counsel. We can talk after this. And if you want to make a motion, you can make a motion. But this should not be used as another basis for delay. The report was due last week. We got the request for an extension just a few days before that. And to hear now that they need this information for the report has me very, very concerned and suspicious.

THE COURT: All right. Well, --

MS. DEITSCH-PEREZ: And I think Mr. Morris --

THE COURT: -- yes, I'm done hearing about this. There is zero chance I'm granting a hearing on a motion to compel this week. And again, given that it is related to information supposedly the expert needs and we're already past the deadline for an expert, I mean, I don't know --

MS. DEITSCH-PEREZ: Your Honor, we asked for this many, many, many weeks ago.

THE COURT: Okay. Well, --

MS. DEITSCH-PEREZ: Okay.

THE COURT: -- maybe a motion to compel should have been filed many, many weeks ago. But I've let you know where I stand on this.

All right. So I will try to get these reports and recommendations out as quickly as possible.

I said I wanted to come back to *Trussway*. You know, we're not here on anything except these three adversaries today, but could you repeat what you said, Mr. Demo, about a new district court action filed by -- I'm not quite sure who was the plaintiff.

MS. DEMO: It was filed by the Sbaiti firm, which is the same file -- law firm which filed --

THE COURT: It was filed by who? Your audio is not great today.

MR. DEMO: The --

THE COURT: It was filed by who?

MR. DEMO: Oh. Sorry. The Sbaiti firm. I don't know how to pronounce the name of that firm. But that's the same firm who filed the DAF action. And it was filed on behalf of an entity called PCMG, and then there's a bunch of Roman numerals after it. PCMG had a very, very, very small interest in the Highland Select Fund, which is an entity managed by Highland that's 99.95 percent owned by Highland, and then the balance, I think, is owned by this fund and maybe

a little bit by Mr. Okada. This firm is owned by Mr. Dondero.

They filed an action on the 21st. We found out about it by accident yesterday, because we haven't been served yet. We haven't fully digested it, but the crux of the matter is that Mr. Seery breached his obligations under the Investment Advisers Act when he sold the Trussway asset and the SSP asset for under value and for not allowing Mr. Dondero to bid on those assets.

And so we will respond accordingly, Your Honor, and that's -- I really can't get into it because we just got it last night and we're still digesting it.

THE COURT: But the Debtor is the one and only Defendant?

MR. DEMO: I believe that's the case, Your Honor, yes. So, there -- there were no allegations that they're going to add Mr. Seery like the last one, but yes.

MR. SEERY: I'd be happy to offer some clarity if you'd like, Your Honor.

THE COURT: Yes. Go ahead, Mr. Seery.

MR. SEERY: We received a copy of this lawsuit through the -- originally through the press and then we hunted it down. We have not been served. It's by an entity called PCMG, and I believe it's 17, Roman Numeral XVII. It is a small entity owned by Mr. Dondero and Mr. Okada. It owned .2 percent of Highland Select Equity Fund. Highland Select

Equity Fund owned 89 -- or does own 89.9 percent of Trussway Holdings. It's this -- PCMG is no longer a partner in Highland Select Equity.

Trussway Holdings owned 76.6 percent of SSP Holdings, which was an entity that was sold. The remaining balance of that, those interests were owned by third parties, including a small business lending group.

The complaint was just filed against the Debtor, arguing nonsensically that somehow the Debtor has an obligation to PCMG as an investor in Equity Select. Anyone who knows anything about the Investment Advisers Act knows that's not the case, that the obligation is to the fund, not to the investors.

We'll deal with it, but it's just another of the myriad of examples filed by the Sbaiti firm -- this is their second go -- of just creating costs. This one is a -- if you go derivatively, it's a .137 percent interest in SSP.

THE COURT: All right. Well, we --

MR. SEERY: Thank you.

THE COURT: Thank you, Mr. Seery. We have a hearing on the other lawsuit that includes you as a defendant coming up in June. I can't remember when in June.

MR. DEMO: It's June 8th, Your Honor.

THE COURT: June 8th. In person. So I'm going to stay tuned for what this Sbaiti law firm has to say.

To say I'm concerned is a big understatement, but we'll hear what the evidence and argument is on June 8th. I hope the message gets delivered how concerned I am to hear that yet another lawsuit has been filed that appears to be an end run around certain prior orders of the Court.

So, all right. We'll look for the order on the stay.

MR. DEMO: Yes, Your Honor.

THE COURT: And again, we'll try to be as quick as we can on the reports and recommendation.

(Proceedings concluded at 3:36 p.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 **05/27/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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

Signed June 4, 2021

United States Bankruptcy Judge

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

In re HI HLAND CAPITAL MANA EMENT, L.P.,[1] Debtor.	Chapter 11 Case No. 19-34054-sgj11
HI HLAND CAPITAL MANA EMENT, L.P., Plaintiff, vs. JAMES DONDERO, Defendant.	Adversary Proceeding No. 21-03003-sgj

ORDER GRANTING IN PART JAMES DONDERO S MOTION TO STAY PENDING THE MOTION TO ITHDRA THE REFERENCE OF PLAINTIFF S COMPLAINT

Upon consideration of *James Don ero s Motion to Stay Pen in t e Motion to it ra t e eferen e of Plaintiff s Complaint* Adv. Docket No. 22 (the "Motion"), the Plaintiff's

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The head uarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, T 75201.

Complaint, the record of this proceeding, and the arguments presented by the parties during the hearing and status conference conducted before this Court on May 25, 2021, the Court finds that the Motion should be granted in part as set forth below. Accordingly,

IT IS HEREBY ORDERED that

1. The Motion is GRANTED IN PART.

2. The above-referenced adversary proceeding, including any current response deadlines, pre-trial deadlines, and hearing dates, is stayed until July 28, 2021, which is sixty days from May 29, 2021. All trial dates and related pre-trial deadlines will be scheduled or re-scheduled as necessary to ensure that the parties have sufficient time in advance of trial to prepare and to fully brief and argue dispositive motions.

3. Notwithstanding anything herein to the contrary, unless otherwise agreed to in writing by counsel for the parties, discovery will proceed in accordance with that certain *men e S e lin r er* Adv. Docket No. 18 with the following modifications (i) the deadline for service of expert disclosures is May 28, 2021 and (ii) the deadline for completion of expert discovery is June 14, 2021.

END OF ORDER

DOCS NY 43294.4 36027/002

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

In Re: Highland Capital Management, L.P.	§	Case No. 19-34054-sgj11
James Dondero et al	§	
Appellant	§	
vs.	§	
Stacey G Jernigan	§	3:21-CV-00879-K
Appellee	§	

[2083] Order denying motion to recuse (related document #2060) Entered on 3/23/2021

APPELLANT SUPPLEMENTAL RECORD
VOLUME 4

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

In re:	§	**Chapter 11**
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**Case No. 19-34054-sgj11**
	§	
Debtor.	§	
In re:	§	
	§	
JAMES DONDERO, *et al.*,	§	
	§	
Appellants,	§	
	§	
v.	§	**Case No. 3:21-cv-00879-K**
	§	
HON. STACEY G. C. JERNIGAN,	§	
	§	
Appellee.	§	

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MOTION FOR LEAVE TO SUPPLEMENT RECORD ON APPEAL

James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware limited liability company (collectively, "*Appellants*") file this Motion for Leave to Supplement Record on Appeal.

MOTION FOR LEAVE TO SUPPLEMENT

As the Court is aware, this is an appeal from the denial of a motion to recuse. The core issues on appeal are: (a) whether "a reasonable man, cognizant of the relevant circumstances surrounding [the Bankruptcy Court's] failure to recuse, would harbor legitimate doubts about that judge's impartiality;"[1] and (b) whether the Bankruptcy Court should be recused from sitting as the judge and jury in the various Adversary Proceedings listed above. Respectfully, Appellants, like

[1] *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir.1999).

every litigant, are entitled to a full and fair opportunity to make their case in a fair and impartial forum.[2] As an appellate court, this court has the discretion to order supplementation of the record on appeal.[3]

Here, Appellants timely filed their notice of appeal, statement of issues and designated the record that existed at that time to show the Bankruptcy Court's bias and prejudice to Appellants. However, since Appellants designated the record, the Bankruptcy Court has taken additional positions that further support a finding that the Court's impartiality is likely to be reasonably questioned. Debtor, who has just now intervened, will not suffer any prejudice, as it is just now preparing its own designation of record.

These hearings show the Bankruptcy Court's continued appearance of bias, lack of impartiality, and establish findings against Appellants that lack any evidence. For example, at one of these hearings the Bankruptcy Court suggested causes of action that the Debtor could bring against Appellants, namely Dondero, if Dondero's defenses were successful and ordering relief that no party had requested.

Appellants respectfully request the Court grant leave to supplement the record, including by adding the following:

Main Case

Vol. 1

000001

000010

Vol 2

000308

Docket No.	Date	Description
2256	4/29/21	Dugaboy Motion to Compel Compliance with Bankruptcy Rule 2015.3
2440	6/10/21	Transcript of hearing held on 6/8/21
2445	6/10/21	Transcript of hearing held on 6/10/21

[2] *Miller v. Sam Houston State Univ.*, 986 F.3d 880, 893 (5th Cir. 2021).
[3] *Huddleston v. Nelson Bunker Hunt Tr. Est.*, 102 B.R. 71, 75 (N.D. Tex. 1989).

Adversary No. 20-03190

Vol. 2

Docket No.	Date	Description
175	5/10/21	Transcript of hearing on trial docket call and defendant's emergency motion to stay
182	5/18/21	Order Resolving Adversary Proceeding
185	5/21/21	Transcript of Hearing on Ruling Resolving Adversary Proceeding
190	6/7/21	Memorandum Opinion and Order Granting in Part Plaintiff's Contempt Motion

000399
000454
000459
000474

Adversary No. 21-03003

Vol. 3

Docket No.	Date	Description
21	4/15/21	Defendant's Motion to Withdraw Reference
22	4/15/21	Defendant's Motion to Stay Pending Motion to Withdraw Reference
23	4/15/21	Motion to Expedite Motion to Stay
	4/20/21	Email from courtroom deputy regarding request for expedited hearing on motion to stay
35	5/14/21	Motion to Compel Seery Deposition Testimony (including exhibits)
36	5/14/21	Motion to Expedite Motion to Compel
	5/14/21-5/17/21	Email chain between B Assink to Courtroom deputy re: filing of motion to compel and motion to expedite and setting of hearing on motion to compel, dated 5/14/21 – 5/17/21
	5/14/21-5/18/21	Additional Email chain between B Assink to Courtroom deputy re: filing of motion to compel and motion to expedite and setting of hearing on motion to compel, dated 5/14/21 – 5/18/21
49	5/24/21	Order Denying Motion to Compel
50	5/25/21	Transcript of hearing held on motion to compel on 5/20/21
58	5/27/21	Transcript of hearing held on Motion to Stay and Status Conference on Motion to Withdraw Reference
64	6/4/21	Order Granting In Part James Dondero's Motion to Stay

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Adversary No. 20-03195

Vol. 4

Docket No.	Date	Description

Vol. 4
000774
000783
000801
000806
000809
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45	5/19/21	UCC motion to expedite motion to stay
46	5/19/21	UCC motion to stay proceeding for 90 days (as re-filed)
47	5/19/21	Notice of Hearing setting hearing on motion to stay for 5/20/21
48	5/19/21	Order Granting UCC motion to expedite
50	5/19/21	Highland Dallas Foundation and CLO Holdco's Objection to UCC's emergency motion to stay
52	5/20/21	Highland Dallas Foundation and CLO Holdco's W&E List for Hearing on Motion to Stay (with exhibits attached)
54	5/20/21	Court admitted exhibits SEE # 52
57	5/21/21	Post-hearing memorandum suggesting error by the Court
62	5/24/21	Order staying adversary proceeding
65	5/25/21	Transcript of hearing held on UCC's motion to stay on 5/20/21
67	5/27/21	Order addressing post hearing memorandum suggesting error

CONCLUSION

For the foregoing reasons, Appellants respectfully request the Court grant leave to supplement the records and award Appellants such other and further relief to which they may be entitled.

Dated: June 16, 2021

Respectfully submitted,

By: */s/ Michael J. Lang*
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Telephone: (214) 817-4500
Counsel for Movants

CERTIFICATE OF CONFERENCE

The undersigned certifies that on June 15, 2021, Appellants conferred with opposing counsel who indicated that they are opposed to the relief requested.

/s/ Michael J. Lang
Michael J. Lang

CERTIFICATE OF SERVICE

The undersigned certifies that on June 16, 2021, a true and correct copy of the above and foregoing document was served on all parties of record via the Court's e-filing system.

/s/ Michael J. Lang
Michael J. Lang

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Counsel for the Official Committee of Unsecured Creditors

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

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	)	
Debtor,	)	Case No. 19-34054-SGJ11
OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	)	
Plaintiff,	)	
vs.	)	Adversary Proceeding No. 20-03195
CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT	)	

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

JAMES SCOTT III IN HIS INDIVIDUAL CAPACITY, AS TRUSTEE OF THE DUGABOY INVESTMENT TRUST, AND AS TRUSTEE OF THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO, Defendants.	)

MOTION FOR EXPEDITED CONSIDERATION ON THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' EMERGENCY MOTION TO STAY THE ADVERSARY PROCEEDING FOR NINETY DAYS

The Official Committee of Unsecured Creditors (the "Committee"), by and through its attorneys, hereby files this motion for expedited consideration on the "Motion for Expedited Consideration"), seeking immediate consideration of the *Official Committee of Unsecured Creditors' Emergency Motion to Stay the Adversary Proceeding for Ninety Days* (the "Motion to Stay the Adversary Proceeding"). In further support of this Motion for Expedited Consideration, the Committee respectfully states as follows:

I. RELIEF REQUESTED

1. By this Motion for Expedited Consideration, the Committee respectfully requests the Court enter an order authorizing the expedited consideration of the Motion to Stay the Adversary Proceeding on the next date the Court is available.

II. BASIS FOR RELIEF

2. Courts have authority to shorten time for "cause shown." *See* Fed. R. Bankr. P. 9006(c). Due to the delay of the effective date of the Plan,[2] the Committee filed its *Application*

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion to Stay the Adversary Proceeding.

for Order Pursuant to Section 1103 of the Bankruptcy Code Authorizing the Employment and Retention of Teneo Capital, LLC as Litigation Advisor to the Official Committee of Unsecured Creditors Effective April 15, 2021 [Docket No. 2306] to retain and employ the future Litigation Trustee[3] pursuant to sections 328(a) and 1103(a) of the Bankruptcy Code to perform litigation advisory services for the Committee in this chapter 11 case, including services related to this Adversary Proceeding (the "Litigation Advisor") on May 14, 2021. Because responsibility for the Adversary Proceeding will transfer to the Litigation Trustee upon the effective date of the Plan, the Committee filed the Motion to Stay the Adversary Proceeding, requesting a ninety (90) day stay of the Adversary Proceeding to allow the Litigation Advisor the necessary time to gain an understanding of the facts underlying the Adversary Proceeding, the Debtor's structure, and other issues pertinent to its role pursuing the Estate Claims on a go-forward basis. In particular, the Litigation Advisor needs time to consider the issues raised in Defendants' pending Motions to Dismiss and Motions to Withdraw the Reference to determine how best to proceed.

3. Currently, the Committee's response deadlines to the Defendants' pending Motions to Dismiss and Motions to Withdraw the Reference are due on Friday, May 21, 2021. The Committee requested an extension of these deadlines from Defendants to allow for the usual twenty-one (21) -day notice period for the Motion to Stay the Adversary Proceeding, but counsel

[3] Upon the effective date of the Plan, a Litigation Sub-Trust, created for the benefit of the holders of claims and interests in the Debtor, will be vested with certain claims and causes of action of the Debtor, including the Estate Claims (the "Causes of Action"). Pursuant to the Plan, Marc S. Kirschner, Senior Managing Director of Teneo, will be appointed as Litigation Trustee and will be tasked with, among other things, investigation and monetization of the Causes of Action, including the Adversary Proceeding.

for Defendants did not agree. Therefore, expedited consideration of the Motion to Stay the Adversary Proceeding is necessary.

4. No party will be prejudiced by the immediate consideration and entry of an order approving the Motion to Stay the Adversary Proceeding. To the contrary, expedited consideration of the Motion to Stay the Adversary Proceeding is in the interest of all parties, as further delay will negatively impact the efficient adjudication of the Adversary Proceeding and could negatively impact the Committee or the Litigation Trustee's recovery on claims for the benefit of the Debtor's estate.

5. Therefore, the Committee respectfully requests that the Court grant this Motion for Expedited Hearing and enter an order authorizing the expedited consideration of the Motion to Stay the Adversary Proceeding on the next date the Court is available. The Committee further respectfully requests an extension of their time to respond to the Defendants' Motions to Dismiss and Motions to Withdraw the Reference until the later of: (1) five business days after the Court enters an Order on the Motion to Stay the Adversary Proceeding; or (2) upon expiration of the 90-day stay of the Adversary Proceeding sought in the Committee's Motion to Stay the Adversary Proceeding.

III. CONCLUSION

Accordingly, the Committee respectfully requests immediate consideration of the Court, and the entry of an order setting the Motion to Stay the Adversary Proceeding for hearing on the next date the court is available and granting the Committee such other relief to which it may be justly entitled at law or in equity.

[*Remainder of Page Intentionally Left Blank*]

Dated: May 18, 2021
Dallas, Texas

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COUNSEL FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

CERTIFICATE OF CONFERENCE

I hereby certify that, on May 17, 2021, counsel for the Official Committee of Unsecured Creditors has conferred with counsel for the Debtor, Grant James Scott III, CLO Holdco, Ltd., Highland Dallas Foundation, James D. Dondero, The Dugaboy Investment Trust, and the Get Good Nonexempt Trust regarding the expedited nature of the relief sought in this motion. Counsel for the Debtor does not object to the expedited consideration of the Motion to Stay the Adversary Proceeding. Counsel for CLO Holdco, Ltd., Highland Dallas Foundation, Inc., James D. Dondero, The Dugaboy Investment Trust, and the Get Good Nonexempt Trust object to the expedited consideration of the Motion to Stay the Adversary Proceeding. Counsel for Grant James Scott III deferred on the issue, expressing that their client neither agreed nor expressly opposed the requested relief.

/s/ *Chandler Rognes*
Chandler Rognes
Counsel for the Official Committee of Unsecured Creditors

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case on May 18, 2021.

/s/ *Chandler Rognes*
Chandler Rognes
Counsel for the Official Committee of Unsecured Creditors

EXHIBIT 1

Proposed Order

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

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	)	Case No. 19-34054 (SGJ)
Debtor.	)	

ORDER GRANTING THE MOTION FOR EXPEDITED HEARING ON THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' EMERGENCY MOTION TO STAY THE ADVERSARY PROCEEDING NINETY DAYS

On this day, the Court considered the Official Committee of Unsecured Creditors' (the "Committee") *Motion for Expedited Hearing on the Official Committee of Unsecured Creditors' Emergency Motion to Stay the Adversary Proceeding Ninety Days* (the "Motion for Expedited

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

Hearing"). Based on the pleadings on file, the Court finds that good cause exists to grant the Motion for Expedited Hearing. Therefore, the Court GRANTS the Motion for Expedited Hearing.

IT IS THEREFORE ORDERED that the Motion for Expedited Hearing is **GRANTED**.

IT IS FURTHER ORDERED that, once provided, the Committee shall file with the Court a notice of hearing setting the date and time of the Motion to Stay the Adversary Proceeding.

IT IS FURTHER ORDERED that the Committee's response deadlines for the pending Motions to Dismiss[2] and Motions to Withdraw the Reference are stayed until the later of (1) five business days after the Court enters an order on the Motion to Stay the Adversary Proceeding or (2) upon expiration of the 90-day stay of the Adversary Proceeding sought in the Committee's Motion to Stay the Adversary Proceeding.

This Court shall retain jurisdiction over all matters arising from or relating to the interpretation or implementation of this Order.

End of Order

[2] Capitalized terms used but not defined herein shall have the respective meanings given to them in the Motion to Stay the Adversary Proceeding.

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Counsel for the Official Committee of Unsecured Creditors

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

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	)	
Debtor,	)	Case No. 19-34054-SGJ11
OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	)	
Plaintiff,	)	
vs.	)	Adversary Proceeding No. 20-03195
CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT JAMES SCOTT III IN HIS INDIVIDUAL CAPACITY, AS TRUSTEE OF THE DUGABOY INVESTMENT TRUST, AND AS TRUSTEE OF	)	

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO,

Defendants.

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' EMERGENCY MOTION TO STAY THE ADVERSARY PROCEEDING FOR NINETY DAYS

The Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtor and debtor in possession (the "Debtor") hereby moves the Court for entry of an order under section 105 of title 11 of the United States Code (the "Bankruptcy Code") to stay the above-captioned adversary proceeding for ninety (90) days (the "Motion"). In support of this Motion, the Committee respectfully states as follows:[2]

Background

1. On October 16, 2019, the Debtor filed its voluntary petition for relief under chapter 11 of title 11 of the Bankruptcy Code. Pursuant to sections 1107 and 1108 of the Bankruptcy Code, the Debtor is continuing to operate its businesses and manage its properties and assets as debtor in possession.

2. On October 29, 2019, the Office of the United States Trustee held a meeting to appoint the Committee pursuant to section 1102 of the Bankruptcy Code (the "Formation Meeting"). At the Formation Meeting, the Committee selected Sidley Austin LLP as its counsel. At its formation, the Committee consisted of the following four members: (a) Redeemer Committee of Highland Crusader Fund ("Redeemer"); (b) Meta-E Discovery; (c) UBS Securities LLC and UBS AG London Branch (together, "UBS"); and (d) Acis Capital Management, L.P. and Acis Capital Management GP, LLP (together, "Acis"). Acis and Redeemer resigned from the Committee effective as of April 15, 2021 and April 30, 2021, respectively. The Committee

[2] This Motion is supported by the Declaration of Marc S. Kirschner (the "Kirschner Decl."), attached hereto and incorporated herein as **Exhibit 2.**

therefore currently consists of Meta-E Discovery and UBS.

3. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's Bankruptcy Case to this Court [Docket No. 186].

4. On January 9, 2020, the Court approved the *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket. No. 28], approving a settlement between the Debtor and the Committee concerning, among other things, governance of the Debtor and the pursuit of claims held by the Debtor. The approved settlement was embodied in a term sheet filed on the docket [Docket No. 354] (the "Term Sheet"). Pursuant to the Term Sheet, the Committee was granted standing to pursue the "Estate Claims," defined as "any and all estate claims and causes of action against Mr. Dondero, Mr. Okada, other insiders of the Debtor, and each of the Related Entities, including promissory notes held by any of the foregoing." (Term Sheet at 4.)

5. On December 17, 2020, pursuant to the Court's *Order Denying Motion for Remittance of Funds Held in Registry of Court* [Docket No. 825][3] and the Term Sheet, the Committee commenced the above-captioned adversary proceeding against defendants (the "Adversary Proceeding").

6. In a bench ruling issued on February 8, 2021, and supplemented by an order entered on February 22, 2021 [Docket No. 1943], the Court confirmed the Debtor's *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the "Plan").[4]

7. Upon the effective date of the Plan, a Litigation Sub-Trust, created for the benefit

3 The Court ordered the Committee to commence an adversary proceeding against defendant CLO Holdco, Ltd. ("CLO Holdco") by December 17, 2020 in order to keep certain funds in the Court's registry from being disbursed to CLO Holdco, an entity that has been one of the main subjects of the Committee's Estate Claims investigation [Docket No. 825].

4 Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Plan.

of the holders of claims and interests in the Debtor, will be vested with certain claims and causes of action of the Debtor, including the Estate Claims (the "Causes of Action"). Pursuant to the Plan, Marc S. Kirschner, Senior Managing Director of Teneo, will be appointed as Litigation Trustee (the "Future Litigation Trustee") and will be tasked with, among other things, investigation and monetization of the Causes of Action. Therefore, upon the effective date of the Plan, the responsibility for prosecution of this Adversary Proceeding will transfer to the Future Litigation Trustee.

8. On March 1, 2021, Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (together, the "Advisors") filed a notice of appeal of the order confirming the Plan to the United States District Court of the Northern District of Texas (the "Confirmation Appeal") [Docket No. 1957]. On April 1, 2021, the Advisors filed the *Motion for Stay Pending Appeal* Civ. Act. No. 3:21-cv-00538-N, [Docket No. 3] and The Dugaboy Investment Trust ("Dugaboy") and Get Good Trust ("Get Good") filed the *Motion for Stay Pending Appeal*, Civ. Act. No. 3:21-cv-00550-L, [Docket No. 6] with the District Court for the Northern District of Texas, both seeking a stay of the effectiveness of the Plan pending resolution of the Confirmation Appeal (the "Stay Pending Appeal Motions"). The Confirmation Appeal remains pending.

9. On April 14, 2021 and April 26, 2021, the defendants in the Adversary Proceeding filed various motions to dismiss the Adversary Proceeding for failure to state a claim [A.P. Docket Nos. 22, 23, 25, 30, 32] (collectively the "Motions to Dismiss"). Defendants CLO Holdco, Highland Dallas Foundation, Inc., James D. Dondero, Get Good, and Dugaboy also filed motions to withdraw the reference [A.P. Docket Nos. 24, 33, 37] (collectively the "Motions to Withdraw the Reference"). The Committee's responses to the Motions to Dismiss and Motions to Withdraw the Reference are currently due on May 21, 2021, and a status conference for the Motions to Withdraw the Reference has been noticed for June 3, 2021 [A.P. Docket Nos. 28, 38, 39].

10. Because the effective date of the Plan and formation of the Litigation Sub-Trust has been delayed, on May 14, 2021, the Committee filed its *Application for Order Pursuant to Section 1103 of the Bankruptcy Code Authorizing the Employment and Retention of Teneo Capital, LLC as Litigation Advisor to the Official Committee of Unsecured Creditors Effective April 15, 2021* [Docket No. 2306] to retain and employ the future Litigation Trustee pursuant to sections 328(a) and 1103(a) of the Bankruptcy Code to perform litigation advisory services for the Committee in this chapter 11 case, including this Adversary Proceeding (the "Litigation Advisor"). Given the statute of limitations for certain potential claims and the current status of the Adversary Proceeding, the Committee seeks to retain the Litigation Advisor until the effective date of the Plan to ensure that the Causes of Action, including those set forth the Adversary Proceeding, are investigated and pursued in a timely and efficient manner.

Relief Requested

11. In order to protect all rights of the Litigation Sub-Trust, Future Litigation Trustee, and all unsecured creditors, by this Motion, the Committee seeks a stay of the entirety of the proceedings of the Adversary Proceeding for ninety (90) days pursuant to section 105 of the Bankruptcy Code, to provide the Litigation Advisor with the necessary time to familiarize itself with the Adversary Proceeding, so as to adequately and efficiently defend the Motions to Withdraw the References, the Motions to Dismiss, and to effectively manage the litigation of the Adversary Proceeding in its entirety.

Argument and Authorities

12. Pursuant to section 105(a) of the Bankruptcy Code, the Court "may issue any order . . . that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). Moreover, the Supreme Court has held:

[T]he power to stay proceedings is incidental to the power inherent in every court

> to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

Landis v. N. Am. Co., 299 U.S. 248, 254-55 (1936).

13. Here, a stay of the Adversary Proceeding is in the interests of judicial economy and efficiency, and in the interests of the Debtor's estate. (*See* Kirschner Decl. ¶¶ 6–8.) The Committee filed the Adversary Proceeding with the intent and understanding that, pursuant to the terms of the Plan, the proceeding would transfer to the Future Litigation Trustee upon the effective date of the Plan. (*Id.* at ¶ 4.) While it was anticipated that the effective date of the Plan would have already occurred, it has been delayed as a result of, among other things, the Confirmation Appeal and the Stay Pending Appeal Motions initiated by certain defendants in this Adversary Proceeding. In fact, due to the delay of the effective date of the Plan and the fast approaching expiry of certain statutes of limitations, the Committee has recently sought to retain the Future Litigation Trustee as the current Litigation Advisor to the Committee, in order to protect all rights and claims of the Litigation Sub-Trust and ensure that the Causes of Action, including the Adversary Proceeding, are properly and efficiently investigated and prosecuted. (*Id.* at ¶ 5.)

14. As this Court is aware, the Debtor's byzantine structure and its transactions amongst Related Entities—many of which are subject of the Committee's Estate Claims investigation—are extremely complex. Retention of the Litigation Advisor at this time, in advance of its role as Litigation Trustee, and imposition of a brief ninety (90) day stay of the Adversary Proceeding, will provide the Litigation Advisor the necessary time it needs to gain an understanding of the facts underlying the Adversary Proceeding, the Debtor's structure, and other issues pertinent to its role pursuing all of the Estate Claims on a go-forward basis, and to enable it to best protect all rights of the Litigation Sub-Trust and maximize claims for the benefit of all

creditors. (*See id.* at ¶¶ 6–8.)

15. Because responsibility for the Adversary Proceeding will transfer to the Litigation Trustee upon the effective date of the Plan, it is important for the Litigation Advisor to be involved in the Adversary Proceeding at this time. (*Id.* at ¶ 6.) This is especially true given the pending Motions to Withdraw the Reference and Motions to Dismiss the Adversary Proceeding, adjudication of which may significantly change the trajectory of this Adversary Proceeding and may potentially affect others that the Litigation Trustee may decide to pursue. (*Id.* at ¶ 7.) Because the Litigation Advisor should be involved in the defense of the Motions to Dismiss and Motions to Withdraw the Reference, the Committee respectfully moves for a short ninety (90) day stay of the entirety of the Adversary Proceeding, to allow the Litigation Advisor time to consider the issues before the Court and determine how best to proceed.

16. This short stay is in the interests of judicial economy, will ensure the most efficient execution of the Adversary Proceeding, and is in the best interests of the Debtor's estate and ultimate potential recovery for the Debtor's creditors. The Committee's Motion is not submitted for purposes of delay, but rather so that justice may be served.

REQUESTED RELIEF

For the foregoing reasons, the Committee respectfully requests the Court grant an Order staying all proceedings in the Adversary Proceeding for ninety (90) days, including, without limitation, any response deadlines and pending hearing dates, and grant the Committee such other and further relief as to which it may be justly entitled.

Dated: May 18, 2021

SIDLEY AUSTIN LLP

/s/ Paige Holden Montgomery

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Paige Holden Montgomery

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Counsel for the Official Committee of Unsecured Creditors

CERTIFICATE OF CONFERENCE

I hereby certify that, on May 17, 2021, counsel for the Official Committee of Unsecured Creditors conferred with counsel for the Debtor, Grant James Scott III, CLO Holdco, Ltd., Highland Dallas Foundation, James D. Dondero, The Dugaboy Investment Trust, and the Get Good Nonexempt Trust regarding the relief sought in this motion. Counsel for the Debtor does not oppose the relief sought in this motion. Counsel for CLO Holdco, Ltd., Highland Dallas Foundation, Inc., James D. Dondero, The Dugaboy Investment Trust, and the Get Good Nonexempt Trust oppose the relief sought in this motion. Counsel for Grant James Scott III deferred on the issue, expressing that their client neither agreed nor expressly opposed the requested relief.

/s/ *Chandler Rognes*
Chandler Rognes

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case on May 18, 2021.

/s/ *Chandler Rognes*
Chandler Rognes

EXHIBIT 1

PROPOSED ORDER

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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	
Debtor,	Case No. 19-34054-SGJ11
OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	
Plaintiff,	
vs.	Adversary Proceeding No. 20-03195
CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT JAMES SCOTT III IN HIS INDIVIDUAL CAPACITY, AS TRUSTEE OF THE DUGABOY INVESTMENT TRUST, AND AS TRUSTEE OF	

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO,)
)

Defendants.

ORDER GRANTING THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' EMERGENCY MOTION TO STAY THE ADVERSARY PROCEEDING FOR NINETY DAYS

Upon consideration of the official committee of unsecured creditors' (the "Committee") *Emergency Motion to Stay the Adversary Proceeding for Ninety Days* (the "Motion"),

IT IS HEREBY ORDERED that:

1. The Motion is **GRANTED.**
2. The Adversary Proceeding,[2] including any current response deadlines and hearing dates, is stayed for ninety days after the issuance of this Order.
3. This Court shall retain jurisdiction over all matters arising from or relating to the interpretation or implementation of this Order.

End of Order

[2] Capitalized terms used but not defined herein shall have the respective meanings given to them in the Motion.

EXHIBIT 2

DECLARATION OF MARC S. KIRSCHNER

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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	
Debtor,	Case No. 19-34054-SGJ11
OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	
Plaintiff,	
vs.	Adversary Proceeding No. 20-03195
CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT JAMES SCOTT III IN HIS INDIVIDUAL CAPACITY, AS TRUSTEE OF THE DUGABOY INVESTMENT TRUST, AND AS TRUSTEE OF THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO,	
Defendants.	

DECLARATION OF MARC S. KIRSCHNER IN SUPPORT OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' EMERGENCY MOTION TO STAY THE ADVERSARY PROCEEDING FOR NINETY DAYS

Pursuant to 28 U.S.C. Section 1746, Marc S. Kirschner declares as follows:

1. I am a Senior Managing Director with Teneo Capital, LLC ("Teneo"), an international consulting and advisory firm. I submit this Declaration on behalf of Teneo (the "Declaration") in support of the motion to stay the adversary proceeding for ninety days (the "Motion to Stay the Adversary Proceeding") of the Official Committee of Unsecured Creditors

1 The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

(the "Committee") of Highland Capital Management, L.P., the debtor and debtor-in-possession in the above-captioned chapter 11 case (the "Debtor"). Except as otherwise noted, I have personal knowledge of the matters set forth herein.

2. My firm and I have a wealth of experience in providing litigation support, investigation and advisory services in restructurings and reorganizations and enjoy an excellent reputation for services it has rendered in chapter 11 cases on behalf of debtors, creditors and trusts throughout the United States. I have decades of experience as a bankruptcy and restructuring lawyer, distressed debt investor, financial advisor and fiduciary. I founded and led for 15 years the bankruptcy department in the New York office of the global law firm, Jones Day, until my retirement from the private practice of law. Thereafter, I was appointed by SDNY Bankruptcy Judge Robert Drain as Chapter 11 Trustee of Refco Capital Markets, a global securities and derivatives dealer, which was one of the largest cases ever for which a Chapter 11 Trustee was appointed and continued post confirmation as Litigation Trustee for two trusts formed under Refco's Plan. I am recognized as a leading authority in pursuing billion dollar fraudulent conveyance and other claims on behalf of litigation trusts, and am currently serving as Litigation Trustee for Tribune, Nine West and Millennium Health. I am a Fellow of the American College of Bankruptcy. The Court has previously reviewed my curriculum vitae and concluded that I have "substantial experience in bankruptcy litigation matters, particularly with respect to [my] prior experience as a litigation trustee for several litigation trusts as set forth on the record of the Confirmation Hearing and in the Confirmation Brief." [Docket No. 1943 at ¶ 45].

3. On February 22, 2021 [Docket No. 1943], the Court confirmed the Debtor's *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the "Plan").

4. Upon the effective date of the Plan, a Litigation Sub-Trust, created for the benefit of the holders of claims and interests in the Debtor, will be vested with certain claims and causes of action of the Debtor, including this Adversary Proceeding[3] (the "Causes of Action"). Upon the effective date of the Plan, Teneo will become the trustee of the Litigation Sub-Trust.

5. Due to the delay in the effective date of the Plan, on Friday, May 14, 2021, the Committee filed its *Application for Order Pursuant to Section 1103 of the Bankruptcy Code Authorizing the Employment and Retention of Teneo Capital, LLC as Litigation Advisor to the Official Committee of Unsecured Creditors Effective April 15, 2021* [Docket No. 2306] to retain and employ my firm pursuant to sections 328(a) and 1103(a) of the Bankruptcy Code to perform litigation advisory services for the Committee in this chapter 11 case, including this Adversary Proceeding (the "Litigation Advisor"), until the effective date of the Plan and creation of the Litigation Sub-Trust.

6. Given the recently filed application to retain my firm as Litigation Advisor to the Committee, and because responsibility for the Adversary Proceeding will transfer to the Litigation Trustee post-effective date of the Plan, it is necessary that my firm and I are involved in the prosecution of the Adversary Proceeding going forward.

7. In order to provide adequate time for myself and my firm to gain an understanding of the complex transactions described in the Adversary Proceeding, particularly in connection with the Motions to Dismiss and Motions to Withdraw the Reference, and the complex issues before the Court, I am requesting a ninety day stay of the Adversary Proceeding. This stay is necessary

3 Capitalized terms used but not defined herein shall have the respective meanings given to them in the Motion to Stay the Adversary Proceeding.

the Motions to Dismiss and Motions to Withdraw the Reference, and the complex issues before the Court, I am requesting a ninety day stay of the Adversary Proceeding. This stay is necessary and critically important, especially because of the pending Motions to Withdraw the Reference and Motions to Dismiss. Because responsibility for the Adversary Proceeding (and any other Causes of Action seeking recovery on behalf of the Debtor's creditors) will transfer to the Litigation Trustee in the near future, it is important that my firm and myself are involved in directing the strategy and approach to responding to both the Motions to Withdraw the Reference and the Motions to Dismiss to best serve the interests of the Debtor's estate, and maximize recovery of unsecured creditors. Further, the adjudication of these motions will not only have an impact on this Adversary Proceeding, but may also impact future Causes of Action that the Litigation Trustee may bring. As such, a brief stay of the Adversary Proceeding to allow for an orderly transition of responsibilities and knowledge, as well as investigation of claims, is in the best interests of the Debtor's estate and the potential recoveries for the Debtor's creditors.

8. For all of these reasons, Teneo respectfully requests the Court grant a ninety day stay of the Adversary Proceeding, as set forth fully in the Motion to Stay the Adversary Proceeding.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 18th day of May, 2021

Marc Kirschner
Senior Managing Director
Teneo Capital, LLC

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Counsel for the Official Committee of Unsecured Creditors

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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	
Debtor,	Case No. 19-34054-SGJ-11
OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	
Plaintiff,	
vs.	Adversary Proceeding No. 20-03195
CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT JAMES SCOTT III IN HIS INDIVIDUAL	

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

CAPACITY, AS TRUSTEE OF THE DUGABOY INVESTMENT TRUST, AND AS TRUSTEE OF THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO,

Defendants.

NOTICE OF HEARING FOR THE THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' EMERGENCY MOTION TO STAY THE ADVERSARY PROCEEDING FOR NINETY DAYS

PLEASE TAKE NOTICE that a hearing on the *Emergency Motion to Stay the Adversary Proceeding for Ninety Days* [Docket No. 46] (the "Motion to Stay") filed by the Official Committee of Unsecured Creditors' (the "Committee") in the above-captioned adversary proceeding is scheduled for hearing on **Thursday, May 20, 2021 at 9:30 a.m. (Central Time)** (the "Hearing").

The Hearing on the Motion to Stay will be held before The Honorable Stacey G. C. Jernigan, United States Bankruptcy Court Judge, and will be conducted via WebEx videoconference. The WebEx video participation/attendance link for the Status Conference is: https://us-courts.webex.com/meet/jerniga.

A copy of the WebEx Hearing Instructions for the Hearing is attached hereto as Exhibit A; alternatively, the WebEx Hearing Instructions for the Hearing may be obtained from Judge Jernigan's hearing/calendar site at: https://www.txnb.uscourts.gov/judges-info/hearing-dates/judgejernigans-hearing-dates.

[*Remainder of Page Intentionally Left Blank*]

SIDLEY AUSTIN LLP

/s/ Paige Holden Montgomery
Penny P. Reid
Paige Holden Montgomery
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-and-

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Counsel for the Official Committee of Unsecured Creditors

EXHIBIT A

WebEx Hearing Instructions

WebEx Hearing Instructions
Judge Stacey G. Jernigan

Pursuant to General Order 2020-14 issued by the Court on May 20, 2020, all hearings before Judge Stacey G. Jernigan are currently being conducted by WebEx videoconference unless ordered otherwise.

For WebEx Video Participation/Attendance:

Link: https://us-courts.webex.com/meet/jerniga

For WebEx Telephonic Only Participation/Attendance:

Dial-In: 1.650.479.3207
Meeting ID: 479 393 582

Participation/Attendance Requirements:

- Counsel and other parties in interest who plan to actively participate in the hearing are encouraged to attend the hearing in the WebEx video mode using the WebEx video link above. Counsel and other parties in interest who will not be seeking to introduce any evidence at the hearing and who wish to attend the hearing in a telephonic only mode may attend the hearing in the WebEx telephonic only mode using the WebEx dial-in and meeting ID above.
- Attendees should join the WebEx hearing at least 10 minutes prior to the hearing start time. Please be advised that a hearing may already be in progress. During hearings, participants are required to keep their lines on mute at all times that they are not addressing the Court or otherwise actively participating in the hearing. **The Court reserves the right to disconnect or place on permanent mute any attendee that causes any disruption to the proceedings**. For general information and tips with respect to WebEx participation and attendance, please see Clerk's Notice 20-04: https://www.txnb.uscourts.gov/sites/txnb/files/hearings/Webex%20Information%20and%20Tips_0.pdf
- **Witnesses are required to attend the hearing in the WebEx video mode and live testimony will only be accepted from witnesses who have the WebEx video function activated**. Telephonic testimony without accompanying video will not be accepted by the Court.
- All WebEx hearing attendees are required to comply with Judge Jernigan's Telephonic and Videoconference Hearing Policy (included within Judge Jernigan's Judge-Specific Guidelines): https://www.txnb.uscourts.gov/content/judge-stacey-g-c-jernigan

Exhibit Requirements:

- Any party intending to introduce documentary evidence at the hearing must file an exhibit list in the case with a true and correct copy of each designated exhibit filed as a separate, individual attachment thereto so that the Court and all participants have ready access to all designated exhibits.
- If the number of pages of such exhibits exceeds 100, then such party must also deliver two (2) sets of such exhibits in exhibit binders to the Court by no later than twenty-four (24) hours in advance of the hearing.

Notice of Hearing Content and Filing Requirements:

IMPORTANT: For all hearings that will be conducted by WebEx only:

- The Notice of Hearing filed in the case and served on parties in interest must: (1) provide notice that the hearing will be conducted by WebEx videoconference only, (2) provide notice of the above WebEx video participation/attendance link, and (3) attach a copy of these WebEx Hearing Instructions or provide notice that they may be obtained from Judge Jernigan's hearing/calendar site: https://www.txnb.uscourts.gov/judges-info/hearing-dates/judge-jernigans-hearing-dates.
- When electronically filing the Notice of Hearing via CM/ECF select "at https://us-courts.webex.com/meet/jerniga" as the location of the hearing (note: this option appears immediately after the first set of Wichita Falls locations). Do not select Judge Jernigan's Dallas courtroom as the location for the hearing.

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

Signed May 19, 2021

United States Bankruptcy Judge

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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	
Debtor,	Case No. 19-34054-SGJ11
OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	
Plaintiff,	
vs.	Adversary Proceeding No. 20-03195
CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT JAMES SCOTT III IN HIS INDIVIDUAL CAPACITY, AS TRUSTEE OF THE DUGABOY	

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

INVESTMENT TRUST, AND AS TRUSTEE OF THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO,

Defendants.

ORDER GRANTING THE MOTION FOR EXPEDITED HEARING ON THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' EMERGENCY MOTION TO STAY THE ADVERSARY PROCEEDING NINETY DAYS

On this day, the Court considered the Official Committee of Unsecured Creditors' (the "Committee") *Motion for Expedited Hearing on the Official Committee of Unsecured Creditors' Emergency Motion to Stay the Adversary Proceeding Ninety Days* (the "Motion for Expedited Hearing"). Based on the pleadings on file, the Court finds that good cause exists to grant the Motion for Expedited Hearing. Therefore, the Court GRANTS the Motion for Expedited Hearing.

IT IS THEREFORE ORDERED that the Motion for Expedited Hearing is **GRANTED**.

IT IS FURTHER ORDERED that a hearing for the Motion to Stay the Adversary Proceeding is set for 9:30 am C.T. on May 20, 2021. The Committee shall also file with the Court a notice of hearing for the Motion to Stay the Adversary Proceeding.

IT IS FURTHER ORDERED that the Committee's response deadlines for the pending Motions to Dismiss[2] and Motions to Withdraw the Reference are stayed until the later of (1) five business days after the Court enters an order on the Motion to Stay the Adversary Proceeding or (2) upon expiration of the 90-day stay of the Adversary Proceeding sought in the Committee's Motion to Stay the Adversary Proceeding.

This Court shall retain jurisdiction over all matters arising from or relating to the interpretation or implementation of this Order.

[2] Capitalized terms used but not defined herein shall have the respective meanings given to them in the Motion to Stay the Adversary Proceeding.

End of Order

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ATTORNEYS FOR CLO HOLDCO, LTD. AND HIGHLAND DALLAS FOUNDATION, INC.

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

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

OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	§	
	§	
Plaintiff,	§	
	§	**Adversary No. 20-03195**
vs.	§	
	§	
CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT JAMES SCOTT III IN HIS INDIVIDUAL CAPACITY, AS TRUSTEE OF THE DUGABOY INVESTMENT TRUST, AND AS TRUSTEE OF THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO,	§	
	§	
Defendants.	§	

RESPONSE IN OPPOSITION

CLO HOLDCO, LTD. and Highland Dallas Foundation, Inc.[1] (the "Charitable Defendants") file this *Response in Opposition* (the "Response") to the *Emergency Motion to Stay the Adversary Proceeding for Ninety Days* (Dkt. No. 44) (the "Motion to Stay") filed by the Official Committee of Unsecured Creditors (the "Committee"). The Committees' request to stay the above-captioned adversary proceeding (the "Adversary Proceeding") is premised upon the need for the Litigation Advisor to "familiarize itself with the Adversary Proceeding so that it can adequately and efficiently defend the Motions to Withdraw the Reference, the Motions to Dismiss,

[1] CLO HOLDCO, LTD. and Highland Dallas Foundation, Inc. have filed a *Motion to Withdraw the Reference* [Dkt. No. 24], and nothing herein shall be deemed a waiver of their right to a trial by jury on all claims asserted in this Adversary Proceeding nor consent to the entry of final orders in this Adversary Proceeding by the Bankruptcy Court.

and to effectively manage the litigation of the Adversary Proceeding in its entirety." *See* Motion to Stay, ¶11 (all capitalized terms defined therein).

As set forth herein, the Committee's Motion to Stay comes on the heels of an already weeks long extension requested by the Committee without disclosure of any abatement and agreed to by all defendants. The Court has already stayed consideration of the Motions to Dismiss and the parties agreed to continue discovery based upon the pending Motions to Withdraw the Reference. Given that the Committee is represented by counsel who has undoubtedly familiarized themselves with the Adversary Proceeding, and that the Litigation Advisor has been actively engaged since April 15, 2021, such an extension has no basis and only serves to prejudice the defendants.

BACKGROUND

In the underlying bankruptcy case, Case No. 19-34054 (the "Bankruptcy Case"), on October 29, 2019, the Committee selected Sidley Austin LLP ("Sidley Austin") as counsel. *See* Bankruptcy Case, Dkt. No. 2306, ¶3. On December 17, 2020, the Committee through Sidley Austin commenced this Adversary Proceeding against the defendants (the "Defendants"). Dkt. No. 2. On April 14, 2021, the Charitable Defendants filed a *Motion to Dismiss, or in the alternative, Motion for More Definite Statement* (Dkt. No. 23) (the "Charitable Defendants Motion to Dismiss") and the *Motion to Withdraw the Reference* (Dkt. No. 24) (the "Charitable Defendants Motion to Withdraw the Reference"). Several other Defendants filed motions to dismiss (Dkt. Nos. 22, 25, 30, 32), collectively with the Charitable Defendants Motion to Dismiss, the "Motions to Dismiss"), and motion to withdraw the reference (Dkt. No. 33) (collectively, with the Charitable Defendants Motion to Withdraw the Reference, the "Motions to Withdraw the Reference").

Pursuant to Local Bankruptcy Rule 5011-1, on April 16, 20211, the Court provided a setting for a status conference on the Motions to Withdraw the Reference for **May 25, 2021** and

confirmed availability for a setting on the Motions to Dismiss at the same time. Before the Charitable Defendants filed notices of this setting, on April 16, 2021, the Committee requested an extension of time to oppose to the Motions to Dismiss and Motions to Withdraw the Reference to **May 21, 2021**. Noting that this extension would provide only four (4) days for Defendants to file replies, the Charitable Defendants agreed to the extension contingent upon the Court having another setting available the week after. The Court provided a setting for **June 3, 2021**, so the Charitable Defendants agreed to the requested extension, which was an over two-weeks long extension. At no time did the Committee disclose it would request a three-months long abatement after conclusion of the extension. The Court later decided it would not hear the Motions to Dismiss on June 3, 2021, and instead decided to take up the Motions to Withdraw the Reference first, effectively staying the proceedings pending disposition of the Motions to Withdraw the Reference. Additionally, the Court cancelled its status conference concerning this Adversary Proceeding on May 10, 2021. Following this decision, the Committee and Defendants agreed to cancel a proposed discovery conference.

The Committee filed its *Application to Employ Teneo* in the Bankruptcy Case on May 14, 2021. Bankruptcy Case, Dkt. No. 2306 (the "Application to Employ Teneo"). Therein, the Committee requested *nunc pro tunc* relief, as Teneo commenced work on **April 15, 2021**. Application to Employ Teneo, ¶ 15. In the Application to Employ Teneo, the Committee explained the Scope of Services to be provided by Teneo as:

> Scope of Services
>
> Teneo will provide such litigation support, investigation and advisory services to the Committee and its legal advisors as they deem appropriate and feasible in order to advise the Committee on the Causes of Action, including but not limited to the following:
>
> - Assistance in the investigation of business activities of insiders, related and affiliated parties;

- Assistance in forensic review of financial information of the Debtor;
- Assistance in the evaluation and analysis of the Causes of Action;
- Assistance in the development of complaints prosecuting the Causes of Action, including attendance at depositions and provision of expert reports/testimony on case issues as required by the Committee; and
- Render such other litigation advisory or such other financial advisory assistance as the Committee or its counsel may deem necessary that are consistent with the role of a litigation advisor and not duplicative of services provided by other professionals in this proceeding.

Id. at ¶17. Absent from the Scope of Services proposed purely legal defense of non-evidentiary motions, like the Motions to Withdraw the Reference or Motions to Dismiss. This role appears to be that of Sidley Austin, and according to the Committee, there is to be no duplication between professionals employed by the Committee (if Teneo is necessary to advise Sidley Austin, is Sidley Austin necessary??). The idea that Sidley Austin needs the services of Teneo, when the services of Teneo do not include providing advice as to how to approach the legal issues of withdrawal of reference or 12(b)(6) motions to dismiss (or motions for more definite statement) is ludicrous (would Sidley Austin put this disclaimer on its website??? - we think not).

Now at the expiration of the May 21, 2021 response deadline, the Committee seeks to stay the Adversary Proceeding for ninety (90) days because the Teneo needs time to "familiarize itself with the Adversary Proceeding, so as to adequately and efficiently defend the Motions to Withdraw the References, the Motions to Dismiss, and to effectively manage the litigation of the Adversary Proceeding in its entirety." *See* Motion to Stay, ¶11.

Prior to filing the Motion to Stay, the Committee sought consent.[2] Undersigned counsel responded twice, as follows:

---

[2] Counsel's message stated: "All,

Response 1: "Chandler and counsel,

On behalf of Highland Dallas Foundation and CLO HoldCo, we oppose the requested stay. First, we granted an extension until May 21 by which the UCC is to respond to the motions to withdraw reference and to dismiss, and to the UCC exceeding the page limit. Second, the UCC and its very capable counsel cannot need oversight to deal with the Motion to Withdraw Reference. We think the withdrawal motions should be considered by the Court on June 3, and then send her recommendation thereafter. As you know, the Court has pushed our motions to dismiss, without date, so no stay is really necessary now. We have no idea as to how long the Court will take with its recommendation, but we need to get the court in which the litigation will take place to get set. In fact, nothing will really happen until the District Court rules, as all parties will have the right to respond to the bankruptcy court's recommendation. The point here is that there is a long extension already built into our situation, and we all need the withdrawal motions resolved. We would consider a stay involving any matter other than the withdrawal motions, but that is not what you requested. There is utterly no reason for an extension of the response deadline. None at all. Also, utterly no reason to postpone the withdrawal process.

Please advise that we are opposed to the stay as described in the message below.

Response Number 2: Chandler,

Also, and I came late to the bankruptcy case and related matters, but wasn't any Committee litigation to be initiated within 90 days of the registry order? I have seen that this deadline was extended to accommodate discovery but there was that

---

On Friday, the Committee filed an application to retain Teneo (the future litigation trustee under the terms of the Plan) as litigation advisor to the Committee for the interim time period before the Plan goes effective. Because this adversary proceeding will transfer to the litigation trustee upon effective date of the Plan, we plan to file a motion to stay the adversary proceeding, including the response deadlines and hearings set for the pending motions to dismiss and motions to withdraw the reference, for 90 days, to allow Teneo sufficient time to acquaint itself with the status of the adversary proceeding and the pending motions, and to determine how to proceed.

Given our Friday (May 21) response deadlines for the pending motions to dismiss and motions to withdraw the reference, and the status conference for the motions to withdraw the reference set for June 3, we plan to file the motion on an emergency and expedited basis. Of course, if you would agree that our response deadlines and the June 3 status conference could be postponed until the Court rules on the motion to stay the adversary proceeding, we would file the motion with the normal 21-day notice period.

Can you please let us know if the defendants oppose either: (1) a 90 day stay of the adversary proceeding and/or (2) an expedited hearing on the motion to stay? Given the tight turnaround, we would appreciate a response as soon as possible. We plan to file our motions this evening. "

> extension. Also, it seems as though the UCC refrained from serving parties, which generated further delay. We did ask for a short extension for a long time to respond so that all responses for my two clients would be filed together, but the extension was very short. As mentioned below we granted your requested extension, which you mad without any mention of a further extension caused by a "stay." I reiterate the message below

Although the Committee was well-aware of the Motions to Withdraw Reference and Motions to Dismiss, and had already engaged in Teneo when it requested its initial extension, it did not disclose to the Defendants that upon expiration of the extension, it would then move to stay the Adversary Proceeding for ninety (90) days. Nonetheless, given that the Court has already deferred consideration of the Motions to Dismiss and the parties agreed to wait on discovery pending the disposition of the Motions to Withdraw the Reference, the Defendants informed the Committee that the Defendants would consider a stay for matters other than the Motions to Withdraw the Reference, but would not agree to a ninety (90) stay of all matters. Committee counsel did not respond to the proposal to discuss an agreed stay and the Committee filed its Motion to Stay.

OPPOSITION

Bankruptcy Rule 5011 is clear that the filing of a motion to withdraw the reference does not stay an adversary proceeding, but the bankruptcy court may, as this Court has, stay, on such terms and conditions as are proper, proceedings pending disposition of the motion. FED. R. CIV. P. 5011(c). Here, the Court has already exercised this power and essentially stayed further proceedings pending disposition of the Motions to Withdraw the Reference. But the Committee urges that this is not enough, as it demands a ninety (90) day stay of all proceedings, including the Motions to Withdraw the Reference, because of the April 15, 2021 retention of the Litigation Advisor.

While this Court certainly has discretion to stay proceedings, the party moving for a stay bears a "heavy burden" to demonstrate that it is appropriate. *See Coastal (Bermuda) Ltd. v. E.W. Saybolt* & Co., 761 F.2d 198, 203 n.6 (5th Cir. 1985); *Mott's LLP v. Comercializadora Eloro, S.A.,* No. 5:20-CV-651-DAE, 2020 WL 8454920, at *2 (W.D. Tex. Dec. 14, 2020). Courts recognize that they must tread carefully in granting a stay of proceedings since a party has a right to a determination of its rights and liabilities without undue delay. *Schobert v. CSX Transportation Inc.,* No. 1:19-CV-76, 2020 WL 7028468, at *39 (S.D. Ohio Nov. 30, 2020)(citing to *Ohio Env't Council v. U.S. Dist. Ct., S. Dist. of Ohio, E. Div.,* 565 F.2d 393, 396 (6th Cir. 1977)). Moreover, even when a court determines a stay is appropriate, the court must only impose a stay that is reasonable in length. *Clinton v. Jones*, 520 U.S. 681, 706, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997)).

i) Counsel for the Committee is certainly familiar with the Adversary Proceeding and can provide competent representation

As set forth herein, counsel for the Committee has been involved in the Bankruptcy Case since October of 2019. Sidley Austin was required to investigate the facts underlying this Adversary Proceeding before it commenced it. *See* FED. R. P. BANKR. 9011(b) (requiring a reasonable inquiry before presenting a petition to the court). The invoices filed in the Bankruptcy Case by Sidley Austin shows that counsel has spent a great deal of time working on the Bankruptcy Case and Adversary Proceeding and has been compensated millions of dollars for doing so. *See* Dkt. No. 2328 ("Prior Monthly Applications Filed" -- totaling $9,146,297.85); Dkt. No. 2328 (numerous time entries regarding the Adversary Proceeding); Dkt. No. 2160 (same); Dkt. No. 1963 (same); Dkt. No. 1842 (same). As such, counsel for the Committee is certainly familiar with Adversary Proceeding and able to defend the Motions to Withdraw the Reference and Motions to Dismiss. Moreover, as explained herein, Teneo has been retained to provide "litigation support,

investigation, and advisory services." The Scope of Services does not include purely legal responses to non-evidentiary motions, nor could it because that role would fall to Sidley Austin and according to the Committee, there can be no duplication of services provided by other professionals.

Additionally, the Committee retained Teneo on April 15, 2021. This is one day after the Charitable Defendants Motion to Withdraw the Reference and Motion to Dismiss were filed. Given that the Charitable Defendants already agreed to an over two (2) week extension for a response deadline, there can be no prejudice to Teneo. Teneo has had weeks longer than any plaintiff would normally have to respond to the Charitable Defendants Motion to Withdraw the Reference and Motion to Dismiss. The Committee points to the "complexities" of the Adversary Proceeding, but there is no precedent for the idea that because a case is deemed complex a plaintiff should be given a three months stay to respond to motions to withdraw the reference and motions to dismiss. Also, there are no complexities regarding the Motions to Withdraw Reference that the requested stay could even assist. The arguments are legal and counsel for Committee is in as good a position to know how to respond as it ever will be. The requested is a smokescreen for delay without basis. In fact, Teneo cannot "supplement" Sidley Austin's response to Motions to Withdraw the Reference because doing so would be a duplication of services. We ask whether the counsel really is considering consenting to withdrawal of the reference of this Adversary Proceeding. We think this is not likely. There is no need for delay.

ii) Defendants will be unnecessarily prejudiced by the requested stay.

A party has a right to a determination of its rights and liabilities without undue delay. Schobert, 2020 WL 7028468, at *39. So in that way, a stay is always prejudicial. But worse, here, the Committee created the situation which it now attempts to leverage into a litigation advantage.

The Committee filed this Adversary Proceeding in December 2020. The Committee implies it was forced to due to the fast expiry of certain statutes of limitations. But the Committee did not move to stay the Adversary Proceeding from the outset, even though it knew by, at the absolute latest, January 22, 2021 that the claims underlying the Adversary Proceeding would be transferred to the Litigation Sub-Trust upon the Effective Date. Dkt. No. 1811 (Plan Supplement, Litigation Trust Form). Also, undersigned counsel has no idea when the Effective Date will occur (or if it will occur) but believes it could not occur until late-June Even after the Plan was confirmed on February 8, 2021, the Committee did nothing. Only after the Defendants filed their Motions to Withdraw the Reference and Motions to Dismiss, and the Committee and counsel smelled that there might be a litigation advantage to be had, did the Committee move to stay the Adversary Proceeding based upon the all same information it had since at least January 2021.

CONCLUSION

Here, the Court has already exercised its authority to stay matters pending disposition of the Motions to Withdraw the Reference, and the Committee has already benefited from the extensions the Defendants agreed to. Undersigned counsel has offered discussions on further stay after withdrawal of the reference has been decided, which is under the control of this Court, and not the litigants (such that a stay might already extend as to matters other than withdrawal of the reference, for more than 90 days). Undersigned counsel agreed to a material extension for the Committee, which withheld filing its proceeding and then took an overlong time within which to serve it. Given that the Committee has already had far more time to defend the Motions to Withdraw the Reference and the Motions to Dismiss than the applicable rules provide, and only need file basically legal responses to the two pending motions, there is nothing Teneo can offer. The request is without merit, and must be made to avoid having to file a response to the pending

motions.. The Committee has known of all the purported grounds for its Motion to Stay for months, but did nothing, until the last minute. And, for no reason, as the purported grounds are not grounds for delay in responding to and consideration of the Motions to Withdraw the Reference. The Committee cannot meet its heavy burden to show a stay of the Adversary Proceeding for ninety (90) days is appropriate. The Motion to Stay must be denied.

Dated: May 19, 2021

Respectfully submitted,

KELLY HART PITRE

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ATTORNEYS FOR CLO HOLDCO, LTD. AND HIGHLAND DALLAS FOUNDATION, INC.

CERTIFICATE OF SERVICE

I, undersigned counsel, hereby certify that a true and correct copy of the above and foregoing document and all attachments thereto were sent via electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case on this May 19, 2021.

/s/ Louis M. Phillips
Louis M. Phillips

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ATTORNEYS FOR CLO HOLDCO, LTD. AND HIGHLAND DALLAS FOUNDATION, INC.

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

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

OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	§	
	§	
Plaintiff,	§	
	§	**Adversary No. 20-03195**
vs.	§	
	§	
CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT JAMES SCOTT III IN HIS INDIVIDUAL CAPACITY, AS TRUSTEE OF THE DUGABOY INVESTMENT TRUST, AND AS TRUSTEE OF THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO,	§	
	§	
Defendants.	§	

WITNESS AND EXHIBIT LIST

CLO HOLDCO, LTD. and Highland Dallas Foundation, Inc.[1] (the "Charitable Defendants") submits the following witness and exhibit list (the "Witness and Exhibit List"), and designates the following exhibits in connection with the plaintiff's in the above-captioned adversary proceeding (the "Committee") *Motion To Stay the Adversary Proceeding for Ninety Days* [Dkt. No. 46], set for hearing at 9:30 AM (Central Time) on May 20, 2021.

WITNESSES:

1) Any witnesses called or designated by any other party.

2) Any impeachment or rebuttal witnesses.

[1] CLO HOLDCO, LTD. and Highland Dallas Foundation, Inc. have filed a *Motion to Withdraw the Reference* [Dkt. No. 24], and nothing herein shall be deemed a waiver of their right to a trial by jury on all claims asserted in this Adversary Proceeding nor consent to the entry of final orders in this Adversary Proceeding by the Bankruptcy Court.

3) Any witness needed to authenticate a document.

EXHIBITS

No.	Exhibit	Offered	Admitted
1	*Application to Employ Teneo* Bankruptcy Case, Dkt. No. 2306		
2	April 16, 2021 Email from C. Rognes Re: UCC v. CLO Holdco, et al. - extension on response deadline		
3	April 19, 2021 Email from C. Rognes Re: UCC v. CLO Holdco, et al. - extension on response deadline		
4	May 17, 2021 3:11 p.m. Email from C. Rognes Re: UCC v. CLO Holdco, et al. - motion to stay		
5	May 17, 2021 4:47 p.m. Email from L. Phillips Re: UCC v. CLO Holdco, et al. - motion to stay		
6	May 17, 2021 4:12 p.m. Email from L. Phillips Re: UCC v. CLO Holdco, et al. - motion to stay		
	Any exhibit introduced by any other party		
	Rebuttal exhibits		
	Impeachment Exhibits		

Charitable Defendants reserve the right to amended the forgoing, as needed.

Dated: May 20, 2021

Respectfully submitted,

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ATTORNEYS FOR CLO HOLDCO, LTD. AND HIGHLAND DALLAS FOUNDATION, INC.

CERTIFICATE OF SERVICE

I, undersigned counsel, hereby certify that a true and correct copy of the above and foregoing document and all attachments thereto were sent via electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case on this May 20, 2021.

/s/ Louis M. Phillips
Louis M. Phillips

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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	Case No. 19-34054 (SGJ)
Debtor.	

APPLICATION FOR ORDER PURSUANT TO SECTION 1103 OF THE BANKRUPTCY CODE AUTHORIZING THE EMPLOYMENT AND RETENTION OF TENEO CAPITAL, LLC AS LITIGATION ADVISOR TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS EFFECTIVE APRIL 15, 2021

1 The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

EXHIBIT 1

NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT 1100 COMMERCE ST # 1452, DALLAS, TX 75242 BEFORE CLOSE OF BUSINESS ON JUNE 7, 2021, WHICH IS AT LEAST 24 DAYS FROM THE DATE OF SERVICE HEREOF.

ANY RESPONSE SHALL BE IN WRITING AND FILED WITH THE CLERK, AND A COPY SHALL BE SERVED UPON COUNSEL FOR THE MOVING PARTY PRIOR TO THE DATE AND TIME SET FORTH HEREIN. IF A RESPONSE IS FILED A HEARING MAY BE HELD WITH NOTICE ONLY TO THE OBJECTING PARTY.

IF NO HEARING ON SUCH NOTICE OR MOTION IS TIMELY REQUESTED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT OR THE NOTICED ACTION MAY BE TAKEN.

The Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtor and debtor in possession (the "Debtor") hereby moves the Court for entry of an order under sections 328(a) and 1103 of title 11 of the United States Code (the "Bankruptcy Code"), Rule 2014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 2014-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the Northern District of Texas (the "Local Rules") authorizing the employment and retention of the consulting firm of Teneo Capital, LLC ("Teneo"), as litigation advisor to the Committee. In support of this application (the "Application"), the Committee respectfully states as follows:

Jurisdiction and Venue

1. The Court has jurisdiction over this Application pursuant to 28 U.S.C. §§ 157 and 1334. Venue of this proceeding and this Application is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief sought herein are sections 328(a) and 1103 of the Bankruptcy Code. This Application is a core proceeding pursuant to 28 U.S.C. 157.

Background

2. On October 16, 2019 (the "Petition Date"), the Debtor filed its voluntary petition for relief under chapter 11 of title 11 of the Bankruptcy Code. Pursuant to sections 1107 and 1108

of the Bankruptcy Code, the Debtor is continuing to operate its businesses and manage its properties and assets as debtor in possession.

3. On October 29, 2019 the Office of the United States Trustee held a meeting to appoint the Committee pursuant to section 1102 of the Bankruptcy Code (the "Formation Meeting"). At the Formation Meeting, the Committee selected Sidley Austin LLP as its counsel, on November 6, 2019, the Committee selected FTI Consulting, Inc. as its financial advisor. At its formation, the Committee consisted of the following four members:

(a) Redeemer Committee of Highland Crusader Fund ("Redeemer");

(b) Meta-e Discovery;

(c) UBS Securities LLC and UBS AG London Branch (together, "UBS"); and

(d) Acis Capital Management, L.P. and Acis Capital Management GP, LLP (together, "Acis").

4. Acis and Redeemer resigned from the Committee effective as of April 15, 2021 and April 30, 2021, respectively. The Committee therefore currently consists of Meta-E Discovery and UBS.

5. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's Bankruptcy Case to this Court [Docket No. 186].

6. On January 9, 2020, the Court approved the *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket. No. 281] (the "Settlement Motion"), approving a settlement between the Debtor and the Committee concerning, among other things, governance of the Debtor and the pursuit of claims held by the Debtor. The approved settlement was embodied in a term sheet filed on the docket [Docket No. 354] (the "Term Sheet").

7. In a bench ruling issued on February 8, 2021, and supplemented by an order entered

on February 22, 2021 [Docket No. 1943], the Court confirmed the Debtor's *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the "Plan").[2]

8. Upon the effective date of the Plan, a Litigation Sub-Trust, created for the benefit of the holders of claims and interests in the Debtor, will be vested with certain claims and causes of action of the Debtor (the "Causes of Action"). Pursuant to the Plan, Marc S. Kirschner, Senior Managing Director of Teneo, will be appointed as Litigation Trustee and will be tasked with, among other things, investigation and monetization of the Causes of Action.

9. On March 1, 2021, Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (together, the "Advisors") filed notice of appeal of the order confirming the Plan to the United States District Court of the Northern District of Texas (the "Confirmation Appeal") [Docket No. 1957]. On April 1, 2021, the Advisors filed *Motion for Stay Pending Appeal* Civ. Act. No. 3:21-cv-00538-N, [Docket No. 3] and The Dugaboy Investment Trust and Get Good Trust filed the *Motion for Stay Pending Appeal*, Civ. Act. No. 3:21-cv-00550-L, [Docket No. 6] with the District Court for the Northern District of Texas, both seeking a stay of the effectiveness of the Plan pending resolution of the Confirmation Appeal.

Relief Requested

10. By this Application, the Committee seeks to employ and retain Teneo pursuant to sections 328(a) and 1103(a) of the Bankruptcy Code to perform litigation advisory services for the Committee in this chapter 11 case, effective April 15, 2021.

11. The Committee is familiar with the professional standing and reputation of Teneo. The Committee understands and recognizes that Teneo, and in particular, Senior Managing Director Mr. Kirschner, has a wealth of experience in providing litigation support, investigation

2 Capitalized terms used but not defnined herein shall have the meanings ascribed to them in the Plan.

and advisory services in restructurings and reorganizations and enjoys an excellent reputation for services it has rendered in chapter 11 cases on behalf of debtors, creditors and trusts throughout the United States. Mr. Kirschner has decades of experience as a bankruptcy and restructuring lawyer, distressed debt investor, financial advisor and fiduciary. Mr. Kirschner founded and led for 15 years the bankruptcy department in the New York office of the global law firm, Jones Day, until his retirement from the private practice of law. Thereafter, he was appointed by SDNY Bankruptcy Judge Robert Drain as Chapter 11 Trustee of Refco Capital Markets, a global securities and derivatives dealer, which was one of the largest cases ever for which a Chapter 11 Trustee was appointed and continued post confirmation as Litigation Trustee for two trusts formed under Refco's Plan. He is recognized as a leading authority in pursuing billion dollar fraudulent conveyance and other claims on behalf of litigation trusts, and is currently serving as Litigation Trustee for Tribune, Nine West and Millennium Health. Mr. Kirschner is a Fellow of the American College of Bankruptcy. The Court has previously reviewed Mr. Kirschner's curriculum vitae and concluded that Mr. Kirschner "has substantial experience in bankruptcy litigation matters, particularly with respect to his prior experience as a litigation trustee for several litigation trusts as set forth on the record of the Confirmation Hearing and in the Confirmation Brief." Confirmation Order ¶ 45 [Docket No. 1943].

12. It is because of this experience that the Committee selected, and the Debtor supported, Mr. Kirschner as Litigation Trustee. Although the Committee expects the Effective Date to occur in the near future, the statute of limitations for certain potential claims are fast approaching. Therefore, the Committee is seeking to retain Teneo until the effective date of the Plan in order to ensure that the Causes of Action are investigated and pursued in a timely manner.

13. Teneo is a recognized leading financial advisory firm focused on distressed situations, valuation analyses and fiduciary roles. Teneo frequently advises debtors and creditors

in a broad range of distressed corporate financial situations, including in chapter 11 cases and out-of-court restructurings. Teneo has considerable experience in performing forensic financial, fraudulent conveyance, valuation and solvency analyses and other complex financial advisory services, often in connection with review, analysis and resolution of claims, on behalf of official committees, including in matters such as *In re Ultra Petroleum Corp., et al*, No. 20-32631 (Bankr. S.D. Tex.); *In re: Ditech Holding Corp.*, *et. al.*, No. 19-10412 (Bankr. S.D.N.Y.); *In re: Real Industry, Inc., et al.*, No. 17-12464 (Bankr. D. Del.); and *In re: Tribune Co., et al.*, 08-13141 (Bankr. D. Del.).

14. Teneo has often undertaken these sorts of reviews as a financial advisor to trustees, receivers or other independents, including in matters involving Platinum Partners, led by Marc Kirschner; Fletcher International; Millennium (Marc S. Kirschner, Trustee); Nine West (Marc S. Kirschner, Trustee); Physiotherapy; and Tribune (Marc S. Kirschner, Trustee).

15. To ensure that the Causes of Action are investigated and pursued in a vigorous and timely manner, the Committee believed it was essential to require Mr. Kirschner and Teneo to commence work effective April 15, 2021 on an interim basis under the direction of the Committee. If the Plan becomes effective before the return date of this Application, the Application will be withdrawn, and the Litigation Trust will succeed to the Kirschner and Teneo work product as provided for in the Plan.

16. The services of Teneo are deemed necessary to enable the Committee to investigate and pursue the Causes of Action that the Committee currently has standing to bring and that will be vested in the Litigation Trust. Pursuit of the Causes of Action will maximize the value of the Debtor's estate to the benefit of its creditors. Further, Teneo is well qualified and able to represent the Committee in a cost-effective, efficient and timely manner. The Committee does not believe that the services of Teneo will be duplicative of services provided by FTI to the Committee. FTI

and Teneo will undertake to coordinate their services to the Committee to avoid or minimize any unnecessary duplication of services and will work together to ensure a smooth transition of any work related to Causes of Action from FTI to Teneo.

Scope of Services

17. Teneo will provide such litigation support, investigation and advisory services to the Committee and its legal advisors as they deem appropriate and feasible in order to advise the Committee on the Causes of Action, including but not limited to the following:

- Assistance in the investigation of business activities of insiders, related and affiliated parties;
- Assistance in forensic review of financial information of the Debtor;
- Assistance in the evaluation and analysis of the Causes of Action;
- Assistance in the development of complaints prosecuting the Causes of Action, including attendance at depositions and provision of expert reports/testimony on case issues as required by the Committee; and
- Render such other litigation advisory or such other financial advisory assistance as the Committee or its counsel may deem necessary that are consistent with the role of a litigation advisor and not duplicative of services provided by other professionals in this proceeding.

Teneo's Eligibility for Employment

18. Teneo has informed the Committee that, except as may be set forth in the Declaration of Marc S. Kirschner (the "Kirschner Declaration"), it does not hold or represent any interest adverse to the estate, and therefore believes it is eligible to represent the Committee under Section 1103(b) of the Bankruptcy Code. To the best of the Committee's knowledge and based upon the Kirschner Declaration, (a) Teneo's connections with the Debtor, creditors, any other party in interest, or their respective attorneys are disclosed on Exhibit B to the Kirschner Declaration; and (b) the Teneo professionals working on this matter are not relatives of the United States Trustee for the Northern District of Texas (the "U.S. Trustee") or of any known employee in the office

thereof, or any United States Bankruptcy Judge of the Northern District of Texas. Teneo has not provided, and will not provide any professional services to the Debtor, any of the creditors, other parties-in-interest, or their respective attorneys and accountants with regard to any matter related to this chapter 11 case before the effective date of the Plan.

19. Teneo will conduct an ongoing review of its files to ensure that no conflicts or other disqualifying circumstances exist or arise. If any new material facts or relationships are discovered, Teneo will supplement its disclosure to the Court.

20. Teneo has agreed not to share with any person or firm the compensation to be paid for professional services rendered in connection with this case.

Terms of Retention

21. Teneo is not owed any amounts with respect to pre-petition fees and expenses.

22. The Committee understands that, if Teneo is retained by the Committee pursuant to the Order requested in this Application, Teneo intends to apply to the Court for allowances of compensation and reimbursement of expenses for its litigation advisory services in accordance with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, corresponding local rules, orders of this Court and guidelines established by the U.S. Trustee. If the Effective Date of the Plan occurs before this Application is approved (and the Application is subsequently withdrawn), the Litigation Trust will compensate Mr. Kirschner and Teneo in accordance with the terms of this Application.

23. Teneo's compensation hereunder will be comprised as follows: (i) a fixed $40,000 per month for the first three (3) months, and $20,000 per month on a go-forward basis for the services of Mr. Kirschner, plus (ii) the regular hourly fees of any additional Teneo personnel, plus (iii) a percentage of recoveries of litigation based as set forth below (the "Litigation Recovery Fee"), (iv) plus reimbursement of actual and necessary expenses incurred by Teneo. Actual and

necessary expenses would include any reasonable legal fees incurred by Teneo related to Teneo's retention and defense of fee applications in this case, subject to Court approval.

24. The current customary hourly rates and agreed to discounted rates, subject to periodic adjustment, charged by Teneo professionals anticipated to be assigned to this case are as follows:

	Normal Rates	Discounted Rates
Senior Managing Directors, Senior Advisors and Managing Directors	$800-$1,250	$720-1,125
Directors, Vice Presidents and Consultants	$500-$800	$450-$720
Associates and Analysts	$350-$500	$315-$450
Administrative Staff	$200-$300	$180-$270

Teneo has agreed with the Committee to discount its customary hourly rates by 10%, and agreed that such rates will not be subject to any periodic increases until the end of 2022.

25. Teneo and the Committee have agreed that the Litigation Recovery Fee earned by Teneo shall be equal to one and one half percent (1.50%) of any Net Litigation Proceeds up to $100,000,000, and two percent (2.0%) of any Net Litigation Proceeds exceeding $100,000,000. For the purposes of calculating the Litigation Recovery Fee, the amount of Net Litigation Proceeds shall be calculated as the gross amount of proceeds from litigation directed by Mr. Kirschner, less hourly fees (but not the fixed fees payable for the services of Mr. Kirschner, whether before or after the consummation of the Sub-Trust of which he will serve as Trustee) earned by Teneo, hourly fees charged by counsel in connection with the prosecution of the Causes of Action, expert witness, e-discovery, court and discovery expenses; but gross amount of proceeds of litigation directed by Mr. Kirschner are not to be reduced by the cost of director and officer and errors and omissions insurance, tax accounting work which would be outsourced, contingency fees charged by any other professional, or litigation funding financing and/or related contingent fee charges. For the avoidance of doubt, Net Litigation Proceeds will include proceeds from litigation arising

from all Causes of Action, whether originally brought by the Debtor, the Reorganized Debtor, the Committee, the Litigation Trust, or their successors or assigns, including, but not limited to, litigation brought in connection with collection on demand or term notes held by the Debtor.

Indemnification

26. In addition to the foregoing, and as a material part of the consideration for the agreement of Teneo to furnish services to the Committee pursuant to the terms of this Application, the Committee believes that the following indemnification terms are customary and reasonable for committee professionals in chapter 11 cases:

a. subject to the provisions of subparagraphs (b) and (c) below and approval of the Court, the Debtor is authorized to indemnify, and shall indemnify, Teneo and its affiliates, and each of their respective officers, directors, managers, members, partners, employees and agents, and any other person controlling Teneo or any of its affiliates and their successors and permitted assigns (collectively "Indemnified Persons") to the fullext extent lawful from and against any and all claims, liabilities, losses, actions, suits, proceedings, third-party subpoenas, damages, costs and expenses (collectively, an "Action") (including, without limitation full reimbursement of all fees and expenses of counsel incurred in investigating, preparing or defending against any such Action and in enforcing the terms of this section), as incurred, related to or arising out of or in connection with Teneo's provision of services and engagement under this Application, but not for any claim arising from, related to, or in connection with Teneo's post-petition performance of any other services other than those in connection with the engagement, unless such post-petition services and indemnification therefore are approved by this Court; and

b. the Debtor shall have no obligation to indemnify an Indemnified Person for any Action that is either (i) judicially determined (the determination having become final) to have arisen primarily from Teneo's gross negligence, willful misconduct or fraud unless the Court determines that indemnification would be permissible pursuant to In re United Artists Theatre company, et al., 315 F.3d 217 (3d Cir. 2003), or (ii) settled prior to a judicial determination as to Teneo's gross negligence, willful misconduct or fraud, but determined by this Court, after notice and a hearing, to be a claim or expense for which an Indemnified Person is not entitled to receive indemnity under the terms of this Application; and

c. if, before the earlier of (i) the entry of an order confirming a chapter 11 plan in this case (that order having become a final order no longer subject to appeal), and (ii) the entry of an order closing this chapter 11 case, an Indemnified Person believes that it is entitled to the payment of any amounts by the Debtor on account

of the Debtor's indemnification obligations under the Application, including, without limitation, the advancement of defense costs, the Indemnified Person must file an application in this Court, and the Debtor may not pay any such amounts to the Indemnified Person before the entry of an order by this Court approving the payment. This subparagraph (c) is intended only to specify the period of time under which the Court shall have jurisdiction over any request for fees and expenses by Teneo for indemnification, and not as a provision limiting the duration of the Debtor's obligation to indemnify Teneo. The indemnification obligations herein shall survive the confirmation of the plan and the expiration of Teneo's retention and shall be binding with full force and effect on any successor or assign of the Debtor.

27. The Committee believes that indemnification is customary and reasonable for Committee professionals in chapter 11 proceedings. See In re Joan & David Halpern, Inc., 248 B.R. 43 (Bankr. S.D.N.Y. 2000).

No Prior Request

28. No prior Application for the relief requested herein has been made to this or any other Court.

Notice

29. Notice of this Application has been given to (i) the Debtor, (ii) the U.S. Trustee and (iii) the Office of the United States Attorney for the Northern District of Texas; (iii) the Debtor's principal secured parties; and (iv) parties requesting notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Committee submits that no further notice is required.

WHEREFORE, the Committee respectfully requests that the Court enter an order, substantially in the form attached hereto, authorizing the Committee to employ and retain Teneo as litigation advisor for the Committee for the purposes set forth above, effective April 15, 2021 and grant such further relief as is just and proper.

Dated: May 14, 2021
Chicago, Illinois

By: UBS SECURITIES LLC AND UBS AG LONDON BRANCH
Solely in their capacity as member of the Official Committee of Unsecured Creditors
Name: Elizabeth Kozlowski
Title: Executive Director

Dated: May 14, 2021
Chicago, Illinois

By: META-E DISCOVERY, LLC
Solely in its capacity as member of the
Official Committee of Unsecured Creditors
Name: Paul Rom
Title: CEO

EXHIBIT 1

PROPOSED ORDER

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

In re:	)	**Chapter 11**
	)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	)	**Case No. 19-34054_ (SGJ)**
	)	
Debtor.	)	

ORDER PURSUANT TO SECTION 1103 OF THE BANKRUPTCY CODE AUTHORIZING THE EMPLOYMENT AND RETENTION OF TENEO CAPITAL, LLC AS LITIGATION ADVISOR TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS EFFECTIVE APRIL 15, 2021

Upon the application (the "Application") of the Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtor and debtor in possession (the "Debtor"), for an order pursuant to section 1103 of chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"), authorizing them to retain Teneo Capital, LLC as litigation advisor; and upon the Declaration of Marc S. Kirschner in support of the Application; and due and adequate notice of the Application having been given; and it appearing that no other notice need be given; and it appearing that Teneo is not representing any adverse interest in connection with this case; and it appearing that the relief requested in the Application is in the best interest of the Committee; after due deliberation and sufficient cause appearing therefore, it is hereby

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

ORDERED that the Application be, and it hereby is, granted; and it is further

ORDERED that the capitalized terms not defined herein shall have the meanings ascribed to them in the Application; and it is further

ORDERED that in accordance with section 1103 of the Bankruptcy Code, the Committee is authorized to employ and retain Teneo as of April 15, 2021 as their litigation advisor on the terms set forth in the Application; and it is further

ORDERED that Teneo shall be compensated in accordance with the procedures set forth in sections 330 and 331 of the Bankruptcy Code and such Bankruptcy Rules as may then be applicable, from time to time, and such procedures as may be fixed by order of this Court; and it is further

ORDERED that, Teneo is entitled to reimbursement of actual and necessary expenses, including legal fees related to its retention application and future fee applications as approved by the Court; and it is further

ORDERED that the following indemnification provisions are approved:

a. subject to the provisions of subparagraphs (b) and (c) below and approval of the Court, the Debtor is authorized to indemnify, and shall indemnify, Teneo and its affiliates, and each of their respective officers, directors, managers, members, partners, employees and agents, and any other person controlling Teneo or any of its affiliates and their successors and permitted assigns (collectively "Indemnified Persons") to the fullext extent lawful from and against any and all claims, liabilities, losses, actions, suits, proceedings, third-party subpoenas, damages, costs and expenses (collectively, an "Action") (including, without limitation full reimbursement of all fees and expenses of counsel incurred in investigating, preparing or defending against any such Action and in enforcing the terms of this section), as incurred, related to or arising out of or in connection with Teneo's provision of services and engagement under this Application, but not for any claim arising from, related to, or in connection with Teneo's post-petition performance of any other services other than those in connection with the engagement, unless such post-petition services and indemnification therefore are approved by this Court; and

b. the Debtor shall have no obligation to indemnify an Indemnified Person for any Action that is either (i) judicially determined (the determination having become final) to have arisen primarily from Teneo's gross negligence, willful misconduct or fraud unless the Court determines that indemnification would be permissible pursuant to In re United Artists Theatre company, et al., 315 F.3d 217 (3d Cir. 2003), or (ii) settled prior to a judicial determination as to Teneo's gross negligence, willful misconduct or fraud, but determined by this Court, after notice and a hearing, to be a claim or expense for which an Indemnified Person is not entitled to receive indemnity under the terms of this Application; and

c. if, before the earlier of (i) the entry of an order confirming a chapter 11 plan in this case (that order having become a final order no longer subject to appeal), and (ii) the entry of an order closing this chapter 11 case, an Indemnified Person believes that it is entitled to the payment of any amounts by the Debtor on account of the Debtor's indemnification obligations under the Application, including, without limitation, the advancement of defense costs, the Indemnified Person must file an application in this Court, and the Debtor may not pay any such amounts to the Indemnified Person before the entry of an order by this Court approving the payment. This subparagraph (c) is intended only to specify the period of time under which the Court shall have jurisdiction over any request for fees and expenses by Teneo for indemnification, and not as a provision limiting the duration of the Debtor's obligation to indemnify Teneo. The indemnification obligations herein shall survive the confirmation of the plan and the expiration of Teneo's retention and shall be binding with full force and effect on any successor or assign of the Debtor; and it is further

ORDERED that this Court shall retain jurisdiction with respect to all matters arising or related to the implementation of this order.

End of Order

EXHIBIT 2

KIRSCHNER DECLARATION

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

In re:	)	
	)	**Chapter 11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	
	)	**Case No. 19-34054 (SGJ)**
	)	
Debtor.	)	

DECLARATION OF MARC S. KIRSCHNER IN SUPPORT OF THE APPLICATION FOR AN ORDER PURSUANT TO SECTION 1103 OF THE BANKRUPTCY CODE AUTHORIZING THE EMPLOYMENT AND RETENTION OF TENEO CAPITAL, LLC AS LITIGATION ADVISOR TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS EFFECTIVE APRIL 15, 2021

Pursuant to 28 U.S.C. Section 1746, Marc S. Kirschner declares as follows:

1. I am a Senior Managing Director with Teneo Capital, LLC ("Teneo"), an international consulting and advisory firm. I submit this Declaration on behalf of Teneo (the "Declaration") in support of the application (the "Application") of the Official Committee of Unsecured Creditors (the "Committee") of Highland Capital Management, L.P., the debtor and debtor-in-possession in the above-captioned chapter 11 case (the "Debtor"), for an order authorizing the employment and retention of Teneo as litigation advisor under the terms and conditions set forth in the Application. Except as otherwise noted,[4] I have personal knowledge of the matters set forth herein.

Disinterestedness and Eligibility

2. In connection with the preparation of this Declaration, Teneo conducted a review of its contacts with the Debtors, their affiliates and certain entities holding large claims against or interests in the Debtors that were made reasonably known to Teneo. A listing of the parties

[4] Certain of the disclosures herein relate to matters within the personal knowledge of other professionals at Teneo and are based on information provided by them.

reviewed is reflected on **Exhibit A** to this Declaration. Teneo's review, completed under my supervision, consisted of a query of the Exhibit A parties within an internal computer database containing names of individuals and entities that are present or recent former clients of Teneo. A listing of such relationships that Teneo identified during this process is set forth on **Exhibit B** to this Declaration.

3. Based on the results of its review, except as otherwise discussed herein, Teneo does not have a relationship with any of the parties on Exhibit A ("Parties in Interest") in matters related to these proceedings. Teneo has provided and could reasonably expect to continue to provide services unrelated to the Debtor's case for the various entities shown on Exhibit B. Teneo's assistance to these parties has been related to providing various financial restructuring, litigation support, technology, strategic communications, and economic consulting services. To the best of my knowledge, Teneo does not hold or represent any interest adverse to the estate, nor does Teneo's involvement in this case compromise its ability to continue such consulting services.

4. Further, as part of its diverse practice, Teneo appears in numerous cases, proceedings and transactions that involve many different professionals, including attorneys, accountants and financial consultants, who may represent claimants and parties-in-interest in the Debtor's case. Also, Teneo has performed in the past, and may perform in the future, advisory consulting services for various attorneys and law firms, and has been represented by several attorneys, law firms and financial institutions, some of whom may be involved in this proceeding.

5. In addition, Teneo has in the past, may currently and will likely in the future be working with or against other professionals involved in this case in matters unrelated to the Debtor and this case. Based on our current knowledge of the professionals involved, and to the best of my knowledge, none of these relationships create interests adverse to the estate, and none are in connection with this case. Teneo, its affiliates and/or personnel may have business associations—

including purchasing goods, services, and/or insurance on market terms in the ordinary course—with certain Parties-in-Interest and their respective affiliates, creditors, investors, insurers, vendors, unrelated to these Chapter 11 Cases. In addition, in the ordinary course of its business, Teneo may engage or be engaged by counsel or other professionals in unrelated matters who now represent, or who may in the future represent, Parties-in-Interest. Teneo and/or its personnel may be taxpayers or constituents of governmental bodies that are creditors or vendors of the Debtors or their affiliates.

6. Teneo (including affiliates, employees, and contractors) has roles in many cases, proceedings, and transactions ("Matters").

7. The Matters include acting as, or on behalf of, trustees, who have actual or potential claims against many parties ("Trustee Matters"). These Trustee Matters involve thousands of parties with respect to whom Teneo has not undertaken to conduct a search. Parties-in-Interest in these Chapter 11 Cases may be actual or potential defendants in Trustee Matters or serve as attorneys, financial advisors, investment banks, or other advisors or service providers to the trustees or their adversaries.

8. The Matters also include acting as interim managers on behalf of certain clients. Some Parties-in-Interest involved in these Chapter 11 Cases may have relationships with those clients, including, but not limited to, serving as attorneys, financial advisors, investment banks, or other advisors or service providers to such clients or to parties adverse to such clients in unrelated matters.

9. The Matters involve many different professionals, including attorneys, accountants, investment bankers, and financial consultants, who may represent claimants and parties-in-interest that are or may be aligned with or adverse to claimants or parties-in-interest represented by Teneo.

Such professionals, including, attorneys, accountants, investment bankers, and financial consultants may represent Parties-in-Interest.

10. In connection with the Matters, many investment funds and financial institutions hold positions in relevant capital structures and may, in any given Matter, be aligned with or adverse to the positions of Teneo' clients. Moreover, Teneo may have had, may be having and may in the future have strategic discussions or discussions regarding investment or other financial relationships, unrelated to these Chapter 11 Cases, with one or more parties affiliated with, or providing services to, Parties-in-Interest in these Chapter 11 Cases.

11. Teneo is not believed to be a "Creditor" with respect to fees and expenses of the Debtor within the meaning of section 101(10) of the Bankruptcy Code. Further, neither I nor any other member of the Teneo engagement team serving this Committee, to the best of my knowledge, is a holder of any outstanding debt instruments or shares of the Debtor's stock.

12. As such, to the best of my knowledge, Teneo does not hold or represent any interest adverse to the estate, and therefore believes it is eligible to represent the Committee under Section 1103(b) of the Bankruptcy Code.

13. It is Teneo's policy and intent to update and expand its ongoing relationship search for additional parties in interest in an expedient manner. If any new material relevant facts or relationships are discovered or arise, Teneo will promptly file a Bankruptcy Rule 2014(a) Supplemental Declaration.

Professional Compensation

14. Subject to Court approval and in accordance with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, applicable U.S. Trustee guidelines and local rules, Teneo will seek payment for its fixed and hourly basis compensation, plus reimbursement of actual and necessary expenses incurred by Teneo, including legal fees related to its retention application and

future fee applications as approved by the Court. Teneo's customary hourly rates as charged in bankruptcy and non-bankruptcy matters of this type by the professionals assigned to this engagement are outlined in the Application for the employment of Teneo. These hourly rates are adjusted periodically. Pursuant to an agreement with the Committee, the rates shown in the Application shall be reduced by 10% for the duration of this engagement, and shall not be subject to any periodic increases through the end of 2022.

15. To the best of my knowledge, a) no commitments have been made or received by Teneo with respect to compensation or payment in connection with this case other than in accordance with the provisions of the Bankruptcy Code, and b) Teneo has no agreement with any other entity to share with such entity any compensation received by Teneo in connection with this chapter 11 case.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 14th day of May 2021

Marc Kirschner
Senior Managing Director
Teneo Capital, LLC

EXHIBIT A

Listing of Parties-in-Interest Reviewed for Current and Recent Former Relationships

Debtors
Highland Capital Management

Affiliated Parties
Acis CLO Management GP
Acis CLO Management Holdings
Acis CLO Management Intermediate Holdings I
Acis CLO Management Intermediate Holdings II
Acis CLO Management
Acis CMOA Trust
Advisors Equity Group
Argentina Funds
Asbury Holdings
Castle Bio Manager
De Kooning
Eagle Equity Advisors
Eames
Falcon E&P Opportunities Fund GP
Governance
Governance Re
Gunwale
HCF Funds
HCMS Falcon GP
HCRE Partners
HCREF-I Holding Corp.
HCREF-XI Holding Corp.
HCREF-XII Holding Corp.
HE Capital Fox Trails
HE Capital
HE Mezz Fox Trails
HE Peoria Place Property
HE Peoria Place
HFP CDO Construction Corp.
HFP GP
Highland Argentina Regional Opportunity Fund GP
Highland Brasil
Highland Capital Insurance Solutions GP
Highland Capital Insurance Solutions, GP
Highland Capital Management (Singapore)
Highland Capital Management Korea
Highland Capital Management Korea Limited
Highland Capital Management Korea Limited (Relying Advisor)
Highland Capital Management Services
Highland Capital Multi-Strategy Fund
Highland Capital of New York
Highland Capital Special Allocation
Highland CDO Holding Company
Highland CDO Opportunity Fund GP
Highland CDO Opportunity GP
Highland CLO Assets Holdings Limited
Highland CLO Holdings
Highland CLO Management,
Highland Crusader Fund
Highland Dynamic Income Fund GP
Highland Employee Retention Assets
Highland ERA Management
Highland Financial Corp.
Highland Financial Partners
Highland Fund Holdings
Highland HCF Advisor (Relying Advisor
Highland HCF Advisors
Highland Latin America Consulting
Highland Latin America GP
Highland Latin America LP
Highland Latin America Trust
Highland Multi Strategy Credit Fund GP
Highland Multi Strategy Credit Fund
Highland Multi Strategy Credit GP
Highland Multi-Strategy Fund GP
Highland Multi-Strategy Master Fund
Highland Multi-Strategy Onshore Master SubFund II
Highland Multi-Strategy Onshore Master Subfund
Highland Receivables Finance I
Highland Restoration Capital Partners GP
Highland Select Equity GP
Highland Select Equity Master Fund
Highland Special Opportunities Holding Company
Highland SunBridge GP
Hirst
Hockney
Lautner

Maple Avenue Holdings
Neutra
NexAnnuity Holdings
NexBank Capital
NexBank Securities
NexBank SSB
NexBank Wealth Advisors
NexPoint Advisors GP
NexPoint Capital
NexPoint Funds
NexPoint Insurance Distributors
NexPoint Insurance Solutions GP
NexPoint Insurance Solutions
NexPoint Real Estate Advisors GP
NexPoint Securities
NHT Holdco
NREA SE MF Holdings
NREA SE MF Investment Co
NREA SE Multifamily
NREA SE1 Andros Isles Leaseco
NREA SE1 Andros Isles Manager
NREA SE1 Arborwalk Leaseco
NREA SE1 Arborwalk Manager
NREA SE1 Towne Crossing Leaseco
NREA SE1 Towne Crossing Manager
NREA SE1 Walker Ranch Leaseco
NREA SE1 Walker Ranch Manager
NREA SE2 Hidden Lake Leaseco
NREA SE2 Hidden Lake Manager
NREA SE2 Vista Ridge Leaseco
NREA SE2 Vista Ridge Manager
NREA SE2 West Place Leaseco
NREA SE2 West Place Manager
NREA SE3 Arboleda Leaseco
NREA SE3 Arboleda Manager
NREA SE3 Fairways Leaseco
NREA SE3 Fairways Manager
NREA SE3 Grand Oasis Leaseco
NREA SE3 Grand Oasis Manager
NREA Southeast Portfolio One Manager
NREA Southeast Portfolio Three Manager
NREA Southeast Portfolio Two Manager
Oldenburg
Penant Management LP
Pershing
PetroCap Incentive Partners III
Pollack
SE Battleground Park
SE Glenview
SE Governors Green II
SE Gulfstream Isles GP
SE Gulfstream Isles LP
SE Heights at Olde Towne
SE Lakes at Renaissance Park GP I
SE Lakes at Renaissance Park GP II
SE Lakes at Renaissance Park
SE Multifamily Holdings
SE Multifamily REIT Holdings
SE Myrtles at Olde Towne
SE Quail Landing
SE River Walk
SE SM, Inc.
SE Stoney Ridge II
SE Victoria Park
SH Castle BioSciences
Spiritus Life
Starck
Stonebridge PEF
Strand Advisors XVL
The Dondero Insurance Rabbi Trust
The Ohio State Life Insurance Company
The Okada Insurance Rabbi Trust
Thread 55
Tihany
Tricor Business Outsourcing
US Gaming SPV
US Gaming
Warhol
Wright

Other Parties
Atlas IDF
Baylor University
Concord Management
Falcon E&P Opportunities Fund
Fix Asset Management
FRM Investment Management
Grosvenor Capital Management
HCMS Falcon
Highland Capital Insurance Solutions
Highland Capital Management Fund Advisors
Highland Capital Management Latin America
Highland Select Equity Fund
Highland Select Equity Fund GP
NexPoint Advisors
NexPoint Advisors GP
Rand PE Fund I
United States Army Air Force Exchange Services

Taxing and Other Significant Governmental Authorities

California Franchise Tax Board
Internal Revenue Service
Los Angeles County Tax Collector
Delaware Division of Revenue

Banks and Secured Parties
BBVA
Frontier State Bank
Hunter Mountain Investment Trust
Jeffries, LLC Prime Brokerage Services
KeyBank National Association
Mark K. Okada
Strand Advisors
The Dugaboy Investment Trust
The Mark and Pamela Okada Family Trust – Exempt Trust #1

United States Bankruptcy Judges in the Northern District of Texas
Barbara J. Houser
Robert L. Jones
Harlin D. Hale
Stacey G. C. Jernigan
Mark X. Mullin
Edward L. Morris

United States Trustee for the Northern District of Texas (and Key Staff Members)
William T. Neary
Lisa L. Lambert
Nathalie Brumfield-Brown
Kara Croop
Ruby Curry
Christi C. Flanagan
C. Marie Goodier
Meredyth Kippes
Marina J. Lopez
LaSharion F. McClellan
Stephen McKitt
Sandra F. Nixon
Felicia P. Palos
Bradley D. Perdue
Nancy S. Resnick
Kendra M. Rust
Erin Schmidt
Joseph W. Speranza
Cheryl H. Wilcoxson
Cindy Worthington
Elizabeth Young

Official Creditors' Committee Members
Redeemer Committee of the Highland Crusader Fund
Meta-e-Discovery
UBS Securities
UBS AG London Branch
Acis Capital Management
Acis Capital Management GP

Official Creditors' Committee Members' Attorneys
Blank Rome
Jenner & Block
Latham Watkins
Morris, Nichols, Arsht & Tunnel
Morrison Cohen
Richards Layton & Finger
Rogge Dunn Group
Winstead

Official Creditors' Committee Attorneys and Professionals
Sidley Austin
Young Conaway Stargatt & Taylor
FTI

Top Unsecured Creditors
American Arbitration Association
Andrews Kurth
Bates White
Boies, Schiller & Flexner
CLO Holdco
Connolly Gallagher
Debevoise & Plimpton
DLA Piper (US)
Duff & Phelps
Foley Gardere
Joshua & Jennifer Terry
Lackey Hershman
McKool Smith
Meta-e Discovery
NWCC
Patrick Daugherty
Reid Collins & Tsai

Debtor's Ordinary Course Professionals
Anderson Mori & Tomotsune
ASW Law
Bell Nunnally

Carey Olsen
Culhane Meadows PLLC
Deloitte
Kim & Chang
Maples (Cayman)
PricewaterhouseCoopers
Rowlett Hill Collins
Willkie Farr & Gallagher
Wilmer Hale

Parties Who have Filed Notices of Appearance
Allen ISD
Alvarez & Marshal CF Management
BET Investments, II
Coleman County TAD
Dallas County
Fannin CAD
Grayson County
Hunter Mountain Trust
Integrated Financial Associates
Irving ISD
Kaufman County
Patrick Daugherty
Pension Benefit Guaranty Corporation
Rockwall CAD
Tarrant County
Upshur County
Aberdeen Loan Funding
ACIS CLO 2017-7
ACIS Funding
ACIS Funding GP
Ashby & Geddes
Brentwood Investors Corp.
Bristol Bay Funding
Cabi Holdco I
California Public Employees
Carlyon Cica Chtd.
Chipman Brown Cicero & Cole
CLO Entities
Crescent TC Investors
Cross & Simon
Dentons US
Eastland CLO
Grayson CLO
HCSLR Camelback Investors (Cayman)
Highland CLO 2018-1
Highland Credit Opportunities CDO
Highland Legacy Limited
Highland Legacy Limited Highland Park CDO I
Highland Park CDO I
Highlander Equity Holdings III
Intertrust Entities
Intertrust SPV (Cayman)
Jackson Walker
Jasper CLO
Kurtzman Steady
Liberty Cayman Holdings
Liberty CLO
MaplesFS
Nixon Peabody
Pam Capital Funding GP Co.
Pam Capital Funding LP
Pam Capital Funding LP Co.
PamCo Cayman
Red River CLO
Rockwall Investors Corp.
Schulte Roth & Zabel
Southfork Cayman Holdings
Sullivan Hazeltine Allinson
Valhalla CLO
Wake LV Holdings
Wake LV Holdings II
Walter Holdco I
Westchester CLO

Directors and Officers
James Dondero
Brad Ross
Terry Jones
Frank Waterhouse
Nathan Burns
Jonathan Lamensdorf
Laurie Whetstone
Ted Dameris
Paul Adkins
Trey Parker
Clifford Stoops
Thomas Surgent
Mark Mark
Joseph Sowin
Scott Ellington
Kieran Brennan
Jun Park
Michael Hurley
Michael McLochlin
Jon Pglitsch
Jacquelyn Graham
Hunter Covitz

Active Entities
11 Estates Lane

1110 Waters
140 Albany
1525 Dragon
17720 Dickerson
1905 Wylie
2006 Milam East Partners
2006 Milam East Partners GP
201 Tarrant Partners
2014 Corpus Weber Road
2325 Stemmons HoldCo
2325 Stemmons Hotel Partners
2325 Stemmons TRS
300 Lamar
3409 Rosedale
3801 Maplewood
3801 Shenandoah
3820 Goar Park
400 Seaman
401 Ame
4201 Locust
4312 Belclaire
5833 Woodland
5906 DeLoache
5950 DeLoache
7758 Ronnie
7759 Ronnie
AA Shotguns
Aberdeen Loan Funding
Acis CLO 2017-7
Acis CLO Management
Acis CLO Opportunity Funds
Acis CLO Trust
Acis CMOA Trust
Acis Loan Funding
Advisors Equity Group
Allenby
Allisonville RE Holdings
AM Uptown Hotel
Apex Care
Asbury Holdings
Ascendant Advisors
Atlas IDF
Atlas Oak Mill I Holdings
BB Votorantim Highland Infrastructure
BDC Toys Holdco
BH Willowdale Manager
Big Spring Partners
Bloomdale
Brentwood CLO
Brentwood Investors Corp.
Bristol Bay Funding
C-1 Arbors
C-1 Cutter's Point
C-1 Eaglecrest
C-1 Silverbrook
Cabi Holdco
Cabi Holdco GP
Cabi Holdco I
Camelback Residential Investors
Camelback Residential Partners
Capital Real Estate - Latitude
Castle Bio
Castle Bio Manager
CG Works
Claymore Holdings
Common Grace Ventures
Corbusier
CP Equity Hotel Owner
CP Equity Land Owner
CP Equity Owner
CP Hotel TRS
CP Land Owner
CP Tower Owner
Crossings 2017
Dallas Cityplace MF SPE Owner
Dallas Lease and Finance
De Kooning
Dolomiti
DrugCrafters
Dugaboy Management
Dugaboy Project Management GP
Eagle Equity Advisors
Eames
Eastland CLO
Eastland Investors Corp.
EDS Legacy Heliport
EDS Legacy Partners
EDS Legacy Partners Owner
Entegra Strat Superholdco
Entegra-FRO Holdco
Entegra-FRO Superholdco
Entegra-HOCF Holdco
Entegra-NHF Holdco
Entegra-NHF Superholdco
Entegra-RCP Holdco
Estates on Maryland
Estates on Maryland Holdco
Estates on Maryland Owners
Estates on Maryland Owners SM
Falcon E&P Four Holdings
Falcon E&P One
Falcon E&P Opportunities Fund

Falcon E&P Opportunities GP
Falcon E&P Royalty Holdings
Falcon E&P Six
Falcon E&P Two
Falcon Four Midstream
Falcon Four Upstream
Falcon Incentive Partners
Falcon Incentive Partners GP
Falcon Six Midstream
Flamingo Vegas Holdco
Four Rivers Co-Invest
FRBH Abbington
FRBH Abbington SM
FRBH Arbors
FRBH Beechwood
FRBH Beechwood SM
FRBH C1 Residential
FRBH Courtney Cove
FRBH Courtney Cove SM
FRBH CP
FRBH Duck Creek
FRBH Eaglecrest
FRBH Edgewater JV
FRBH Edgewater Owner
FRBH Edgewater SM
FRBH JAX-TPA
FRBH Nashville Residential
FRBH Regatta Bay
FRBH Sabal Park
FRBH Sabal Park SM
FRBH Silverbrook
FRBH Timberglen
FRBH Willow Grove
FRBH Willow Grove SM
FRBH Woodbridge
FRBH Woodbridge SM
Freedom C1 Residential
Freedom Duck Creek
Freedom Edgewater
Freedom JAX-TPA Residential
Freedom La Mirage
Freedom LHV
Freedom Lubbock
Freedom Miramar Apartments
Freedom Nashville Residential
Freedom REIT
Freedom Sandstone
Freedom Willowdale
Fundo de Investimento em Direitos Creditorios BB Votorantim Highland Infraestrutura
G&E Apartment REIT The Heights at Olde Towne
G&E Apartment REIT The Myrtles at Olde Towne
GAF REIT
GAF Toys Holdco
Gardens of Denton II
Gardens of Denton III
Gleneagles CLO
Governance
Governance Re
Grayson CLO
Grayson Investors Corp.
Greenbriar CLO
Gunwale
Hakusan
Hammark Holdings
Hampton Ridge Partners
Harko
Haverhill Acquisition Co.
Haygood
HBI Consultoria Empresarial
HCBH 11611 Ferguson
HCBH Buffalo Pointe
HCBH Buffalo Pointe II
HCBH Buffalo Pointe III
HCBH Hampton Woods
HCBH Hampton Woods SM
HCBH Overlook
HCBH Overlook SM
HCBH Rent Investors
HCMS Falcon
HCMS Falcon GP
HCO Holdings
HCOF Preferred Holdings
HCRE 1775 James Ave
HCRE Addison
HCRE Addison TRS
HCRE Hotel Partner
HCRE HWS Partner
HCRE Las Colinas
HCRE Las Colinas TRS
HCRE Partners
HCRE Plano
HCRE Plano TRS
HCREF-I Holding Corp.
HCREF-II Holding Corp.
HCREF-III Holding Corp.
HCREF-IV Holding Corp.
HCREF-IX Holding
HCREF-V Holding

HCREF-VI Holding
HCREF-VII Holding
HCREF-VIII Holding
HCREF-XI Holding
HCREF-XII Holding
HCREF-XIII Holding
HCREF-XIV Holding
HCREF-XV Holding
HCSLR Camelback
HCSLR Camelback Investors
HCSLR Camelback Investors (Cayman)
HE 41
HE Capital
HE Capital 232 Phase I
HE Capital 232 Phase I Property
HE Capital Asante
HE Capital Fox Trails
HE Capital KR
HE CLO Holdco
HE Mezz Fox Trails
HE Mezz KR
HE Peoria Place
HE Peoria Place Property
Heron Pointe Investors
HFP Asset Funding II
HFP Asset Funding III
HFP CDO Construction Corp.
HFP GP
HFRO Sub
Hibiscus HoldCo
Highland - First Foundation Income Fund
Highland 401(k) Plan
Highland Argentina Regional Opportunity Fund
Highland Argentina Regional Opportunity Fund GP
Highland Argentina Regional Opportunity Master Fund
Highland Brasil
Highland Brasilinvest Gestora de Recursos
Highland Capital Brasil Gestora de Recursos
Highland Capital Funds Distributor
Highland Capital Insurance Solutions
Highland Capital Insurance Solutions GP
Highland Capital Loan Fund
Highland Capital Loan GP
Highland Capital Management
Highland Capital Management
Highland Capital Management (Singapore)
Highland Capital Management Charitable Fund
Highland Capital Management Fund Advisors
Highland Capital Management Korea Limited
Highland Capital Management Latin America
Highland Capital Management Multi-Strategy Insurance Dedicated Fund
Highland Capital Management Retirement Plan and Trust
Highland Capital Management Services
Highland Capital Multi-Strategy Fund
Highland Capital of New York
Highland Capital Realty Trust
Highland Capital Special Allocation
Highland CDO Holding Company
Highland CDO Opportunity Fund
Highland CDO Opportunity Fund GP
Highland CDO Opportunity GP
Highland CDO Opportunity Master Fund
Highland CDO Trust
Highland CLO 2018-1
Highland CLO Assets Holdings Limited
Highland CLO Funding
Highland CLO Gaming Holdings
Highland CLO Holdings
Highland CLO Management
Highland CLO Trust
Highland Credit Opportunities CDO
Highland Credit Opportunities CDO
Highland Credit Opportunities CDO Asset Holdings
Highland Credit Opportunities CDO Asset Holdings GP
Highland Credit Opportunities CDO Financing
Highland Credit Opportunities CDO GP
Highland Credit Opportunities Fund
Highland Credit Opportunities Holding Corporation
Highland Credit Opportunities Japanese Feeder Sub-Trust
Highland Credit Strategies Fund
Highland Credit Strategies Holding Corporation
Highland Credit Strategies Master Fund
Highland Dynamic Income Fund
Highland Dynamic Income Fund GP
Highland Dynamic Income Master Fund
Highland Employee Retention Assets
Highland Energy and Materials Fund
Highland Energy Holdings
Highland Energy MLP Fund
Highland ERA Management
Highland eSports Private Equity Fund
Highland Financial Corp.
Highland Financial Partners
Highland Fixed Income Fund

Highland Flexible Income UCITS Fund
Highland Floating Rate Fund
Highland Floating Rate Opportunities Fund
Highland Fund Holdings
Highland Funds I
Highland Funds II
Highland Funds III
Highland GAF Chemical Holdings
Highland General Partner, LP
Highland Global Allocation Fund
Highland Global Allocation Fund II
Highland GP Holdings
Highland HCF Advisor
Highland Healthcare Equity Income and Growth Fund
Highland iBoxx Senior Loan ETF
Highland Income Fund
Highland Latin America Consulting
Highland Latin America GP
Highland Latin America LP
Highland Latin America Trust
Highland Legacy Limited
Highland LF Chemical Holdings
Highland Loan Fund
Highland Loan Funding V
Highland Loan Master Fund
Highland Long/Short Equity Fund
Highland Long/Short Healthcare Fund
Highland Marcal Holding
Highland Merger Arbitrage Fund
Highland Multi Strategy Credit Fund
Highland Multi Strategy Credit Fund GP
Highland Multi Strategy Credit GP
Highland Multifamily Credit Fund
Highland Multi-Strategy Fund GP
Highland Multi-Strategy IDF GP
Highland Multi-Strategy Master Fund
Highland Multi-Strategy Onshore Master Subfund
Highland Multi-Strategy Onshore Master SubFund II
Highland Opportunistic Credit Fund
Highland Park CDO 1
Highland Premier Growth Equity Fund
Highland Premium Energy & Materials Fund
Highland Prometheus Feeder Fund I
Highland Prometheus Feeder Fund II
Highland Prometheus Master Fund
Highland RCP Fund II
Highland RCP II GP
Highland RCP II SLP
Highland RCP II SLP GP
Highland RCP Parallel Fund II
Highland Real Estate Capital
Highland Receivables Finance I
Highland Restoration Capital Partners
Highland Restoration Capital Partners GP
Highland Restoration Capital Partners Master
Highland Restoration Capital Partners Offshore
Highland Select Equity Fund
Highland Select Equity Fund GP
Highland Select Equity GP
Highland Select Equity Master Fund
Highland Small-Cap Equity Fund
Highland Socially Responsible Equity Fund
Highland Special Opportunities Holding Company
Highland SunBridge GP
Highland Tax-Exempt Fund
Highland TCI Holding Company
Highland Total Return Fund
Highland's Roads Land Holding Company
Hirst
HMCF PB Investors
Hockney
HRT North Atlanta
HRT Timber Creek
HRTBH North Atlanta
HRTBH Timber Creek
Huber Funding
HWS Addison
HWS Investors Holdco
HWS Las Colinas
HWS Plano
Jasper CLO
Jewelry Ventures I
JMIJM
Karisopolis
Keelhaul
Kuilima Montalban Holdings
Kuilima Resort Holdco
Lakes at Renaissance Park Apartments Investors
Lakeside Lane
Landmark Battleground Park II
LAT Battleground Park
LAT Briley Parkway
Lautner
Leawood RE Holdings
Liberty Cayman Holdings
Liberty CLO
Long Short Equity Sub
Longhorn Credit Funding

Maple Avenue Holdings
Marcal Paper Mills Holding Company
Mark and Pamela Okada Family Trust - Exempt Descendants' Trust
Mark and Pamela Okada Family Trust - Exempt Trust #2
Markham Fine Jewelers
Meritage Residential Partners
ML CLO XIX Sterling (Cayman)
NCI Assets Holding Company
Neutra
New Jersey Tissue Company Holdco
NexAnnuity Holdings
NexBank Capital
NexBank Capital Trust I
NexBank Land Advisors
NexBank Securities
NexBank SSB
NexBank Title
NexPoint Advisors
NexPoint Advisors GP
NexPoint Capital
NexPoint Capital
NexPoint Capital REIT
NexPoint CR F/H DST
NexPoint Credit Strategies Fund
NexPoint Discount Strategies Fund
NexPoint Discount Yield Fund
NexPoint Distressed Strategies Fund
NexPoint Energy and Materials Opportunities Fund
NexPoint Energy Opportunities Fund
NexPoint Event-Driven Fund
NexPoint Flamingo DST
NexPoint Flamingo Investment Co
NexPoint Flamingo Leaseco
NexPoint Flamingo Manager
NexPoint Healthcare Opportunities Fund
NexPoint Hospitality
NexPoint Hospitality Trust
NexPoint Insurance Distributors
NexPoint Insurance Solutions
NexPoint Insurance Solutions GP
NexPoint Latin American Opportunities Fund
NexPoint Legacy 22
NexPoint Lincoln Porte
NexPoint Lincoln Porte Equity
NexPoint Lincoln Porte Manager
NexPoint Merger Arbitrage Fund
NexPoint Multifamily Capital Trust
NexPoint Multifamily Operating Partnership
NexPoint Multifamily Realty Trust
NexPoint Opportunistic Credit Fund
NexPoint Peoria
NexPoint RE Finance Advisor
NexPoint RE Finance Advisor GP
NexPoint Real Estate Advisors
NexPoint Real Estate Advisors GP
NexPoint Real Estate Advisors II
NexPoint Real Estate Advisors III
NexPoint Real Estate Advisors IV
NexPoint Real Estate Advisors V
NexPoint Real Estate Advisors VI
NexPoint Real Estate Advisors VII
NexPoint Real Estate Advisors VII GP
NexPoint Real Estate Advisors VIII
NexPoint Real Estate Capital
NexPoint Real Estate Finance
NexPoint Real Estate Finance OP GP
NexPoint Real Estate Finance Operating Partnership
NexPoint Real Estate Opportunities
NexPoint Real Estate Partners
NexPoint Real Estate Strategies Fund
NexPoint Residential Trust Inc.
NexPoint Residential Trust Operating Partnership
NexPoint Residential Trust Operating Partnership GP
NexPoint Securities
NexPoint Strategic Income Fund
NexPoint Strategic Opportunities Fund
NexPoint Texas Multifamily Portfolio DST
NexPoint WLIF
NexPoint WLIF I
NexPoint WLIF I Borrower
NexPoint WLIF II
NexPoint WLIF II Borrower
NexPoint WLIF III
NexPoint WLIF III Borrower
NexPoint WLIF Manager
NexStrat
NexVantage Title Services
NexVest
NexWash
NFRO REIT Sub
NFRO TRS
NHF CCD
NHT 2325 Stemmons
NHT Beaverton
NHT Beaverton TRS
NHT Bend

NHT Bend TRS
NHT Destin
NHT Destin TRS
NHT DFW Portfolio
NHT Holdco
NHT Holdings
NHT Intermediary
NHT Nashville
NHT Nashville TRS
NHT Olympia
NHT Olympia TRS
NHT Operating Partnership
NHT Operating Partnership GP
NHT Operating Partnership II
NHT Salem
NHT SP
NHT SP Parent
NHT SP TRS
NHT Tigard
NHT Tigard TRS
NHT TRS
NHT Uptown
NHT Vancouver
NHT Vancouver TRS
NMRT TRS
NREA Adair DST Manager
NREA Adair Investment Co
NREA Adair Joint Venture
NREA Adair Leaseco
NREA Adair Leaseco Manager
NREA Adair Property Manager
NREA Adair, DST
NREA Ashley Village Investors
NREA Cameron Creek Investors
NREA Cityplace Hue Investors
NREA Crossings Investors
NREA Crossings Ridgewood Coinvestment
NREA Crossings Ridgewood Investors
NREA DST Holdings
NREA El Camino Investors
NREA Estates Inc.
NREA Estates Investment Co
NREA Estates Leaseco
NREA Estates Manager
NREA Estates Property Manager
NREA Estates, DST
NREA Gardens DST Manager
NREA Gardens Investment Co
NREA Gardens Leaseco
NREA Gardens Leaseco Manager
NREA Gardens Property Manager
NREA Gardens Springing
NREA Gardens Springing Manager
NREA Gardens, DST
NREA Hidden Lake Investment Co
NREA Hotel TRS
NREA Hue Investors
NREA Keystone Investors
NREA Lincoln Porte
NREA Meritage Inc.
NREA Meritage Investment Co
NREA Meritage Leaseco
NREA Meritage Manager
NREA Meritage Property Manager
NREA Meritage, DST
NREA Oaks Investors
NREA Retreat Investment Co
NREA Retreat Leaseco
NREA Retreat Manager
NREA Retreat Property Manager
NREA Retreat, DST
NREA SE MF Holdings
NREA SE MF Investment Co
NREA SE Multifamily
NREA SE One Property Manager
NREA SE Three Property Manager
NREA SE Two Property Manager
NREA SE1 Andros Isles Leaseco
NREA SE1 Andros Isles Manager
NREA SE1 Andros Isles, DST
(Converted from DK Gateway Andros)
NREA SE1 Arborwalk Leaseco
NREA SE1 Arborwalk Manager
NREA SE1 Arborwalk, DST
(Converted from MAR Arborwalk)
NREA SE1 Towne Crossing Leaseco
NREA SE1 Towne Crossing Manager
NREA SE1 Towne Crossing, DST
(Converted from Apartment REIT Towne Crossing, LP)
NREA SE1 Walker Ranch Leaseco
NREA SE1 Walker Ranch Manager
NREA SE1 Walker Ranch, DST
(Converted from SOF Walker Ranch Owner)
NREA SE2 Hidden Lake Leaseco
NREA SE2 Hidden Lake Manager
NREA SE2 Hidden Lake, DST
(Converted from SOF Hidden Lake SA Owner)
NREA SE2 Vista Ridge Leaseco
NREA SE2 Vista Ridge Manager
NREA SE2 Vista Ridge, DST
(Converted from MAR Vista Ridge)

NREA SE2 West Place Leaseco
NREA SE2 West Place Manager
NREA SE2 West Place, DST
(Converted from Landmark at West Place)
NREA SE3 Arboleda Leaseco
NREA SE3 Arboleda Manager
NREA SE3 Arboleda, DST
(Converted from G&E Apartment REIT Arboleda)
NREA SE3 Fairways Leaseco
NREA SE3 Fairways Manager
NREA SE3 Fairways, DST
(Converted from MAR Fairways)
NREA SE3 Grand Oasis Leaseco
NREA SE3 Grand Oasis Manager
NREA SE3 Grand Oasis, DST
(Converted from Landmark at Grand Oasis, LP)
NREA Southeast Portfolio One Manager
NREA Southeast Portfolio One, DST
NREA Southeast Portfolio Three Manager
NREA Southeast Portfolio Three, DST
NREA Southeast Portfolio Two
NREA Southeast Portfolio Two Manager
NREA Southeast Portfolio Two, DST
NREA SOV Investors
NREA Uptown TRS
NREA VB I
NREA VB II
NREA VB III
NREA VB IV
NREA VB Pledgor I
NREA VB Pledgor II
NREA VB Pledgor III
NREA VB Pledgor IV
NREA VB Pledgor V
NREA VB Pledgor VI
NREA VB Pledgor VII
NREA VB SM
NREA VB V
NREA VB VI
NREA VB VII
NREA Vista Ridge Investment Co
NREC AR Investors
NREC Latitude Investors
NREC REIT Sub
NREC TRS
NREC WW Investors
NREF OP I
NREF OP I Holdco
NREF OP I SubHoldco
NREF OP II
NREF OP II Holdco
NREF OP II SubHoldco
NREF OP IV
NREF OP IV REIT Sub
NREF OP IV REIT Sub TRS
NREO NW Hospitality
NREO NW Hospitality Mezz
NREO Perilune
NREO SAFStor Investors
NREO TRS
NRESF REIT Sub
NXRT Abbington
NXRT Atera
NXRT Atera II
NXRT AZ2
NXRT Barrington Mill
NXRT Bayberry
NXRT Bella Solara
NXRT Bella Vista
NXRT Bloom
NXRT Brandywine
NXRT Brandywine GP I
NXRT Brandywine GP II
NXRT Brentwood
NXRT Brentwood Owner
NXRT Cedar Pointe
NXRT Cedar Pointe Tenant
NXRT Cityview
NXRT Cornerstone
NXRT Crestmont
NXRT Enclave
NXRT Glenview
NXRT H2 TRS
NXRT Heritage
NXRT Hollister
NXRT Hollister TRS
NXRT LAS 3
NXRT Master Tenant
NXRT Nashville Residential
NXRT North Dallas 3
NXRT Old Farm
NXRT Pembroke
NXRT Pembroke Owner
NXRT PHX 3
NXRT Radbourne Lake
NXRT Rockledge
NXRT Sabal Palms
NXRT SM
NXRT Steeplechase
NXRT Stone Creek
NXRT Summers Landing GP

NXRT Summers Landing LP
NXRT Torreyana
NXRT Vanderbilt
NXRT West Place
NXRTBH AZ2
NXRTBH Barrington Mill
NXRTBH Barrington Mill Owner
NXRTBH Barrington Mill SM
NXRTBH Bayberry
NXRTBH Cityview
NXRTBH Colonnade
NXRTBH Cornerstone
NXRTBH Cornerstone Owner
NXRTBH Cornerstone SM
NXRTBH Dana Point
NXRTBH Dana Point SM
NXRTBH Foothill
NXRTBH Foothill SM
NXRTBH Heatherstone
NXRTBH Heatherstone SM
NXRTBH Hollister
NXRTBH Hollister Tenant
NXRTBH Madera
NXRTBH Madera SM
NXRTBH McMillan
NXRTBH North Dallas 3
NXRTBH Old Farm
NXRTBH Old Farm II
NXRTBH Old Farm Tenant
NXRTBH Radbourne Lake
NXRTBH Rockledge
NXRTBH Sabal Palms
NXRTBH Steeplechase
NXRTBH Stone Creek
NXRTBH Vanderbilt
NXRTBH Versailles
NXRTBH Versailles SM
Oak Holdco
Okada Family Revocable Trust
Oldenburg
Pam Capital Funding
Pam Capital Funding GP Co.
PamCo Cayman
Park West 1700 Valley View Holdco
Park West 2021 Valley View Holdco
Park West Holdco
Park West Portfolio Holdco
PCMG Trading Partners XXIII
PDK Toys Holdco
Pear Ridge Partners
Penant Management GP
Penant Management LP
PensionDanmark
Pensionsforsikringsaktieselskab
PetroCap Incentive Partners II
PetroCap Incentive Partners III, LP
PetroCap Partners II
PetroCap Partners III
Pharmacy Ventures I
Pharmacy Ventures II
Pollack
Powderhorn
PWM1
PWM1 Holdings
Pyxis Capital
Pyxis Distributors
Ramarim
Rand Advisors Series I Insurance Fund
Rand Advisors Series II Insurance Fund
Rand PE Fund I
Red River CLO
Red River Investors Corp.
Riverview Partners SC
Rockwall CDO
Rockwall CDO II
Rockwall Investors Corp.
Rothko
RTT Hollister
RTT Rockledge
SCG Atlas Governors Green
SCG Atlas Governors Green Holdings
SCG Atlas Governors Green REIT
SCG Atlas Oak Mill I
SCG Atlas Oak Mill I REIT
SCG Atlas Oak Mill II
SCG Atlas Oak Mill II Holdings
SCG Atlas Oak Mill II REIT
SCG Atlas Stoney Ridge
SCG Atlas Stoney Ridge Holdings
SCG Atlas Stoney Ridge REIT
SE Battleground Park
SE Glenview
SE Governors Green
SE Governors Green Holdings
SE Governors Green I
SE Governors Green II
SE Governors Green REIT
SE Gulfstream Isles GP
SE Gulfstream Isles LP
SE Heights at Olde Towne
SE Lakes at Renaissance Park GP I
SE Lakes at Renaissance Park GP II

SE Lakes at Renaissance Park LP
SE Multifamily Holdings
SE Multifamily REIT Holdings
SE Myrtles at Olde Towne
SE Oak Mill I
SE Oak Mill I Holdings
SE Oak Mill I Owner
SE Oak Mill I REIT
SE Oak Mill II
SE Oak Mill II Holdings
SE Oak Mill II Owner
SE Oak Mill II REIT
SE Quail Landing
SE River Walk
SE SM
SE Stoney Ridge
SE Stoney Ridge Holdings
SE Stoney Ridge I
SE Stoney Ridge II
SE Stoney Ridge REIT
SE Victoria Park
Sevilla Residential Partners
SFH1
SFR WLIF
SFR WLIF I
SFR WLIF II
SFR WLIF III
SFR WLIF Manager
SFR WLIF Series I
SFR WLIF Series II
SFR WLIF Series III
SH Castle BioSciences
Small Cap Equity Sub
Socially Responsible Equity Sub
SOF Brandywine I Owner
SOF Brandywine II Owner
SOF-X GS Owner
Southfork Cayman Holdings
Southfork CLO
Southpoint Reserve at Stoney Creek
Specialty Financial Products Designated Activity Company
Specialty Financial Products Limited
Spiritus Life
SSB Assets
Starck
Stonebridge-Highland Healthcare Private Equity Fund
Strand Advisors
Strand Advisors III
Strand Advisors IV
Strand Advisors IX
Strand Advisors V
Strand Advisors XIII
Strand Advisors XVI
Stratford CLO
Summers Landing Apartment Investors
The Dondero Insurance Rabbi Trust
The Dugaboy Investment Trust
The Get Good Non-Exempt Trust No. 1
The Get Good Non-Exempt Trust No. 2
The Get Good Trust
The Ohio State Life Insurance Company
The Okada Family Foundation
The Okada Insurance Rabbi Trust
The SLHC Trust
Thread 55
Tihany
Tranquility Lake Apartments Investors
Tuscany Acquisition
Uptown at Cityplace Condominium Association
US Gaming
US Gaming OpCo
US Gaming SPV
Valhalla CLO
VB GP
VB Holding
VB One
VB OP Holdings
VBAnnex C GP
VBAnnex C Ohio
VBAnnex C, LP
VineBrook Annex B
VineBrook Annex I
VineBrook Homes Merger Sub
VineBrook Homes Merger Sub II
VineBrook Homes OP GP
VineBrook Homes Operating Partnership
VineBrook Homes Trust
VineBrook Partners I
VineBrook Partners II
VineBrook Properties
Wake LV Holdings
Wake LV Holdings II
Walter Holdco
Walter Holdco GP
Walter Holdco I
Warhol
Westchester CLO
Wright
Yellow Metal Merchants

EXHIBIT B

Listing of Parties-in-Interest Noted for Court Disclosure

UBS Securities	UBS is a client of an affiliate of Teneo Capital in connection with unrelated matters. UBS served as investment banker to a constituency that was adverse to a client group of Teneo Capital in an unrelated matter.
Blank Rome	Teneo Capital and Blank Rome are representing a common client in an unrelated matter.
Jenner & Block	Jenner and Teneo Capital represented a common client in a concluded, unrelated matter.
Latham Watkins	Latham servces as counsel to a party adverse to a Teneo Capital employee in his capacity as trustee of a litigation trust in an unrealted matter. Latham has advised clients with interestst adverse to those of clients of Teneo Capital in unrelated matters.
Morris, Nichols, Arsht & Tunnel	Morris Nichols serves as counsel to an individual UCC member in an unrelated matter in which Teneo Capital represents the UCC. Morris Nichols is counsel to a lender group for a lending facility for which Teneo Capital provided financial advisory services to the facility and the administrative agent in an unrelated matter. Morris Nichols was counsel to an equity committee in an unrelated matter where Teneo Capital provided financial advisory services to that committee.

Sidley Austin	Sidley was counsel to to a company for which Teneo Capital provided interim management services.
Young Conaway Stargatt & Taylor	Young Conaway and Teneo Capital represented common clients in unrelated, concluded matters, including where one or more Teneo Capital employees served as officers of the entity for which Young Conaway is or was counsel. Young Conaway and Teneo Capital are representing adverse interests in an unrelated matter.
FTI	FTI is serving as financial advisor to a debtor for which Teneo Capital is providing interim management services in an unrelated matter. FTI has served as financial advisor to clients who are adverse to clients of Teneo Capital in unrelated matters.
Andrews Kurth	Hunton Williams Andrews Kurth and Teneo Capital represented a common client in an unrelated, concluded matter. Hunton represented a client adverse to a client of Teneo Capital in a concluded, unrelated matter.
Boies, Schiller & Flexner	Teneo Capital provided expert services to a Boies client in a concluded, unrelated matter.
Debevoise & Plimpton	Teneo Capital and Debevoise represented a common client in a concluded, unrelated matter.

DLA Piper (US)	Teneo Capital is providing expert witness services to DLA on behalf of a common client in an unrelated matter. DLA is advising creditors for whom Teneo Capital was providing financial advisory services in an unrelated matter.
Duff & Phelps	Teneo is providing expert witness services in an unrelated matter to a Duff employee in his capacity as a Chapter 11 Trustee. Teneo Capital is working with the employee of a predecessor firm who is now at Duff in connection with certain unrelated expert witness client matters.
Foley & Lardner	Foley serves a counsel to a Teneo Capital employee in his capacity as a member of the Restructuring Committee in an unrelated matter.
McKool Smith	McKool Smith and Teneo Capital represented a common client in a concluded, unrelated matter.
Reid Collins & Tsai	Reid Collins and Teneo Capital represented a common client in an unrelated matter.
Deloitte	An affiliate of Teneo Capital has agreed, subject to regulatory approval and closing, to acquire the UK Restructuring Business of Deloitte.
Maples (Cayman)	Maples serves as counsel to a fund for which a Teneo Capital employee was serving as replacement general partner in a concluded, unrelated matter.

PricewaterhouseCoopers	PWC served as financial advisor to a client for which Teneo Capital provided interim management services in an unrelated, concluded matter.
Wilmer Hale	WilmerHale serves as counsel to clients adverse to Teneo Capital clients in unrelated matters. WilmerHale represents clients adverse to constituents of a Teneo Capital employee in his capacity as a member of the Restrtucturing Committee in an unrelated matter
Alvarez & Marshal CF Management	A&M serves as financial advisor to an entity whose interest may be adverse to those of a client of Teneo Capital in an unrelated matter.
Jackson Walker	Jackson Walker was counsel to a company for which Teneo Capital served as financial advisor to its independent directors in an unrelated matter. Jackson Walker served as counsel to a party adverse to a client of Teneo Capital in a concluded, unrelated matter.
Russell Nelms	Teneo Capital serves as financial advisor to Judge Nelms in his capacity as a litigation trustee in an unrelated matter.

From: Rognes, Chandler <crognes@sidley.com>
Sent: Friday, April 16, 2021 12:23 PM
To: Louis M. Phillips
Cc: Montgomery, Paige; Hugh Connor; Michael Anderson; Amelia L. Hurt
Subject: UCC v. CLO Holdco, et al. - extension on response deadline

Louis,

The Committee would like to request an extension of our time to oppose or otherwise respond to CLO Holdco and Highland Dallas Foundation's motion to withdraw the reference and motion to dismiss. Are you agreeable to an extension to and including May 21, 2021? The other defendants have already agreed to such an extension with regard to their pending motions and we would prefer to respond on the same date for all defendants, if possible.

Thanks,
Chandler

CHANDLER M. ROGNES
Associate

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SIDLEY

EXHIBIT 2

From: Louis M. Phillips
Sent: Monday, April 19, 2021 5:09 PM
To: Rognes, Chandler; Amelia L. Hurt
Cc: Montgomery, Paige; Hugh Connor; Michael Anderson
Subject: RE: UCC v. CLO Holdco, et al. - extension on response deadline

Chandler,

We have sent to the other defendants our proposed June 3 date, with which the Court is good. We are looking to the Court for a time and hopefully will have that either today or tomorrow. With the June 3 date, we can agree to a May 21, 2021 response deadline. We just wanted a few more days (than three) within which to formulate our reply. Hopefully we can get our notice(s) out tomorrow. Is this message sufficient?

Louis M. Phillips
Partner

KELLY HART PITRE
ATTORNEYS AT LAW

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TELEPHONE: 225-381-9643
FAX: 225-336-9763
DIRECT: 225-338-5308

louis.phillips@kellyhart.com
www.kellyhart.com

Licensed to Practice in the State of Louisiana

From: Rognes, Chandler <crognes@sidley.com>
Sent: Monday, April 19, 2021 5:04 PM

EXHIBIT 3

To: Louis M. Phillips <Louis.Phillips@kellyhart.com>; Amelia L. Hurt <Amelia.Hurt@kellyhart.com>
Cc: Montgomery, Paige <pmontgomery@sidley.com>; Hugh Connor <hugh.connor@kellyhart.com>; Michael Anderson <michael.anderson@kellyhart.com>
Subject: RE: UCC v. CLO Holdco, et al. - extension on response deadline

Hi Louis and Amelia,

Checking in to see if you are okay with our requested extension of time to oppose or otherwise respond to CLO Holdco and Highland Dallas Foundation's motion to withdraw the reference and motion to dismiss to May 21? Similarly, were you able to get a setting with the Court for the week of June 1?

Thanks,
Chandler

CHANDLER M. ROGNES
Associate

SIDLEY AUSTIN LLP
+1 214 969 3578
crognes@sidley.com

> **From:** Louis M. Phillips <Louis.Phillips@kellyhart.com>
> **Sent:** Friday, April 16, 2021 1:13 PM
> **To:** Rognes, Chandler <crognes@sidley.com>
> **Cc:** Montgomery, Paige <pmontgomery@sidley.com>; Hugh Connor <hugh.connor@kellyhart.com>; Michael Anderson <michael.anderson@kellyhart.com>; Amelia L. Hurt <Amelia.Hurt@kellyhart.com>
> **Subject:** Re: UCC v. CLO Holdco, et al. - extension on response deadline
>
> My only concern is that the Court gave us a hearing date of May 25. I am in a mediation (just took a break). I want to make sure that if we need to reply the Court has an opportunity to review (and we have enough time - I am real slow- to respond.
>
> Can I get with my work mate Amelia and try to get back to you today?
>
> ---
> Sent from Workspace ONE Boxer
>
> On April 16, 2021 at 12:23:28 PM CDT, Rognes, Chandler <crognes@sidley.com> wrote:
>
> Louis,
>
> The Committee would like to request an extension of our time to oppose or otherwise respond to CLO Holdco and Highland Dallas Foundation's motion to withdraw the reference and motion to dismiss. Are you agreeable to an extension to and including May 21, 2021? The other defendants have already agreed to such an extension with regard to their pending motions and we would prefer to respond on the same date for all defendants, if possible.
>
> Thanks,
> Chandler
>
> **CHANDLER M. ROGNES**
> Associate

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+1 214 969 3578
crognes@sidley.com
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From: Rognes, Chandler <crognes@sidley.com>
Sent: Monday, May 17, 2021 3:11 PM
To: Louis M. Phillips; Warren Horn; Roland Schafer; Brian Clark; Amelia L. Hurt; Hugh Connor; Michael Anderson; Clay Taylor; Douglas Draper; Bryan Assink; John J. Kane; John Wilson; John Bonds
Cc: Montgomery, Paige; Abdul-Jabbar, Mustafa
Subject: UCC v. CLO Holdco, et al. - motion to stay

All,

On Friday, the Committee filed an application to retain Teneo (the future litigation trustee under the terms of the Plan) as litigation advisor to the Committee for the interim time period before the Plan goes effective. Because this adversary proceeding will transfer to the litigation trustee upon effective date of the Plan, we plan to file a motion to stay the adversary proceeding, including the response deadlines and hearings set for the pending motions to dismiss and motions to withdraw the reference, for 90 days, to allow Teneo sufficient time to acquaint itself with the status of the adversary proceeding and the pending motions, and to determine how to proceed.

Given our Friday (May 21) response deadlines for the pending motions to dismiss and motions to withdraw the reference, and the status conference for the motions to withdraw the reference set for June 3, we plan to file the motion on an emergency and expedited basis. Of course, if you would agree that our response deadlines and the June 3 status conference could be postponed until the Court rules on the motion to stay the adversary proceeding, we would file the motion with the normal 21-day notice period.

Can you please let us know if the defendants oppose either: (1) a 90 day stay of the adversary proceeding and/or (2) an expedited hearing on the motion to stay? Given the tight turnaround, we would appreciate a response as soon as possible. We plan to file our motions this evening.

Thanks,
Chandler

CHANDLER M. ROGNES
Associate

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EXHIBIT 4

From: Louis M. Phillips
Sent: Monday, May 17, 2021 4:47 PM
To: Rognes, Chandler; Warren Horn; Roland Schafer; Brian Clark; Amelia L. Hurt; Hugh Connor; Michael Anderson; Clay Taylor; Douglas Draper; Bryan Assink; John J. Kane; John Wilson; John Bonds
Cc: Montgomery, Paige; Abdul-Jabbar, Mustafa
Subject: RE: UCC v. CLO Holdco, et al. - motion to stay

Chandler,

Also, and I came late to the bankruptcy case and related matters, but wasn't any Committee litigation to be initiated within 90 days of the registry order? I have seen that this deadline was extended to accommodate discovery but there was that extension. Also, it seems as though the UCC refrained from serving parties, which generated further delay. We did ask for a short extension for a long time to respond so that all responses for my two clients would be filed together, but the extension was very short. As mentioned below we granted your requested extension, which you mad without any mention of a further extension caused by a "stay." I reiterate the message below.

Louis M. Phillips
Partner

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EXHIBIT 5

From: Louis M. Phillips
Sent: Monday, May 17, 2021 4:12 PM
To: 'Rognes, Chandler' <crognes@sidley.com>; Warren Horn <whorn@hellerdraper.com>; Roland Schafer <roland@bondsellis.com>; Brian Clark <bclark@krcl.com>; Amelia L. Hurt <Amelia.Hurt@kellyhart.com>; Hugh Connor <hugh.connor@kellyhart.com>; Michael Anderson <michael.anderson@kellyhart.com>; Clay Taylor <clay.taylor@bondsellis.com>; Douglas Draper <ddraper@hellerdraper.com>; Bryan Assink <bryan.assink@bondsellis.com>; John J. Kane <jkane@krcl.com>; John Wilson <john.wilson@bondsellis.com>; John Bonds <john@bondsellis.com>
Cc: Montgomery, Paige <pmontgomery@sidley.com>; Abdul-Jabbar, Mustafa <mabdul-jabbar@sidley.com>
Subject: RE: UCC v. CLO Holdco, et al. - motion to stay

Chandler and counsel,

On behalf of Highland Dallas Foundation and CLO HoldCo, we oppose the requested stay. First, we granted an extension until May 21 by which the UCC is to respond to the motions to withdraw reference and to dismiss, and to the UCC exceeding the page limit. Second, the UCC and its very capable counsel cannot need oversight to deal with the Motion to Withdraw Reference. We think the withdrawal motions should be considered by the Court on June 3, and then send her recommendation thereafter. As you know, the Court has pushed our motions to dismiss, without date, so no stay is really necessary now. We have no idea as to how long the Court will take with its recommendation, but we need to get the court in which the litigation will take place to get set. In fact, nothing will really happen until the District Court rules, as all parties will have the right to respond to the bankruptcy court's recommendation. The point here is that there is a long extension already built into our situation, and we all need the withdrawal motions resolved. We would consider a stay involving any matter other than the withdrawal motions, but that is not what you requested. There is utterly no reason for an extension of the response deadline. None at all. Also, utterly no reason to postpone the withdrawal process.

Please advise that we are opposed to the stay as described in the message below.

Louis M. Phillips
Partner

KELLY HART PITRE
ATTORNEYS AT LAW

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From: Rognes, Chandler <crognes@sidley.com>
Sent: Monday, May 17, 2021 3:11 PM
To: Louis M. Phillips <Louis.Phillips@kellyhart.com>; Warren Horn <whorn@hellerdraper.com>; Roland Schafer <roland@bondsellis.com>; Brian Clark <bclark@krcl.com>; Amelia L. Hurt <Amelia.Hurt@kellyhart.com>; Hugh Connor <hugh.connor@kellyhart.com>; Michael Anderson <michael.anderson@kellyhart.com>; Clay Taylor <clay.taylor@bondsellis.com>; Douglas Draper <ddraper@hellerdraper.com>; Bryan Assink <bryan.assink@bondsellis.com>; John J. Kane <jkane@krcl.com>; John Wilson <john.wilson@bondsellis.com>; John Bonds <john@bondsellis.com>
Cc: Montgomery, Paige <pmontgomery@sidley.com>; Abdul-Jabbar, Mustafa <mabdul-jabbar@sidley.com>
Subject: UCC v. CLO Holdco, et al. - motion to stay

All,

On Friday, the Committee filed an application to retain Teneo (the future litigation trustee under the terms of the Plan) as litigation advisor to the Committee for the interim time period before the Plan goes effective. Because this adversary proceeding will transfer to the litigation trustee upon effective date of the Plan, we plan to file a motion to stay the adversary proceeding, including the response deadlines and hearings set for the pending motions to dismiss and motions to withdraw the reference, for 90 days, to allow Teneo sufficient time to acquaint itself with the status of the adversary proceeding and the pending motions, and to determine how to proceed.

Given our Friday (May 21) response deadlines for the pending motions to dismiss and motions to withdraw the reference, and the status conference for the motions to withdraw the reference set for June 3, we plan to file the motion on an emergency and expedited basis. Of course, if you would agree that our response deadlines and the June 3 status conference could be postponed until the Court rules on the motion to stay the adversary proceeding, we would file the motion with the normal 21-day notice period.

Can you please let us know if the defendants oppose either: (1) a 90 day stay of the adversary proceeding and/or (2) an expedited hearing on the motion to stay? Given the tight turnaround, we would appreciate a response as soon as possible. We plan to file our motions this evening.

Thanks,
Chandler

CHANDLER M. ROGNES
Associate

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SIDLEY

From: Louis M. Phillips
Sent: Monday, May 17, 2021 4:12 PM
To: Rognes, Chandler; Warren Horn; Roland Schafer; Brian Clark; Amelia L. Hurt; Hugh Connor; Michael Anderson; Clay Taylor; Douglas Draper; Bryan Assink; John J. Kane; John Wilson; John Bonds
Cc: Montgomery, Paige; Abdul-Jabbar, Mustafa
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Please advise that we are opposed to the stay as described in the message below.

Louis M. Phillips
Partner

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ATTORNEYS AT LAW

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EXHIBIT 6

Licensed to Practice in the State of Louisiana

From: Rognes, Chandler <crognes@sidley.com>
Sent: Monday, May 17, 2021 3:11 PM
To: Louis M. Phillips <Louis.Phillips@kellyhart.com>; Warren Horn <whorn@hellerdraper.com>; Roland Schafer <roland@bondsellis.com>; Brian Clark <bclark@krcl.com>; Amelia L. Hurt <Amelia.Hurt@kellyhart.com>; Hugh Connor <hugh.connor@kellyhart.com>; Michael Anderson <michael.anderson@kellyhart.com>; Clay Taylor <clay.taylor@bondsellis.com>; Douglas Draper <ddraper@hellerdraper.com>; Bryan Assink <bryan.assink@bondsellis.com>; John J. Kane <jkane@krcl.com>; John Wilson <john.wilson@bondsellis.com>; John Bonds <john@bondsellis.com>
Cc: Montgomery, Paige <pmontgomery@sidley.com>; Abdul-Jabbar, Mustafa <mabdul-jabbar@sidley.com>
Subject: UCC v. CLO Holdco, et al. - motion to stay

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Thanks,
Chandler

CHANDLER M. ROGNES
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SIDLEY

****

****

BTXN 208 (rev. 07/09)

IN RE: Official Committee of Unsecured Creditors v. CLO Holdco, Ltd. et al

DEBTOR

Motion For Leave filed by Plaintiff Official Committee of Unsecured Creditors doc. #46

Case # 20−03195−sgj

TYPE OF HEARING

Official Committee of Unsecured Creditors

PLAINTIFF / MOVANT

VS

CLO Holdco, Ltd.

DEFENDANT / RESPONDENT

Paige Holden Montgomery

ATTORNEY

Louis M. Phillips

ATTORNEY

EXHIBITS

SEE EXHIBIT LIST

Exhibit #1 − Application to Employ Teneo; Doc. #2306

Exhibit #2 − April 16, 2012 Email from C. Rognes Re: UCC v. CLO Holdco, et al. − extension on response to deadline

Exhibit #3 − April 19, 2021 Email from C. Rognes Re: UCC v. CLO Holdco, et al. − extension on response deadline

Exhibit #4 − May 17, 2021 3:11 p.m. Email from C. Rognes Re: UCC v. CLO Holdco, et al. − motion to stay

Exhibit #5 − May 17, 2021 4:47 p.m. Email from L. Phillips Re: UCC v. CLO Holdco, et al. − motion to stay

Exhibit #6 − May 17, 2021 4:12 p.m. Email from L. Phillips Re: UCC v. CLO Holdco, et al. − motion to stay

Michael Edmond

REPORTED BY

May 20, 2021

HEARING DATE

Stacey G. Jernigan

JUDGE PRESIDING

KELLY HART PITRE

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ATTORNEYS FOR CLO HOLDCO, LTD. AND HIGHLAND DALLAS FOUNDATION, INC.

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

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

OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	§	
	§	
Plaintiff,	§	
	§	**Adversary No. 20-03195**
vs.	§	
	§	
CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT JAMES SCOTT III IN HIS INDIVIDUAL CAPACITY, AS TRUSTEE OF THE DUGABOY INVESTMENT TRUST, AND AS TRUSTEE OF THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO,	§	
	§	
Defendants.	§	

POST HEARING MEMORANDUM SUGGESTING ERROR BY THE COURT

CLO HOLDCO, LTD. and Highland Dallas Foundation, Inc.[1] (the "Charitable Defendants") file this *Post Hearing Memorandum Suggesting Error by the Court*. On May 20, 2021, this Court held a hearing upon the Plaintiff's motion for a 90 day stay of this adversary proceeding (*see* Dkt. No. 44 -- the "Motion to Stay"). The Charitable Defendants filed an *Opposition* (Dkt. No. 50 -- the "Opposition")[2] and appeared through counsel at the hearing held upon the Motion to Stay. The Charitable Defendants also introduced 6 Exhibits at the hearing (*see* Dkt. No. 52).

After hearing the Court issued an oral ruling to grant the requested 90 day stay, and advised that it would issue an order providing for the stay upon submission by Plaintiff. The two primary

[1] CLO HOLDCO, LTD. and Highland Dallas Foundation, Inc. have filed a *Motion to Withdraw the Reference* [ECF No. 24], and nothing herein shall be deemed a waiver of their right to a trial by jury on all claims asserted in this Adversary Proceeding nor consent to the entry of final orders in this Adversary Proceeding by the Bankruptcy Court.

[2] Capitalized terms not otherwise defined herein take their meaning from the Opposition.

grounds used by the Court to justify its decision to grant a 90 day stay are clearly wrong, with one contrary to plain math, and the other contrary to the evidence and the entire underpinning of the Opposition filed by the Charitable Defendants.

First, the math. The Court says that the time it could take to get a ruling from the District Court on the pending Motions to Withdraw Reference would in effect give the Plaintiffs the requested stay, as it might take up to 90 days for the reference issues to be finally determined. Therefore, the Court found that there could be no prejudice to the Charitable Defendants, because the requested stay would in all likelihood be already baked in to the proceedings. As a math problem this is wrong. The 90 day stay will in fact be a 180 day delay if the Court is correct that the natural process will take 90 days to conclusion of the reference withdrawal motions. That would place the decision on the motions to withdraw reference somewhere close to mid-November, 2021, or some 10 plus months after the complaint initiating this proceeding was filed (the amended complaint, which is the first entry of the docket of this proceeding, was filed December 17, 2020).

Second, this Court improperly imputed ill motive to the Charitable Defendants because the Court decided, directly contrary to the evidence submitted and the argument of counsel, that the opposition to the stay was somehow grounded in a desire to impose upon Mr. Kirschner the obligation to work without being paid. Where that conclusion came from cannot be understood. The Charitable Defendants, in fact, introduced the employment application which expressly requests retroactive approval to the filing date. *See* Application to Employ, ¶10. Second, the Charitable Defendants argued that the Committee had been utilizing the services of Kirschner since mid-April and therefore would not be prejudiced. The underlying assumption of the Charitable Defendants is that Kirschner will be employed and the Court will approve the routine request that his employment (and therefore right to compensation) would commence as of the date

of his retention, in mid-April. So, there is utterly no underpinning for the Court's erroneous imputation of bad motive on the part of the Charitable Defendants, which is clearly a primary ground for the Court's decision to stay this proceeding. The Charitable Defendants want nobody to work without being paid, and this Court's imputation of this bad motive to the Charitable Defendants is clearly wrong.[3]

Simply put, there is no basis for defendants to have to be under the cloud of a multi-million dollar lawsuit for some 10 months (at least) before they know before what court they will be litigating. This Court made the correct decision to set the Motions to Withdraw the Reference for the conference required by this Court's local rules on June 3, 2021. The Court's math is not correct, the stay is not baked in, but rather would have the effect of adding another 90 days at least to the delay, which would mean 10 months before a Motions to Withdraw the Reference decision. Also and again, there was no basis for the Court's imputation of bad motive or bad faith to the Charitable Defendants. Finally, the idea that the Committee and counsel thereto needs further client advice as to the legal issue of withdrawal of the reference or that a new client will direct current litigation trust counsel as to the way to plead around a withdrawal of reference motion can in no way be seen as well founded.

This Court should consider this post-hearing memorandum and reconsider its determination to issue the stay, and should deny the requested stay.

Respectfully submitted,

KELLY HART PITRE

/s/ Louis M. Phillips
Louis M. Phillips (#10505)
One American Place
301 Main Street, Suite 1600

[3] The Court as well could not comprehend defendants wishing to prod a proceeding to conclusion. The Charitable Defendants are not seeking expeditious determination, quite the opposite. We seek, simply, normal process.

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Fort Worth, Texas 76102
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ATTORNEYS FOR CLO HOLDCO, LTD. AND HIGHLAND DALLAS FOUNDATION, INC.

CERTIFICATE OF SERVICE

I, undersigned counsel, hereby certify that a true and correct copy of the above and foregoing document and all attachments thereto were sent via electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case on this May 21, 2021.

/s/ Louis M. Phillips
Louis M. Phillips

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

Signed May 21, 2021

United States Bankruptcy Judge

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

In re:	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	
Debtor,	Case No. 19-34054-SGJ11
OFFICIAL COMMITTEE OF UNSECURED CREDITORS,	
Plaintiff,	
vs.	Adversary Proceeding No. 20-03195
CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT JAMES SCOTT III IN HIS INDIVIDUAL CAPACITY, AS TRUSTEE OF THE DUGABOY	

[1] The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

INVESTMENT TRUST, AND AS TRUSTEE OF THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO,

Defendants.

ORDER GRANTING THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' EMERGENCY MOTION TO STAY THE ADVERSARY PROCEEDING FOR NINETY DAYS

Upon consideration of the official committee of unsecured creditors' *Emergency Motion to Stay the Adversary Proceeding for Ninety Days* [Docket No. 46] (the "Motion"), the *Response in Opposition* [Docket No. 50] filed by Defendants CLO Holdco, Ltd. and Highland Dallas Foundation, Inc., the *Response in Opposition* [Docket No. 53] filed by Defendants The Dugaboy Investment Trust and the Get Good Nonexempt Trust, and the arguments presented at the emergency hearing conducted before this Court on May 20, 2021,

IT IS HEREBY ORDERED that:

1. The Motion is **GRANTED.**
2. The Adversary Proceeding,[2] including any current response deadlines and hearing dates, is stayed for ninety days after the issuance of this Order.
3. This Court shall retain jurisdiction over all matters arising from or relating to the interpretation or implementation of this Order.

End of Order

[2] Capitalized terms used but not defined herein shall have the respective meanings given to them in the Motion.

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF TEXAS

BEFORE THE HONORABLE STACEY G. JERNIGAN, JUDGE

In Re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	Case No. 19-34054-sgj11
OFFICIAL COMMITTEE OF UNSECURED CREDITORS, Plaintiff, v. CLO HOLDCO, LTD., et al., Defendants.	Adv. Proc. No. 20-03195-sgj PLAINTIFF'S MOTION for CONTINUANCE
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. JAMES DONDERO, Defendant.	Adv. Proc. No. 21-03003-sgj DEFENDANT DONDERO'S MOTION to COMPEL DISCOVERY, the TESTIMONY of JAMES P. SEERY, JR. May 20, 2021 Dallas, Texas (Via WebEx)

Appearances in 21-03003:

For Plaintiff Highland Capital Management,	John A. Morris Pachulski Stang Ziehl & Jones LLP 10100 Santa Monica Boulevard, 13th Floor Los Angeles, California 90067
For Defendant-Movant James Dondero:	Michael P. Aigen Stinson, L.L.P. 3102 Oak Lawn Avenue, Suite 777 Dallas, Texas 75219 Bryan C. Assink Bonds Ellis Eppich Schafer Jones LLP 420 Throckmorton Street, Suite 1000 Forth Worth, Texas 76102

Appearances continued on next page.

Appearances in 20-3195:

For the Official Committee of Unsecured Creditors:	Paige Holden Montgomery Sidley Austin LLP 2021 McKinney Avenue, Suite 2000 Dallas, Texas 75201
	Matthew A. Clemente Sidley Austin LLP One South Dearborn Chicago, Illinois 60603
For Defendants Highland Dallas Foundation and CLO Holdco Ltd.:	Louis M. Phillips Kelly Hart & Pitre 301 Main Street, Suite 1600 Baton Rouge, Louisiana 70801
	Amelia L. Hurt Kelly Hart & Pitre 400 Poydras Street, Suite 1812 New Orleans, Louisiana 70130
For Defendants The Dugaboy Investment Trust and The Get Good Nonexempt Trust:	Douglas S. Draper Heller, Draper, Patrick & Horn, L.L.C. 650 Poydras Street, Suite 2500 New Orleans, Louisiana 70130-6103
For Grant James: Scott, III:	John J. Kane Kane Russell Coleman Logan Bank of America Plaza 901 Main Street, Suite 5200 Dallas, Texas 75202
For UBS Securities LLC:	Andrew Clubok Latham & Watkins, LLP 555 Eleventh Street, NW, Suite 1000 Washington, D.C. 20004-1304
For Scott Ellington, Jean Paul Sevilla, Isaac Leventon, and others:	Frances Smith Ross & Smith, PC Plaza of the Americas 700 North Pearl Street, Suite 1610 Dallas, Texas 75201
Digital Court Reporter:	United States Bankruptcy Court Michael F. Edmond Sr., Judicial Support Specialist 1100 Commerce Street, Room 1254 Dallas, Texas 75242
Certified Electronic Transcriber:	Susan Palmer Palmer Reporting Services

Proceedings recorded by digital recording; transcript produced by federally-approved transcription service.

I N D E X

Witnesses:

	Direct	Cross	Redirect	Recross
Marc Kirschner				
Declaration:	61			
By Mr. Phillips:		62		
By Ms. Montgomery:			65	

Exhibits Received in Evidence:

Thursday, May 20, 2021 9:40 o'clock a.m.

P R O C E E D I N G S

THE COURT: — settings in Highland Capital adversary proceedings.

Before I start with that, I want to let anyone who is on the line for a different case, RE Palm Springs II, LLC, that the hearing we had on that matter was continued. Certain of the parties filed an agreed motion to continue, and so I continued that to June 9th at 9:30. So to the extent you are on the line only for the Palm Springs matter, that matter is not going forward today.

All right. So turning to Highland, I will start with the first-filed emergency motion. It was in Highland versus Dondero, Adversary 21-3003. Counsel for Dondero filed a motion to compel testimony of James Seery. So who do we have appearing for Mr. Dondero this morning?

All right. So —

MR. [SPEAKER]: I think he's on mute, Your Honor.

THE COURT: Sir, you are on mute. Try again.

MR. AIGEN: Ah, I apologize, Your Honor. Is this better?

THE COURT: Yes.

MR. AIGEN: Okay. Good morning, Your Honor. Michael Aigen from Stinson, representing Mr. Dondero. I apologize for that.

THE COURT: All right. So you are now co-counsel with Bond Ellis, perceive?

MR. AIGEN: That is correct. The lead counsel from our firm is Ms. Deborah Deitsch-Perez. She unfortunately has medical emergencies going on with her family and is unfortunately unable to be here for this hearing.

THE COURT: All right. Thank you.

For Highland, who do we have appearing on this matter?

MR. MORRIS: Good morning, Your Honor. It's John Morris From Pachulski Stang Ziehl and Jones for the debtor.

THE COURT: All right. Thank you. I presume those are the only appearances on this discovery dispute.

MR. AIGEN: That's correct.

THE COURT: All right. Well, Ms. — Mr. Aigen, you're, I guess, new on the scene in the Highland matters. And let me just tell you I've read all the pleadings. So I am aware that of our numerous adversary proceedings, this is the one only involving Dondero as a defendant and only involving three notes. So, to help you find your argument, I'm going to say this. I remember when I was in law school — here comes a story — one of our law professors said a suit on a note is the simplest kind of lawsuit there is. And probably when you are a young lawyer and if you go to a civil business practice type law firm, this is probably where you're going to get your feet wet.

And so, with that in my brain and having read the

pleadings, I'm asking: Why is this going to be complicated where we need extensive discovery from the CRO/CEO who came on the scene post bankruptcy two plus years after the notes?

So that's what's in my brain having read the pleadings. And so convince me why I'm totally misreading the situation.

MR. AIGEN: Thank you, Your Honor. I appreciate that. One thing I want to make sure we understand is this is we're seeking to compel deposition testimony for Mr. Seery in his corporate rep capacity. We're not specifically asking for Mr. Seery. We sent corporate rep depo topics over. They told us Mr. Seery would be the corporate rep but they objected to certain topics, as is their right. The specific topics, as you know, we're seeking discovery on, there's Numbers 9, 14 through 17 go together, Number 20. In that sense what we're seeking discovery on is a defense that we have asserted in this proceeding that's currently pending.

As I'm sure you know from reading the pleadings, one of Mr. Dondero's defenses is that there was a subsequent oral agreement that the home would be discharged based upon certain conditions being met. Highland, as is their right, believes that this oral agreement never happened. And, as a result, it contends that the defense has no merit. In their motion, I think it was, or in their response, paragraph 4, they specifically say that this defense has no basis in fact. That's

their right. The problem, however, is just taking this position, based on this position they're also saying, well, we don't get discovery on this event.

And although we're talking about six different requests, it really comes down to three different areas, and I'll jump into those and explain each one. The first one, which I think is the most straightforward, is topic nine, which asks for testimony regarding Mr. Dondero's defenses. Initially we got a response saying that the objection wasn't relevant and then they filed a response. And I think they realized that might not have made a lot of sense saying it wasn't relevant, so they said it was vague or invalid.

Counsel's well aware, as you are, what are defenses in this case. They served discovery on these defenses. We responded. They never complained that they're inadequate. They know that our defense, at least one of them, is there had been oral agreement on the loan, that it would be forgiven if certain conditions occur, and that's what we want to take discovery on.

I'm confident counsel has interviewed Highland employees to see who knows anything about this agreement. I'm sure it's very possible that no one knows anything about this agreement, and that's fine. But we certainly have a right to ask the corporate rep about this and find out if anyone's going to talk about this oral agreement at trial. This isn't burdensome discovery —

THE COURT: Can I — can I — let me ask a question right there. The defense is based on an oral agreement. I mean your client is the payee on the notes — excuse me — excuse me — the maker. It's easy to get confused here. He's the maker on the notes, but he was the CEO of the payee on the notes. So this is not Bank of America makes a loan to Joe, the plumber, or, you know, I mean this is — he's on both sides of the transaction. So he knows who the oral agreement was made with, right?

MR. AIGEN: Correct, Your Honor.

THE COURT: So, again, I'm trying to understand —

MR. AIGEN: May I follow up —

THE COURT: — the depth of the discovery needed. Presumably, I think I read in here, that you're deposing — or I don't know if it's agreed or not — you're deposing various other Highland former employees. But — but I don't understand why the current CEO that was not around before the bankruptcy would have any personal knowledge about oral agreements. I mean this would all be in Mr. Dondero's head, right?

MR. AIGEN: Your Honor, I absolutely agree. And there are, I guess, two parts to that answer. One is we aren't taking other Highland employees' depositions. We've asked for them, and they have refused to give them to us and said they're irrelevant. We're trying to work that issue out. And we may get one of their depositions. If they go give us one for a

couple hours and drop off, but this is — right now this is the only discovery we're getting. Their doc requests, they're not going to give us any documents related to these topics. So this is our chance to get discovery on it.

As to his personal knowledge, he's their corporate rep. As a corporate rep, he can go figure out what other people know. But they're going to put someone on the stand — and I think it's important, Your Honor, obviously they're going to make a defense in this case — or, sorry — which stops our defense with legal arguments saying even if this oral agreement occurred and took place, it's not legally enforceable. I understand.

THE COURT: Yeah, and what about —

MR. AIGEN: I mean this is —

THE COURT: — what about that? What about that? I mean it's hard not to separate the need for discovery from that, so what about that?

MR. AIGEN: Well, your — yeah. No, that's — if they file a summary judgment on a legal issue, then we will address that in our summary judgment legal issue, but right now we have a pending defense. And, Your Honor, one of their responses to our defense, as they put in their response in paragraph 4, they specifically state that this oral agreement never occurred. So I need to know how they know that, who are they going to put on the stand. I don't know which people are saying that. So we

ask for — to put it down into corporate rep topic. They could have given us anyone. They decided to give us Mr. Seery. But, yes, he may not have personal knowledge, but that's who they chose for their corporate rep to testify on this topic.

He's the only one I'm able to get this information from. And he may come up and say no one knows anything about that. That's fine. But they have already said: We're taking the position that this oral agreement never occurred. I don't know how they know that, I don't know who they're going to put on the stand, but they are taking a factual position on that. So we should have a right to take discovery on it. Whether they don't think this is a legally-valid defense, well, that's fine, they could have moved for summary judgment on day one. They didn't. As of now, this defense is still pending.

We have less than two months until trial. I don't know when the summary judgment's going to come, so there's not going to be a chance to wait until the legal aspects of these defenses are heard and then take discovery. This is our one opportunity to do it.

THE COURT: Okay. So this is topic number nine. And you say why not, let us ask a few questions, it may be five minutes of questioning if he doesn't really know anything. Is that a summary of your position?

MR. AIGEN: Well, yeah, he may not know anything and they may not know anything, or they may, yes. I don't know how

much time it's going to take. The fact that they put in writing that this agreement never occurred makes me think that someone must know something, but I don't know. It could be on that. that —

THE COURT: All right.

MR. AIGEN: — it's certainly possible, Your Honor.

THE COURT: All right.

MR. AIGEN: That — and then the second topic or second, I guess, group is 14 through 17 where we ask about information about loans made by Highland or the debtor that were particular to other people. And the reason these requests are relevant is, once again, — well, not once again — but it's our position that Highland commonly entered into these types of agreements. They're saying: Hey, this never happened, this agreement didn't take place.

So the fact that Highland entered into other similar type loan agreements with similar type business group provisions, although maybe not dispositive, it certainly leads to evidence that this agreement did in fact take place in the situation where they're telling you and putting a pleading and writing in the pleading, hey, this never — this agreement never took place. So this is relevant —

THE COURT: So — so — so —

MR. AIGEN: — and, like I said, —

THE COURT: — on topics 14 through 17 you're saying

it's relevant if loans were made to other employees or officers besides Mr. Dondero and it's relevant if those loans were forgiven or not as to these three notes?

MR. AIGEN: Correct, Your Honor. Because they are challenging that this agreement took place, for the —

THE COURT: Well, —

MR. AIGEN: — fact that other similar —

THE COURT: — what if they did do this with another employee, why is that relevant these three notes?

MR. AIGEN: Well, because they're challenging that our oral agreement took place. The fact that oral agreements like this were routine at Highland would make it more believable and factual that our agreement took place, in light of their challenge to the fact that the agreement took place.

Like I said, if they were just making legal challenges to whether the agreement is enforceable, that would be one thing. So instead they're also taking the position, hey, we don't think this actually took place. So all — if Highland routinely entered into agreements like this for other employees, like I said, I understand that wouldn't be dispositive, but that would tend to show that this pattern and practice of Highland did include oral agreements like this.

THE COURT: Okay. I don't mean to get off on a tangent here, but, you know, are there going to be a lot of fraudulent-transfer lawsuits if in fact there was debt forgiven

in the couple of years or four years leading up to bankruptcy? And are we going to have — well, I just don't understand, you know, the obvious big tax exposure to your client and other human beings if your — if your argument prevails, but I guess I shouldn't — I shouldn't second guess legal strategy, but my brain can't help to go there.

All right. But, again to the relevance, your defense is: There was an agreement to forgive these notes. It was oral and we're entitled to discovery regarding other loans to other employees for which there might have been oral forgiveness because that will help establish our defense; that's the sum and substance of categories 14 through 17?

MR. AIGEN: That's correct, Your Honor.

THE COURT: Okay.

MR. AIGEN: And obviously I don't think there's any need to try the ultimate legal issues here, but we're well aware of these tax issues and we've worked into it, and so there are different tax consequences depending on how conditions are structured and it's my understanding that in situations like this there wouldn't be sort of tax consequences, but that's an issue for another day. But because you raised it, Your Honor, I want to make sure that you know we are aware of that issue and that is something we're prepared to address when it — when it comes before this.

So should I move on to the last — last topic, Your

Honor?

THE COURT: Okay.

MR. AIGEN: The last topic is Request Number 20 which asks for testimony regarding compensation paid by Highland to Mr. Dondero. And I know this might be a little unusual because someone should know what they were paid, but obviously in a situation like this where we don't have control of all the records and the pay structure is complicated, we don't have all of that, so it's a little different than your usual situation. And the reason this is relevant, obviously this goes to the forgiveness aspect of it, and basically information regarding Mr. Dondero's compensation will be helpful or relevant because it shows part of the story here is that if you look at his compensation as a whole, he was underpaid and the notes were forgiven as part of this compensation which goes along with the underpaid. In other words, it puts this oral agreement into context and explains why it is thus. Again, they're saying this never happened, so as part of our presentation of our case, we're going to explain why this was done and why it makes sense. And to put that into context, we want information related to Mr. Dondero's compensation. We're not asking for other people's compensation on this, we said information related to Mr. Dondero's own compensation.

And, again, I understand that counsel thinks that these defenses have no merit. That's their right. That makes

sense. And I assume they will file a summary judgment on these, but they haven't done it. These defenses are currently pending. We're going to trial in less than two months. We may not be getting anyone else's depositions. They're not giving us documents on this topic. And I understand it may be a little unique to have Mr. Seery testify on this, but that's because we just presented them with topics. That's the witness they are putting forward, which is their right. I have no problem with that. But this is our one opportunity to get discovery on this and that's why we're before the Court today. Thank you for your time.

THE COURT: Okay. Just to clarify, I think I heard you saying Mr. Dondero doesn't have access to the records. Mr. Dondero doesn't have records regarding the compensation paid by Highland to him and any agreements related to that?

MR. AIGEN: He — he had some but not all.

THE COURT: Okay. Well, I don't understand that. Why would that be? He's the founder, he was the CEO of this company until three months after the bankruptcy was filed. He — I mean it sounds inconceivable to me that he wouldn't have everything he needs as far as what he was paid in the agreements regarding what he was paid by his company Highland.

MR. AIGEN: Well, Your Honor, fortunately or unfortunately I have not been involved what I understand is sort of disagreements between the parties here on Mr. Dondero's

access to certain documents of Highland, but my understanding is he — Highland now has possession of all its documents. And he — I know there were requests between counsels on Dondero to get particular documents in other matters and other situations going on. But he — Highland is the one that has possession of those documents now, not — not Mr. Dondero.

THE COURT: Okay. He'd at least have his tax returns, right, and files regarding his tax returns?

MR. AIGEN: Correct, correct. Correct. Yes. Yes, Your Honor.

THE COURT: All right. Well, Mr. Morris, now for your responses in — I'm playing devil's advocate with you. If y'all have named Mr. Seery as a 30(b) corporate rep and out of these 20 topics you agree to — two, three, four, five, six — I guess 13 of the subject matters, what's the big deal about a few extra questions?

MR. MORRIS: A few — a few issues.

First, Your Honor, is Mr. Dondero on the line?

THE COURT: Well, that's a good question. I forgot to check that because I have ordered him in the past to be at every hearing.

Mr. Dondero, are you with us this morning?

Mike, did you see him —

MR. ASSINK: No, Your Honor. This is —

THE REPORTER: I haven't seen Mr. Dondero.

THE COURT: Okay. Well, Mr. Aigen, what do you know about that? Or I see Mr. Bryan Assink is out there as well. What do y'all know about that?

THE REPORTER: He's on mute, Your Honor.

THE COURT: You're on mute, sir.

MR. ASSINK: Your Honor, I apologize. This is Bryan Assink of Bonds Ellis. I'm just trying to — I'm just trying to —

THE COURT: Okay. It sounds like someone's speaking, but I can't hear it.

THE REPORTER: Bryan Assink, his voice is low. He's —

THE COURT: Okay. Mr. Assink, please turn your volume up. We can barely, barely, barely hear you.

Mr. Assink.

MR. ASSINK: Your Honor, is that — is that better? I'm sorry. I tested this before —

THE COURT: Okay, it's better now. Go ahead.

MR. ASSINK: — I joined and —

THE COURT: Go ahead.

MR. ASSINK: Your Honor, this was set on an emergency basis, and we just didn't coordinate with Mr. Dondero. We didn't think he needed to attend these kind of nonevidentiary hearings and —

THE COURT: Mr. Assink, you asked for the emergency hearing. And you filed your motion Friday afternoon. We were

in court Tuesday. And I was happy that you resolved our disputes Tuesday. And I remember saying: Preview of coming attractions, I guess I'll see y'all Friday, right. Right, nobody said anything about, uh, we have an emergency setting, we're hoping to have.

But, anyway, be that as it may, an hour or two after I got out of court Tuesday, my Courtroom Deputy was telling me that you were wanting the hearing this week. And I first said it'll have to be Monday. I mean we're — we've got a backlog of stuff in our queue that we're really trying to get out. And — and I understood that you really pressed for having this hearing today. I didn't see the — all the emails, but my Courtroom Deputy said you all really wanted this hearing today, not Monday.

So, with that, why would you press for today if Mr. Dondero wasn't available, number one? And, number two, why would you think he wasn't needed? I mean it was a couple of hearings ago that I said someone pull out my order and see what I said, because I couldn't remember the exact wording —

MR. ASSINK: No, Your Honor, I apologize. I'm sorry, Your Honor. I apologize. There's been a lot going. I think it — the coordination might have just slipped. I'm not sure, Your Honor, I wasn't sure what order required him to be here today with the preliminary injunction dissolves but, you know, it wasn't our intention that he would not — he would not appear.

We — it was more just a coordination thing. We intend that he will be at all hearings before, Your Honor, you know, Friday's hearing and substantive hearings. I just — I think this is more of a coordination issue, Your Honor, and I apologize.

THE COURT: Okay.

MR. ASSINK: There has been a lot going on.

THE COURT: Oh, don't I know. There's two of us, me and my Law Clerk working on this, and there are a bunch of y'all. So, yes, I feel — I feel absolutely what you feel and more as far as a lot going on.

So let me clarify. My language that ordered Mr. Dondero to be at every hearing was in the preliminary injunction that's now superseded by the agreed order y'all announced Tuesday. So are you telling me you thought now that mandate didn't apply? Is that one of the things —

MR. ASSINK: Not — not specifically, Your Honor, —

THE COURT: — I'm hearing?

MR. ASSINK: Not specifically, Your Honor. We thought perhaps the formal mandate in the order was no longer applying, but our understanding was you would want Mr. Dondero at substantive hearings going forward, and that has been our understanding. And we would expect him to be before Your Honor at all such hearings. Part of the basis, the reasoning he's not here today was perhaps as an oversight on my part due to the scheduling, and I had a lot of deadlines yesterday and I think

it just maybe fell through the cracks, and I apologize, Your Honor.

THE COURT: All right.

MR. ASSINK: You know, we — Your Honor, —

THE COURT: Well, I'm going to say a couple of things. You know this could have been raised Tuesday, when we were here on the adversary proceeding, in which the preliminary injunction was issued, okay, it would have been — it would have been wise, it would have been very wise to raise the issue.

Second, it screams irony, if nothing else, that at a time when I have under advisement a motion to hold Mr. Dondero in contempt of Court that there would be a trip-up, the second-recent trip-up, by the way, where he didn't appear at a hearing. There was a time a few weeks ago, two or three weeks ago, can't remember what hearing it was then, but he wasn't here.

Okay. The —

MR. ASSINK: Well, Your Honor, I just want to say —

THE COURT: — the third thing I'm going to say — the third thing I'm going to say is I guess I'll issue an order in the main case now, you know, a one- or two-sentence order in the main case saying repeating the sentence that was in the preliminary injunction, that he's going to show up at every hearing. I never said only at substantive hearings. The only thing I hesitated on at all, because I've done this in other

cases, is sometimes I'll say any hearing at which, you know, the person is taking a position, okay, an opposition, an objection, you know, even if you file a pleading taking a neutral stand, if he's going to file a pleading that requires the Court and all the lawyers' attention to some extent, he's going to need to be in court. So that's something I thought about doing, but then I was reminded, that I said, no, he's just going to be at all hearings in the future.

And procedural, substantive, I never made that distinction and I never would because — because it's taking up time, it's taking up time of the Court, lawyers, parties. And if he is going to use the offices of this Court or, you know, take up the time of any lawyers, then he needs to be a part of it, okay?

MR. ASSINK: Your Honor, yes, I —

THE COURT: So I thought I made that very clear the last time he didn't show up, but I think —

MR. ASSINK: Your Honor, I apologize. You know that's certainly not our intention here. We've been rushing around. I think this is more — this is more on — on me and just the fast pace with everything. We would intend that he would be here at all hearings. We're not trying to make any exception. We're not trying to say that the preliminary injunction got rid of his obligation to be before, Your Honor. You know, we weren't clear exactly what the directive was for these kinds of hearings, or

at least perhaps I wasn't fully, and — but, nevertheless, Your Honor, we would — we would have had him be here. I think the fast pace with the hearing settings and just everything going on, it might have slipped through the cracks. It's not — there was no ill will with him not being here, Your Honor. I apologize. It's just an oversight on our part. We would anticipate that he will be here for all future hearings. You know it's no disrespect to the Court. It was not an intentional thing. We apologize, Your Honor. So I understand the Court's comments. It's — but I just want to make clear it's we're not trying to be cute, we're not trying to say that, oh, the preliminary injunction is gone, he doesn't have to be here. That's not our intention, Your Honor. It was I think just an oversight and a scheduling issue this time, but Mr. Dondero will of course appear before Your Honor in all matters going forward, so I apologize.

THE COURT: All right. Well, again, you're scheduling. You sought the scheduling, you sought the emergency hearing, and this is the second time we've had this discussion in less than a month.

All right. So, Mr. Morris, back to you. I think —

MR. MORRIS: Yeah.

THE COURT: — you were about to answer the question of if Mr. Seery is going to be produced and talk about 13 different topics, why is it a big deal to talk about these other seven

topics.

MR. MORRIS: Because there is no way to prepare a witness for the vague statements that are being offered by counsel. I'll point out that Mr. Aigen is yet another former — a lawyer who formerly represented Highland and is now suing us, but we'll dispense with the disqualification motion right now.

Your Honor, here is the deal. There have to be some limits, there have to be some reasonable limits. As you started, Your Honor, in law school you're taught that a collection case under demand notes is the simplest thing there is. In fact, in New York there's a special provision in state law that permits a plaintiff to file a motion for summary judgment in lieu of a complaint when they have an instrument such as a note, which is exactly what we have here.

Mr. Dondero has already admitted in his answer, in his interrogatories, and in his answers to several requests to admit that the notes are valid, that he received the money contemporaneously with the notes. When he signed the note, he received the money. The debtor has made demand and he hasn't paid, so we will be moving for summary judgment on that basis.

So let's look at what the defenses are and why we just feel like it's a burden on the debtor to even entertain these concepts. His first answer, Your Honor, said that the notes were forgiven based on an agreement. So we asked him in the interrogatory or request to admit, I forget which, show us your

tax returns that you paid the taxes. Of course he didn't pay taxes because of course the note wasn't forgiven. So instead he amends his answers, he amends the affirmative defense to add the words: Pursuant to a condition subsequent. Okay, he didn't say that the first time.

The first time it was — it was forgiven and now it's not forgiven but it's basically deferred until a condition subsequent. So he is not even contending. If you look at his amended answer, he's not even contending that it was forgiven, he's simply saying that the obligation to repay has been deferred pursuant to an oral agreement under which he does have to pay until the debtor completes the liquidation of his assets, basically, if you read it. That's what it says. And that's how we got here.

I don't know if you picked up on it, Your Honor, but in response to an interrogatory, when we said who made the agreement on behalf of the debtor, Mr. Dondero said that he did. Okay, this isn't an oral agreement unless he was talking to himself. This is something that happened, according to him, in his head; that somehow he, as the maker of the note, had a discussion with himself in his capacity as the chief executive officer of the debtor, and the two of them, in his head, agreed that he wouldn't have to pay. Initially wouldn't have to pay at all and now apparently doesn't have to pay until the debtor completes its sale of assets. That is what the defense is here,

so let's be very, very clear about it.

It's not an oral agreement, it's something that he's making up in his head that he didn't make up the first time, that he changed the second time, and that he — that he can't describe at all. One of the interrogatories said: When did this take place. He didn't answer that part of the interrogatory. He hasn't told us.

And here is the interesting thing, Your Honor. He's partially performed. He has admitted in response to — I forget if it was an interrogatory or a request to admit, it's in our papers — he has admitted that in December 2019, after the petition date, and while he was still in control of the debtor, that he made a payment to the debtor, a portion of which was used to pay principal and interest on one or more of the notes, so. So either he made that payment after he made his agreement in his head that it would be deferred, which makes no sense, or he entered the agreement in his head after the time that he made the payment, which would be in violation of the automatic stay, because how did he just get to forgive or to defer payment of an obligation to the debtor without seeking permission from the Bankruptcy Court. Those are the only two possibilities here, okay.

So I don't want to have to prepare my client for such nonsense. I don't think we should be required to prepare my client for such nonsense. And if you take a look at the other

so-called affirmative defenses, he's got waiver, but he doesn't know — he doesn't identify how we waived, when we waived, who waived. And, in fact, it's completely contradicted from the evidence that's already in the record. Every single monthly operating report, all of the debtor's contemporaneous books and records, they're in the record. I actually submitted them in opposition to his first request for an adjournment of this proceeding because I wanted — I put my cards on the table, Your Honor. I really don't — I don't like to play games. I put my cards on the table. They see all of that. All of that is there. The debtor has — can see them. So how could we have waived everything.

Consideration, I'm supposed to prepare my client to answer questions on his defense of lack of consideration, when Mr. Dondero has already admitted that he received the face amount of each note at the time the note was executed? What — we should not be entertaining this.

And let's talk about topics 14 to 17, the so-called other loans that were forgiven. Mr. Dondero was the president and chief executive officer of this company for decades. Has he identified one single person who received a forgiven loan? Nope. Has he identified one loan that was ever forgiven? Nope. Has he ever contended that he had a forgivable loan? Nope. He's got this vague and ambiguous defense that somehow — it's not even a defense, frankly. His defense is that he had an oral

agreement with himself, either he did or he didn't, right. We've got document requests outstanding. They were due weeks ago. Mr. Aigen has promised me in writing tomorrow, tomorrow, Friday. May 21st, he's going to complete his document production.

We've gotten two documents so far, two bank statements that show his receipt of the loan proceeds, right. We don't have — there is no evidence for this. We don't have the identification of a loan that was ever forgiven. We don't have the identification of a person whose loan was forgiven. We have nothing. How can we possibly prepare?

Rule 30(b)(6) actually requires them to describe with reasonable particularity the matters for examination. How do I prepare my client on — on these things? What he's trying to do, I think what they're trying to do is be cute, of course, and they're trying to — they want to ask Mr. Seery and Mr. Seery will say, 'I don't have any knowledge of this.' And then they're going to show up to trial and they're going to put on a case and say, 'Mr. Seery didn't have any knowledge of it, so he can't rebut,' or something — something silly like — I mean I don't really know what they're doing. This is just such bad faith.

Your Honor, you heard counsel say that the loan was forgiven or deferred, but it's not even forgiven. So — so it doesn't even make sense, but you heard him say that he was

underpaid, that Mr. Dondero was underpaid and that there's some connection not with forgiveness because he's admitted that he's now changed his story, it hasn't been forgiven. It was originally forgiven, now it's just deferred, and that that happened because he was underpaid. Does that make any sense at all?

The guy who was in control of this enterprise from day one, and I'm supposed to prepare my client to provide a history of Mr. Dondero's compensation. He doesn't know what he was — did he not pay his taxes? Should we go down that path and should I now start subpoenaing his tax returns? Because I think that's appropriate. If you want to ask what I have, I want to know what you have. So maybe Mr. Aigen can agree on the record that I can have Mr. Dondero's tax returns. If he'll do that maybe I'll reconsider, because this is nonsense, Your Honor. And that's really the point. And I want to nip this in the bud now because this is the first of five note cases for entities owned and controlled by Mr. Dondero, and the same thing is happening in some of these other cases, Your Honor. It is.

And — and if we go down this path, you know you're the Judge, you make the call, but we're going to be having a lot of these because I'm not volunteering putting my client through this process. It's not right. It's just not right.

He made an oral agreement with himself? Please. You either violated the automatic stay or you partially performed,

thereby proving it never happened. Mr. Aigen says, oh, we contest it. We don't sit here and contest it. The proof is in the record. The proof is his client's own words. The proof of the documents that we've already put before the Court. (Briefly garbled audio) — never happened.

And I just — I just want to nip this in the bud. That's really our point, Your Honor. To put forth a client in — in a notes action, the simplest form of action there could possibly be, to answer questions on 13 different topics, but there's a limit to what we'll do, and this is our limit. And that's why we won't — we won't do it in the absence of a court order.

THE COURT: Okay.

MR. MORRIS: Thank you, Your Honor.

THE COURT: All right. So I will give the last word to you, Mr. Aigen. What would you like to say in rebuttal?

All right. You must be on mute.

MR. [SPEAKER]: He's on mute.

MR. AIGEN: Sorry.

THE COURT: Okay.

MR. AIGEN: A few quick points, Your Honor. Number one, counsel has referred to New York procedure on how he could file a quick summary judgment. Well, he can file summary judgment here too. They didn't do it. These defenses are pending, we have a right to take discovery on it. I think

that's pretty straightforward.

Number two, counsel has repeatedly stated, as he states in his pleading, that we changed our position and that first answer it said that the notes were forgiven. It doesn't say that. I'm reading from their pleading at paragraph 16 where they quote our answer, the original one where it says, "Defendant asserts that plaintiff's claim should be barred because it was previously agreed by plaintiff that plaintiff would not collect on the note." There's no change in the position. It wasn't asserted before these notes were actually forgiven, so that's just not true, and his own pleadings reflect that.

We also heard a lot of conversation about what we have given them. We have answered their interrogatories. They didn't ask about other people who may have loans forgiven. They had never asked about that. That's why we haven't told them. They could get that information. They could serve discovery. They're the one that wanted this case on a fast track. So keep talking about discovery or answers he doesn't have because those are answers to questions he never asked. There is no discovery out there where they said to us identify the individual who you believe received loans that are forgiven. They never asked that. That's why they don't —

THE COURT: Let me —

MR. AIGEN: — that answer, so I don't think that's

right.

THE COURT: Let me ask you this. If Bank of America loaned money to Mr. Dondero and he defaulted and they sued him on the note, do you think Mr. Dondero could get discovery regarding all other borrowers or any other borrower that Bank of America may have lent money to and did they forgive some of their indebtedness, did they have special arrangements? Do you think in a million years a state court judge would allow discovery on this?

MR. AIGEN: Not under that hypothetical, but I would — what I would say, Your Honor, if there was an oral condition as part of that loan and it turns out that everyone knew that Bank of America provided those same oral conditions to a subset other group of lenders — or borrowers, for whatever reason, and the parties disputed that, then I think it would be discoverable. So I think the situation here is —

THE COURT: Oral agreements —

MR. AIGEN: — different from your situation. I agree with the hypothetical.

THE COURT: I mean again I — you know, oral agreements. I mean give me examples of case law where oral agreements somehow prevailed at the end of the day. I mean I just...

MR. AIGEN: And, Your Honor, at summary judgment, when we have to present our case, we'll present our case. Like I

said, they could have filed the summary judgment on day one, just like they could do in New York, and said, you know, on the defenses, but we're doing this and we're doing it on a fast track obviously with trial in less than two months. So this is our one opportunity to get discovery. And when they filed their summary judgment, we'll respond with the law. But until they do, for whatever reason they have waived it. They have told you that it would be burdensome to allow him to answer a few other questions. I don't — for one thing, burden was not an objection they made, so he's talking about how it's burdensome and he doesn't want to do it. But this is our one opportunity to get this information. And if they file summary judgment, and, you know, these defenses go away, obviously it won't be an issue later, but this is our one opportunity to get this discovery.

THE COURT: Okay.

MR. MORRIS: Your Honor, if I may? Just one last point. There is zero chance, zero chance that if any loan was ever forgiven by the debtor that it was on the same terms on which Mr. Dondero now claims his loan would be forgiven or deferred. And how do I know that? Because if you look at his response to the interrogatory, the condition subsequent, by them. And Mr. Aigen is just wrong, he did change his answer. His original answer was that he wouldn't have to pay. And then his new answer, his amended answer is that he wouldn't have to pay until a condition subsequent. And when we asked him what

that condition subsequent was, it was the liquidation of certain assets. Since the liquidation of those assets has not been completed, by definition, no other maker could have had a note or an oral agreement or an agreement of any kind of the type that Mr. Dondero has. So yet another reason why it fails to meet the burden, they fail to meet the burden under Rule 26. Nobody could have ever had the same note forgiven or agreement, because the condition subsequent hasn't been met yet.

THE COURT'S RULING ON THE MOTION TO COMPEL

THE COURT: All right. Well, I'm going to deny the motion to compel. I don't think that the burden has been met to establish the relevance of these, I guess it's — one, two, three, four, five — six topics that are now at issue, topics 9, 14 through 17, or 20, and, you know, I don't think the proportionality standard is met here.

I do think it would be not proportionate to the needs of the case for the CEO, who came in place in 2020, postpetition, two years after these notes were executed, to have to go do research about any loans made by Highland to any officers and employees over the years and, you know, I don't know who he's going to question, what policy he is going to look into that might be some substance or evidence as to oral agreements or forgiveness. I don't think he should have any obligation to search files and interview people to figure out what the affirmative defenses and Mr. Dondero are all about or

based in. And, again, no one would have better information about his own compensation than Mr. Dondero himself.

I mean I want to stress that this comes against a backdrop of — well, it seems like some antagonism, to say the least, on the part of Mr. Dondero where Mr. Seery's concerned. It seems like it's always a fight with Mr. Seery. And you say, well, we didn't handpick him as the 30(b)(6) witness, but, you know, the motion to compel names him by name. It just — it feels like another antagonistic move.

You've got him for a deposition next Monday on 13 or so different topics. I think it is appropriate to draw the line on these six or so topics that again just don't seem relevant or proportional to the needs of the case.

All right. So, Mr. Morris, would you please upload just a simple order reflecting the Court's ruling?

MR. MORRIS: I would be happy to, Your Honor.

THE COURT: Okay. Actually I'm going to ask Mr. Aigen to do it. I'm sorry. I need to be thinking about attorney's fees and who should bear the costs of what.

So, Mr. Aigen, would you please electronically submit an order?

MR. AIGEN: Yes.

THE COURT: All right. Thank you.

All right. Well, if there's nothing else on this particular adversary, let me just double check. Any

housekeeping matters before I move onto the other adversary?

MR. AIGEN: Not from the debtor, Your Honor.

MR. CLUBOK: Your Honor, —

THE COURT: All right.

MR. CLUBOK: I don't know if you're about to move on. Your Honor, can you hear me?

THE COURT: I'm sorry, Mr. Clubok?

MR. CLUBOK: Your Honor, —

THE COURT: Were you weighing in on —

MR. CLUBOK: Yeah, I'm — I'm sorry. It's not about that proceeding, but are you about to move on beyond — beyond the Highland matters?

THE COURT: No, no, no.

MR. CLUBOK: There was another Highland matter —

THE COURT: I was next — I was next going to go to the other adversary, the dispute between the committee and seven or so defendants. And, yes, I know we have UBS I guess all day tomorrow unless anything has changed. So we'll — we'll hear before we're done any previews about tomorrow.

All right, so moving on —

MR. CLUBOK: Thank you.

THE COURT: — the Committee versus CLO Holdco, 20-3195. We have a committee motion to basically stay the adversary proceeding for 90 days. So I will get lawyer appearances on that.

Who do we have appearing for the committee, the movant?

MS. MONTGOMERY: Yes, Your Honor. Paige Montgomery for the committee.

THE COURT: All right. And for the defendants, who do we have appearing?

MR. PHILLIPS: Good morning, Your Honor. Louis M. Phillips on behalf of Highland Dallas Foundation and CLO Holdco Ltd., along with my associate Amelia Hurt.

THE COURT: All right. I saw your —

MR. DRAPER: Good morning, Your —

THE COURT: — pleading filed at 9:00 something last night.

Any other defendant appearances?

MR. KANE: Yes, Your Honor, —

MR. DRAPER: Yes, Your Honor. Douglas Draper on behalf of the Dugaboy Investment Trust —

THE COURT: All right. Thank you.

MR. DRAPER: — and Get Good.

THE COURT: Oh, okay. Thank you.

Other appearances?

MR. KANE: Yes, Your Honor. John Kane on behalf of Grant James Scott, III.

THE COURT: Okay. Mr. Kane, your volume was very low. You're — you're Mr. Scott's counsel as trustee for these trusts?

MR. KANE: In — in a sense, Your Honor, and in his individual capacity. I no longer represent CLO Holdco.

THE COURT: Okay. I don't know if you got that at all, Michael. It was so faint.

THE REPORTER: Yeah, I got a little of it, but it —

THE COURT: Okay. you're no longer representing CLO Holdco, Ltd., but you're representing Grant Scott in his trustee capacity for these two trusts?

MR. KANE: Your Honor, Grant Scott is no longer the acting director or trustee of CLO Holdco, but he was a named defendant in this action based on his time as trustee or director of CLO Holdco, and I represent him in that capacity.

THE COURT: Okay. Any other defendant appearances?

MR. ASSINK: Good morning, Your Honor. This is Bryan Assink for Mr. Dondero.

THE COURT: Okay. Any other appearances?

All right. Well, Ms. Montgomery, you may make your argument.

MS. MONTGOMERY: Thank you, Your Honor. And thank you for taking the time to consider our motion so quickly.

I'd like to just briefly address how we plan to proceed today. To make more time, we'd like to give a brief opening statement. I'm not sure who among the defendants intends to be heard specifically today in opening, but at the conclusion of that we would like to proceed to testimony. We

have Mr. Kirschner, who you can see on the screen, Your Honor, and he's here today. We plan, for efficiency sake, to put him on by proffer to the extent that that is acceptable to the Court. And then he will be available to answer any questions that the Court or the defendants may have.

THE COURT: All right.

MS. MONTGOMERY: As you can see in our motion, we're requesting a 90-day stay of the adversary proceeding. And the purpose for that stay is to allow Mr. Kirschner and his firm, Teneo, the time they need to get up to speed on this case.

Stepping back for a moment, it was always the committee's intention have these claims prosecuted by the ultimate litigation trustee. However, due to a disagreement about certain funds that are held in the Court's registry, the clock started ticking on the committee's time to bring this adversary proceeding. So but for the order that the committee commenced an adversary proceeding by a date certain, this action would have been brought at a later time by a litigation trustee post effective date as part of a comprehensive litigation strategy related to all estate claims.

For a variety of reasons the effective date of the plan has been repeatedly delayed, which has necessarily delayed the formation of the litigation subtrust. We're coming up on two years since the filing of the bankruptcy proceeding and there's limited time available for the trust to be formed and

the trustee to develop a comprehensive litigation strategy.

As the Court may have noted, as we are wrapping things up, two of our four committee members have also recently retired/withdrawn from the committee. So as a result last Friday, the committee filed an application —

THE COURT: Just inquiring minds want to know. I mean did they — did they by chance sell their claims or they just were tired of the committee role?

MR. CLEMENTE: Your Honor, if I may? It's Matt Clemente. I'll just jump in on that, Your Honor, —

THE COURT: Um-hum.

MR. CLEMENTE: — very quickly. I don't know how anybody could be tired of being on the committee, but the answer is, Your Honor, that they both sold their claims and claim-transfer notices have been placed on the docket. The United States Trustee is aware and the trustee's position at this point is to keep the committee at the two members, which are Meta E and UBS, as we continue forward here through the case and hopefully to an effective date in the near future.

THE COURT: All right. Thank you.

All right. Ms. Montgomery, continue.

MS. MONTGOMERY: Thank you, Your Honor.

So as a result, last Friday the committee filed an application to retain Mr. Kirschner and his firm as litigation advisor to the committee until the plan goes effective and the

litigation subtrust is formed. At that point Mr. Kirschner will become the litigation trustee under the plan and he'll be responsible for all claims brought seeking recovery on behalf of the estate. So obviously under the terms of the plan, our client, the committee, will cease to exist at that point and responsibility for the adversary proceeding that we're currently being heard in will pass to the litigation trustee. And there will be a new oversight committee, which has not been formed yet either as of the effective date.

So because this adversary proceeding will transfer to the litigation subtrust upon the effective date of the plan, it's imperative that Mr. Kirschner be involved in the prosecution of the adversary proceeding immediately and the development of legal strategy for all of the estate claims as a whole. For a number of reasons, the 90-day stay of the adversary proceeding will provide Mr. Kirschner with the necessary time he needs to get up to speed.

Mr. Kirschner needs to familiarize himself with the Byzantine structure of the debtor and the relationships among the debtor and its thousands of related entities and insiders. The corporate structure, as you have noted on several occasions, is highly complicated. And the ownership and beneficial ownership of entities is confusing enough even before you consider the variety of transfers of estate assets between and among those entities — entities. We've heard these

relationships described as tentacles. I tend to think of them as a web, and the allegations of this adversary proceeding represent only a small section of strands.

Mr. Kirschner also needs time to familiarize himself with the pending motions to withdraw the reference and the motions to dismiss, and to develop the strategy which could significantly change the trajectory of the adversary proceeding and future adversary proceedings. Mr. Kirschner's decisions regarding how to respond to these motions may change the course of the litigation in ways that are material to the pending motions. For example, he could determine to amend the complaint or he could bring additional claims that the committee does not have standing to bring on its own. For example, breach of fiduciary duty. Importantly, there could be arguments surrounding the motion to withdraw the reference and have impacts on the other actions that may be brought by Mr. Kirschner in his role as litigation trustee.

The strategy surrounding plaintiff's response to the motion to withdraw the reference may also depend on facts that have not yet been developed. Mr. Kirschner should be given at least some time to develop that strategy.

It's also worth noting that the notice period on Mr. Kirschner's retention application does not end until June 7th, which is after the current hearing date for the motions to withdraw the reference, which are set for June 3rd. Given his

proposed role as litigation advisor and his future role as litigation trustee, he will be responsible for this adversary proceeding, he should be involved in the strategy to oppose the motions to withdraw the reference.

As you know, Your Honor, the Highland entities have an extremely complex structure involving obscure relationships and ownership structures. Mr. Kirschner not only has to get up to speed with those facts, but he also needs to wrap his hands around the transfer of information obtained from both the debtor and the committee over the course of these proceedings. So this adversary proceeding is just one part of the complexity that is the estate claims, but it's an important part and he should have time to ensure that he's proceeding in the most efficient way and in the way that's best for the debtor's estate.

In addition to needing to get up to speed on the facts giving rise to this case, Mr. Kirschner is also — will be working on a comprehensive strategy for all estate claims. As pointed out in the response that was filed last night, since he is familiar with the adversary proceeding, obviously, we filed it, and we did so after tedious review of thousands of documents, and it took us months to put together a picture of the transactions that are underlying the complaint, and those months were after we had been actively involved in these proceedings for over a year, so it's a very complicated — there's some pretty complicated stuff going on there.

We also believe that we provide competent representation, which is at least tangentially challenged in that response, but we're the lawyers that represent the committee. We're not the party that's responsible for the decisions of the underlying management of the litigation. Obviously lawyers take direction from their clients and ours as of the effective date will no longer exist, and Mr. Kirschner will be the person who's responsible for making those decisions.

So to put it slightly differently, we may be driving the car but we're not deciding, you know, where the car is going. That's the client's decision.

I am at least somewhat offended by opposing counsel's implication that the motion to stay was brought in bad faith because it smelled that there might be some litigation advantage. All I can do in response to that, Your Honor, is assure the Court that the stay is not being sought for such a purpose. To the extent that there's any gamesmanship occurring in these proceedings, it's not us that's engaging in it.

Mr. Kirschner is entitled to gain his own understanding of the issues underlying this adversary and of the litigation landscape as a whole, and to have an orderly transition of responsibilities from the committee, the debtor, and counsel for both before he's asked to make important strategic decisions that could have long-lasting implications on his work.

In short, Your Honor, there is no rush to have the pending motions heard and no prejudice to defendants by a stay of proceedings. As they point out in their response, the Court has delayed the hearing on the motion to dismiss until after consideration on the motion to withdraw the reference. Additionally, as they make clear in their response, discovery is not underway at this point. We still haven't effectuated service as to all defendants. We have some defendants that are foreign entities and we're still working through the service of process. We're not entirely sure how much longer that's going to take, but it has proven to be a lengthy process to date, and we don't really have an estimated time for when that will be done. So, if anything, there is an ideal time for a pause on proceedings that won't prejudice any party.

The only purported harm our opponents have identified is the delay itself, and I have to admit, Your Honor, that this is the first time I've ever heard a defendant argue that they're prejudiced by litigation against them not proceeding. In fact, we reviewed the cases that are cited in the response that purport to support a right of good — to a determination of rights and liabilities without undue delay. Unsurprisingly, both involve instances of a defendant seeking to delay prosecution of a plaintiff's case rather than the reverse, as we see here. And in those cases, the stays that were sought were either indefinite or extremely long. They were not a brief

90-day extension of the sort recognize requested here. There's simply no prejudice to the defendant in the adversary by staying the proceeding for 90 days.

On the other hand, the 90-day stay of the adversary proceeding will provide Mr. Kirschner with the time that he needs to develop an understanding of this adversary proceeding and the litigation strategy as a whole. And moving forward without the stay may very well prejudice the future litigation subtrust and harm the debtor's estate.

That's all I have for now, Your Honor.

THE COURT: All right. A couple of questions. You said there's been no service on certain defendants, and I know that certain of these defendants are said to be Cayman Island entities, these various Charitable — Charitable Daf (phonetic), maybe CLO Holdco Ltd, Charitable Daf Fund, those three in particular, right, right foreign entities? Okay, so they have gone —

MS. MONTGOMERY: Yes, Your Honor.

THE COURT: — they have not — those are the three, I presume, that have not been served?

MS. MONTGOMERY: CLO Holdco has been served, the others have not.

THE COURT: Okay, okay. Thank you. I'm sorry, I'm getting a little mixed up. So there's been money in the registry of the Court and I remember that was why early on I

sort of created a quick time table for you all getting this filed. How much money is still in the registry of the Court? I remember there were agreed orders that some of it could be paid over, I think, to Mr. Rocatta (phonetic). I can't remember who — who all. But is there still a substantial fund in the registry of the Court without me going online and looking that up?

MS. MONTGOMERY: I'm going to have to look and get the exact numbers as well, Your Honor, but it's the portion of the moneys that were purportedly payable to CLO Holdco are still in the Court's registry.

THE COURT: Okay. So it's just that defendant's funds. And am I also correct that now the debtor ultimately has a majority interest in CLO Holdco, the debtor itself, because of that Harbor Vest (phonetic) settlement?

MR. PHILLIPS: No, Your Honor.

THE COURT: Oh, that's not right?

MR. PHILLIPS: I don't think so, no.

MR. KANE: Your Honor, this is John Kane. I can actually provide some clarity on that. The Harbor Vest acquisition by the debtor's affiliate relates to HCLOF, Highland CLO Funding, not CLO Holdco. CLO Holdco is the 49-percent interest owner in HCLOF.

THE COURT: Okay.

MR. DEMO: And this is Greg Demo, Your Honor, from the

debtor. I can confirm what Mr. Kane just said.

THE COURT: Okay, okay. So CLO Holdco is just strictly in that line of the Charitable Daf and as far as who owns — who owns it —

MS. MONTGOMERY: That is — that's my understanding, Your Honor.

THE COURT: Okay, okay, so I — once again I have flipped the organizational structure.

All right. And then my last question for you, Ms. Montgomery, is the effective date of the plan has not occurred. There's obviously an appeal now at the Fifth Circuit, a direct appeal of the confirmation order. Is there still a stay pending appeal — a motion for a stay pending appeal pending out there either at the District Court or Fifth Circuit, or have those been ruled on one way or the other?

MS. MONTGOMERY: Mr. Demo, could you — were you popping on to answer that question?

MR. DEMO: Yes, Ms. Montgomery.

This is Greg Demo, Your Honor, from Highland Capital Management. We still intend to try to go effective after the hearing on the exit financing, which has been postponed until June 25th. That's counsel to NexPoint Advisors, and counsel to Highland Capital Management Fund Advisors filed a motion last night with the Fifth Circuit seeking a further stay of the — of the effective date, pending the resolution of their appeal. So

we don't know how that's going to shake out, but the debtor does anticipate trying to go effective following June 25th.

THE COURT: All right. So has there been a stay of the confirmation order?

MR. DEMO: We've agreed to a short administrative stay —

THE COURT: Okay.

MR. DEMO: — as all this stuff has been going on. I believe the administrative stay — actually I can't remember when it expires, but we have agreed to a short administrative stay.

THE COURT: Okay. And so it's —

MR. DRAPER: Your Honor, this is Douglas Draper.

THE COURT: Okay, go ahead.

MR. DRAPER: Just to give the Court some background, —

THE COURT: Go ahead.

MR. DRAPER: — there were two — you denied the stay pending appeal. There were two appeals taken from your ruling. One by myself on behalf of Dugaboy and one by Devor (phonetic) on behalf of other entities. They both went up to Judge Godbey. He has never ruled on the stays pending appeal. So what was done is inasmuch as the motion — the appeal of the confirmation order is up in the Fifth Circuit, last night Devor filed a motion for a stay pending appeal in the Fifth Circuit, and that's pending. So that's the procedural background of what's gone on.

THE COURT: All right. Thank you, Mr. Draper.

All right. Well, I'll hear opening statements from our defendants. And I ask you please not to be duplicative of each other. So who wants to go first for the defendants?

MR. PHILLIPS: Your Honor, Louis M. Phillips on behalf of Highland Dallas Foundation and CLO Holdco Ltd. We filed a response in opposition to the motion to stay. And we are the ones who, my firm and I, and I'm the one that filed, that sent messages across to counsel for the committee in response to the request for consent or notice of opposition. So I guess since we filed the response we ought to go forward.

We have reviewed the — we laid out a time line in our response. We've laid out communications between counsel and our response. We laid out what we think the burden is. And we've laid out the case law that we think establishes the burden for a stay.

What we are concerned about is the — first of all, the 90-day stay, it might even come around as far as further activity in the lawsuit because we don't know what the Court would do on June 3rd. We know that the Local Rules require that — or set forth that the Court will issue a report after the conference on June 3rd about — to the District Court concerning the motion to withdraw reference. We filed a motion to withdraw reference. We filed a first response to the litigation, A, a motion to withdraw reference; and, B, a motion to dismiss under

Rule 12(b)(6) and a motion for a more definite statement as well. Both our filings were followed by other defendants who sought withdrawal of the reference and also dismissal.

This Court has pushed aside the motion to dismiss pending resolution of the — of the motion to withdraw reference, which we think is entirely appropriate and we're fine with, so where we are, Your Honor, —

THE COURT: And let me — let me just interject there. That is always 100 percent of the time my practice, and I think the other bankruptcy judges here. It's out of deference to the District Court. If the District Court ends up withdrawing the reference, they may want to say, 'I want to withdraw the whole darn thing. We don't even want you doing pretrial matters,' so we don't want to get ahead of them by considering a pretrial matter. So I did what I do in every case and will take the next steps —

MR. PHILLIPS: And we agree a hundred percent with that approach, Your Honor. We didn't really know how we were going to proceed on the motions to dismiss. But we had deadlines to filing and we got very brief extensions for one of our clients to file a response to the complaint after service. On the other client, we didn't get any extension to file a response. So we filed timely responses and we didn't know how the Court was going to handle the motion to dismiss. And the way the Court just handled them is entirely what we — we agreed

that that was the way to do it, because the District Court has several alternatives if it determines to withdraw the reference. And we know the courts, we've looked at the Court's Local Rule. We just don't know how long, and we have no control and we're fine with having no control over how long the Court would — would have to take, given its docket, to issue its report to the District Court. And we have no control over what the District Court would do.

Our problem with the motion for a stay is that we know that the only things really pending now are motions to withdraw reference. Those are subject to being brought before Your Honor at either kind of a hearing/conference where the parties will put forth their legal arguments and any evidence, but the evidence will basically be the nature of a litigation and the situation of the docket. So there's no real factual issues in dispute. We have a lawsuit, we have a motion to withdraw reference that's been briefed. We grant an extension of the response deadline to May 21st in connection with the request by counsel. And we purposely asked the Court for the June 3rd date, all with agreement of all counsel. And then two days we get the emergency motion — or last night, yesterday we get the emergency motion to stay when the litigation assistant was, in fact, retained on the day or two after we filed our responses. And there was no mention in any way, shape, or form of a need to stay at that time.

So we have one thing pending: Motions to withdraw the reference. We have reviewed and set forth in our response the scope of services for which Teneo was being retained. It does look to us like it is — it looks like litigation support and litigation analysis.

And I hear what counsel for the plaintiff is saying, but there have been — she's — we agree that there has been months and months and months of analysis, there have been millions and millions and millions of dollars spent on U.S. — UCC counsel fees. They have gone through thousands and thousands of documents. They came up with this piece of litigation. This is the one I know about. This is the one pending before the Court. And there might be — there is a suggestion that there is an overarching litigation strategy being employed, but this is what we have right here. And that's speculation that we have no idea about and we assume the Court has no idea about.

So we have one thing that we want decided and it's easy for a plaintiff to say — and, look, we're chastised for being defendants who want to move the lawsuit. One of our clients didn't even ask for an extension of the deadline to respond. We have — we asked for one extension for one of clients. And that extension dovetailed into the response date for the other client so that we could file a single response for both clients. That was granted. We appreciate that. And when

the committee asked for an additional time, we granted it with the proviso that we get the June 3rd date so that if we need to file a reply, we'd have three or four days to file the reply.

We have been — we have not been the ones asking for any delay and we're not going to ask for any delay. And so I don't care what other cases say, I don't care what the plaintiff's lawyer says about defendants always want to delay. We're not asking for any kind of delay. We want to move forward. And we think we have the right to figure out and find out what court is going to be handling our litigation. That's what we're asking for.

We've already said in the communications that we've listed on our witness and exhibit list that we'll be more than happy to talk about some type of stay about motions — you know, discovery, whatever, whatever, if there — if the litigation advisor needs to get up to speed on what documents are out there, what documents it would have to review, that's fine. We're probably going to do some discovery. But we're only going to discovery if our motion to dismiss under 12(b) are not granted, because if they are there doesn't need to be any litigation advice or any analysis about alternatives or objectives or overarching strategy to deal with the motion to dismiss under Rule 12(b). That's a legal issue. And the counsel is very adept — we say counsel's adept. We know they're adept. That's why we know that they are ready to proceed in

response to our motion to withdraw reference.

And then if the District Court takes it after Your Honor gives her report, then we'll bring the motions, we'll get with the lawyers for the plaintiff and we'll make — bring our motion to dismiss before the District Court on some kind of agreed schedule, but those are legal issues. There is no advice needed for a motion to withdraw reference. There's no advice needed for a motion to dismiss under 12(b). Those are legal questions and — and the idea that Sidley and Austin needs assistance from an advisor as to how to approach a legal issue, we don't think is meritorious.

So, Your Honor, we have put — we have a witness and exhibit list of six documents. One is — Document 1 is the application to employ the Teneo firm. 2 is the — 2, 3, 4, 5, and 6 are email communications we have provided them. They are between counsel that are before the Court here today, just to show that we granted extension for them to respond, then they ask, and we responded, and so that they were on notice that we opposed the requested stay. And we would like for the motion to withdraw reference to go forward.

The parties will have plenty of time to work out discovery, Rule 26 issues, motion for relief — motion to dismiss under 12(b) in front of whichever court is going to handle it. Certainly this Court is — if the motion to withdraw reference is denied, this Court will be in full control of when we have

hearings on the motion to dismiss. And we understand that. So will the District Court if the District Court grants the motion to withdraw the reference. The District Court will determine hearings on the motion to dismiss under Rule 12(b). And then we have those two things to get past. And those are legal questions, legal questions that are already before the Court or already there. So we don't see how additional time is necessary with respect to that.

We think by the time the stay — quote stay expires we'll have a determination at least on the withdrawal motions. And we can probably have a setting on the dismissal motions. And if there — if the plaintiffs survive dismissal, then we'll have discovery that all litigants will be involved in and agreeing to and with scheduling orders, et cetera, from whatever court is going to try this case.

And I'd like to say also that once we have — CLO Holdco has been involved in the bankruptcy case. We recognize that. I was not the lawyer for CLO Holdco, but I'm representing CLO Holdco now. The Highland Dallas Foundation has not been. And the Highland Dallas Foundation is a charitable organization that has institutional people on the board, has one donor seat on the board, but it's — it's being sued for twenty something million dollars. And the idea that it has no interest in getting this resolved is not correct. It wants to get it resolved and that's why we're opposing this stay. Thank you,

Your Honor.

THE COURT: All right. A couple of follow-up questions. I'm struggling a bit with the fact that we have a couple of defendants, two or three defendants that have not even been served yet. So is it appropriate for this Court to be going forward on a motion to withdraw the reference when I don't know what's going to happen with those two defendants. Are they going to be served? If so, what sort of position are they going to have with regard to the reference being withdrawn?

And, in any event, ultimately I'm going to have to slice and dice this in a report to the District Court saying, you know, these entities filed proofs of claim and that may affect the authority of the Court, you know, maybe it does. I mean a part of me thinks what's going on here and should we just wait till they have been served so we have the ability to report to the District Court: Here is every defendants' position on this.

MR. PHILLIPS: Your Honor, I can't answer the question. I don't — I mean it seems to me like we have — we have — CLO Holdco was served. And it is a foreign entity. We don't know why the other two have not been served. I'm not — we just don't know. So I mean does that mean if we — I mean we had to go forward, we had to answer, we had to respond. We had a deadline to do it. It didn't matter that two hadn't been served. And so we — you know, if we hadn't responded, given our

service, we would have had a default entered against us and a request for a default judgment. So I don't know the answer to the question because I can't imagine that a plaintiff can file a lawsuit and then the lawsuit was filed months ago and not serve two people and keep the defendants hung up.

I don't know if there is a problem of service. There was one entity that got served that is a foreign entity. I don't know why the other ones haven't been served. The Highland Dallas Foundation was served. The other parties who have appeared were served. So we have no control over that because we're not serving anybody. And I would think that the part — I did some looking in the — in the record and it seems to me like we don't have — you know, I can't tell you whether we have — what the arguments would be for the parties who have not been served.

I would assume given that everybody has — my two clients have filed what they filed. CLO Holdco filed a proof of claim, but it was in effect disallowed and converted to a claim for zero. My other client, Highland Dallas Foundation, has not made any appearance in this case. So all I can say is we think two — I think the two clients that I'm currently representing, we know they have been served. We had a deadline to respond. We have responded. And we think we're entitled to a jury trial and withdrawal of the reference.

MS. MONTGOMERY: Your Honor, if I can answer the

question. CLO Holdco was served through its counsel, whereas the other two foreign entities require domestication of the subpoena in the Caymans. And it's our understanding that may take as long as — just having heard — as another two months for that process to be complete.

THE COURT: All right. My other question I guess is maybe more rhetorical than something you could really answer. I — you know — on the one hand, you know, what Ms. Montgomery is arguing: Our true plaintiff contemplated for this lawsuit isn't in place yet because the plan hadn't gone effective and, you know, some — some of the defendants here or affiliates of defendants are wanting to delay, delay, delay further when the plan can go effective. You know last night a motion for stay pending appeal with the Fifth Circuit was filed. So it's like, no, don't let the plan go forward, let's not get Mr. Kirschner in place. But, oh, don't issue a stay on this lawsuit. It just feels a little bit inconsistent, the two positions. What — do you have anything to say to that?

MR. PHILLIPS: I have — all I have to say, all I can say, Your Honor, and that is CLO Holdco, as I understand it, is not an appealing party. My other client that's been served, Highland Dallas Foundation, is not an appealing party. We're a defendant in — in this lawsuit. And so we don't see — we're not in a position to be inconsistent about anything. We're not an appellant. We're not seeking any kind of relief on appeal. And

we — but we are defendants who have been served and who have filed motions to withdraw reference. So you will have to ask other people about that. I'm completely consistent in my position.

MR. DRAPER: Your Honor, this is Douglas Draper on behalf of Dugaboy, who has both —

THE COURT: All right.

MR. DRAPER: — appealed your decision —

THE COURT: Okay.

MR. DRAPER: — and has asked for a stay pending appeal.

THE COURT: Okay.

MR. DRAPER: It's not an inconsistent position because two reasons. Number one, you gave the committee authority to file this suit. The committee took that authority and filed the suit within the time period. So whether the case is going forward or — the stay — the case is stayed and the confirmation order is stayed or not, this action and this entity and this proceeding is going to go forward.

And so all we're talking about here, just so we — it's all clear, we're just talking about who is going to try this suit. We're not talking about a master litigation strategy. We're talking about a location. And, quite frankly, it would surprise the hell out of me if — if the new person, or whoever, says, look, I want to go to the District Court.

This is just a location issue, nothing more. You can sift through each one of these defendants who have been served as to whether we have a right to a jury trial or not. And each one, as the Court recognized, is on a — on a defendant-by-defendant basis. I did file a proof of claim. Whether I have a right to a jury trial, you're going to have to look at to see if in fact my proof of claim relates to this claim.

Mr. — Mr. Phillips is a defendant set of facts. And these other defendants may be a different set of facts. So all we're talking about is location. It is purely procedural. And I don't think the stay at the district — of the confirmation order or not is — is in any way impacts this whatsoever. This is a location question.

THE COURT: All right. Any other opening statements from defendants?

All right. Ms. Montgomery, you may put on your witness. And I'm fine with the proffer, but we'll then swear him in and see if there cross-examination from the others. All right, you may proceed.

MS. MONTGOMERY: Yes, Your Honor. At this point we'd like to proffer Mr. Kirschner's declaration that was submitted in support of our motion for the stay as the content of his proposed testimony. Mr. Kirschner is obviously here to answer any questions you have or on cross-examination after he's been sworn in. And, Your Honor, we would just reserve our right to a

brief redirect should that prove necessary.

THE COURT: All right. So I have in front of me the Declaration of Marc S. Kirschner. It was actually attached to the committee's motion for stay. It's about four pages long.

Let me ask: Are there lawyers who are going to want to cross-examine Mr. Kirschner?

Going once, going twice, no one wishes to cross-examine him?

THE REPORTER: He's on mute.

THE COURT: Oh, Mr. Phillips, —

MR. PHILLIPS: Your Honor, I'm sorry. I was on mute. I'm on mute, as I probably already muted, but I was on mute and I apologize.

Your Honor, this — this is — this declaration, there's no way to cross-examine a declaration that speaks in conclusory language. The declaration, it was mimicked and mirrors — mirrors exactly as the party looking into the mirror, not as the reverse of the party looking into the mirror, argument by — opening statement by counsel. I would ask a couple of questions of Mr. Kirschner, please.

THE COURT: All right. Mr. Kirschner, I need to swear you in. Would you speak up, say, "testing one, two."

MR. KIRSCHNER: Yes. Testing one, two.

THE COURT: All right.

MR. KIRSCHNER: Coming through?

THE COURT: I — I hear you, I don't see —

MR. KIRSCHNER: Okay.

THE COURT: There you are. Please raise your right hand.

MR. KIRSCHNER: I can.

MARC S. KIRSCHNER, COMMITTEE'S WITNESS, SWORN/AFFIRMED

THE WITNESS: I do.

THE COURT: All right. Thank you.

Mr. Phillips, go ahead.

MR. PHILLIPS: Yes, Your Honor. Thank you. Just a couple of questions.

CROSS-EXAMINATION

BY MR. PHILLIPS:

Q. Mr. Kirschner, in paragraph 7 of your declaration, if you could find it. Just let me know when you're there.

A. I'm there. Thank you.

Q. Okay. Thanks. You say that it's important for your firm to gain an understanding of the complex transactions described in the adversary proceeding, particularly in connection with the motion to dismiss and motions to withdraw reference and complex issues before the Court. What does that mean?

A. That means that, as Ms. Paige indicated in her opening statement and as the Court and all the defendants understand, I was — when I was designated as litigation trustee in January, there has been delay after delay after delay in the effective

date of the plan, and now we're even at the Fifth Circuit, so the trust and my role as subtrustee has not yet gone into effect. Prior to April 15th, I had no access to the debtor, to the committee, or any of the attorneys, no access through any protected information. I had no input on the complaint.

I became worried as the passage of time went on about the possible running of statute of limitations later on this year in October. And it was I who suggested to Mr. Clemente to come up with what is an extremely unusual procedure, to permit the committee retain me on an interim basis until the effectiveness of the trust, and then to flip my work effectively into the trust.

This is very unusual. It's not even yet approved by the Court. Nevertheless, I and my firm have worked very diligently since April 15th to get up to speed on this entire complex factual and legal situation. I cannot just look at the Holdco adversary in a vacuum.

There has been as the Court and all the parties here know much better than I, there has been ongoing litigation on many fronts for quite a long time. There has been supplied a Byzantine web of some 1400 entities —

MR. PHILLIPS: Your Honor, Your Honor, —

THE WITNESS: — to accomplish —

MR. PHILLIPS: Your Honor, could I interrupt? He needs to answer the question.

BY MR. PHILLIPS:

Q. What does — what does — what does the understanding about the motion to withdraw reference mean? What do you need to get up to date on the motion to withdraw reference?

A. I'm responding to your question.

THE WITNESS: If I may, Your Honor, I'm responding to the question. I'm almost done —

MR. PHILLIPS: Your Honor, a narrative, a preexisting narrative —

THE COURT: Ah, —

MR. PHILLIPS: We just — I just want to know. We have legal issues.

THE COURT: Okay, I sustain the objection —

MR. PHILLIPS: I want to know what he —

THE COURT: If you could reask the question and we'll see if we can get an answer —

MR. PHILLIPS: All right. I'll reask the question, Your Honor. I'm sorry. I apologize.

Your Honor, I'm going to withdraw any questions. I'm — this is — this is going to turn into just an argument. His declaration and conclusory and it's just going to be more conclusion. So I'm — I'm willing to argue from his declaration in closing.

THE COURT: All right. Any other questions?

No other —

MR. DRAPER: None, Your Honor, from Dugaboy.

THE COURT: Okay. Anyone else?

Ms. Montgomery, do you have any redirect on that brief cross?

REDIRECT EXAMINATION

MS. MONTGOMERY: Yes. I think, Your Honor, I would just ask if there is anything else that Mr. Kirschner feels the Court should be aware of before reaching a decision on today's — on today's motion?

MR. PHILLIPS: Your Honor, we object to that question. That's not even a question.

THE COURT: I overrule. He can answer.

THE WITNESS: Okay. Thank you very much, Your Honor.

As I was saying, there is a Byzantine web here of over 1400 entities, many moving intertwined parts. I have literally and my firm has literally had to triage the monumental amount of work that is necessary to get my hands on this overall situation. There's allegations that money's been flying all over the world —

MR. PHILLIPS: Your Honor, this is not — this is not appropriate testimony. This is — that's hearsay. There's allegations all — money flowing all over the world. This is — this is a narrative that has nothing to do with the pending motion to withdraw reference and is, in essence, an assassination piece. This is — what we —

THE COURT: I overrule. He's trying to explain why he needs 90 days at bottom here, so I think it's relevant.

MR. PHILLIPS: Well, the long —

THE COURT: And I understand everything's an allegation subject to evidence.

MR. PHILLIPS: Well, we're talking about allegations, —

MR. [SPEAKER]: Right.

MR. PHILLIPS: — we're talking about — we just heard they're allegations about money flying all over the world. That's not an acceptable testimony. You know that and everybody on this call knows that. That's absolute abject hearsay and the idea that you could — you could buttress a motion for stay after you've had 30 days to review a legal analysis about a motion to withdraw reference, because there are allegations of money flowing all over the world is ridiculous. Your Honor, we — we firmly and in this way object —

THE COURT: Overruled. I understand you don't like the emotional, if you want to call it, emotional language. You think it's hyperbole, you think it's hearsay, but he didn't — he didn't offer an out-of-court statement. He's just saying the allegations — you know, they're in pleadings, they're allegations in many different adversaries, and so I overrule the objection.

You can complete your answer, Mr. Kirschner.

THE WITNESS: Thank you very much, Your Honor.

All of these complexities in my view potentially impact on the motions to withdraw. I recently realized that I cannot properly perform my fiduciary duty to all creditors by the deadline for a response to the motion to withdraw and the motions to dismiss. I am in fact considering potential amendments to the existing Holdco adversary to possibly other issues that may impact the withdrawal motion.

Your Honor said this morning that it's important to take into consideration both procedural and substantive matters. I am worried about potential impacts of whatever I do. And bear in mind, as Ms. Paige indicated, I am — (brief garbled audio) — no process plan. All of this was supposed to have been put in the litigation trust under my auspices. I am now litigation advisor, not yet approved by the Court. It is the client, I, who direct, after consultation, all strategy by lawyers.

I have a long history, as Your Honor has seen from my C.V., of directing complex billions of dollars of litigations. I rely on lawyers, but I am very involved in every aspect of the case. This is very confusing, not just the CLO Holdco itself but the entire complexity of all of the potential matters here that I need to study in a very short period of time. I'm concerned that dealing just with this in this couple of days is going to be harmful to creditors ultimately and respectfully request the Court to grant the 90-days adjournment.

Maybe I'm being overly cautious and I apologize for that, but I feel strongly about my fiduciary duty and want to do the best I can to understand everything that's going on before we have to respond both to the withdrawal motion and the motion to dismiss. So thank you, Your Honor.

THE COURT: Thank you.

Anything else, Ms. Montgomery, as far as examination?

MS. MONTGOMERY: No, Your Honor. I have no further questions.

THE COURT: All right. Mr. Phillips, or anyone else, any recross on that redirect?

No? All right. Thank you.

All right. This —

MR. PHILLIPS: No, Your Honor. I muted myself again. No, Your Honor.

THE COURT: Okay. Is that all of the evidence you're going to present, Ms. Montgomery?

MS. MONTGOMERY: It is, Your Honor.

THE COURT: All right. Well, I'll turn to our objectors —

MR. PHILLIPS: We —

THE COURT: I'm sorry?

MR. PHILLIPS: We'd like the enter and offer — we'd like to offer and introduce our exhibits that we put on our witness and exhibit list, Your Honor.

THE COURT: Okay.

MR. PHILLIPS: And we've submitted them to the Court, Exhibit 1 through 6, as itemized in our witness and exhibit list.

THE COURT: All right. This is Docket Number 52 in the adversary, correct?

MR. PHILLIPS: Yes. Yes, ma'am.

THE COURT: All right. So let me pull it up here. Okay, we've got the application to employ Teneo and different emails.

Any objection, Ms. Montgomery, to this?

MS. MONTGOMERY: I have no objection to Exhibit 1, Your Honor, the application, and obviously it's a pleading that we filed. I have questions about the relevance of the other exhibits, but I have no objection to their admission. They're emails that went back and forth between the parties.

THE COURT: All right. Well, do you want to address that relevance? I'm not sure if it was an objection or — was it an objection ultimately? Was it —

MR. PHILLIPS: I didn't hear an objection, Your Honor.

THE COURT: Ms. Montgomery.

MS. MONTGOMERY: Your Honor, for purposes of today's hearing, I have — I have no concerns about their admission for your consideration.

THE COURT: Oh, okay, so —

MS. MONTGOMERY: We're not contesting the history of the back-and-forth between the parties.

THE COURT: Okay. I will admit 1 through 6.

(Defendants' Exhibits 1 through 6 received in evidence.)

THE COURT: All right. Any — any other evidence from our defendants?

MR. PHILLIPS: No, Your Honor.

THE COURT: All right. Well, anything in the way of closing argument? Ms. Montgomery, you are the movant. You go first.

MS. MONTGOMERY: Yes, Your Honor, just very briefly to address a couple of points. First of all, I think that there's been some sort of misconstruing of Mr. Kirschner's role as the litigation advisor and ultimately the litigation trustee. He — functionally, the litigation advisor — we're in a very unique situation here.

The parties never expected that the effective date would be delayed in the way that it has been. We're coming up on the two-year anniversary of the filing of the proceedings. There are a number of claims that need to be investigated and decisions make about how they will be pursued in the next couple of months. And so this litigation advisor role, as Mr. Kirschner testified, is somewhere unique in that we're trying to work around the constraints that have been created by the way that these proceedings have moved forward.

The litigation advisor is really functionally a proxy for the role that Mr. Kirschner will have upon the effective date of the plan as litigation trustee. He's not acting in the capacity of a law firm or like and FTI or a DSI, or any of the other professionals that have been specifically retained in the bankruptcy to date because the role isn't the same traditional role. Right, he is functioning in a way that will allow him access that he needs to the data to get up to speed to make the decisions that have to be made so that he can, you know, proceed in the way that is best for meeting his fiduciary duties to the ultimate litigation subtrust.

So to the extent that there is any sort of argument that, you know, he — that his role is duplicative or any of the other things that we've heard today or that we've seen in the response, I think that those are just a misunderstanding of what he will actually be doing. He is going to be the client, Your Honor. He is not going to be the lawyer.

The other thing I think that we talked about a bit is, you know, this argument that Mr. Kirschner has been involved in the case since April 15th and therefore he's had plenty of time to understand everything that he needs to know to be able to move forward. Technically, Your Honor, I think it goes without saying he's not officially retained until after the return date on the motion to withdraw. And even so, just based on the years now that we've spent in this case, I can — I can argue to you

and I think Your Honor will feel the same way, there's too much learn in that short a time period to be able to say that you are proceeding in the way that is going to be best for the estate in that short timeframe.

We're working to get Mr. Kirschner up to speed, the debtor is working to get Mr. Kirschner up to speed, but there is a lot that has happened here and that continues to change on a daily basis, including the stay that was filed just last night.

And then, finally, Your Honor, I would argue that there has been no harm established by virtue of the stay. And, in fact, all of the things we've heard today established the fact that there may be harm if the stay is denied. So, for example, Your Honor you know very correctly pointed out that we have two international defendants who haven't even appeared at this proceeding yet, right. We may not effectuate service for another two months. It may be another 60 of these 90 days that we're requesting for a stay may be required just to get them properly served and into this proceeding.

And, you know, I agree, Your Honor, that there may be issues that surround those two defendants that, you know, we won't be able to take into consideration until they're properly here in the Court and able to file their own motion to withdraw, if that's what they want, or state their position with regard to it.

You know, Your Honor, moreover, there is a lot going

on here and Mr. Kirschner does realistically need time to be able to develop his approach and make decisions about whether or not there will be amendments to the complaint that could impact the motion to withdraw. He needs to make decisions about other claims that may be brought. There are a lot of moving parts. It's a unique situation. And we would urge the Court to allow him the time that he needs to be able to effectuate his duties in the way that he sees fit.

THE COURT: And I know I have it right in front of me, but the employment application for Mr. Kirschner and his firm to potentially be litigation advisor until the plan goes effective, when is that set for hearing?

MS. MONTGOMERY: It's set for June 7th, Your Honor, and the motion to withdraw is currently set for June 3rd. And that — that motion to retain Mr. Kirschner was only filed on Friday of last week, and our motions that you're hearing today were filed on Tuesday.

THE COURT: Okay.

MS. MONTGOMERY: So it's a very short delay of time between the two.

THE COURT: All right. I'll hear other closing arguments.

MR. PHILLIPS: Your Honor, thank you. As far as harm, we have one — we have one client, Highland Dallas Foundation, who has made no appearance in this case, as has very — and

assume they're being sued for $24 million, and that's not a problem.

Under the argument structure we're hearing today, we could never really get until a plaintiff has said, 'I have no further ability to amend the complaint,' a hearing on a motion to withdraw reference. Look, we didn't file the complaint. The complaint was filed four or five months ago. And very able counsel looked, and as counsel has argued, has looked at thousands and thousands of documents, have been paid millions and millions of dollars for its work, and it came up with this lawsuit that was filed — I've forgotten the filing date, but it was filed at least four and a half months ago, January of this year I believe. Ms. Montgomery — counsel for plaintiff can say the exact date.

But we've got two defendants who haven't been served, but I've got one — I've got two that have been served. And we have established a basis upon which we can get — we have a right to a jury trial and a right to withdrawal of the reference. And that motion has been filed. And the idea that I'm going to bring — I'm going to change clients — and it's really complicated. After we've done millions and millions and millions of dollars worth of work, looked at thousands and thousands and thousands of documents, that we may come in and do a different lawsuit that pleads around a motion to withdraw reference is no basis for a stay.

That — that — the narrative about, you know, the hearsay, the narrative about the aspersions, the this and the that, this is really complicated, this is really hard, well, we have a lawsuit in front of you, Your Honor, and it's been pending for months. And it was filed by the committee that had authority to file it and it was filed by the law firm for the committee that had authority to represent the client who filed it. And that's what they came up with after months and months and months of years of looking at stuff and looking at documents and deciding what to bring as far as claims of this nature against these defendants. I'm worried about two of them.

I'm worried about — particularly worried with respect to the stay, I'm worried about both of them for — with respect to the stay, but one of my clients, Highland Dallas Foundation, has had no involvement in this bankruptcy case. And now let's just wait around. It's got a $24 million cloud hanging over its head and it's expected to continue to try to raise money and try to act as a charity while — while Mr. Kirschner gets familiar — refamiliarized and gets familiar with the situation where counsel and the committee have been working for, what, a year and a half, two years, to get ready, and here's what the lawsuit — here's the lawsuit they came up with.

So no harm has been alleged. In fact, harm will be — all you heard about the potential harm to the estate is that notwithstanding millions and tens of millions of dollars of fees

paid to professionals to determine litigation claims and we have barely, what, two months left to bring them? That's 22 months worth of looking into things, millions and millions of fees. The estate might be irretrievably harmed if a motion to withdraw reference moves forward, when the committee and counsel were responsible and filed this complaint, and they were responsible to file the complaint under the transaction and occurrences, standards such that whatever they haven't pled, whatever they haven't pled by the time to plead is gone. And the idea that we need another 22 months for Mr. Kirschner to get up to speed or some other to come up with additional litigation and additional amendments to postpone a withdrawal of reference means that you can never get a hearing on a withdrawal of reference.

We think the pleadings are there. They have been — they have been investigated, we assume. They're subject to motions to dismiss, which are legal questions. They're subject to motions to withdraw reference, which are legal questions. And we're ready for a decision on what court's going to handle this. And by the time that's done, Mr. Kirschner will have whatever rights he has, as if he has any. The plan will either be confirmed and effective or it won't be, but that's not our problem. Thank you.

THE COURT: Any other closing arguments?

Going once, going twice.

MR. ASSINK: Your Honor, I apologize. Just for the

record, this is Bryan Assink for Mr. Dondero. And Mr. Dondero joins in the objections made by defendants in this proceeding and adopts the arguments made by Mr. Phillips. That is all, Your Honor. Thank you.

MR. DRAPER: Your Honor, can the Court hear me?

THE COURT: Yes.

MR. DRAPER: This is Douglas — okay. What I'd like to make, a short comment. The argument that there are unserved parties is a red herring and it's a red herring for the following reason. The Court has to go through each defendant to determine if they have a right to — a right to withdraw a reference. The facts with respect to Mr. Phillips' clients are different than the facts with respect to my clients. So the two unserved parties may have a right to do it, they may not, but it doesn't affect your ruling with respect to Mr. Phillips' clients or mine because we have either waived or didn't waive our right to a jury trial. And so this argument that there's two other parties out there, again, is a red herring. They have their own right and it will not affect Mr. Phillips' right or mine. So I think that needs to be taken into account.

And, again, all we're talking about is location. The — if they want to amend their suit at a later point, that's fine, but we are just talking about who's going to hear the case. And, quite frankly, Mr. Phillips is right, I don't think the Court can in a very short period of time unpack these

withdrawal issues. And so you may be looking at a recommendation that you make that takes 30 or 60 days. We don't know what the District Court's going to do with it. And, quite frankly, you know we may be 90 or 120 days down the road before the location is even determined.

That's all I have to say, Your Honor.

THE COURT: All right. Anyone else?

THE RULING OF THE COURT

THE COURT: All right. I'll just be honest, I've tried hard to understand where everyone is coming from here, but this has been yet another hearing where I just frankly don't understand why the big fight, why all the papers, and why all the Court time used.

I mean I think I hear everyone agreeing that the plaintiff is essentially going to get its/his 90-day stay here. I mean if I were to go forward on the motions, plural, motions to withdraw the reference, let's be real, it's going to take: This Court two or three or four weeks to get a report and recommendation to the District Court, given the complexity here of the parties and, you know, we try to do a very clear roadmap for the District Court, what's this lawsuit about, who are the parties; and then it's going to take a few weeks for the District Court to rule on that. So I mean optimistically, the most optimistic thing I can imagine is 60 days from now you have an order from the District Court saying where the lawsuit's

going to go forward.

I mean so we're fighting, to me, over a big nothing burger. I think the stay is, in effect, going to happen. So all we're talking about here is pushing a plaintiff to go forward, who at this point is working for free because the plan hadn't gone effective and he hadn't been appointed. I mean it seems like from my perspective the defendants — again I'm trying to understand the practicalities here, but I'm going to be honest, it almost feels like defendants tweaking with the future litigation trustee, 'We're going to make you go forward and work for free when at the end of the day you're probably going to get a stay anyway,' because there's no way a district judge is going to rule on this in much sooner than 90 days. It's like you're just forcing him to work for free and move fast on the motion to withdraw the reference.

And it is a red herring? I don't know, maybe. I think likely this is ultimately going to be tried in the District Court since certain parties haven't filed proofs of claim. But if the District Court does what it always does, in my experience, I've never had, I can't remember ever having a district court say, 'I'm withdrawing the whole darn thing.' They almost always use the — they almost always use the bankruptcy judges as their magistrates in a case when they withdraw the reference.

Bankruptcy judge, handle all the pretrial stuff, the

discovery disputes, the motions to dismiss, motions for summary judgment. If you were on a motion to dismiss or a motion for summary judgment in a way that would finally dispose of any claims, well, you have to do that in a report and recommendation to me. So I feel like we all know that's likely where this is heading, so I don't know why we had to have an hour fight.

I don't know why it's any big shakes to just stay the whole darn thing for 90 days, especially when we have the whole reason the plaintiff, liquidating trustee is not in place yet, because of a stay, that some of these defendants or their affiliates have wanted. It just seems silly to me.

And I do want to address one other thing. There has been an argument that Sidley and Austin and the committee have had months to get up to speed on the issues in the lawsuit, they had months to bring it. It's been pending months. But I'll say something for the benefit of those who have not been around for this whole case, in July of last year, July 2020, which by that point was about 10 months into the case, it was front and center to this Court the difficulty the committee was having getting discovery. They had served four requests for production, going back to before this case was even pending before me. When the case was in Delaware, they were already filing, serving requests for production of documents, wanting to get a protocol in place for ESI, and then finally it all kind of came to a head in July.

And I remember saying, 'I'm sure there's a transcript

out there you can access.' Gee, I may not have pressed the issue so much on this lawsuit being filed involving CLO Holdco. I may not have pressed the committee's feet to the fire so much on getting that filed if I had been fully aware at all of these efforts going on outside of the Court to get documents, to get documents, four requests for production, and then finally the protocol order, if you will, that the committee filed, asking this Court to put in place some protocol to get ESI from like nine different custodians of debtor records. So my point is those who have not lived with this case for the whole time, they don't know that I kind of live to regret pressing the committee to get this lawsuit on file. You know I was worried because of Holdco. I had like ordered money to be put in the registry of the Court before I had, you know, litigation pending. So that's why I put pressure. But then I learned and had a multi-hour hearing on what the committee had gone through trying to get documentation. So that's very much in the back of my mind here in my ruling.

And my ruling is going to be that I grant the 90-day continuance. Again, I hope that in 90 days, we — I don't know if we'll know something from the Fifth Circuit on the plan or not, but at least we'll be closer to that point. And, again, we're looming, you know October 16th, 2021 as a deadline for bringing claims, and I think that's relevant here. There's a lot to be focused on that may or may not impact the way this

lawsuit ultimately is mapped out. I think the fact that we have two unserved defendants, I think it does matter.

I think a district court may be a little hesitant, really want to see the complete picture on each defendants' position before it rules. So the 90-day stay is granted.

All right. So please upload the order, Ms. Montgomery.

Thank you, all, for your arguments.

Before we wrap it up, Mr. Clubok, if you're still with us, I think you were hoping to raise something that might pertain to tomorrow's hearing on the UBS debtor compromise. If you're still there, you may speak to whatever it was you wanted to present.

MR. CLUBOK: Good morning, Your Honor. Still — still the morning. Hopefully you can hear me.

THE COURT: I can.

MR. CLUBOK: Your Honor, I'm really just previewing an issue. In light of the comment that you made earlier today about having this motion, discovery, and then folks not previewing it, I just wanted to alert you to the fact that in our adversary proceeding we have sought discovery against five third parties, Scott Ellington, Isaac Ellington, three other folks, all of whom are represented by Ms. Smith, who is here, you can see. And we first sought —

MS. SMITH: This is Frances Smith. Your Honor,

Frances Smith on behalf of Mr. Ellington, J.P. Sevilla, Mr. Isaac Leventon, Matt VRO, and Mary Catherine Lucas (phonetics).

I just received an email earlier this morning from Mr. Clubok that he was going to do this preview for you. To the extent he gets into the substance of any motions that are not filed, that's inappropriate. And so —

THE COURT: Okay.

MS. SMITH: — if he wants to take Your Honor offer of a preview to say what he is going to file, I'm fine with that. But if he's going to start going into the substance, that is not appropriate.

THE COURT: Okay. We'll let Mr. Clubok get a little further into what he was going to say, and then we'll decide do we need to cut it off.

Mr. Clubok, go ahead.

MR. CLUBOK: Thank you, Your Honor. I was about to say that there were five — there's the five individuals that Ms. Smith represents, we sought discovery from in April 2nd, and, namely, depositions. After a long period of time culminating in a meet-and-confer last week, Ms. Smith filed a motion to quash on behalf of these five individuals on Monday and set a hearing date for July 29th.

All I'm — all I'm previewing, Your Honor, is to alert you that in response to that motion to quash, a hearing date set for July 29th, so effectively will end up being, you know,

months and months of delay to these individuals who are needed to move this conjunctive-relief proceeding forward, we are filing our response today to Ms. Smith's motion and a countermotion to compel. And I'm merely flagging this issue for Your Honor because we are going to ask either Your Honor or Ms. Ellison, we're going to style our motion as an expedited request, we would just simply love to have a hearing as early as reasonably practicable on these issues. And I have no intention of getting into the merits now, but happy to do so. I think it will all be familiar to you from their discussions in the Dondero deposition dispute, but we just — or simply I'm just flagging for you, because you raised it this morning, you know, why didn't people tell me, so we just are going to ask the hearing, the soonest-possible hearing, and I don't think it has to be a very long hearing, on whether or not we get third-party discovery, depositions of Mr. Ellington, Mr. Leventon, and the other three individuals that Ms. Smith represents; subject to one of them is on maternity leave, and we're going to be pursuing discovery of that while she's in that state, but —

THE COURT: All right.

MR. CLUBOK: — but other than that we just ask that a hearing to be scheduled. And I'm just alerting you that we're going to be making that request.

THE COURT: Okay. Well, I have been forewarned. I have been forewarned. And I'll wait to see the motion for

expedited hearing and decide if I think it's appropriate to give an expedited hearing, okay? I'll look at the pleadings and likely just rule on the pleadings on the timing, okay?

Thank you.

MR. CLUBOK: Your Honor, —

MS. SMITH: Your Honor, since we're previewing, we will be filing a response to that as well.

THE COURT: All right.

MS. SMITH: Thank you, Your Honor.

COURT SECURITY OFFICER: All rise.

(The hearing was adjourned at 11:45 o'clock a.m.)

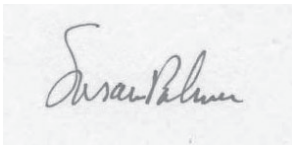
—o0o—

State of California)
) SS.
County of San Joaquin)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of Texas, Office of the Clerk, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

I am a Certified Electronic Reporter and Transcriber by the American Association of Electronic Reporters and Transcribers, Certificate Nos. CER-124 and CET-124. Palmer Reporting Services is approved by the Administrative Office of the United States Courts to officially prepare transcripts for the U.S. District and Bankruptcy Courts.



Susan Palmer
Palmer Reporting Services

Dated May 22, 2021

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

Signed May 27, 2021

United States Bankruptcy Judge

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

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054 (SGJ)
	§	
Debtor.	§	
	§	
OFFICIAL COMMITTEE OF UNSECURED CREDITORS	§	
	§	
Plaintiff,	§	
	§	
vs.	§	Adversary No. 20-03195
	§	
CLO HOLDCO, LTD., CHARITABLE DAF HOLDCO, LTD., CHARITABLE DAF FUND, LP, HIGHLAND DALLAS FOUNDATION, INC., THE DUGABOY INVESTMENT TRUST, GRANT JAMES SCOTT III IN HIS INDIVIDUAL CAPACITY, AS TRUSTEE OF THE	§	

DUGABOY INVESTMENT TRUST, AND AS TRUSTEE OF THE GET GOOD NONEXEMPT TRUST, AND JAMES D. DONDERO,	§ § § § §
Defendants.	§

ORDER ADDRESSING POST HEARING MEMORANDUM SUGGESTING ERROR BY THE COURT [DE # 57]

The court previously held a hearing on the Official Committee of Unsecured Creditors' *Emergency Motion to Stay the Adversary Proceeding for Ninety Days* [DE #46] on May 20, 2021. The court heard arguments from the Plaintiff, the Unsecured Creditors Committee (the "UCC"), in support, and opposing arguments from counsel representing the various Defendants CLO Holdco, Ltd., Highland Dallas Foundation, Inc., the Dugaboy Investment Trust, the Get Good Nonexempt Trust, and James Dondero. The court issued an oral ruling at the Hearing granting the UCC's Motion for a 90-day stay of the Adversary Proceeding. On May 24, 2021, the *Order Granting the Official Committee of Unsecured Creditors' Emergency Motion to Stay the Adversary Proceeding for Ninety Days* [DE # 62] was entered.

Prior to the Order being uploaded, on May 21, 2021, counsel for CLO Holdco, Ltd. and Highland Dallas Foundation, Inc. filed a *Post Hearing Memorandum Suggesting Error by the Court* [DE # 57]. While the filing was not labeled as a motion for reconsideration or a motion for rehearing, the conclusion of the Post-Hearing Memorandum essentially states a request that the court reconsider its determination and deny the stay granted to the UCC.

Under Rule 59 of the Federal Rules of Civil Procedure a court may order a new trial or amend its judgment upon a motion. Rule 59 is made applicable to the Adversary Proceeding through Bankruptcy Rule 9023, applying Rule 59 to cases under the Bankruptcy Code. Rule 59 motions "serve [two] narrow purpose[s] of allowing a party 'to correct manifest errors of law or

fact or to present newly discovered evidence.'" *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989). A Rule 59 motion is "not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 478–79 (5th Cir.2004) (citing *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)).

To the extent the Post-Hearing Memorandum is, in essence, a motion pursuant to Rule 59 of the Federal Rules of Civil Procedure and Bankruptcy Rule 9023, the court finds the arguments made in the Post-Hearing Memorandum insufficient to suggest a manifest error of law or fact; nor do the arguments present newly discovered evidence. As such, the court denies any motion brought pursuant to Rule 59 and Bankruptcy Rule 9023 to reconsider the Order Staying the Adversary Proceeding made through the Post-Hearing Memorandum. Therefore, it is

ORDERED that, to the extent counsel for CLO Holdco, Ltd. and Highland Dallas Foundation, Inc. seeks to bring a motion pursuant to Rule 59 of the Federal Rules of Civil Procedure and Bankruptcy Rule 9023 to reconsider or rehear the Order Staying the Adversary Proceeding, it is hereby **denied**.

END OF ORDER