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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	§ § § § § § §	Bankruptcy Case No. 19-34054
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. NEXPOINT ADVISORS, L.P., Defendant.	§ § § § § § § § § § § § §	Adversary Proceeding No. 21-03005 Civil Action No. 3:21-cv-00880-C

DEFENDANT'S LIMITED OBJECTION TO REPORT AND RECOMMENDATION

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TO THE HONORABLE SAM R. CUMMINGS, U.S. DISTRICT JUDGE:

COMES NOW NexPoint Advisors, L.P. (the "Defendant"), the defendant in the above-styled and numbered bankruptcy adversary proceeding (the "Adversary Proceeding") filed by Highland Capital Management, L.P. (the "Plaintiff"), and files this its *Limited Objection* (the "Objection") to the *Report and Recommendation to District Court Proposing That It: (A) Grant Defendant's Motion to Withdraw the Reference At Such Time As Bankruptcy Court Certifies That Action Is Trial Ready; and (B) Defer Pretrial Matters To Bankruptcy Court* (the "Report and Recommendation"), respectfully stating as follows:

I. SUMMARY

1. The Defendant objects to the Report and Recommendation to the extent that the Bankruptcy Court recommends that it retain this Adversary Proceeding for pretrial matters and until this Adversary Proceeding is certified as ready for trial. Because *this* Court will conduct the jury trial, *this* Court should consider all pretrial matters as they will inevitably dictate to some degree the jury trial. Moreover, because this Adversary Proceeding is not core, the Bankruptcy Court cannot adjudicate any dispositive motion and it would be a waste of both courts' resources and the parties' resources to go through any such practice. For these reasons, and also because of the Bankruptcy Court's apparent bias against the Defendant, this Court should immediately withdraw the reference of this Adversary Proceeding.

II. BACKGROUND

2. On October 16, 2019, Highland Capital Management, L.P. (the "Debtor"), founded by Mr. James Dondero, filed bankruptcy in Delaware.[1] The Debtor's creditors, including Acis Capital Management, L.P. (a debtor in a previous bankruptcy case before the Bankruptcy Court involving Mr. Dondero), moved to transfer this bankruptcy case to the

[1] R. 2382, the December 3, 2019 Transcript - Motion to Transfer, at 78:21-23 (R. 2459).

Northern District of Texas seeking to have it assigned to the Bankruptcy Court. During the hearing, the Debtor's current lead bankruptcy counsel, Jeffrey Pomerantz, acknowledged that a "fresh start" in the Delaware Bankruptcy Court was needed because the Bankruptcy Court in the Northern District of Texas had pre-existing, negative views of Debtor's management, including Mr. Dondero as a result of the Acis bankruptcy.[2] Nonetheless, on December 4, 2019, the Delaware Bankruptcy Court transferred the case to the Northern District of Texas where it was assigned to Judge Jernigan, who also presided over the Acis Bankruptcy.[3] *See* Bankr. Dkt. No. 1.

3. The Defendant is a registered investment advisor that advises many third-party investors with respect to their investments. Mr. Dondero manages and controls the Defendant and, to a degree, owns interests in the Defendant.

4. On January 22, 2021, Debtor commenced the present Adversary Proceeding against the Defendant, asserting a state law, non-core breach of contract claim on account of alleged promissory notes owed by the Defendant to the Debtor in the approximate amount of $23,071,195.03, and an entirely dependent turnover claim under 11 U.S.C. § 542(b) for the amounts allegedly owed on the notes. The Defendant did not consent to the Bankruptcy Court entering a final judgment in the Adversary Proceeding and the Defendant timely and property demanded a trial by jury.

5. On March 18, 2021, the Defendant, Mr. Dondero, and others filed their Motion to Recuse Bankruptcy Judge Jernigan, together with a supporting 37-page Brief and supplemental materials (consisting of 2,722 pages) [Bankr. Dkt. Nos. 2060-2062] seeking to recuse Judge

[2] *Id.* at 77:18-22 (R. 2485). "[T]he committee and Acis are really being disingenuous, and they have not told you the real reason that they want the case before Judge Jernigan. . . .It is because she formed negative views regarding certain members of the debtor's management that the committee and Acis hope will carry over to this case." *Id.* at 78:3-8 (R. 2459).

[3] *Id.* at 90:15-24 (emphasis added) (R. 2471). In fact, Mr. Pomerantz specifically referred to the Bankruptcy Court's opinions of Mr. Dondero as "baggage." *Id.* at 79:14-20 (emphasis added) (R. 2460).

Jernigan in all adversary proceedings filed by the Debtor against the movants, including the Defendant. Five days later, without holding a hearing, the Bankruptcy Court entered the *Order Denying Motion to Recuse Pursuant to 28 U.S.C. § 455* [Bankr. Dkt. No. 2083].

6. The Defendant, Mr. Dondero, and others subsequently appealed to this Court the Bankruptcy Court's denial of their recusal motion. *See* Case 3:21-cv-00879-K at Dkt. No. 16. The appeal remains pending.

7. On April 13, 2021, the Defendant filed its motion to withdraw the reference of this Adversary Proceeding, based on this Adversary Proceeding being non-core and based on the Defendant's jury rights. The Debtor subsequently objected, arguing, remarkably, that the turnover action in Count II was core and that this action predominated; *i.e.* that the Bankruptcy Court could liquidate disputed promissory note claims through a turnover action.

8. After a contested hearing, the Bankruptcy Court entered its Report and Recommendation on July 8, 2021, agreeing: (i) that this Adversary Proceeding is non-core; (ii) that the Defendant has valid jury rights which it has not waived; and (iii) therefore, that the Bankruptcy Court cannot enter a judgment in this Adversary Proceeding, thus necessitating a withdrawal of the reference. However, the Bankruptcy Court recommended that it retain the Adversary Proceeding, including for all pretrial matters, under this Adversary Proceeding is certified as trial ready. As reported and recommended by the Bankruptcy Court:

> In light of: (a) the noncore, related-to claims in the Complaint; (b) the lack of a proof of claim or any other claim related to the Notes asserted by HCMFA-Defendant; and (c) the lack of any other consent by HCMFA-Defendant to the equitable jurisdiction of the bankruptcy court related to the Notes, the bankruptcy court recommends the District Court: refer all pre-trial matters to the bankruptcy court, and grant the Motion upon certification by the bankruptcy court that the parties are trial-ready.
>
> With regard to such pretrial matters, the bankruptcy court further recommends that, to the extent a dispositive motion is brought that the bankruptcy court

> determines should be granted and would finally dispose of claims in this Adversary Proceeding, the bankruptcy court should submit a report and recommendation to the District Court for the District Court to adopt or reject.

Report and Recommendation at p. 12.

III. ARGUMENT

A. Judicial Economy Favors Immediate Withdrawal of the Entire Adversary Proceeding Because of the Certainty of Dispositive Motion Practice Combined with the Right to a Jury Trial

9. This Court should withdraw the reference of the Adversary Proceeding immediately and *in toto*.

10. Here, the Bankruptcy Court lacks jurisdiction to rule on a dispositive motion such as a motion to dismiss or a motion for summary judgment. Thus, any ruling by the Bankruptcy Court on any such motion will result only in proposed findings and conclusions, reviewable *de novo* in this Court. *See* 28 U.S.C. § 157(c)(1). Because this is a case in which it is likely that the Debtor will initiate dispositive motion practice, considerations of efficiency weigh in favor of withdrawing the reference early to enable the district court to hear the dispositive motion. *In re Gulf States Long Term Acute Care of Covington, L.L.C.*, 455 B.R. 869, 877 (E.D. La. 2011) ("Given the need for a jury trial in this case, it would be inefficient to allow pretrial motion practice to continue in the bankruptcy court, delaying the eventual referral of claims to this Court for resolution at trial.").

11. Numerous courts within the Fifth Circuit, including this Court, have held that judicial economy favors immediate withdrawal of the reference where, as here, a bankruptcy court cannot enter final orders or judgments on dispositive motions, and instead can only issue proposed findings of fact and conclusions of law:

> Judicial economy will not be sacrificed by the withdrawal. Rather, adjudicating all of the claims, both core and non-core, in the district court eliminates the

> prospect of an appeal from the bankruptcy judge's adjudications of core claims, and dispenses with the need for the district court to conduct a de novo review of proposed findings and conclusions of the bankruptcy judge after a trial in the bankruptcy court as to non-core claims. And, for the same reasons, withdrawal of the reference will foster the economical use of the resources of the litigants.

In re Mirant Corp. v. S. Co., 337 B.R. 107, 122 (N.D. Tex. 2006). *Accord Guffy v. Brown (In re Brown Med. Ctr., Inc.)*, No. BR 15-3229, 2016 WL 406959, at *4 (S.D. Tex. Feb. 3, 2016) (overruling bankruptcy court's report and recommendation to maintain the proceeding in the bankruptcy court for pretrial matters and instead ordering immediate withdrawal of the reference).

12. Withdrawing the reference now promotes judicial economy, as it will enable this Court to have the familiarity necessary to make key trial determinations on the more complex evidentiary and expert issues that arise in a jury trial. Moreover, because the trial of this Adversary Proceeding will be to a jury, this Court should not risk the Bankruptcy Court's determination of pretrial mattes, such as motions *in limine*, tying in any way this Court's hands. Simply put, while the Bankruptcy Court is certainly an expert on bankruptcy law and practice, this Adversary Proceeding does not involve the bankruptcy laws, and the Bankruptcy Court is certainly no expert on jury trials and jury practice. Or, if this Court will necessarily review *de novo* all pretrial orders entered by the Bankruptcy Court as this Court prepares for trial, it would be a gross waste of the Bankruptcy Court's resources, this Court's resources, and the parties' resources to prepare, review, and contest any such orders.

B. The Appearance of Bias Supports the Immediate Withdrawal of the Reference

13. Withdrawing the reference immediately will also ameliorate any appearance of bias arising out of the Bankruptcy Court making pre-trial rulings, including a dispositive motion concerning millions of dollars in disputed obligations involving a party who is appealing that

same Bankruptcy Court's denial of a recusal motion. *Cooley v. Foti*, No. CIV.A. 86-3704, 1988 WL 10166, 1988 U.S. Dist. LEXIS 1131 at *5 (E.D. La. Feb. 5, 1988) (finding the magistrate judge's personal "bias constitutes extraordinary circumstances and justifies the withdrawal of the [analogous] § 636[] references"). In *Cooley,* the District Court, in making its determination that there was sufficient reasons to justify vacating a reference to a magistrate judge based on the "possibility of bias or prejudice," found that the "magistrate evidenced a degree of anger so pervasive as to amount to personal bias, even though it had its origin in litigation before the magistrate." *Id.* at **5-6. The evidence of bias in that case included, among other things, *sua sponte* actions by the magistrate requiring the requesting party to show cause why he should not be sanctioned for filing answers and defenses that did not "fairly meet the substance of the averments denied." *Id.* at 3. The actions in this case similarly demonstrate, at a minimum, a possibility of bias or prejudice.

14. For example, as detailed in the Appellate Brief filed in the recusal appeal,[4] the Defendant contends the Bankruptcy Court entered the Highland bankruptcy case with negative opinions of Mr. Dondero and all entities affiliated or controlled by him, and that this predisposition "manifested itself in actions that impaired Appellants' legal rights; favored Appellants' opponents; and created, at a minimum, the clear perception that the Bankruptcy Court was unwilling to act impartially where Mr. Dondero and the Affected Entities were concerned." Specifically, among other things, the record reflects that the Bankruptcy Court has:

[4] Appellants' Brief (filed by James Dondero, Highland Capital Management Fund Advisors LP, NexPoint Advisors LP, NexPoint Real Estate Partners LLC, The Dugaboy Investment Trust, and The Get Good Trust) at p. 15 (citations omitted), Case No. 3:21-CV-00879-K, attached to the Aigen Declaration as Exhibit 4 [Appeal Dkt. No. 16].

(a) repeatedly made negative statements about Mr. Dondero and questioned Mr. Dondero's credibility before he ever testified; [5]

(b) summarily disregarded the testimony of any witness favorable to Mr. Dondero and the Defendant as 'under [Mr. Dondero's] control' and *per se* not credible;[6]

(c) repeatedly concluded, without evidence, that any entity the Bankruptcy Court deemed associated with Mr. Dondero was essentially an agent and no more than a pawn of Mr. Dondero;[7]

(d) declared that Mr. Dondero and his 'controlled entities' are vexations litigants because: (i) they defended lawsuits and motions filed against them; and/or (ii) have asserted valid legal positions (including to preserve their and the Affected Entities' legal rights on appeal);[8]

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[5] For example, on February 19, 2020, the Bankruptcy Court held a hearing on Debtor's application to retain a law firm to, among other things, appeal an order against Neutra Ltd. ("Neutra") (a company owned by Mr. Dondero). While former Bankruptcy Judge Russell Nelms (one of the Debtor's independent directors) determined that engaging the firm to represent Neutra was in the Debtor's best interest, the Bankruptcy Court concluded, without evidence, that Debtor's fully independent board was being unduly influenced by Mr. Dondero. At the same hearing, the Bankruptcy Court indicated that it believed Mr. Dondero lacked credibility even though, at that point in time, Mr. Dondero had not yet testified. *See* February 19, 2020 Transcript at 38:22-39:17; 62:6-17; 177:7-178:3; 174:22-175:1, a true and correct copy of which is attached to the Aigen Declaration as Exhibit 5.

[6] *See, e.g.,* February 22, 2021 Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief [Bankr. Dkt. No. 1943] at p. 19 ("At the Confirmation Hearing, Mr. Post testified on behalf of the Highland Advisors and Funds that the Funds have independent board members that run the Funds, but the Bankruptcy Court was not convinced of their independence from Mr. Dondero merely because none of the so-called independent board members have ever testified before the Bankruptcy Court and all have been engaged with the Highland complex for many years. Notably, the Court questions Mr. Post's credibility because, after more than 12 years of service, he abruptly resigned from the Debtor in October 2020 at the exact same time that Mr. Dondero resigned at the Board of Directors' request, and he is currently employed by Mr. Dondero."); *see also* January 8, 2021 Transcript, at 175:8-176:25, a true and correct copy of which is attached to the Aigen Declaration as Exhibit 6. Mr. Post is not employed by Mr. Dondero. Rather, he serves as an officer of various entities affiliated with Mr. Dondero, including the Defendant. This is further evidence that the Bankruptcy Court simply disregards the corporate form for any entity affiliated with Mr. Dondero.

[7] February 8, 2021 Transcript at 13:17-24; 20:18-20; 21:18-22:3, a true and correct copy of which is attached to the Aigen Declaration as Exhibit 7.

[8] February 8, 2021 Transcript at 46:20-25, attached to the Aigen Declaration as Exhibit 7.

(e) issued a *sua sponte* order demanding that so-called 'Dondero-Affiliated Entities' disclose their ownership and control, including entities that have not appeared or filed anything in the Highland Bankruptcy;[9] and

(f) applied more favorable standards and rules to the Debtor than those it afforded to Appellants, including the Defendant.[10]

15. The Defendant notes the following in particular. On February 17, 2021, the Debtor filed yet another adversary proceeding against the Defendant and an affiliated company, Adversary Proceeding No. 21-03010.[11] The Debtor sought a permanent, mandatory injunction. The Bankruptcy Court set the injunction for trial on six days' notice. At the conclusion of the trial, the Bankruptcy Court denied the mandatory injunction as moot.[12] Notwithstanding such denial and the resulting loss of jurisdiction, as there was no case or controversy, the Bankruptcy Court nevertheless entered an order highly favorable to the Debtor, giving the Debtor all kinds of findings that were not even requested or the subject of the trial, and changing the Defendant's legal and contractual rights.[13] And, the Bankruptcy Court blamed the Defendant, not the Debtor, for forcing an all-day trial on something that never was an emergency and never was a live case or controversy, instead being obviously moot:

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[9] June 17, 2021 Order at p. 1 ("This Order is issued by the court sua sponte pursuant to Section 105 of the Bankruptcy Code and the court's inherent ability to efficiently monitor its docket and evaluate the standing of parties who ask for relief in the above-referenced case. More specifically, the Order is directed at clarifying the party-in-interest status or standing of numerous parties who are regularly filing pleadings in the above-referenced 20-month-old Chapter 11 bankruptcy case.").

[10] Appellants' Brief (filed by James Dondero, Highland Capital Management Fund Advisors LP, NexPoint Advisors LP, NexPoint Real Estate Partners LLC, The Dugaboy Investment Trust, and The Get Good Trust) at p. 15 (citations omitted), Case No. 3:21-CV-00879-K, attached to the Aigen Declaration as Exhibit 4 [Appeal Dkt. No. 16].

[11] App. 88.

[12] App. 110.

[13] App. 106-110.

> I don't want you to think my calm demeanor means I am a happy camper. I am not. I am beyond annoyed. I mean, I can't even begin to guesstimate how many wasted hours were spent on the drafting Option A, Option B. Wait. Let me pull up the exact words. Mr. Norris confirming, We withdrew Option B after the Debtor accepted it.
>
> I mentioned fee-shifting once before in a different context, and, of course, we haven't even gotten to the motion for a show cause order declaring Mr. Dondero in contempt. I don't know if the lawyers fully appreciate how this looks. Mr. Rukavina, you said that I have formed opinions that you don't think are fair and made comments about vexatious litigation and whatnot. But while I continue, I promise you, to have an open mind, it is days like this that make me come out with statements that Mr. Dondero, repeating his own words, apparently, he's going to burn the house down if he doesn't get his baby back.
>
> I mean, it seems so obviously transparent that he's just driving the legal fees up. It's as though he doesn't want the creditors to get anything, is the way this looks. If he wants me to have a different impression, then he needs to start behaving differently. I mean, I can't even imagine how many hundreds of thousands of dollars of legal fees were probably spent the past two weeks on Option A, Option B, and all the different sub-agreements and whatnot. And as recently as Friday afternoon, the K&L Gates lawyer saying we have a deal, and then, oh, wait, maybe not, maybe we do, maybe we don't. And then Mr. Dondero acting like he had no clue what the K&L Gates lawyers were saying as far as we have a deal. And Mr. Norris distancing himself from having seen any of that, and I didn't have power. You know, I'm sure he had a cell phone, like the rest of us, that gets emails. I'm making a supposition. I shouldn't make that. But it just feels like sickening games.
>
> And again, if this keeps on, if this keeps on, one day, one day, there may be an enormous attorney fee-shifting order. And, of course, I would have to find bad faith, and I wouldn't be surprised at all if I get there.
>
> * * *
>
> [Addressing Jim Dondero] I'm glad you're on the line. I cannot overstate how very annoyed I am by hearing all these hours of testimony and to feel like none of it was necessary. None of it was necessary. Okay? There could have been a consensual deal.[14]

16. Instead of focusing on the all-day trial that was not needed and was forced by the Debtor, and at which the Defendant *prevailed*, the Bankruptcy Court instead focused on

[14] App. 118-120.

settlement negotiations and blamed Mr. Dondero, and therefore the Defendant, for not taking the Debtor's settlement proposal.

17. The Defendant has two primary defenses in this Adversary Proceeding. First, the Defendant contracted with the Debtor such that the Debtor handled all accounting needs for the Defendant, including ensuring that the Defendant timely pays its obligations. The Debtor alleges that the Defendant failed to make the annual payment under the promissory note at the end of 2020, which then caused the Debtor to accelerate the note. If so, then the Debtor was responsible for the default, as it was the Debtor that was contractually obligated to ensure that the Defendant made that annual payment; *i.e.* the Debtor caused the very default which it now seeks to exploit. Second, the underlying note was subject to a condition precedent, pursuant to which the note would be discharged upon the disposition at above cost of any of the portfolio company interests managed and/or owned, directly or indirectly, by the Debtor and/or its affiliates or managed funds. Indeed, when Dondero raised this affirmative defense in a separate adversary proceeding filed by the Debtor against him, the Bankruptcy Court itself suggested that the Debtor should then assert an action to avoid the discharge as a fraudulent transfer, thus further evidencing its bias against Mr. Dondero and any entity affiliated with him (and, indeed, the Debtor will be adding such a cause of action here against the Defendant).[15]

18. Thus, the credibility of the witnesses is a key issue in this Adversary Proceeding, especially concerning the note discharge defense, where the witnesses with knowledge of the condition subsequent are Mr. Dondero and his sister, Nancy Dondero. Resolving the adversary complaint will entail, among other things, prove of oral agreements to which Mr. Dondero was a party, determinations about the adequacy of Mr. Dondero's compensation, an examination of

[15] Appellants' Brief at 24-25 [Appeal Dkt. No. 16]; June 10, 2021 Transcript at 81:5-16 (App. 81); 83:1-12 (App. 83), a true and correct copy of which is attached to the Aigen Declaration as Exhibit 8; May 20, 2021 Transcript at 12:23 – 13:6, a true and correct copy of which is attached to the Aigen Declaration as Exhibit 3.

whether the potential compensation via loan forgiveness was properly structured for IRS purposes and the value of Mr. Dondero's performance at the Debtor. As the Bankruptcy Court appears to have a bias against Mr. Dondero, or at least that it has already formed the opinion that Mr. Dondero is not credible, the Defendant is reasonably, and deeply, concerned that the Bankruptcy Court will conclude *a priori* that its defenses are not credible and will act on pretrial matters with that bias or pre-existing conclusion. The Defendant does not propose to try the recusal matter through this Objection. However, all of these legitimate concerns about potential bias are best resolved by this Court simply doing what Congress intended: withdrawing the reference immediately and *in toto*.

C. This Adversary Proceeding Requires Substantial Consideration of Federal Tax Law That Has Wide-Ranging Implications, Which Requires Mandatory Withdrawal

19. In its underlying motion for withdrawal of the reference, the Defendant did not seek a mandatory withdrawal of the reference of this proceeding under 28 U.S.C. § 157(d) as a proceeding that involves the construction of both the Bankruptcy Code and other federal law, as the Defendant had not then asserted its note discharge defense. However, now that the Defendant is asserting that defense,[16] the mandatory withdrawal of the reference of this Adversary Proceeding also strongly favors the immediate withdrawal of the reference.

20. The likelihood of motion practice makes the need for mandatory withdrawal stronger. For example, in *Clinton v. Pilgrim's Pride Corp. (In re Pilgrim's Pride Corp.)*, the Bankruptcy Court recommended immediate withdrawal of the reference with respect to all proceedings because the disposition of a motion for summary judgment required the court's interpretation of a certain federal statute. Nos. 08-45664-DML, 4:09-CV-00386-Y, 09-04222-

[16] The Defendant's motion to amend its answer to assert this affirmative defense remains pending. However, the Debtor does not oppose such motion and the Defendant believes that the Bankruptcy Court will shortly authorize such amended answer.

DML, 2009 Bankr. LEXIS 2291, at *6 (Bankr. N.D. Tex. Aug. 12, 2009) (holding "I further recommend that withdrawal of the reference be immediate and with respect to all proceedings in the Adversary. Disposition of the MTD is likely to require interpretation of the PSA -- as will any other dispositive motions."). Similarly, here, this Court will be determining dispositive motions that involve federal tax statues.

21. A principal defense in the Adversary Proceeding is that the underlying note was modified by an agreement under which the note would be forgiven as compensation if certain achievements were met. To reconcile any optical confusion between the four corners of the Notes, and the subsequent agreement rendering the Notes forgivable, is rooted in tax law. For example, as discussed below, the issue of whether it is credible that the subsequent agreement under which the note was to be forgiven on the occurrence of certain conditions subsequent needs to be put in context with how loan-based deferred compensation is structured to be compliant with applicable tax law, including Internal Revenue Code sec. 61(a)(11).[17]

22. To clarify, the Defendant is not questioning the competency of the Bankruptcy Court to handle routine tax matters. On these claims, however, the fact-finder will ultimately need to hear fact and expert testimony about how loans are used as a deferred compensation device and how those devices are structured. Such analysis requires the Court to determine the particulars and nuances of the note, the circumstances and testimony regarding the creation of the note, testimony on the conditions subsequent and financial benchmarks resulting in the note becoming compensation, whether those conditions subsequent were met, how the funds from the note were ultimately treated, and by whom. *Salloum v. Comm'r of Internal Revenue*, 113 T.C.M. (CCH) 1563 (T.C. 2017). Placing perceived roadblocks to the use of a compensation method that is common in the financial services industry would have an adverse impact on competition

[17] Expert Report of Bruce A. McGovern, attached to the Aigen Declaration as Exhibit 2.

for top level professionals in the industry. Moreover, the note reference the existence of other "existing or hereafter arising" related agreements [Adversary Proceeding at docket no. 1, Exhibit 1, p. 2] that Mr. Dondero will testify related to the conditions under which the loan would be forgiven. As an understanding of the complex tax requirements for a bona fide note that also has the capacity to be deferred compensation is needed to adjudicate this proceeding, the issues should be adjudicated by this Court so that the Court is familiar with the issues and nuances when making a final decision on the dispositive motions and at trial.

23. There is no indication that these are the kind of tax matters that the bankruptcy court routinely hears. Indeed, Mr. Dondero has retained experts that will address the tax-related matters because both the Court and fact-finder jurors would be aided by experts familiar with how loan-based deferred compensation is structured to be compliant with tax law. These opinions bear on whether it is credible that the subsequent agreement here -- under which the loan was to be forgiven on the occurrence of certain conditions subsequent -- was made, by explaining why one would make such an agreement. Rather than duplicate the effort of determining these issues, the parties and judicial economy are better served by immediate withdrawal of the reference.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, and as originally requested by the Defendant in its motion to withdraw the reference, the Defendant respectfully requests that the Court enter an order immediately withdrawing the reference of the Adversary Proceeding for all purposes.

RESPECTFULLY SUBMITTED this 22d day of July, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 22d day of July, 2021, true and correct copies of this document were served on the recipients listed below by the Court's ECF system:

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	§	Bankruptcy Case No. 19-34054
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. NEXPOINT ADVISORS, L.P., Defendant.	§	Adversary Proceeding No. 21-03005 Civil Action No. 3:21-cv-00880-C

APPENDIX IN SUPPORT OF DEFENDANT'S LIMITED OBJECTION TO REPORT AND RECOMMENDATION TO DISTRICT COURT ON THE MOTION TO WITHDRAW THE REFERENCE

Defendant NexPoint Advisors, L.P. files this Appendix in Support of its Limited Objection to Report and Recommendation to District Court on the Motion to Withdraw the Reference and requests the Court take judicial notice of the documents contained herein.

Exhibit	Document	Appendix Page(s)
A	Declaration of Michael P. Aigen in Support of Limited Objection of James Dondero to Report and Recommendation to District Court	App. 1-4
1	Excerpts from the Transcript of the Delaware Bankruptcy Court Hearing on December 2, 2019, Case No. 19-12239	App. 5-11
2	Excerpts from the Transcript of the Bankruptcy Court Hearing on May 20, 2021, Adversary Proceeding Nos. 20-3195, 21-3003	App. 12-18
3	Appellants' Brief (filed by James Dondero, Highland Capital Management Fund Advisors LP, NexPoint Advisors LP, The Dugaboy Investment Trust, The Get Good Trust and NexPoint Real Estate Partners LLC, Case No. 3:21-CV-00879-K [Dkt. No. 16]	App. 19-52
4	Excerpts from the Transcript of the Bankruptcy Court Hearing on February 19, 2020, Case No. 19-34054	App. 53-64
5	Excerpts from the Transcript of the Bankruptcy Court Hearing on January 8, 2021, Adversary Proceeding No. 20-3190	App. 65-70
6	Excerpts from the Transcript of the Bankruptcy Court Hearing on February 8, 2021, Case No. 19-34054	App. 71-79
7	Excerpts from the Transcript of the Bankruptcy Court Hearing on June 10, 2021, Adversary Proceeding Nos. 21-3006, 21-3007	App. 80-86
8	Complaint for Mandatory Injunction	App. 88-104
9	Order Denying Mandatory Injunction as Moot	App. 106-110
10	Bankruptcy Court Ruling on Mandatory Injunction	App. 112-125

RESPECTFULLY SUBMITTED this 22d day of July, 2021.

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Exhibit A

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ATTORNEYS FOR DEFENDANT JAMES DONDERO

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-Plaintiff	§	**Adversary No. 21-03003-sgj**
v.	§	
	§	**Civil Case No. 3:21-CV-01010-E**
JAMES D. DONDERO,	§	
	§	
Defendant.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff.	§	
v.	§	
	§	
JAMES D. DONDERO,	§	
	§	
Defendant.	§	

DECLARATION OF MICHAEL P. AIGEN IN SUPPORT OF LIMITED OBJECTION OF JAMES DONDERO TO REPORT AND RECOMMENDATION TO DISTRICT COURT

I, Michael P. Aigen, pursuant to 28 U.S.C. § 1746(a), under penalty of perjury, declare as follows:

1. I am a member of the law firm of Stinson LLP, counsel to Defendant James Dondero, and I submit this Declaration in support of the *Limited Objection of James Dondero to Report and Recommendation to District Court* being filed concurrently with this Declaration. I submit this Declaration based on my personal knowledge and review of the documents listed below.

2. Attached as **Exhibit 1** is a true and correct copy of excerpts from the Transcript of the Delaware Bankruptcy Court Hearing on December 2, 2019.

3. Attached as **Exhibit 2** is a true and correct copy of excerpts from the Transcript of the Bankruptcy Court Hearing on May 20, 2021.

4. Attached as **Exhibit 3** is a true and correct copy of the Appellants' Brief (filed by James Dondero, Highland Capital Management Fund Advisors LP, NexPoint Advisors LP, The Dugaboy Investment Trust, The Get Good Trust and NexPoint Real Estate Partners LLC [Case No. 3:21-CV-00879-K, Dkt. No. 16].

5. Attached as **Exhibit 4** is a true and correct copy of excerpts from the Transcript of the Bankruptcy Court Hearing on February 19, 2020.

6. Attached as **Exhibit 5** is a true and correct copy of excerpts from the Transcript of the Bankruptcy Court Hearing on January 8, 2021.

7. Attached as **Exhibit 6** is a true and correct copy of excerpts from the Transcript of the Bankruptcy Court Hearing on February 8, 2021.

8. Attached as **Exhibit 7** is a true and correct copy of excerpts from the Transcript of the Bankruptcy Court Hearing on June 10, 2021.

9. Attached as **Exhibit 8** is a true and correct copy of Debtor's proposed Amended Complaint.

10. Attached as **Exhibit 9** is a true and correct copy of the confidential Expert Report of Professor Bruce A. McGovern based upon his knowledge of deferred compensation and application of federal income tax to loans that may or may not be forgiven.

11. Attached as **Exhibit 10** is a true and correct copy of the confidential Expert Report of Alan M. Johnson based upon his knowledge and experience advising asset management and other financial service firms on compensation.

Dated: July 21, 2021.

/s/ Michael P. Aigen
Michael P. Aigen

Exhibit 1

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

- -x

In the Matter of:

HIGHLAND CAPITAL MANAGEMENT, L.P., Case No.

Debtor. 19-12239(CSS)

- -x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

December 2, 2019

10:07 AM

B E F O R E:

HON. CHRISTOPHER S. SONTCHI

CHIEF U.S. BANKRUPTCY JUDGE

ECR OPERATOR: LESLIE MURIN

Acis, learned all about Acis' relationship to Highland. But the real issue before Your Honor is what does that have to do with this debtor, this debtor's assets and liabilities, and this debtor's operations. And as my comments will show, we think that's a significantly overblown argument.

Your Honor, during their presentation, Counsel really strayed a little bit from what the motion and the joinders sort of said. There they went through a painstaking analysis of the various factors supporting venue. I know Your Honor said that over three factors, you don't find that helpful, but the courts have relied on a series of factors.

And I think the reason why they have strayed away from that and focused on the committee being the one to support the transfer-of-venue motion and the facts of the Acis case is because when you pare it down, the actual factors demonstrate that there is no way the committee can carry its burden to demonstrate that venue should be transferred.

However -- Your Honor pointed to this at the beginning, in mentioning comments about forum-shopping -- the committee and Acis are really being disingenuous, and they have not told you the real reason that they want the case before Judge Jernigan.

At the first-day hearing, Your Honor, Acis said they intended to file a motion for an appointed trustee. The committee has told the debtor it intends to file a motion to

appoint a trustee after this hearing. The motion has not yet been filed, Your Honor, because they want Judge Jernigan to rule on that motion. And it's not because she's familiar with this debtor's business, this debtor's assets, or this debtor's liabilities, because she generally is not. It is because she formed negative views regarding certain members of the debtor's management that the committee and Acis hope will carry over to this case.

The convenience of the parties and the interests of justice and how this case is so unique are just a pretext. They want a trustee to run the debtor, and they want Judge Jernigan and not Your Honor to rule on that motion. That, Your Honor, is not a proper reason to transfer venue, but rather a transparent litigation ploy.

Similarly, Acis also wants the case to proceed in its home court where it has enjoyed success in litigating against the debtor. Your Honor mentioned the conflicts-of-interest theories. They're not just conflicts of interest between two jointly administered debtors. These go to the crux of what the Acis case is about and significant claims against the debtor.

The Court may ask, appropriately -- and the Court did -- why would the debtor file the case in Delaware? Chapter 11 is all about a fresh start. The debtor recognized concerns that the creditors had with certain aspects of its pre-petition conduct, and proactively appointed Brad Sharp as chief

restructuring officer with expanded powers, to oversee the debtor's operations.

Mr. Sharp worked with the debtor and Counsel to craft a protocol for transactions that would be subject to increased transparency. The debtor didn't have to do that. As Your Honor mentioned at the first-day hearing, the debtor operates its business in the ordinary course. But given the circumstances surrounding this case, given the history, we felt, and the CRO, importantly, felt it was important to get on the table what the debtor, through the CRO, believed was ordinary and what was not, so we could have a transparent discussion, discussion that, while we've made headway with the committee, we have not yet been able to come to an agreement.

The debtor filed the case in this district because it wanted a judge to preside over this case that would look at what's going on with this debtor, with this debtor's management, this debtor's post-petition conduct, without the baggage of what happened in a previous case, which contrary to what Acis and the committee says, has very little to do with this debtor.

These form insufficient grounds, Your Honor, to overturn the debtor's choice of venue, and the motion should be denied.

I would like to now walk through the statutory analysis, something that Counsel avoided, because again, I

more convenient. And this is really the crux, which I'll spend some time over the next few minutes.

Texas is more convenient -- convenient -- because the Texas bankruptcy court, where Acis is pending has, in their words, already expended great time and effort familiarizing itself with the debtor and its operations. You've heard statements like "learning curve". You heard statements about everything that the debtor -- that Judge Jernigan has found out about this debtor, and how important and how helpful it is, and how Your Honor will be behind the learning curve. We just don't buy that, Your Honor.

And aside from that argument, the arguments that the committee makes for transfer are arguments that could be made in any case before Your Honor.

THE COURT: Yeah, I was going to say that's kind of an interesting argument, because actually it assumes Judge Jernigan's going to ignore the rules of evidence in making factual findings, because you're limited to the record before you on a specific motion. And what fact you may have learned with regard to something a person has done, maybe that goes into questions of credibility on cross-examination or direct testimony, but to actually base your decision on a fact that's not in the record for the specific proceeding would be improper.

MR. POMERANTZ: Look, I agree, Your Honor. And the

C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true and accurate record of the proceedings.

December 3, 2019

_____ _____

CLARA RUBIN DATE

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Exhibit 2

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:

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Appearances continued on next page.

Appearances in 20-3195:

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	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
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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.

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

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

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

Exhibit 3

CASE NO. 3:21-CV-00879-K

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

HIGHLAND CAPITAL MANAGEMENT, L.P.,

(Debtor)

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,

(Appellants)

v.

HON. STACEY G.C. JERNIGAN AND HIGHLAND CAPITAL MANAGEMENT, L.P.

(Appellees)

On appeal from the United States Bankruptcy Court for the
Northern District of Texas, Dallas Division

APPELLANTS' BRIEF

Respectfully submitted by:
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 8012 of the FEDERAL RULES OF BANKRUPTCY PROCEDURE, and without waiver of any defenses and/or objections that they may have, Appellants James Dondero ("Mr. Dondero"), Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P.,[1] The Dugaboy Investment Trust, The Get Good Trust (collectively, The Dugaboy Investment Trust and The Get Good Trust are, at times, the "Trusts"), and NexPoint Real Estate Partners, LLC ("Appellants") state as follows:

(a) No publicly-held company owns 10% or more of Highland Capital Management Fund Advisors, L.P., nor does it have a parent corporation;

(b) No publicly-held company owns 10% or more of NexPoint Advisors, L.P., nor does it have a parent corporation;

(c) No publicly-held company owns 10% or more of The Dugaboy Investment Trust, nor does it have a parent corporation;

(d) No publicly-held company owns 10% or more of The Get Good Trust, nor does it have a parent corporation; and

(e) No publicly-held company owns 10% or more of the NexPoint Real Estate Partners, LLC, nor does it have a parent corporation.

[1] At times herein, Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. are collectively referred to as the "Advisors."

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JURISDICTIONAL STATEMENT

Appellants file this Appellants' Brief regarding their April 1, 2021 appeal[2] from a final order entered by Judge Jernigan in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (hereinafter referred to as the "Bankruptcy Court") on March 23, 2021.[3]

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 158 & 1334 and Rules 8001 et. seq. of the FEDERAL RULES OF BANKRUPTCY PROCEDURE.

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument, which they believe will aid the Court in deciding this matter.

ISSUES PRESENTED

1. Whether the Bankruptcy Court abused its discretion in denying Appellants' Motion to Recuse Pursuant to 28 U.S.C. § 455 as untimely.[4]

2. Whether the Bankruptcy Court abused its discretion in denying Appellants' Motion to Recuse Pursuant to 28 U.S.C. § 455 on the merits.

[2] R. 1, Appellants' Notice of Appeal (amended on April 6, 2021, R. 16).
[3] R. 31, the Order.
[4] R. 2338, the Motion to Recuse; R. 2342, the Brief in Support; and R. 2379, the Appendix in Support.

Appellants[5] file this Brief in Support of their Appeal of the Bankruptcy Court's Order (the "Order") Denying Appellants' Motion to Recuse Pursuant to 28 U.S.C. § 455 (the "Motion")[6] and would, in support thereof, respectfully show the Court as follows:

I. STATEMENT OF FACTS AND PROCEEDINGS BELOW

A. Debtor has acknowledged the Bankruptcy Court's predisposition.

1. On October 16, 2019, Debtor Highland Capital Management, L.P. ("Highland" or "Debtor") filed bankruptcy in Delaware (the "Highland Bankruptcy") to get a "fresh start."[7] Highland's creditors, including Acis (a debtor in a previous bankruptcy case before the Bankruptcy Court that involved Mr. Dondero (the "Acis Bankruptcy")), moved to transfer this case to the Northern District of Texas seeking to have it assigned to the Bankruptcy Court. In the hearing, Debtor's current counsel, Jeff Pomerantz, expressly acknowledged that the "fresh start" was needed because the Bankruptcy Court had pre-existing, negative views of Debtor's management, including Mr. Dondero:

> … the committee and Acis are really being disingenuous, and they have not told you the real reason that they want the case before Judge Jernigan.[8] … ***It is because she formed negative views regarding certain members of the debtor's management that the committee and Acis hope will carry over to this case***.[9]

2. Debtor further acknowledged that the Bankruptcy Court's predisposition against Mr. Dondero would render it incapable of being impartial and, thus, improperly impact the Highland Bankruptcy. In fact, Mr. Pomerantz specifically referred to the Bankruptcy Court's opinions of Mr. Dondero as "***baggage***."[10] Ultimately, the Delaware bankruptcy court transferred the case,[11]

---

[5] For efficiency, Appellants are jointly represented by a single counsel for purposes of the Motion and this appeal.
[6] 28 U.S.C. § 455 has been made applicable to bankruptcy judges under FED. R. BANKR. P. 5004.
[7] R. 2382, the December 3, 2019 Transcript - Motion to Transfer, at 78:21-23 (R. 2459).
[8] *Id*. at 77:18-22 (R. 2458).
[9] *Id.* at 78:3-8 (emphasis added) (R. 2459).
[10] *Id.* at 79:14-20 (emphasis added) (R. 2460).
[11] *Id.* at 90:15-24 (emphasis added) (R. 2471).

which was assigned to Judge Jernigan.

B. The Bankruptcy Court has acknowledged it holds permanent negative views of Mr. Dondero.

3. Although the Order attempts to downplay the impact of the Acis Bankruptcy, the record contradicts that insinuation. For example, during a January 9, 2020 hearing on a compromise regarding the management of Debtor (the "Compromise"), the Bankruptcy Court acknowledged that it: (a) possessed opinions regarding Mr. Dondero; (b) was unable to extract those opinions from its brain; and (c) was relying on those opinions ***as a basis*** for requiring certain language about Mr. Dondero's involvement with Debtor be included in the Compromise order.[12]

4. Notably, at this time, the Highland Bankruptcy had only been in the Bankruptcy Court for approximately a month. There was nothing in the Highland Bankruptcy record to justify the Bankruptcy Court's specific rulings and comments related to Mr. Dondero. Later, the Bankruptcy Court reiterated that it was relying on its knowledge from the Acis Bankruptcy to support its requirements regarding the contempt language directed at Mr. Dondero in the Compromise order:

> And ***I'm sure most of you can read my mind why***, but I want it crystal clear that if [Mr. Dondero] violates these terms, he's violated a federal court order, and contempt will be one of the tools available to the Court.[13]

Importantly, the Bankruptcy Court made these references to the Acis Bankruptcy, despite refusing to admit an order from the Acis Bankruptcy as evidence during the same hearing because the order was prejudicial.[14] Thus, the information the Bankruptcy Court relied upon was not in evidence.

[12] R. 2519, the January 9, 2020 Transcript at 14:4-11 (R. 2532) and at 78:23-79:16 (R. 2596-2597) (emphasis added). Mr. Dondero, however, remained a portfolio manager and an unpaid employee of Debtor. *Id*.
[13] *Id*. at 80:3-6 (R. 2598).
[14] *Id.* at 57:1-59:17 (R. 2575-2577).

C. Various events in the Highland Bankruptcy demonstrate that the Bankruptcy Court holds a perceptible, interfering bias against Mr. Dondero.

1. The February 19, 2020 Application to Employ Hearing

5. One of the ways the Bankruptcy Court's predisposition against Mr. Dondero manifested itself was through its rulings, including, for example, rulings dismissing the uncontroverted testimony of independent witnesses who testified in support of outcomes that could possibly benefit Mr. Dondero as testimony that was engineered by Mr. Dondero.

6. For example, on February 19, 2020, the Court held a hearing on Debtor's application to retain a law firm to, among other things, appeal an order against Neutra Ltd. ("Neutra") (a company owned by Mr. Dondero). A successful appeal would: (a) defeat a $75 million claim against Debtor; and (b) result in Neutra owning Acis and Debtor being reinstated as the advisor to Neutra, which would generate fees and economic benefit for Debtor.[15] Debtor's independent board, which included former Bankruptcy Judge Russell Nelms, determined that engaging the firm to represent Neutra was in the Debtor's best interest.[16] Nevertheless, the Court concluded, without evidence, that Debtor's fully independent board was being unduly influenced by Mr. Dondero:

> … ***But I'm concerned that Dondero*** or certain in-house counsel has -- you know, they're smart, they're persuasive -- that -- what are the words I want to look for -- they have ***exercised their powers of persuasion*** or whatever to make the Board and the professionals think that there is some valid prospect of benefit to Highland with these appeals, ***when it's really all about Neutra, HCLOF, and Mr. Dondero***. ***That's what I believe***.[17]

At the same hearing, the Bankruptcy Court indicated that it believed Mr. Dondero lacked credibility even though, at that point in time, Mr. Dondero had not yet testified.[18]

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[15] *See* R. 2610, the February 19, 2020 Transcript at 38:22-39:17 (R. 2647-2648) (emphasis added).
[16] *Id.* at 62:6-17 (R. 2671) (emphasis added).
[17] *Id.* at 177:7-178:3 (R. 2786-2787).
[18] *Id.* at 174:22-175:1 (R. 2783-2784).

2. The December 2020 Restriction Motion

7. A second instance involves a motion for injunctive relief that was filed by entities (not including Mr. Dondero) involving certain collateralized loan obligation investment vehicles ("CLOs") that Debtor manages pursuant to Portfolio Management Agreements (the "PMAs"). Generally, the PMAs impose a duty on Debtor, as portfolio manager, to maximize the value of the CLOs' assets for the benefit of the CLOs' noteholders and preference shareholders. The Retail Funds, which are governed by independent boards and owned primarily by third-party investors, collectively invested approximately $368 million in the CLOs.[19] Importantly, Debtor does not own an interest in the CLOs, and, thus, the CLOs are ***not assets of Debtor's estate***.

8. In approximately October 2020, Debtor decided to assume the PMAs (*i.e.*, continue managing the assets), release all Debtor's employees, and simultaneously liquidate the CLOs' assets over a two-year period. The Retail Funds and the Advisors (on behalf of the Retail Funds and pursuant to their obligations under their respective advisory agreements)[20] believed this decision would: (a) fail to maximize the value of the investments for the investors to whom the Advisors and the Retail Funds owed a fiduciary duty; and (b) was incompatible with the CLOs' needs (which required an investment staff). Mr. Dondero, who was still a portfolio manager and unpaid employee of Debtor at that time, also disagreed with Debtor's decision to liquidate.

[19] Highland Income Fund ("HFRO"), NexPoint Strategic Opportunities Fund ("NHF"), and NexPoint Capital, Inc., publicly traded funds advised by the Advisors (defined below) are, at times referred to herein as the "Retail Funds."

[20] The "Advisors" are Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. Each Advisor is registered with the U.S. Securities and Exchange Commission ("SEC") as an investment advisor under the Investment Advisers Act of 1940, as amended. Each of the Advisors advises several funds, including the Retail Funds, which are primarily owned by third-party, "mom and pop" investors. Each of the Retail Funds is a registered investment company or business development company under the Investment Company Act of 1940 (as amended, the "1940 Act"). Each Retail Fund is overseen by a majority independent board of trustees subject to 1940 Act requirements. Those respective boards reviewed and approved, among other things, major contracts including the advisory agreement with the applicable Advisor for the respective Retail Fund. The Retail Funds do not have employees and rely on their respective Advisors, acting pursuant to an advisory agreement, to provide the services necessary for their operations.

9. The Advisors and the Retail Funds raised these same issues with Mr. Seery (Debtor's interim CEO) and requested that Debtor not liquidate the CLOs until the confirmation of Debtor's Plan of Reorganization, as further modified (the "Plan") (which was, at that time, scheduled for early January 2021). Debtor, as portfolio manager, declined and began attempting to leverage the Bankruptcy Court's increasingly perceptible bias against Mr. Dondero for Debtor's benefit. This manifested in a variety of ways.[21]

10. On December 8, 2020, because the Plan violated its statutory and contractual obligation to maximize the value of the CLO assets, pursuant to 11 U.S.C. §§105, 363, and 1107, the Advisors and the Retail Funds (*i.e.*, *not* Mr. Dondero) moved to maintain the status quo and prohibit Debtor from liquidating the CLOs for approximately 30 days (the "Restriction Motion").[22]

11. On December 16, 2020, despite the express statutory basis, the Bankruptcy Court denied the Restriction Motion,[23] stating that it was "dumbfounded" by the motion and declaring the motion as having no statutory or contractual basis and being "almost Rule 11 frivolous."[24] Moreover, while the only evidence demonstrated that the Advisors' and Retail Funds' senior management and independent counsel decided to bring the Restriction Motion, the Bankruptcy Court inscrutably blamed Mr. Dondero for the Restriction Motion.[25] The Bankruptcy Court disregarded the Retail Funds' (publicly-traded, highly-regulated entities) and the Advisors' ability to independently decide to pursue action they deem in their best interest.

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[21] *See* R. 3892, the March 4, 2020 Transcript at 34:6-35:18 (R. 3925-3926); 50:14-52:15 (R. 3941-3942); 58:17-23 (R. 3949).
[22] R. 2798-2823, the Restriction Motion.
[23] *See* R. 2824, the December 16, 2020 Transcript at 63:5-13 (R. 2886).
[24] *Id*. at 64:1-7 (R. 2887). The statutory basis for the relief requested was section 363(c)(1) or 1108 of the Bankruptcy Code, which generally provides that a debtor-in-possession may engage in its ordinary course of business, "unless the court orders otherwise." That was all that was being asked.
[25] *Id*. at 63:14-25 (R. 2886).

3. Debtor's Motion for Injunctive Relief

12. The Bankruptcy Court, however, took a different view of motions filed by Debtor. In December of 2020, K&L Gates, as counsel for the Advisors and the Retail Funds, wrote Debtor to: (a) reiterate the Advisors' and the Retail Funds' objection to Debtor liquidating the CLOs; and (b) notify Debtor that the Retail Funds, ***subject to applicable bankruptcy law*** and the underlying agreements, intended to initiate the procedure to remove Debtor as fund manager of the CLOs (the "K&L Gates Letters").[26]

13. On January 6, 2021, Debtor filed an adversary proceeding seeking to enjoin[27] the Advisors and the Retail Funds from, among other things, exercising any contractual rights that they may have had to remove Debtor as portfolio manager (a contract that Debtor assumed under its plan).

14. On January 26, 2021, the Court commenced the preliminary injunction hearing on the matter (the "Injunction Hearing").[28] The issue at that hearing was whether the Advisors and the Retail Funds tortiously interfered with the PMAs by: (a) hindering Debtor's ability to sell certain CLO assets; (b) threatening to initiate the process for removing Debtor as the portfolio manager of the CLOs; and (c) otherwise attempting to influence and interfere with Debtor's decisions concerning the purchase or sale of any assets on behalf of the CLOs.[29]

15. During the Injunction Hearing, it became clear that there was no basis for the claims or an injunction. In fact, Mr. Seery/Debtor admitted that:

(a) none of the alleged actions caused Debtor to breach any contract with a third party;[30]

(b) the Advisors and the Retail Funds had no contractual obligation to settle the trade (the basis of the alleged hinderance with Debtor's ability to sell CLO

[26] R. 4158-4172, the K&L Gates Letters.
[27] R. 2890-2908, *Highland Capital Mgmt. v. Highland Capital Management Fund Advisors, L.P., et al*. Adversary No. 21-03000-sgj.
[28] R. 2909, the January 26, 2021 Transcript.
[29] *See* R. 8069, Dkt. 1 in Adversary Proceeding No. 21-03000-sgj at ¶ 58 (R. 8082).
[30] *See* R. 2909, the January 26, 2021 Transcript, at 180:12-17 (R. 3088).

assets);[31]

(c) every trade that he attempted to initiate in December (the period in question) closed;[32]

(d) the Debtor's business activities were unaffected by the K&L Gates Letters;[33] and

(e) the K&L Gates Letters merely stated that the Advisors and the Retail Funds were "contemplating taking steps to terminate the CLO Agreements"[34] and no action was taken to remove Debtor as the portfolio manager.

16. Debtor never disputed that the Advisors and the Retail Funds were third-party beneficiaries under the PMAs with a conditional right to terminate the Portfolio Manager.[35] In addition, one cannot generally tortiously interfere by exercising one's own contractual rights and the law does not recognize any claim for "contemplating" action that was never taken.[36] Consequently, Debtor's motion was objectively baseless.

17. Nevertheless, at the hearing, rather than comment on the groundlessness of Debtor's motion, the Bankruptcy Court ***focused on Mr. Dondero***, warning him that he was prohibited from terminating any agreement with Debtor[37] and stated that it was "leaning" toward finding ***Mr. Dondero*** in contempt and shifting the "whole bundle of attorney's fees" to Mr. Dondero as a result

[31] Notably, Debtor itself had numerous authorized traders, whose job was to settle Debtor's trades.
[32] *See* R. 2909, the January 26, 2021 Transcript, at 173:16-19 (R. 3081); 174:1-3 (R. 3082); 174:8-175:5 (R. 3082-3083).
[33] *Id.* at 178:14-24 (R. 3086).
[34] *Id.* at 103:21-23 (R. 3011).
[35] *See* R. 4747-4782 and 4783-4821, examples of Servicing Agreements at section 14 (R. 4762-4763); *see also* R. 4452, the February 2, 2021 Transcript of Hearing at 54:6-56:12 (R. 4505-4507); *see also* R. 5079-5080, a chart of holdings of preference shares in CLOs (showing Movants are preferred shareholders); *see also* R. 4822, February 3, 2021 Transcript of Hearing at 53:1-22 (R. 4874).
[36] *See, e.g., Wilkerson v. Univ. of N. Texas By & Through Bd. of Regents*, 878 F.3d 147, 161 (5th Cir. 2017) (To win, Wilkerson would have to prove that his employer interfered with his employment contract—a legal impossibility, as "one cannot tortiously interfere with one's own contract.").
[37] R. 3166, the January 8, 2021 Transcript, at 119:6-122:25 (R. 3284-3287). Notably, the Bankruptcy Court made the implied finding that Mr. Dondero caused the Retail Funds to send the K&L Gates Letters even though, in a hearing just a week earlier, it ***sustained*** Debtor's objections to Mr. Dondero testifying about the K&L Gates Letters because***: (a) Mr. Dondero lacked personal knowledge;*** (b) any answer would be hearsay; and (c) the K&L Gates Letters (executed by K&L Gates, not Mr. Dondero) speak for themselves. Otherwise, Mr. Dondero should have been given the opportunity to answer the question, which the Court denied.

of this unwarranted motion filed by ***Debtor***.[38]

4. The February 2021 Confirmation Hearing

18. On February 2 and 3, 2021, the Court held a hearing on the Plan. The Advisors and the Retail Funds objected to provisions in the Plan that eliminated or altered their legal and contractual claims against Debtor under the PMAs (the "Objections"). Additionally, Appellants objected to the Plan's release and exculpation provisions for the management of Debtor and the Plan's "gatekeeper" provision that prohibited lawsuits against any exculpated party without prior permission from the Bankruptcy Court.

19. On February 8, 2021, the Court summarily rejected ***all*** of the Objections,[39] questioned the good faith basis for the Objections, and declared that it "***ha[d] good reason to believe*** that [those] parties [were] not objecting to protect economic interests they have in the Debtor, but to be disruptors."[40] The Bankruptcy Court, again without basis, concluded that the other entities objecting to the Plan were "controlled by" Mr. Dondero:[41]

> …the Court has allowed all of these objectors to fully present arguments and evidence in opposition to confirmation, even though their economic interests in the Debtor appear to be extremely remote and the Court questions their good faith. Specifically on that latter point, ***the Court considers them all to be marching pursuant to the orders of Mr. Dondero***.[42]

20. In doing so, the Bankruptcy Court disregarded witness testimony on the sole ground that the witness had, in coordination with Debtor, recently transitioned from Debtor to one of the Advisors.

> …While the evidence presented was that [the Advisors and Retail Funds] have independent board members that run these companies, the Court was not convinced

[38] R. 2909, the January 26, 2021 Transcript, at 251:24-252:5 (R. 3159-3160).
[39] *See* R. 3371, February 8, 2021 Transcript at 15:15-16:5 (R. 3385-3386).
[40] *Id.* at 20:17-20 (R. 3390) (emphasis added).
[41] *Id.* at 20:13-15 (R. 3390).
[42] *Id.* at 22:12-21 (R. 3392).

of their independence from Mr. Dondero.[43]

> The witness who testified on these Objectors' behalves at confirmation, Mr. Jason Post, their chief compliance officer, resigned from Highland after more than twelve years in October 2020, at the same time that Mr. Dondero resigned or was terminated by Highland. And a prior witness recently for these entities whose testimony was made part of the record at the confirmation hearing essentially testified that Mr. Dondero controlled these entities.[44]

21. The Objections were made in good faith.[45] In fact, the U.S. Trustee, whose "good faith basis" was not questioned by the Bankruptcy Court, asserted some of the same objections.[46] Not even the Debtor alleged that the objections were filed bad faith.

22. Going further, at that hearing, even though no party had requested the Bankruptcy Court "to declare Mr. Dondero and his affiliated entities as vexatious litigants *per se*,"[47] the Bankruptcy Court summarily decreed that Mr. Dondero and any entity the Bankruptcy Court deemed to be controlled by Mr. Dondero (collectively, the "Affected Entities")[48] were "vexatious litigants"[49] and held that the "gatekeeper" provision (which they objected to) "appears necessary and reasonable in light of the ***litigiousness of Mr. Dondero*** and his ***controlled entities***."[50] However, the "litigiousness" the Bankruptcy Court listed to support this ruling consisted of the following:

> (a) efforts taken by Mr. Dondero and other entities to defend against injunctions filed against them;
>
> (b) legitimate objections or responses to certain provisions of the Plan and other motions, made to preserve rights on appeal; and/or

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[43] *Id.* at 21:22-24 (R.3391-3392).
[44] Notably, Jason Post resigned from Debtor and was hired by NPA because NPA and Debtor had to separate compliance programs, which were previously jointly administered. This decision was discussed with and approved by Thomas Surgent and Mr. Seery.
[45] R. 3371, the February 8, 2021 Transcript, at 23:8-11(R. 3393).
[46] *Id*.
[47] *Id*. at 46:20-22 (R. 3416).
[48] The definition of the "Affected Entities" includes, without limitation, the Advisors and the Retail Funds.
[49] R. 3371, the February 8, 2021 Transcript, at 46:20-25 (R. 3416).
[50] *Id.*at 45-47 (R. 3415-3417) (emphasis added).

(c) lawsuits in which the pre-petition Debtor ***had been sued*** and was defending itself.[51]

These actions do not meet the factors necessary to deem someone a "vexatious litigant."[52] In fact, Appellants were not parties to these lawsuits, the record reflected little, if any, litigation and motion practice initiated by Appellants,[53] and notice that the issue of vexatiousness was being alleged or tried was never provided.

5. Other Issues Demonstrating Bias

23. The Bankruptcy Court's inability to rule impartially because of its preconceived bias against Mr. Dondero and the other Appellants has also manifested itself in other ways.

24. ***First***, the Bankruptcy Court relied upon extrajudicial information from an article that referenced "Mr. Dondero or Highland affiliates" receiving PPP loans and *sua sponte* directed Debtor's counsel to investigate the loans and report back.[54] However, the PPP loans had ***nothing*** to do with Debtor.[55] Additionally, according to the Order, the Bankruptcy Court's pre-existing negative views of Mr. Dondero had to come from somewhere other than the Acis Bankruptcy. The

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[51] *See* ECF 891 (Acis Action, in which Debtor filed a 65-page objection that it described as having "numerous basis" and in which USB filed an objection); ECF 895 (UBS Action, in which Debtor filed an objection to the claim and stated that it had, "meritorious defenses to most, if not all, of the UBS Claim …", [ECF 928] and in which the Redeemer Committee of the Crusader Funds also objected); ECF 895 (Daugherty Action, in which Debtor asserted that the Daugherty Claim lacked merit); and Dkt. 1384 (HarbourVest Action, in which Debtor "vigorously defen[ded]" the HarbourVest Claims on numerous grounds).

[52] R. 3371, the February 8, 2021 Transcript, at 46:6-15 (R. 3416) (acknowledging the elements necessary to find a party vexatious are: (a) the party's history of litigation; in particular, whether ***he has filed*** vexatious, harassing, or duplicative lawsuits; (b) whether the party had a good faith basis for ***pursuing the litigation***, or perhaps intended to harass; (c) the extent of the burden on the courts and other parties resulting from the party's filings; and (d) the adequacy of alternatives) (emphasis added).

[53] *See* R. 5081-5093 the Chart regarding this bankruptcy proceeding; *see also* R. 5094-5095, the Chart regarding the injunction proceeding.

[54] *See* R. 3422, the July 8, 2020 Transcript at 42:10-24 (R. 3463) ("THE COURT: Okay. All right. Two more questions. And this one has been a bit of a tough one for me to decide whether I should broach this topic or not. You know, ***I read the newspapers, the financial papers, just like everyone else, and I saw a headline that I wished almost I wouldn't have seen, and it was a headline about Dondero or Highland affiliates*** getting three PPP loans. ***And, you know, I'm only supposed to consider evidence I hear in the courtroom, right, or things I hear in the courtroom, but I've got this extrajudicial knowledge right now thanks to just keeping up on current events. I decided I needed to ask about this***. What can you tell me about this, Mr. Pomerantz? I mean, I assumed, from less-than-clear reporting, that it wasn't Highland Capital Management, LP, but I'd like to hear anything you can report about this.").

[55] *See* R. 3758, the July 14, 2020 Transcript at 53:17-59:3 (R. 3810-3816).

Bankruptcy Court now downplays and dismisses recalling (or the impact of) any specific detail from the Acis Bankruptcy relating to Mr. Dondero.[56]

25. ***Second***, the bias against Mr. Dondero has resulted in rulings against Affected Entities that are not legally supported. For example, CLO Holdco is a wholly owned subsidiary of a charitable Doner Advised Fund ("DAF") established by Mr. Dondero. During the Highland Bankruptcy, CLO Holdco, through its independent trustee, moved to have $2.5 million of its funds released from the registry of the Bankruptcy Court. The Bankruptcy Court admitted that CLO Holdco's lawyer made "perfect arguments" and that continuing to hold a non-debtor's assets in the registry of the Court is "tantamount to a prejudgment remedy."[57] Nevertheless, the Bankruptcy Court, concluded that Mr. Dondero was behind the CLO Holdco filing and, therefore, questioned the "good faith" basis of the motion.[58] Even worse, the Bankruptcy Court acknowledged that it could not continue to hold the funds unless the objecting party obtained injunctive relief, which it has never sought, yet the funds have not been released (presumably because of the Bankruptcy Court's unsubstantiated belief that Mr. Dondero might somehow benefit).[59]

26. ***Third***, in a September 2020 hearing in the Acis Bankruptcy, the Bankruptcy Court learned that the DAF and other entities sued Acis (and other non-Acis or Debtor entities) in New York concerning a post-confirmation dispute. ***Without having seen the lawsuit, the Bankruptcy Court declared it vexatious and, again, blamed Mr. Dondero***:

> It's just ridiculous, for lack of a better term, that Dondero and his entities would be doing some of the things it sounds like they're doing: Suing Moody's, for crying out loud, for not downgrading the Acis CLOs. ***If Mr. Dondero doesn't think that is so transparently vexatious litigation, yeah, I'm going out there and saying that.***

[56] R. 31, the Order at pp. 8-9 (R. 38-39).
[57] *See* R. 3533, the June 30, 2020 Transcript at 85:17-22 (R. 3617).
[58] *Id.* at 82:3-11 (R. 3614); 85:4-16 (R. 3617).
[59] Needless to say, the Affected Entities and every entity that the Court believes has any affiliation with Mr. Dondero are gun-shy about filing any pleading out of fear of "sanctions" or accusations of "bad faith." Conversely, the UCC, which has not alleged any basis for the Bankruptcy Court retaining the $2.5 million, has not been chastised or otherwise threatened.

I haven't seen it, but, come on.[60]

It is the Bankruptcy Court's admission that, "I haven't seen it," paired with its finding that the suit was "transparently vexatious litigation" that clearly illustrates the need for recusal.[61]

27. ***Fourth***, the Advisors had a shared services agreement with Debtor in which the Advisors shared office space with Debtor, and each paid Debtor for resources and services. In February of 2021, Debtor terminated that agreement and baselessly moved for a mandatory injunction to force the Advisors and the Retail Funds to describe their plans to replace Debtor after the termination.[62]

28. The Advisors and the Retails Funds did not contest the termination, which posed no harm to Debtor, and had no obligation to share their transition plan with Debtor following its termination of the shared services agreement. Nevertheless, the Bankruptcy Court held a seven-hour evidentiary hearing on the issue[63] and, while it ultimately held that the mandatory injunction was moot, it went beyond the pleadings and relief requested by Debtor ***to issue findings of fact adverse to Mr. Dondero,***[64] ***which were not even requested in the motion***. Moreover, rather than chastise Debtor's motions as being "almost Rule 11 frivolous," the Bankruptcy Court accused Mr. Dondero (***a non-movant***) of driving up legal fees.[65]

29. ***Fifth***, the Bankruptcy Court has permitted Debtor a different standard and set of rules than Appellants. In addition to the discrepancies in the Bankruptcy Court's views regarding the good

[60] *See* R. 3480, the September 23, 2020 Transcript at 51:10-16 (R. 3530).
[61] Notably, the claims against Moody's relating to its ratings concerning the CLOs were the same issues raised in various lawsuits against Moody's following the 2008 crash. The action asserting the claims was initiated by DAF, an independent charity originally funded by Highland Capital. As a primary investor in the ACIS Collateralized Loan Obligations (CLO), the DAF lost almost 80% of its investment in ACIS CLOs as Josh Terry and sub-advisor Bridage circumvented CLO indenture covenants and materially increased the risk in the portfolio. Recently, JP Morgan highlighted ACIS 3-6 as the worst performing 1094 deals outstanding in 2019 through 2020. This action sought relief from the trustee (US Bank) for failing to properly administer the indenture and from Moody's for failing to update or suspend ratings given the breaches described above.
[62] *See* R. 4173-4193, the Mandatory Injunction.
[63] *See* R. 4199-4437, the February 23, 2021 Transcript on Hearing for Mandatory Injunction.
[64] *See* R. 4194, the order on the Mandatory Injunction at pp. 3-5 (R. 4196-4198).
[65] *See* R. 4199, the February 23, 2021 Transcript on Hearing for Mandatory Injunction 232:3-234:19 (R. 4430-4432).

faith of Debtor's filings versus Appellants', the Bankruptcy Court also permits Debtor a wider latitude to, for example, make corrections and clarifications or present evidence. In particular, while the Bankruptcy Court denied Mr. Dondero's request to re-open evidence to provide the Court with exculpatory evidence in a contempt hearing,[66] it permitted Debtor to walk back a judicial admission regarding the amount of bond Debtor requested from Mr. Dondero and even granted Debtor an entire evidentiary hearing to prove a higher bond amount.[67]

D. Recusal is necessary for the pending and future Adversary Proceedings.

30. Importantly, there are numerous adversary proceedings currently pending before the Bankruptcy Court that involve Appellants (collectively, the "Adversary Proceedings").[68] The claims in the Adversary Proceedings include various tort claims, breach of contract claims, and claw-back claims, as well as *alter ego* claims seeking to hold Appellants and others liable for any recovery ordered as to other entities.[69] Each of the Adversary Proceedings will require Appellants to take legal positions and defend themselves, which the Bankruptcy Court is predisposed to considering vexatious and sanctionable (regardless of their validity).

II. SUMMARY OF THE ARGUMENT

31. In March 2021, Appellants moved to recuse the Bankruptcy Court due to its undeniable animus against Mr. Dondero and the resulting prejudicial effect that animus has on the due process

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[66] *See* R. 7716-7993 and 7994-8068, the transcript regarding the hearing held on Motion for Contempt on March 22 and March 24, 2021.
[67] *See* R. 6599-6680, the transcript regarding the hearing held on Motion to Stay Pending Appeal on March 19, 2021.
[68] The Adversary Proceedings include: *Highland Capital Management L.P. v. NexPoint Advisors, L.P. et. al*., Adversary Proceeding No. 21-03000; *Highland Capital Management, L.P. v. Nexpoint Advisors, L.P.*, Adversary No. 21-03005,; *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors*, *L.P.*; Adversary No. 21-03004; *Highland Capital Management, L.P. v. Highland Capital Management Services, Inc.*; Adversary No. 21-03006, in the United States Bankruptcy Court for the Northern District of Texas; *Highland Capital Management, L.P. v. HCRE Partners, LLC (N/K/A Nexpoint Real Estate Partners, LLC*, Adversary No. 21-03007; *Highland Capital Management, L.P. v. HCRE Partners, LLC (N/K/A Nexpoint Real Estate Partners, LLC*, Adversary No. 21-03007; *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P., et al.*; Adversary No. 21-03010; *Highland Capital Management, L.P. v. James Dondero*; Adversary No. 21-03003; and *Official Committee of Unsecured Creditors v. CLO HOLDCO, LTD, et al.*; Adversary No. 20-03195.
[69] *Id*.

rights of Mr. Dondero, the Trusts, and the Affected Entities.

32. The Bankruptcy Court entered the Highland Bankruptcy with negative opinions of Mr. Dondero and subsequently the other Appellants by association. Over the course of the Highland Bankruptcy, the Bankruptcy Court's predisposition against Mr. Dondero manifested itself in actions that impaired Appellants' legal rights; favored Appellants' opponents; and created, at a minimum, the clear perception that the Bankruptcy Court was unwilling to act impartially where Mr. Dondero and the Affected Entities were concerned. Specifically, among other things, the record reflects that the Bankruptcy Court has:

(a) repeatedly made negative statements about Mr. Dondero and questioned Mr. Dondero's credibility before he ever testified;

(b) summarily disregarded the testimony of any witness favorable to Mr. Dondero (or any of the Appellants) as "under [Mr. Dondero's] control" and *per se* not credible;

(c) repeatedly concluded, without evidence, that any entity the Bankruptcy Court deemed associated with Mr. Dondero was essentially an agent and no more than a pawn of Mr. Dondero;[70]

(d) declared that Mr. Dondero and his "controlled entities" are vexatious litigants because: (i) they defended lawsuits and motions filed against them; and/or (ii) have asserted valid legal positions (including to preserve their and the Affected Entities' legal rights and rights on appeal);

(e) issued a *sua sponte* order demanding that so-called "Dondero-Affiliated Entities" disclose their ownership and control, including entities that have not appeared or filed anything in the Highland Bankruptcy; and

(f) applied more favorable standards and rules to Debtor than those it afforded to Appellants.

Notably, the Affected Entities' investment base includes public investors beyond Mr. Dondero.[71]

[70] Specifically, the evidentiary record does not reflect, *e.g.*, that: (a) the corporate formalities have been ignored for the entities; (b) their corporate property has not been kept separate and apart; or (c) Mr. Dondero uses the companies for personal purposes.

[71] For example, while deemed "Dondero controlled entities," HFRO and NHF are controlled by boards the majority of whom are independent in accordance with NYSE and SEC requirements; Mr. Dondero owns less than 13% of NHF

Appellants brought the Motion to safeguard the impartiality that they are entitled to receive as litigants, regardless of Mr. Dondero's history with the Bankruptcy Court.

33. The Bankruptcy Court denied the Motion for the following three reasons:

(a) The Bankruptcy Court's finding the Motion was untimely;

(b) The Bankruptcy Court's subjective belief that it was not biased and that, generally, all of its orders, actions, and findings were proper; and

(c) Criticism of counsel (which was not a ground that Appellants asserted in the Motion) did not justify recusal.[72]

34. The Bankruptcy Court abused its discretion when it denied the Motion. ***First***, Appellants filed the Motion a reasonable time after the Bankruptcy Court's bias manifested itself and only sought relief on a prospective basis. ***Second***, Appellants did not seek recusal based upon "criticism of counsel" or routine docket management actions, and the Bankruptcy Court failed to address the Motion's actual and specific grounds.[73] ***Finally***, and most importantly, a judge's subjective belief that he or she is capable of impartiality[74] or whether the judge ***actually has*** a bias (or actually knows of grounds requiring recusal) is irrelevant.[75] Instead, "[t]he ***appearance*** of impartiality controls the § 455 analysis,"[76] and the test is whether the "'average person on the street who knows all the relevant facts of a case'" might ***reasonably question*** the judge's impartiality.[77]

35. Appellants, like every litigant, are entitled to the opportunity to make their case in a fair and impartial forum.[78] The impartiality of judges is fundamental to the judiciary and the public's

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and less than 1% of HFRO; and the remaining interests are owned by third-party, "mom and pop" investors.

[72] R. 31, the Order at pp. 7-10 (R. 37-40).

[73] *Id*.

[74] *Burke v. Regalado*, 935 F.3d 960, 1054 (10th Cir. 2019) (citations omitted).

[75] *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847, 805 (1988).

[76] *Ferrera-Parra v. United Airlines, Inc.*, No. 4:19-CV-1053, 2021 WL 1795702, at *3 (S.D. Tex. Mar. 30, 2021) (citing *Haskett v. Orange Energy Corp.*, 161 F. Supp. 3d 471, 473 (S.D. Tex. 2015)).

[77] *In re Kansas Pub. Employees Retirement Sys*., 85 F.3d 1353, 1358 (8th Cir.1996).

[78] *Miller v. Sam Houston State Univ*., 986 F.3d 880, 893 (5th Cir. 2021).

confidence in the proceedings over which they preside.[79] Here, recusal of the Bankruptcy Court is the only way to ensure that the Appellants receive the requisite impartiality and fair trial.

III. ARGUMENTS & AUTHORITY

A. Appellants' Motion was timely.

36. The Bankruptcy Court held that the Motion was untimely because it was filed: (a) "more than 15 months after the Highland Bankruptcy was transferred;" (b) "after many dozens of orders have been issued by the court, including a confirmation order that Movants have now appealed;" and (c) "on the eve of a contempt hearing."[80] The Bankruptcy Court abused its discretion in finding the Motion untimely.

37. ***First,*** unlike 28 U.S.C. § 144, timeliness is not an express condition of a recusal motion under § 455, and the sole case cited by the Bankruptcy Court to the contrary, *Davies v. C.I.R.*, 68 F.3d 1129, 1130-31 (9th Cir. 1995), is factually distinguishable from the facts of this case. Cases finding that a recusal motion was untimely generally involve situations in which the complaining party obtained specific, definitive knowledge that the court had a disqualifying circumstance **and** either: (a) intentionally delayed raising the issue until a strategically advantageous time; or (b) raised the issue for the first time after a final judgment.[81] This includes *Davies*. In *Davies*, the judge notified the complaining party, taxpayers, that he had served as IRS Deputy Counsel and Acting Chief Counsel.[82] The taxpayers did not object at the time but, instead, almost a year later, moved to recuse the judge after he had ruled against them.[83] As such, *Davies* does not support the

[79] *Id.*
[80] *See* R. 31, the Order at p. 7 (R. 37).
[81] *See, e.g., United States v. Sanford*, 157 F.3d 987, 989 (5th Cir. 1998) (holding that motion to recuse was untimely because defendant's attorney had testified against judge in judicial council proceedings, but defendant made no motion before district court for recusal in two months before sentencing, or at sentencing itself, and thus, defendant both waited after knowing facts to challenge judge and raised issue for first time on appeal).
[82] *Davies v. C.I.R.*, 68 F.3d 1129, 1130-31 (9th Cir. 1995).
[83] *Id.*

Order.

38. ***Second***, the general amount of time that passed since the Highland Bankruptcy was transferred from Delaware (*i.e.*, 15 months) is not relevant. The timeliness of a recusal motion is determined from the point a judge's bias (or her appearance of bias) has manifested in the case (*i.e.*, after the grounds for recusal, beyond speculation, are actually known).[84] A judge, suspected of bias, cannot sit on that bias and then—after a certain amount of time passes—take action confirming the bias (or appearance thereof) and claim it is too late to recuse and force a party to be judged by a partial jurist.

39. Here, the Bankruptcy Court's bias (or appearance thereof) did not immediately show itself such that it would support a recusal motion. While Debtor acknowledged the Bankruptcy Court's preexisting negative views of Mr. Dondero,[85] the presence of preexisting negative views *alone* is not grounds to recuse. As described above, the Delaware bankruptcy court indicated that such arguments (that the Bankruptcy Court's potential bias might negatively impact the case) were premature because the Bankruptcy Court should enjoy a presumption that it would still follow the rules in making findings:

> Yeah, I was going to say that's kind of an interesting argument, because actually it ***assumes Judge Jernigan's going to ignore the rules of evidence*** in making factual findings, ***because you're limited to the record before you on a specific motion***. And what fact you may have learned with regard to something a person has done, maybe that goes into questions of credibility on cross-examination or direct testimony***, but to actually base your decision on a fact that's not in the record for the specific proceeding would be improper***.[86]

40. Consequently, Appellants hoped the Delaware bankruptcy court was correct and were willing to extend that prescribed presumption to the Bankruptcy Court.

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[84] *Davies v. C.I.R.*, 68 F.3d 1129, 1130-31 (9th Cir. 1995) (citing *E. & J. Gallo Winery v. Gallo Cattle Co.,* 967 F.2d 1280, 1295 (9th Cir.1992)).
[85] R. 2382, the December 2, 2019 Transcript, at 78:3-8 (emphasis added) (R. 2459).
[86] *Id.* at 90:15-24 (emphasis added) (R. 2471).

41. Moreover, while the Bankruptcy Court's language in an earlier January 2020 order is an example of its bias, a single adverse ruling is not grounds for recusal, as it could be an isolated incident. In other words, while a part of the Bankruptcy Court's pattern of bias, a recusal motion based upon this single January 2020 order ruling *alone* would likewise be considered premature.

42. Here, the Bankruptcy Court's inability to rule impartially in matters involving Mr. Dondero and the Affected Entities did not manifest itself until late 2020 and early 2021, after various comments, events, and rulings, exemplified above. It is ***that*** manifestation of bias (or appearance of bias) that is the relevant demarcation line as it relates to timeliness of the Motion, and Appellants indisputably filed the Motion a reasonable time thereafter (*i.e.*, March 18, 2021).

43. ***Third***, the Bankruptcy Court concludes that the Motion was untimely merely because "many dozens of orders have been issued by the court, including a confirmation order that Movants have now appealed."[87] However, the Bankruptcy Court does not identify any order that it claims should have resulted in the Motion being filed earlier. In fact, the sole referenced "Confirmation Order" was entered ***just over a month before the Motion was filed***.

44. ***Fourth***, the fact that Debtor had filed a motion for contempt and a hearing on that motion was pending when Appellants filed the Motion is further irrelevant. Appellants moved to recuse the Bankruptcy Court from Adversary Proceedings—not from hearing any contempt issue.[88] Consequently, the Bankruptcy Court's finding that the Motion was not timely was an abuse of discretion.

B. The Bankruptcy erred in denying the Motion on the merits.

45. Next, with respect to the merits, the Bankruptcy Court denied the Motion because: (a) it subjectively believes that it is not biased ("[t]he Presiding Judge does not believe she harbors, or

[87] R. 31, the Order, at p. 7 (R. 37).
[88] R. 2338-2378, the Motion (including the Motion and Brief in Support).

has shown, any personal bias or prejudice against the Movants");[89] (b) criticism of counsel did not justify recusal;[90] and (c) without addressing any of Appellants' allegations, the Bankruptcy Court's deemed any statements, criticism and orders proper and concluded that the allegations did not establish "doubt in the mind of a reasonable observer as to the judge's impartiality."[91]

1. The Bankruptcy Court erred in relying on its subjective denials of actual bias.

46. It is irrelevant if a judge subjectively believes he or she is capable of impartiality[92] or if the judge actually has a bias (or actually knows of grounds requiring recusal).[93] Instead, "[t]he appearance of impartiality controls the § 455 analysis,"[94] and the test is whether the "'average person on the street who knows all the relevant facts of a case'" might ***reasonably question*** the judge's impartiality.[95] As a result, the Bankruptcy Court abused its discretion in denying Appellants' Motion based upon its subjective declarations and beliefs regarding its bias and the propriety of its actions.

2. Appellants do not seek recusal based upon "criticism of counsel" or routine docket management actions.

47. While the Bankruptcy Court denied the Motion based on an assertion that criticism of counsel did not justify recusal,[96] Appellants did not seek recusal on this ground.[97] Instead, Appellants filed the Motion because the Bankruptcy Court's actions (including the non-exhaustive examples described in the Motion and herein) began to reveal a deep-seated antagonism toward Mr. Dondero and the Affected Entities that went well beyond "normal" admonishment—rendering

[89] R. 31, at Order at p. 10 (R. 40).
[90] *Id.*
[91] *Id*.
[92] *Burke v. Regalado*, 935 F.3d 960, 1054 (10th Cir. 2019) (citations omitted).
[93] *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847, 805 (1988).
[94] *Ferrera-Parra v. United Airlines, Inc.*, No. 4:19-CV-1053, 2021 WL 1795702, at *3 (S.D. Tex. Mar. 30, 2021) (citing *Haskett v. Orange Energy Corp.*, 161 F. Supp. 3d 471, 473 (S.D. Tex. 2015).
[95] *In re Kansas Pub. Employees Retirement Sys*., 85 F.3d 1353, 1358 (8th Cir.1996).
[96] R, 31 the Order at p. 10 (R. 40).
[97] R. 2341, the Motion at ¶ 70 (R. 2376).

the perception of fair judgment and impartiality toward Appellants impossible.[98]

48. Moreover, the only evidence in the Motion that could arguably be considered "criticism of counsel" does not constitute regular admonishment or "criticism of counsel." As alleged in the Motion, the Bankruptcy Court has, among other things: (a) repeatedly threatened sanctions on and questioned Appellants' good-faith basis for: (i) asserting valid legal positions (including in defense of suits and motions filed against them); and/or (ii) preserving their rights (including in the exact same manner in which others are permitted to do so (*e.g.*, the U.S. Trustee's objections to the Plan)); (b) declared a lawsuit Appellants filed as "vexatious" despite admitting that it has never seen the lawsuit; and (c) recommended claims for opposing counsel to bring against Appellants to avoid a reference being withdrawn. This is well beyond ordinary "criticism" and justifies recusal.

3. The Motion's actual and specific grounds, which the Bankruptcy Court failed to address, establish actual bias or an objective appearance of bias.

49. "The review of a recusal order under § 455(a) is 'extremely fact intensive and fact bound,' thus a close recitation of the factual basis for the [party's] recusal motion is necessary."[99] Moreover, section 455(a), which is "designed to promote public confidence in the impartiality of the judicial process,"[100] requires recusal whenever a judge's partiality might reasonably be questioned, ***even if the judge does not have actual personal bias or prejudice***.[101] The judge's failure to recuse herself in such circumstances would constitute an abuse of discretion.[102]

50. The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.[103] As Congress recognized when enacting section 455, litigants "ought

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[98] *Id*.
[99] *Republic of Panama v. Am. Tobacco Co*., 217 F.3d 343, 346 (5th Cir. 2000).
[100] *In re Drexel Burnham Lambert Inc*., 861 F.2d 1307, 1313 (2d Cir. 1988) (quoting H.R.Rep. No. 1453, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 6351, 6354–55); *Liljeberg*, 486 U.S. at 859–60.
[101] *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 860 n. 8 (1988); *Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003).
[102] *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999).
[103] *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *see also Caperton v. A.T. Massey Coal Co*., 556 U.S. 868, 877

not have to face a judge where there is a reasonable question of impartiality."[104] This neutrality requirement helps guarantee that no person will be deprived of his interests in the absence of a proceeding in which the arbiter is not predisposed to find against him.[105] As a result, the Fifth Circuit has held that "***[i]f the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal.***"[106]

51. ***First***, the Bankruptcy Court's Order ignored most of the grounds in the Motion, which itself further demonstrates the Bankruptcy Court's predisposition to rule against Appellants without objective analysis. The evidence in the Motion shows that the Bankruptcy Court's actions reveal such a high degree of antagonism toward Appellants (and favoritism toward any party adverse to Appellants) to make fair judgment impossible, including:

(a) repeated negative statements about Mr. Dondero;

(b) admission that its negative opinions about Mr. Dondero could not be excised from the Court's mind;

(c) repeated reference to proceedings in the Acis Bankruptcy to justify findings made in the Highland Bankruptcy that were not otherwise supported by the Highland record;

(d) indication that it was predisposed to disregard the presumption of corporate formalities and conclude, without supporting evidence, that any entity the Bankruptcy Court considered affiliated with Mr. Dondero (*i.e.*, including the highly regulated Affected Entities, which are governed by independent boards) was essentially Mr. Dondero's alter ego; [107] and

(e) repeatedly disregarding, without basis, of the testimony of any witness with a connection to Mr. Dondero as *per se* not credible, including testimony of attorneys and persons who owe fiduciary duties and ethical obligations.[108]

(2009) ("It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process."); see also *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam) ("Trial before 'an unbiased judge' is essential to due process.") (quoting *Bloom v. Illinois*, 391 U.S. 194, 205 (1968)).

[104] H. Rep. No. 1453, 93d Cong., 2d Sess. 1 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6355.

[105] *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (internal citations omitted).

[106] *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997) (emphasis added).

[107] R. 3371, the February 8, 2021 Transcript at 13:17-24 (R. 3383); 20:18-20 (R. 3390); 21:18-22:3 (R. 3391-3392).

[108] *See, e.g.*, ECF 1943 at p. 19 ("At the Confirmation Hearing, Mr. Post testified on behalf of the Highland Advisors and Funds that the Funds have independent board members that run the Funds, but the Bankruptcy Court was not

The failure to address any of these grounds in the Order is further evidence of the root issue.

52. ***Second***, the Bankruptcy Court, in the Order, appears to be distancing itself from its prior admissions regarding the Acis Bankruptcy, which raises an issue regarding the source of the "extrajudicial knowledge" supporting the Bankruptcy Court's bias against Mr. Dondero. In its Order, the Bankruptcy Court contends that: (a) it does not recall any specific ruling from the *Acis* case relating to Mr. Dondero;[109] (b) it only recalls Mr. Dondero testifying once in court during the *Acis* case;[110] and (c) it has vague recollection that deposition testimony may have been presented another time.[111] Nevertheless, on February 19, 2020, approximately two months after the Highland Bankruptcy was transferred ***and before Mr. Dondero had ever testified in the Highland Bankruptcy***, the Bankruptcy Court prefaced a statement in a hearing with the phrase, ***"[i]f you can trust Mr. Dondero….***"[112]

53. If the Court does not recall anything from the Acis Bankruptcy, then this statement could only be based on extrajudicial knowledge. As a result, the Bankruptcy Court's statements in the Order have created a fact issue over the source of its knowledge to support its expressed doubt as to anyone's ability to "trust" Mr. Dondero.

54. ***Third***, even a lack of extrajudicial knowledge is not fatal because Appellants are entitled to a full and fair opportunity to make their case in an impartial forum—regardless of their history

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convinced of their independence from Mr. Dondero because none of the so-called independent board members have ever testified before the Bankruptcy Court and all have been engaged with the Highland complex for many years. Notably, the Court questions Mr. Post's credibility because, after more than 12 years of service, he abruptly resigned from the Debtor in October 2020 at the exact same time that Mr. Dondero resigned at the Board of Directors' request, and he is currently employed by Mr. Dondero."); *see also*, R. 3166, the January 8, 2021 Transcript, at 175:8-176:25 (R. 3340-3341).

[109] R. 31, Order at p. 8 (R. 38).

[110] *Id.* at p. 9 (R. 39).

[111] *Id.*

[112] R. 2610, the February 19, 2020 Transcript, at 174:22-175:1 (emphasis added) (R. 2783-2784).

with that forum.[113] The Supreme Court has recognized that predispositions developed during the course of a trial can create a valid basis for a bias or partiality motion.[114] While the presence of an extrajudicial source is ***a*** factor in favor of finding recusal under section 455,[115] it is ***not necessary*** for recusal.[116] Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, will support recusal under section 455(a) "***if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible***."[117]

55. As stated above, the Bankruptcy Court has admitted a predisposition against Mr. Dondero and made repeated statements and took actions (including doubting the credibility of any witness connected to Mr. Dondero; ignoring evidence in the record, *e.g.*, evidence of corporate formalities; and disregarding the required presumption that Mr. Dondero's filings by his counsel are made in good-faith) demonstrating that the Bankruptcy Court is not capable of ruling impartially where Mr. Dondero is concerned. Additionally, as described herein (e.g., paragraphs 11, 16-17 and 27-28 above), the Bankruptcy Court has two different standards for Appellants and anyone adverse to Appellants, showing a high degree of favoritism.

56. Importantly, even after the Bankruptcy Court denied the Motion, the Bankruptcy Court's antagonism toward Appellants and favoritism toward any party adverse to Appellants continued.[118] For example, at a hearing on June 10, 2021 after Appellants moved to withdraw the reference, the Bankruptcy Court *sue sponte* recommended Debtor file fraudulent transfer claims

[113] *Miller v. Sam Houston State University,* 986 F.3d 880, 893 (5th Cir. 2021) (citing *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995)).
[114] *Liteky v. United States*, 510 U.S. 540, 554 (1994) (emphasis added).
[115] *Bell v. Johnson*, 404 F.3d 997, 1004 (6th Cir. 2005) (citations omitted).
[116] *Liteky v. United States*, 510 U.S. 540, 554-55 (1994).
[117] *Liteky v. United States*, 510 U.S. 540, 555 (1994) (citation omitted) (emphasis added).
[118] Appellants have moved to supplement the record, which is unopposed and pending before the court. The supplemental documents will demonstrate ongoing bias.

(suggesting that those might affect the reference from being withdrawn).[119]

57. At that same hearing, the Bankruptcy Court refused to grant Dugaboy's motion to compel Debtor to file the "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" as required by Fed. R. Bankr. P. 2015.3(a).[120] The Court raised concerns that the statutorily required information might be used to "cobble together a new adversary alleging mismanagement" against the Debtor[121] and did not grant the motion because, among other things, it would be unduly burdensome.[122]

58. Then, just seven days later, on June 17, 2021, the Bankruptcy Court entered a *sua sponte* order claiming to question Appellants' standing to as creditors to object to various settlements and the handling of the estate (the "June 17 Order").[123] The June 17 Order requires Appellants (and other entities with ties to Mr. Dondero) to "file a Notice in this case disclosing: (1) who owns the entity (showing percentages); (2) whether Mr. Dondero or the Trusts have either a direct or indirect ownership interest in the entity and, if so, what percentage; (3) who are the officers, directors, managers and/or trustees of the Non-Debtor Dondero-Related Entity; and (4) whether the entity is a creditor of the Debtor (explaining in reasonable detail the amount and substance of its claims)."[124] Importantly, the June 17 Order actually establishes Appellants' standing and

[119] June 10, 2021 Transcript at 81:5-16 (App. 81); 83:1-12 (App. 83), a true and correct copy of which is attached to Appellants' Appendix as Tab 1 (App. 1-91).
[120] *Id*. at 49:12-14 (App. 49).
[121] *Id*. at 46:11-13 (App. 46).
[122] *Id.* at 49:12-51:3 (App. 49).
[123] *See* June 17 Order at p. 1 (App. 92), a true and copy of which is attached to Appellants' Appendix as Tab 2 (App. 92-104) ("This Order is issued by the court sua sponte pursuant to Section 105 of the Bankruptcy Code and the court's inherent ability to efficiently monitor its docket and evaluate the standing of parties who ask for relief in the above-referenced case. More specifically, the Order is directed at clarifying the party-in-interest status or standing of numerous parties who are regularly filing pleadings in the above-referenced 20-month-old Chapter 11 bankruptcy case.").
[124] *Id* at p. 12-13 (App. 103-104).

unjustifiably requires action that have nothing to do with standing.

C. Recusal was and remains proper.

59. Here, the Bankruptcy Court seeks to sit as both judge and jury in various pending and future Adversary Proceedings and contested matters and has demonstrated a willingness to retain jurisdiction whenever possible.[125] To do so, the Bankruptcy Court must, but appears unable to, set aside any prejudice or bias against Appellants in those proceedings. A reasonable person, knowing the facts, would doubt the Bankruptcy Court's impartiality regarding Appellants. At a minimum, that is the perception that has been created.[126] The Bankruptcy Court cannot escape this reality by subjectively concluding, without analysis, that it does not believe the allegations in the Motion to be true. As a result, the Bankruptcy Court abused its discretion in denying the Motion.

IV. CONCLUSION AND PRAYER

FOR THE FOREGOING REASONS, Appellants respectfully request that the Court reverse the Bankruptcy Court's order denying Appellants' Motion to Recuse; order that the Bankruptcy Court is recused from the Adversary Proceedings and any future contested matters involving Appellants or any entity connected to Mr. Dondero; and grant Appellants all other further relief, at law or equity, to which they are justly entitled.

[125] *See, e.g.,* R. 3480, the September 23, 2020 Transcript, at 50:4-52:7 (R. 3529-3530).
[126] *Liteky v. United States*, 510 U.S. 540, 551 (1994).

CERTIFICATE OF COMPLIANCE

In compliance with Rules 8014 and 8015, I hereby certify that:

(a) This document complies with the type-volume limit of FED. R. BANKR. P. 8015(a)(7)(B) because, excluding the parts of the document exempted by FED. R. BANKR. P. 8015(g), this document contains 9,285 words.

(b) This document complies with the typeface requirements of FED. R. BANKR. P. 8015(a)(5) and the type-style requirements of FED. R. BANKR. P. 8015(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft word, version 2008, in size 12, Times New Roman.

Dated: June 28, 2021

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CERTIFICATE OF SERVICE

The undersigned certifies that on June 28, 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

Exhibit 4

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

In Re:	)	**Case No. 19-34054-sgj-11**
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas
	)	February 19, 2020
	)	9:30 a.m.
Debtor.	)	
	)	MOTIONS

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.

Second, Foley is not being retained to conduct the Debtor's bankruptcy case. That's my firm, Pachulski Stang. Again, nobody has objected on that basis.

Third, Foley represented the Debtor prior to the petition date on these matters. Again, nobody has objected on that basis.

And, fourth, you know, as Judge Nelms will testify, the retention of Foley and Foley's continued prosecution of the Acis matters is in the best interest of the Debtor's estate.

And then fifth and finally, Foley has no adverse interest with respect to the matters on which it is being retained.

Now, as I mentioned, there were two omnibus objections that were filed. There was the Committee's objection and then there was Acis's objection. Both of these objections really had one common theme, which was that there was insufficient disclosure as to how the fees were going to be allocated, and, honestly, whether or not Mr. James Dondero would benefit from Foley's retention without paying his share of those fees.

Now, we had a meeting with the Committee on Friday and we walked through this issue. And as a result of that, the Committee withdrew its objection.

What we told to the Committee is that, prior to the Acis bankruptcy -- and this goes primarily to the retention -- or, the prosecution of the involuntary petition appeal. In that appeal, Foley is representing just Neutra. Foley is not

representing the Debtor. Now, the economic benefit to the estate, though, in that appeal accrues almost solely to the Debtor. It does not accrue to Neutra or to Neutra's economic interest owners, which, full disclosure, are Mr. James Dondero and Mr. Mark Okada.

The reason why the Debtor -- and you'll hear, again, hear this from Judge Nelms -- believes that it's in the economic best interest of its estate to pay for Neutra's fees in that appeal is that, if Neutra is successful in that appeal, the involuntary petition obviously will be struck, the involuntary will be unwound, and the economic interest and the economic ownership of Acis will revert to Neutra.

Upon that reversion, Highland Capital Management will be reinstated as the advisor to Neutra.

Now, if Neutra -- I'm sorry, if Acis then generates fees, those fees are going to be paid about 85 percent to satisfy the contractual obligations under that advisory agreement.

So, on a go-forward basis, again, if Neutra is successful, 85 percent of the revenue generated by Acis will go to Neutra. That remaining 15 percent will be used to satisfy the claim that Acis -- I'm sorry, that Highland Capital Management has against Acis for the pre-, post-petition, and gap period services that it provided to Acis under the advisory agreements. That claim is about $8 million.

So, 85 percent of the revenue on a go-forward basis is

Q Okay. So, that, plus the Neutra appeal, are two -- I mean, I apologize, withdrawn. That, plus the DAF matter, are two examples where the Board exercised its judgment not to pursue pending litigation; is that fair?
A That's correct.
Q Okay. Is the Board supportive of the Debtor's application to retain Foley for the three matters you have described?
A It is.
Q And without revealing privileged communications, can you describe generally the diligence that the Board conducted to reach that decision?
A Well, we met with some of the people that work at Highland. We met with the Debtor's attorneys, the Pachulski firm. We did have a couple of meetings with Ms. Patel and Mr. Terry. Some of us have reviewed the pleadings, some more than others. And, well, we may have done other things, but those are the ones that come to mind right now.
Q I don't know if you mentioned it, but did you confer with Ms. O'Neil?
A Oh, yes, we did. We talked with Ms. O'Neil about it.
Q Okay. And what was the purpose of the diligence that you just described for the Court?
A Well, ultimately, what we as a board were trying to do was to conduct kind of a cost-benefit analysis to the estate: How much will this potentially cost us? What's the potential

receiving a benefit from this, the Committee has standing to pursue that.

So it's not a null set, Your Honor, whereas cutting off the appeal now does take away that possibility.

THE COURT: How would I be cutting off the appeal? I'm not cutting off the appeal. King & Spalding can go in there and fight hard. Foley can go in there and fight hard for Neutra. So, --

MR. DEMO: One second, Your Honor.

(Counsel confer.)

MR. DEMO: And I guess, you know, Your Honor, and I do want to reiterate that there is no other party with an economic incentive to fight the Neutra appeal the way that the Debtor has an economic incentive.

THE COURT: That makes no sense to me. HCLOF is the one who hated this injunction.

MR. DEMO: That's not the Neutra appeal, Your Honor. That's the confirmation order.

THE COURT: Well, okay. Neutra gets its company back if they win.

MR. DEMO: And we would get our contracts back.

THE COURT: And arguably, it can control Acis, maybe, okay, and it can assign management contracts to whoever it wants. That just -- and it says it'll assign them to Highland. If you can trust Jim Dondero, then Highland's going

to benefit if Neutra wins that appeal. Right?

MR. DEMO: Yes. Yes, Your Honor.

THE COURT: Okay. So that --

MR. DEMO: Highland would benefit greatly --

THE COURT: Okay.

MR. DEMO: -- if Neutra were to win that appeal.

THE COURT: Okay. Okay. Well, but first Neutra benefits, right? And then --

MR. DEMO: No.

THE COURT: -- Highland only secondarily benefits --

MR. DEMO: I -- I --

THE COURT: -- if Jim Dondero keeps his word and gives the management contracts back to Highland.

MR. DEMO: Jim Dondero would also have to repay the $8 million in claim, even if he didn't reinstate those contracts. And that $8 million would be hundred-cent dollars.

THE COURT: Okay.

MR. DEMO: So, worst case, --

THE COURT: It would have been nice to have him testify as to all of this.

MR. DEMO: Worst --

THE COURT: It would be more compelling if I had him.

MR. DEMO: Well, --

THE COURT: Okay? But I don't think --

MR. DEMO: -- I can only do so much, Your Honor.

you know, I hate it that we were here, but I understand it.

But I'm concerned. I'm concerned -- well, here's the deal. We have a great board, and I totally get that Bankruptcy Courts should defer heavily to the reasonable exercise of business judgment by a board. And we've got great professionals. And we've got this case, I think, on a good track as a general matter now. But I'm concerned that Dondero or certain in-house counsel has -- you know, they're smart, they're persuasive -- that -- what are the words I want to look for -- they have exercised their powers of persuasion or whatever to make the Board and the professionals think that there is some valid prospect of benefit to Highland with these appeals, when it's really all about Neutra, HCLOF, and Mr. Dondero. That's what I believe.

I mean, this is awkward, right, because you want to defer to the debtor-in-possession, but I have this long history, and I can think through the scenarios. If this is reversed, here is how it will play out. If this is reversed, here is how it might play out. And I know, you know, there are multiple ways it might play out, but I cannot believe there is a chance in the world there is economic benefit to Highland if these things get reversed. Economic benefit to Neutra: Yeah, maybe. Economic benefit to HCLOF: Well, they'll get what they want. You know, whether it's an economic benefit, I don't know. But benefit to Highland? I just don't think the

evidence has been there to convince me it's reasonable business judgment for Highland to pay the legal fees associated with the appeal.

And even more concerning to me is a valid point was made that Highland is in bankruptcy because of litigation, litigation, litigation. The past officers and directors and controls' propensity to fight about everything. This isn't a balance sheet restructuring, okay? It's not a Chapter 11 caused by operational problems or revenue disruption or who knows what kind of disruption. It's about years of litigation finally coming home to roost. And this just appears to be more of the same, potentially.

Okay. Parties have a right to appeal. I respect that. Neutra, go for it. HCLOF, go for it. But this estate and its creditors should not bear the burden of having Highland pay for that, when, again, I don't think there's any evidence to suggest they could benefit at the end of the day.

So what I'm going to do is I'm going to approve the retention of Foley to represent Highland in the Acis case. We all know the adversary is stayed right now. It may or may not ever be un-stayed, depending on what strategies people want to pursue. But Highland, I think a meritorious case has been presented, and under 327(e) I will approve Foley representing Highland in all Acis matters. Okay? The Acis bankruptcy case. The adversary proceeding, if it goes forward. And so

THE COURT: Okay. Thank you all.

(Proceedings concluded at 1:44 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 **02/20/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

Exhibit 5

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
	Friday, January 8, 2021
	9:30 a.m. Docket
Debtor.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 20-3190-sgj**
Plaintiff,	PRELIMINARY INJUNCTION HEARING [#2]
v.	
JAMES D. DONDERO,	
Defendant.	

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

WEBEX/TELEPHONIC APPEARANCES:

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

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

APPEARANCES, cont'd.:

For James Dondero, Defendant:	D. Michael Lynn John Y. Bonds, III Bryan C. Assink BONDS ELLIS EPPICH SCHAFER JONES, LLP 420 Throckmorton Street, Suite 1000 Fort Worth, TX 76102 (817) 405-6900
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539
For the Funds and Advisors:	Davor Rukavina MUNSCH HARDT KOPF & HARR, P.C. 500 N. Akard Street, Suite 3800 Dallas, TX 75201-6659 (214) 855-7554
For Certain Employees:	Frances A. Smith ROSS & SMITH, P.C. Plaza of the Americas 700 N. Pearl Street, Suite 1610 Dallas, TX 75201 (214) 593-4976
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Transcribed by:	Kathy Rehling 311 Paradise Cove Shady Shores, TX 76208 (972) 786-3063

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action and it was destroyed to keep us from having that evidence.

And they brought forth all kinds of case law. It's a hard area. It's a really, really hard area. But I ended up -- again, it's not in the main opinion. It was in subsequent orders. I ended up saying, yeah, I think you've met the standard here to draw adverse inferences.

So, again, this is a very unpleasant message for me to deliver today. But the destruction of the phone is my biggest takeaway of concern today, how that might have ramifications. You know, there are other bad things, too, about that. I'm not even going to go there right now. But the, you know, Title 18, you can ask your lawyer what that means, but okay.

My second big takeaway before we get to the hopeful stuff is -- and this is kind of harsh, what I'm about to say -- but Ellington and Leventon maybe care more about you, Mr. Dondero, than their law license. You know, I guess it's great to have people in your life who are very, very loyal to you. I mean, loyalty is a wonderful thing. But I am just so worried about things I've heard. Again, the phone and in-house lawyers. The biggest concerns in my brains right now. I have worried about them for a while.

You all will -- well, Mr. Dondero, you might not know this. But we had a hearing a few months ago, maybe September, October, where the Creditors' Committee was trying to get

discovery of documents. And we had some sort of hearing, maybe a motion to compel production. And we had many, many entities that you control file objections: NexPoint, NexBank. I can't even remember. We just had a whole slew. CLO Holdco. Many, many of these entities objected. And I was trying to figure out that day who was instructing them. And oh my goodness, I hope the in-house layers are not involved in this document discovery dispute, because, you know, they have fiduciary duties. And are -- you know, is it -- it feels like it's breaching a duty to the bankruptcy estate when it's in the bankruptcy estate's best interest to get these documents if you're meanwhile hiring lawyers for these other entities, Holdco, et cetera, and saying, Fight this.

I never really pressed it very hard back then, but I raised the issue and I said, I'm really, really concerned about this. And I continue to be concerned about it. I had experiences with Mr. Ellington in the *Acis* case where he testified on the witness stand, and later it looked a heck of a lot like he might have committed perjury. I hate to use such blunt terms. But I let it go. I'm just like, you know, I'm not going to -- you know, I'm going to just hope for the best that he misspoke.

But I'm getting a really bad taste in my mouth about Ellington and Leventon, and I hope that they will be careful and you will be careful, Mr. Dondero, in future actions.

MR. BONDS: Thank you, Your Honor.

(Proceedings concluded at 4:09 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 **01/11/2021**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

Exhibit 6

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, February 8, 2021
	9:00 a.m. Docket
Debtor.	
	BENCH RULING ON CONFIRMATION HEARING [1808] AND AGREED MOTION TO ASSUME [1624]

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

WEBEX APPEARANCES:

For the Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539
For James Dondero:	D. Michael Lynn John Y. Bonds, III Bryan C. Assink BONDS ELLIS EPPICH SCHAFER JONES, LLP 420 Throckmorton Street, Suite 1000 Fort Worth, TX 76102 (817) 405-6900
For Get Good Trust and Dugaboy Investment Trust:	Douglas S. Draper HELLER, DRAPER & HORN, LLC 650 Poydras Street, Suite 2500 New Orleans, LA 70130 (504) 299-3300

APPEARANCES, cont'd.:

For Certain Funds and Advisors:	Davor Rukavina MUNSCH, HARDT, KOPF & HARR 500 N. Akard Street, Suite 3800 Dallas, TX 75201-6659 (214) 855-7587
For Certain Funds and Advisors:	A. Lee Hogewood, III K&L GATES, LLP 4350 Lassiter at North Hills Avenue, Suite 300 Raleigh, NC 27609 (919) 743-7306
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Transcribed by:	Kathy Rehling 311 Paradise Cove Shady Shores, TX 76208 (972) 786-3063

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least $37.4 million" relating to alleged breached employment-related agreements and for the tort of defamation arising from a 2017 press release posted by the Debtor.

The Debtor and Patrick Daugherty recently announced a settlement of the Patrick Daugherty claim in the amount of $750,000 cash on the effective date, an $8.25 million general unsecured claim, and a $2.75 million subordinated claim. Other aspects and details of this settlement are being omitted.

Additionally, an entity known as HarbourVest, who invested more than $70 million with an entity in the Highland complex, asserted a $300 million proof of claim against Highland, alleging, among other things, fraud and RICO violations. The HarbourVest claim was settled during the bankruptcy case for a $45 million general unsecured claim and a $35 million junior claim.

Other than these claims just described, most of the other claims in this case are claims asserted against the Debtor by other entities in the Highland complex, most of which entities the Court finds to be controlled by Mr. Dondero; claims of employees who believe that they are entitled to large bonuses or other types of deferred compensation; and claims of numerous law firms that did work for Highland and were unpaid for amounts due to them on the petition date.

Yet another reason this is not your garden-variety Chapter

that the Debtor filed shortly before the confirmation hearing that, among other things, show the estimated distribution to creditors and compare plan treatment to a likely disbursement in a Chapter 7.

These do not constitute a materially adverse change to the treatment of any creditors or interest holders. They merely update likely distributions based on claims that have now been settled, and they've otherwise incorporated more recent financial data. This happens often before confirmation hearings. The Court finds that it did not mislead or prejudice any creditors or interest holders, and certainly there was no need to resolicit the Plan.

The only Objectors to the Plan left at this time were Mr. Dondero and entities that the Court finds are controlled by him. The standing of these entities to object to the Plan exists, but the remoteness of their economic interest is noteworthy, and the Court questions the good faith of the Objectors. In fact, the Court has good reason to believe that these parties are not objecting to protect economic interests they have in the Debtor, but to be disruptors.

Mr. Dondero wants his company back. This is understandable. But it's not a good faith basis to lob objections to the Plan. The Court has slowed down confirmation multiple times on the current Plan and urged the parties to talk to Mr. Dondero. The parties represent that

they have, and the Court believes that they have.

Now, to be specific about the remoteness of the objectors' interests, the Court will address them each separately. First, Mr. Dondero has a pending objection. Mr. Dondero's only economic interest with regard to the Debtor at this point is an unliquidated indemnification claim. And based on everything this Court has heard, his indemnification claim will be highly questionable at this juncture.

Second, a joint objection has been filed by the Dugaboy Trust and the Get Good Trust. As for the Dugaboy Trust, it was created to manage the assets of Mr. Dondero and his family, and it owns a 0.1866 percent limited partnership interest in the Debtor. The Court is not clear what economic interest the Get Good Trust has, but it likewise seems to be related to Mr. Dondero, and it has been represented to the Court numerous times that the trustee is Mr. Dondero's college roommate.

Another group of Objectors that has joined together in one objection is what the Court will refer to as the Highland and NexPoint Advisors and Funds. The Court understands they assert disputed administrative expense claims against the estate. While the evidence presented was that they have independent board members that run these companies, the Court was not convinced of their independence from Mr. Dondero. None of the so-called independent board members of these

entities have ever testified before the Court. Moreover, they have all been engaged with the Highland complex for many years.

The witness who testified on these Objectors' behalves at confirmation, Mr. Jason Post, their chief compliance officer, resigned from Highland after more than twelve years in October 2020, at the same time that Mr. Dondero resigned or was terminated by Highland. And a prior witness recently for these entities whose testimony was made part of the record at the confirmation hearing essentially testified that Mr. Dondero controlled these entities.

Finally, various NexBank entities objected to the Plan. The Court does not believe they have liquidated claims. Mr. Dondero appears to be in control of these entities as well.

To be clear, the Court has allowed all of these objectors to fully present arguments and evidence in opposition to confirmation, even though their economic interests in the Debtor appear to be extremely remote and the Court questions their good faith. Specifically on that latter point, the Court considers them all to be marching pursuant to the orders of Mr. Dondero.

In the recent past, Mr. Dondero has been subject to a TRO and preliminary injunction by the Bankruptcy Court for interfering with the current CEO's management of the Debtor in specific ways that were supported by evidence. Around the

under the All Writs Act, 28 U.S.C. § 1651. And additionally, under the Bankruptcy Code, a bankruptcy court can issue any order, including a civil contempt order, necessary or appropriate to carry out the provisions of the Code, citing, of course, 105 of the Bankruptcy Code.

The Fifth Circuit stated that, when considering whether to enjoin future filings against a vexatious litigant, a bankruptcy court must consider the circumstances of the case, including four factors: (1) the party's history of litigation; in particular, whether he has filed vexatious, harassing, or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing the litigation, or perhaps intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party's filings; and (4) the adequacy of alternatives.

In the *Baum* case, the Fifth Circuit stated that the traditional standards for injunctive relief -- *i.e.*, irreparable harm and inadequate remedy at law -- do not apply to the issuance of an injunction against a vexatious litigant.

Here, although I have not been asked to declare Mr. Dondero and his affiliated entities as vexatious litigants *per se*, it is certainly not beyond the pale to find that his long history with regard to the major creditors in this case has strayed into that possible realm, and thus this Court is justified in approving this provision.

to win, I turned it off.

I'm sorry. That's terrible. You know, my law clerk, my law clerk that you can't see, Nate, he is from Ann Arbor, Michigan, University of Michigan, and he almost cried when I said I didn't like Tom Brady the other day. So, I apologize.

MR. POMERANTZ: Your Honor, one other comment. We had our motion to assume our nonresidential real property lease that was also on. It got missed in all the fanfare, but it was -- it has been unopposed and essentially done pursuant to stipulation. So we'd like to submit an order on that as well.

THE COURT: Okay. I have seen that, and I approve it under 365. You may submit the order. Okay. Thank you.

MR. POMERANTZ: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 10:35 a.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **02/09/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

Exhibit 7

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
	Thursday, June 10, 2021
Debtor.	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.,	**Adversary Proceeding 21-3006-sgj**
Plaintiff,	DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND BRIEF IN SUPPORT [15]
v.	
HIGHLAND CAPITAL MANAGEMENT SERVICES, INC.,	
Defendant.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 21-3007-sgj**
Plaintiff,	DEFENDANT'S MOTION FOR LEAVE TO AMEND ANSWER TO PLAINTIFF'S COMPLAINT [16]
TO	
v.	
HCRE PARTNERS, LLC N/K/A NEXPOINT REAL ESTATE PARTNERS, LLC,	
Defendant.	

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

WEBEX APPEARANCES:

For the Get Good Trust and Dugaboy Investment Trust:	Douglas S. Draper HELLER, DRAPER & HORN, LLC 650 Poydras Street, Suite 2500 New Orleans, LA 70130 (504) 299-3300
For the Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Debtor:	John A. Morris PACHULSKI STANG ZIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017-2024 (212) 561-7700
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539
For James Dondero:	Clay M. Taylor BONDS ELLIS EPPICH SCHAFER JONES, LLP 420 Throckmorton Street, Suite 1000 Fort Worth, TX 76102 (817) 405-6900
For the NexPoint Parties:	Lauren K. Drawhorn WICK PHILLIPS 3131 McKinney Avenue, Suite 100 Dallas, TX 75204 (214) 692-6200
Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062

Transcribed by:

Kathy Rehling
311 Paradise Cove
Shady Shores, TX 76208
(972) 786-3063

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

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

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

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.)

--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 **06/12/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

EXHIBIT 8

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No.143717) (*admitted pro hac vice*)
Ira D. Kharasch (CA Bar No. 109084) (*admitted pro hac vice*)
John A. Morris (NY Bar No. 2405397) (*admitted pro hac vice*)
Gregory V. Demo (NY Bar No. 5371992) (*admitted pro hac vice*)
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Counsel for Highland Capital Management, L.P.

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. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., AND NEXPOINT ADVISORS, L.P., Defendants.	§	Adversary Proceeding No. _____

[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.

PLAINTIFF HIGHLAND CAPITAL MANAGEMENT, L.P.'S VERIFIED ORIGINAL COMPLAINT FOR DAMAGES AND FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession ("Plaintiff" or the "Debtor"), by its undersigned counsel, files this *Verified Original Complaint for Damages and for Declaratory and Injunctive Relief* (the "Complaint") against defendants Highland Capital Management Fund Advisors, L.P. ("HCMFA") and NexPoint Advisors, L.P. ("NPA," and together with HCMFA, the "Defendants" or the "Advisors"), seeking damages and declaratory and injunctive relief pursuant to sections 105(a), 362, 542, and 1107 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 7001(7) and 7065 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of its Complaint, the Debtor alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT[2]

1. The Advisors serve as the investment manager, either directly or indirectly, to a number of investment vehicles (collectively, the "Funds") regulated pursuant to the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940. Certain of the Funds are publicly traded and have thousands of retail investors who are at risk due to the Advisors' deleterious conduct.

2. The Advisors are owned and controlled by James Dondero. Pursuant to certain Shared Services Agreements, the Debtor has historically provided back-office and middle-office services that enable the Advisors to manage the Funds. Although the Debtor is paid for these

[2] Capitalized terms not specifically defined in this Preliminary Statement shall have the meanings ascribed to them below.

services, providing the services requires the Debtor to maintain a full staff, the cost of which has historically caused substantial net losses to the Debtor.

3. Each of the Shared Services Agreements gives either party the unilateral right to terminate the respective Shared Services Agreement by providing prior written notice. On November 30, 2020, the Debtor provided written notice of its intent to terminate the Shared Services Agreements effective as of January 31, 2021.

4. The Termination Notices could not have come as a surprise to the Advisors because the Debtor was in bankruptcy and had been pursuing an "asset monetization" plan of reorganization that would leave it with a substantially scaled-down work force since at least August 2020. With that in mind, the Debtor began developing a plan pursuant to which the shared services would be transitioned to an entity that would be created, owned, and operated by certain of the Debtor's employees who were expected to be terminated as part of the implementation of the Debtor's Plan.

5. At the same time, the Debtor continued to provide the services required under the Shared Services Agreements – despite the Advisors being in substantial arrears with an outstanding amount due to the Debtor in excess of $3 million – and otherwise continued in its attempts to transition those services in a smooth and orderly manner. Indeed, in order to give the Advisors more time to engage and complete the transition, the Debtor has extended the termination date on two occasions, with the current termination deadline being February 19, 2021.[3]

[3] Although the Shared Services Agreement will terminate on February 19, 2021, the Debtor is willing to further extend the termination dates of the Shared Services Agreements through February 28, 2021, solely to prevent catastrophic harm to the retail investors in the Funds, but the Debtor will be unable to extend the termination date any further as the Debtor is expected to reduce its workforce at the end of February and will have insufficient personnel thereafter to perform under the Shared Services Agreements.

6. Regrettably, as described in more detail below, and notwithstanding the Debtor's best efforts to aid in the transition of services, the Advisors have willfully failed and refused to adopt and effectuate a transition plan, choosing instead to spend the last months threatening the Debtor and certain of its employees and seeking to deflect responsibility for their own wrongful conduct.

7. The status quo is untenable. The Debtor has the contractual right to terminate the Shared Services Agreements and has exercised that right. Pursuant to the Debtor's Plan, there will shortly be a substantial reduction in the Debtor's work force and the Debtor will be unable to provide services to the Advisors. The Advisors' failure to work with the Debtor or to otherwise develop a transition plan of their own has put thousands of retail investors at risk.

8. The Debtor is faced with an awful choice. It can either (a) exercise its rights to terminate the Shared Services Agreements to the detriment of the Funds and their investors, and be sucked into more litigation because of Mr. Dondero's conduct, or (b) attempt to provide services to the Advisors under the Shared Services Agreements at substantial losses and risk material delays in the implementation of the Debtor's Plan.

9. Therefore, in addition to seeking damages and declaratory relief, the Debtor is filing a separate emergency motion for a mandatory injunction compelling the Advisors to adopt and implement a transition plan by February 28, 2021, when the Debtor is expected to substantially reduce its workforce. In the absence of such a mandate, the Funds (together with their thousands of investors) and the Debtor will be irreparably harmed.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and § 1334(b). This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

11. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409.

12. This adversary proceeding is commenced pursuant to Bankruptcy Rules 7001 and 7065, Bankruptcy Code sections 105(a) and 362, 28 U.S.C. §§ 2201 and 2202, and applicable Delaware law.

THE PARTIES

13. The Debtor is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

14. Upon information and belief, HCMFA is a limited partnership with offices located in Dallas, Texas.

15. Upon information and belief, NPA is a limited partnership with offices located in Dallas, Texas.

CASE BACKGROUND

16. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Delaware Court"), Case No. 19-12239 (CSS) (the "Highland Bankruptcy Case").

17. On October 29, 2019, the U.S. Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors with the following members: (a) Redeemer Committee of Highland Crusader Fund, (b) Meta-e Discovery, (c) UBS Securities LLC and UBS

AG London Branch, and (d) Acis Capital Management, L.P. and Acis Capital Management GP LLC.

18. On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].[4]

19. The Debtor has continued to operate and manage its business as a debtor-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No trustee or examiner has been appointed in this chapter 11 case.

20. On November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472] (the "Plan").

21. On February 2 and 3, 2021, the Court conducted a confirmation hearing with respect to the Plan. [Docket No. 1808].

22. On February 8, 2021, the Court rendered an opinion in which it approved the Plan. [Docket No. 1924].

STATEMENT OF FACTS

A. The Debtor Has the Contractual Right to Terminate the Shared Services Agreements, and It Timely Exercised that Right

23. The Debtor is party to the Shared Services Agreements pursuant to which it has a contractual right of termination upon written notice.

The Debtor's Shared Services Agreement with HCMFA

24. The Debtor and HCMFA are parties to that certain *Second Amended and Restated Shared Services Agreement*, effective as of February 8, 2013 (the "HCMFA Shared Services Agreement"), a copy of which is attached hereto as **Exhibit A**.

[4] All docket numbers refer to the main docket for the Highland Bankruptcy Case maintained by this Court.

25. Pursuant to section 2.01 of the HCMFA Shared Services Agreement and Annex A affixed thereto, the Debtor provides certain services to HCMFA that enable HCMFA to manage the Funds.

26. The HCMFA Shared Services Agreement was for a one-year term, subject to automatic one-year renewals "unless sooner terminated under Section 7.02."

27. Section 7.02 of the Shared Services Agreement provides that "[e]ither Party may terminate this Agreement, with or without cause, upon at least 60 days advance written notice at any time prior to the expiration of the Term."

28. On November 30, 2020, the Debtor provided written notice to HCMFA that it intended to terminate the HCMFA Shared Services Agreement as of January 31, 2021 (the "HCMFA Termination Notice"). A copy of the HCMFA Termination Notice is attached hereto as **Exhibit B**.

The Debtor's Shared Services Agreement with NPA

29. The Debtor and NPA are parties to that certain *Amended and Restated Shared Services Agreement*, effective as of January 1, 2018 (the "NPA Shared Services Agreement" and together with the HCMFA Shared Services Agreement, the "Shared Services Agreements"), a copy of which is attached hereto as **Exhibit C**.

30. Pursuant to Article II of the NPA Shared Services Agreement, the Debtor provides certain services to NPA that enable NPA to manage the Funds.

31. The NPA Shared Services Agreement did not have a fixed term. Instead, section 7.01 provided that "[e]ither Party may terminate this Agreement at any time upon at least thirty (30) days' written notice to the other."

32. On November 30, 2020, the Debtor provided written notice to NPA that it intended to terminate the NPA Shared Services Agreement as of January 31, 2021 (the "NPA

Termination Notice" and together with the HCMFA Termination Notice, the "Termination Notices"). A copy of the NPA Termination Notice is attached hereto as **Exhibit D**.

B. Prior to Providing the Termination Notices, the Debtor Worked on a Transition Plan, but the Advisors Failed to Engage or Pay for Services Rendered

33. On August 12, 2020, after considering its strategic options, the Debtor filed an "asset monetization" plan of reorganization pursuant to which, in general, the Debtor proposed to reduce staff, reject certain contracts, and monetize its assets consistent with maximizing value for all stakeholders. [Docket No. 944].

34. Thus, at least as of that time, all stakeholders – including the Advisors – were on notice that the Debtor intended to continue operations on a scaled-down basis with the goal being an orderly monetization of assets.[5]

35. Consistent with that intent, the Debtor began formulating a plan for the transition of services provided under the Shared Services Agreements.

36. Specifically, beginning in the summer of 2020, the Debtor attempted to negotiate for the orderly transition of services with James Dondero, the individual who owns and controls each of the Advisors.

37. The Debtor's proposal contemplated the transition of services to the Advisors from the Debtor to an entity that would be created, owned, and operated by certain of the Debtor's employees ("NewCo") who were expected to be terminated as part of the Debtor's asset monetization plan.

[5] Furthermore, on November 13, 2020, the Debtor filed its *Third Amended Plan of Reorganization of Highland Capital Management* [Docket No. 1383] (the "Third Amended Plan"). In its Third Amended Plan (and subsequent plans), the Debtor explicitly stated that it did not intend to continue providing services under the Shared Service Agreements precisely because they are money losers. Third Amended Plan, Art. IV.A ("[I]t is currently anticipated that neither the Reorganized Debtor nor the Claimant Trust will assume or assume and assign the contracts between the Debtor and certain Related Entities pursuant to which the Debtor provides shared services and sub-advisory services to those Related Entities. The Debtor believes that the continued provision of the services under such contracts will not be cost effective.")

38. With Mr. Dondero in control, the Advisors never provided any constructive response to the Debtor's proposal. Indeed, Mr. Dondero specifically informed the Debtor that he intended to make the transition difficult for the apparent purpose of creating leverage in plan negotiations.

39. In addition to failing to engage in any process designed to provide for the orderly transition of services, the Advisors also failed to pay the Debtor for the services provided under the Shared Services Agreement.

40. Since the Petition Date, each of the Advisors has failed to meet certain of its payment obligations under the Shared Services Agreements. For the period between the Petition Date and January 31, 2021, (a) HCMFA owes the Debtor $2,121,276 for services rendered under the HCMFA Shared Services Agreement, and (b) NPA owes the Debtor $932,977 for services rendered under the NPA Shared Services Agreement. These amounts exclude amounts owed for services provided prior to the Petition Date.

41. The Debtor loses significant money providing services under the Shared Services Agreements, which is why it publicly stated its intention in the Third Amended Plan (and each subsequent amendment and modification to the Plan) not to assume or assume and assign them. While that is bad enough, the Advisors failure to pay for services previously rendered is a blatant breach of the Agreements.

C. The Debtor Offers to Extend the Termination Date to Avoid a Catastrophe and Attempts to Engage the Funds' Board to Aid in the Adoption of a Transition Plan

42. Instead of engaging in the process, the Advisors and certain of their employees were more focused on threatening the Debtor and its employees, all in a transparent effort to deflect responsibility for their own obstinate and wrongful conduct.

43. With the January 31, 2021 termination date fast approaching, and with the Advisors continuing to fail to work cooperatively on a transition plan, the Debtor took the initiative and offered to extend the termination date by two weeks (i) in order to avoid catastrophic consequences for the Funds and their investors that would result from an abrupt termination, and (ii) in the hope that the Advisors would use the extended time to finally and constructively engage.

44. Thus, on January 29, 2021, the parties executed an agreement extending the termination date to February 14, 2021 in exchange for the Advisors paying in advance for services to be rendered by the Debtor during that two-week period. A copy of the January 29, 2021, agreement is attached hereto as **Exhibit E**.

45. During the two-week period, the Debtor and its employees and professionals made every effort to bring the issue of the transition of services to a resolution. Among other things, the Debtor continued to refine the proposal for the transition of services to NewCo.

46. The Debtor also attempted to get the attention of the Funds' Boards because it was concerned that the Boards were either uninformed, not engaged, or were under the influence and control of Mr. Dondero.

47. Among other communications, James P. Seery, Jr., the Debtor's Chief Executive Officer, sent formal written communications to the Board of Directors for the Funds on January 27, 2021, February 8, 2021, and February 12, 2021.[6] Copies of Mr. Seery's letters are attached hereto as **Exhibits F, G and H,** respectively.

48. Despite the efforts of certain of the Advisors' professionals, and despite the Debtor's willingness to make all reasonable concessions on a transition agreement, Mr. Dondero

[6] Mr. Seery's formal correspondence was in addition to his informal correspondence and communications with the Funds' Board and the substantial communications between counsel to the Debtor, the Advisors, and the Funds.

and the Advisors have refused to "say yes" or to otherwise take steps to formulate a transition plan for the protection of the Funds and their investors.

49. Faced with an untenable situation, the Debtor again agreed to extend the termination date, this time to February 19, 2021. *See* **Exhibit I**.

50. Finally, on February 16, 2021, the Debtor made its last attempt to reach an agreement before being forced to take alternative actions to protect itself, the Funds, and investors, by sending the Advisors a proposed term sheet (the "Term Sheet") that provided a reasonable transition plan. A copy of the Term Sheet is attached as **Exhibit J**. The Advisors refused to agree to the terms thereunder.

51. Given that the Court will soon enter an order confirming the Debtor's Plan, and the reduction in the Debtor's work force will follow soon thereafter, the Debtor will be unable to provide services to the Advisors much longer. The Advisors' failure to agree on or formulate a transition plan is creating catastrophic risk for the Funds and their investors. The Advisors' failure to plan for a transition is also creating material risk to the Debtor.

FIRST CLAIM FOR RELIEF

(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

52. The Debtor repeats and realleges each of the allegations in each of the foregoing paragraphs as though fully set forth herein.

53. A bona fide, actual, present dispute exists between the Debtor and the Advisors concerning their respective rights and obligations under the Shared Services Agreements.

54. A judgment declaring the parties' respective rights and obligations will resolve their disputes.

55. Pursuant to Bankruptcy Rule 7001, the Debtor specifically seeks declarations that:

- Each of the Advisors is owned and controlled by Mr. Dondero;
- The Debtor has the contractual right to terminate the HCMFA Shared Services Agreement on 60 days' written notice;
- The Debtor properly exercised its right to terminate the HCMFA Shared Services Agreement by providing at least 60 days' written notice;
- The Debtor's obligation to provide services to HCMFA under the HCMFA Shared Services Agreement (or otherwise) will terminate on February 19, 2021;
- The Debtor has the contractual right to terminate the NPA Shared Services Agreement on 30 days' written notice;
- The Debtor properly exercised its right to terminate the NPA Shared Services Agreement by providing at least 30 days' written notice; and
- The Debtor's obligation to provide services to NPA under the NPA Shared Services Agreement (or otherwise) will terminate on February 19, 2021.

SECOND CLAIM FOR RELIEF

(Breach of Contract)

56. The Debtor repeats and realleges each of the allegations in each of the foregoing paragraphs as though fully set forth herein.

57. The Shared Services Agreements are valid and binding contracts.

58. The Debtor has fully performed all obligations under the Shared Services Agreements.

59. The Advisors have breached the Shared Services Agreements by failing to pay for certain services rendered by the Debtor to the Advisors under the Shared Services Agreements.

60. The Advisors have failed to pay the Debtor all amounts due and owing under the Shared Services Agreements despite the Debtor's demands.

61. The Advisors' breach of the Shared Services Agreements has damaged the Debtor in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF

(For Injunctive Relief -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7065)

62. The Debtor repeats and realleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

63. Pursuant to Bankruptcy Code section 105(a) and Bankruptcy Rule 7065, the Debtor seeks a mandatory injunction directing the Advisors to adopt and implement a plan for the orderly transition of services currently provided under the Shared Services Agreements from the Debtor to NewCo or any other entity of the Advisors' choosing.

64. Bankruptcy Code section 105(a) authorizes the Court to issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a).

65. Bankruptcy Rule 7065 incorporates by reference Rule 65 of the Federal Rules of Civil Procedure and authorizes the Court to issue injunctive relief in adversary proceedings.

66. The Debtor will succeed on the merits of its claims for (a) a declaratory judgment that it has the contractual right to terminate each of the Shared Services Agreements, that it properly exercised those rights, and that, effective February 19, 2021, it has no further legal or equitable obligation to provide any services to the Advisors; (b) damages for breach of contract; and (c) for a mandatory injunction requiring the Advisors to adopt and implement a plan for the orderly transition of shared services.

67. The Advisors' failure to adopt and implement a transition plan is untenable because – as the Advisors have known for months – the Debtor will soon be unable to provide services under the Shared Services Agreements, and such willful misconduct and gross

negligence will cause irreparable harm to the Funds and their investors and to the Debtor and its estate.

68. Given that (a) the Advisors were on notice since at least August 2020, that the Debtor was unlikely to provide services under the Shared Services Agreement for an extended period of time; (b) the Debtor has been pursuing a transition plan since the summer of 2020; (c) the Third Amended Plan filed on November 13, 2020 (and each subsequent version of the Plan), expressly stated that the Debtor would not assume or assume and assign the Shared Services Agreements; (d) the Debtor timely provided notice of termination of the Shared Services Agreements on November 30, 2020; (e) upon information and belief, the Advisors (and not the Debtor) owe contractual and other duties to the Funds, the entities most at risk; and (f) the Debtor has acted in good faith by, among other things, twice extending the anticipated termination date, the balance of the equities strongly favors the Debtor.

69. Finally, the public interest virtually requires that the Advisors be directed to adopt and implement a transition plan. In the absence of a mandatory injunction, thousands of retail investors are likely to suffer catastrophic losses, and there will likely be substantial market disruptions with unforeseeable consequences.

70. Based on the foregoing, the Debtor requests that the Court direct the Advisors to adopt and implement a plan for the orderly transition of services currently provided under the Shared Services Agreements from the Debtor to NewCo, or any other entity of the Advisors' choosing, by February 28, 2021.

PRAYER

WHEREFORE, the Debtor prays for judgment as follows:

- On the First Cause of Action, a judgment declaring that: (i) each of the Advisors is owned and controlled by Mr. Dondero; (ii) the Debtor has the contractual right to terminate the HCMFA Shared Services Agreement on 60 days' written notice; (iii) the Debtor properly exercised its right to terminate the HCMFA Shared Services Agreement by providing at least 60 days' written notice; (iv) the Debtor's obligation to provide services to HCMFA under the HCMFA Shared Services Agreement (or otherwise) will terminate on February 19, 2021; (v) the Debtor has the contractual right to terminate the NPA Shared Services Agreement on 30 days' written notice; (vi) the Debtor properly exercised its right to terminate the NPA Shared Services Agreement by providing at least 30 days' written notice; and (vii) the Debtor's obligation to provide services to NPA under the NPA Shared Services Agreement (or otherwise) will terminate on February 19, 2021.

- On the Second Cause of Action, damages in an amount to be determined at trial arising from the Advisors' breach of the Shared Services Agreements;

- On the Third Cause of Action, a mandatory injunction directing the Advisors to adopt and implement a plan for the orderly transition of services currently provided under the Shared Services Agreements from the Debtor to NewCo, or any other entity of the Advisors' choosing, by February 28, 2021; and

- For such other and further relief as this Court deems just and proper.

Dated: February 17, 2021.

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VERIFICATION

I have read the foregoing VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF and know its contents.

☐ I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☒ I am the Chief Executive Officer and Chief Restructuring Officer of Highland Capital Management, L.P., the Plaintiff in this action, and am authorized to make this verification for and on behalf of the Plaintiff, and I make this verification for that reason. I have read the foregoing document(s). I am informed and believe and on that ground allege that the matters stated in it are true.

☐ I am one of the attorneys of record for _____, a party to this action. Such party is absent from the county in which I have my office, and I make this verification for and on behalf of that party for that reason. I have read the foregoing document(s). I am informed and believe and on that ground allege that the matters stated in it are true.

I certify and declare under penalty of perjury under the laws of the United States that the foregoing is true and correct as of this 17th day of February 2021.

/s/ James P. Seery, Jr.
James P. Seery, Jr.

EXHIBIT 9

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

Signed February 24, 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. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., AND NEXPOINT ADVISORS, L.P., Defendants.	§	Adversary Proceeding No. Case No. 21-03010-sgj11

ORDER

[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 *Emergency Motion for a Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021* [Docket No. 2] (the "Motion")[2] filed by Highland Capital Management, L.P., the debtor and debtor-in-possession in the above-captioned chapter 11 case (the "Bankruptcy Case"), and the plaintiff in the above-captioned adversary proceeding, and this Court having considered (i) the Motion; (ii) *Plaintiff Highland Capital Management, L.P.'s Verified Original Complaint for Damages and for Declaratory and Injunctive Relief* [Docket No. 1] (the "Complaint"); (iii) the arguments and law cited in the Debtor's *Memorandum of Law in Support of its Motion for a Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021* [Docket No. 3] (the "Memorandum of Law," and together with the Motion and Complaint, the "Debtor's Papers"); (iv) the *Objection to Mandatory Injunction and Brief in Support Thereof* [Docket No. 20] (the "Objection"), filed on February 22, 2021, by the Advisors; (v) the testimonial and documentary evidence admitted into evidence during the hearing held on February 23, 2021 (the "Hearing"), including the credibility of witnesses Mr. James P. Seery, Jr., Mr. James Dondero, and Mr. Dustin Norris; and (vi) the arguments made during the Hearing; 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[3] pursuant to 28 U.S.C. § 157(b)(2);

[2] Capitalized terms used but not herein defined shall have the meanings ascribed to such terms in the Motion.

[3] **The court orally stated at the hearing that, at a minimum, there is bankruptcy subject matter jurisdiction in this action, since: (a) there is a conceivable effect on the bankruptcy estate being administered (i.e., the pre-confirmation test for bankruptcy subject matter jurisdiction), since there is a risk of potential liability or regulatory actions being pursued against the estate, if the Debtor does not obtain relief in this action, and, also (b) the outcome of this action could bear on the interpretation, implementation, and execution of a confirmed plan (i.e., the post-confirmation test for bankruptcy subject matter jurisdiction). The court also concluded, upon further analysis, that the action should be deemed to present a "core" matter, with regard to which the bankruptcy court may issue final orders and exercise Constitutional authority, since, among other things, the relief sought is, in essence, supplemental to the confirmation order and in furtherance of implementation of the confirmed plan. *See* 11 U.S.C. § 1142(b). In all events, should this order ever be subject to an appeal, and the District Court concludes that "noncore" matters are involved, the bankruptcy**

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 the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate and that no other notice need be provided; and upon all of the proceedings had before this Court, the legal and factual bases set forth in the Debtor's Papers, and the evidence submitted at the Hearing; and after due deliberation and sufficient cause appearing therefor, and for the reasons set forth in the record on this Motion, the Court makes the following findings of fact:

1. Each of the Advisors is controlled by Mr. Dondero.

2. The Debtor had the contractual right to terminate the HCMFA Shared Services Agreement on 60 days' written notice.

3. The Debtor properly exercised its right to terminate the HCMFA Shared Services Agreement by providing at least 60 days' written notice.

4. The HCMFA Shared Services Agreement and the Debtor's obligation to provide services to HCMFA under the HCMFA Shared Services Agreement terminated on February 19, 2021.

5. The Debtor had the contractual right to terminate the NPA Shared Services Agreement on 30 days' written notice.

6. The Debtor properly exercised its right to terminate the NPA Shared Services Agreement by providing at least 30 days' written notice.

7. The NPA Shared Services Agreement and the Debtor's obligation to provide services to NPA under the NPA Shared Services Agreement terminated on February 19, 2021.

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court requests that the District Court regard this ruling as a *proposed* set of findings, conclusions and order from the bankruptcy court and that the District Court adopt this ruling, pursuant to 28 U.S.C. § 157(c)(1).

8. Except as expressly set forth herein, effective as of February 19, 2021, the Debtor has no obligation to provide any services, software, or assistance to any of HCMFA, NPA, the Funds, or any servicer or personnel retained by any of HMCFA, NPA, or the Funds.

9. As of February 20, 2021, each of HCMFA and NPA had adopted an operating plan to obtain or provide all services previously provided by the Debtor that are necessary to fully perform under their agreements with the Funds without the aid or assistance of the Debtor.

10. Except as expressly set forth herein, as of February 20, 2021, neither HCMFA nor NPA needs any services, including contractual arrangements and software, previously provided by the Debtor or its employees under the Shared Services Agreements that are necessary to fully perform under their agreements with the Funds.

11. On or prior to February 28, 2021, the Advisors will promptly provide the Debtor with written notice of the documents, data, and books and records (collectively, the "Data") that the Advisors' believe constitute their property. If the Debtor in reasonable good faith determines such Data is the Advisors' property, the Debtor will take reasonable efforts to provide the Advisors with a copy of such Data. **Subject to paragraph 13 below, on and prior to February 28, 2021, each party will bear its own costs and expenses associated with the copying of the Data**. Under no circumstances will the Debtor be required to erase or otherwise remove any Data from the Debtor's systems. For the avoidance of doubt, the Debtor will have no obligation to provide any Data that constitutes the Debtor's privileged, confidential, or proprietary information.

12. Subject to paragraph 14, the Debtor will have no obligation to provide any Data to the Advisors after February 28, 2021. If the Debtor in reasonable good faith cannot satisfy any request for Data made pursuant to paragraph 11 by the close of business on February 28, 2021, the Debtor will have no further obligation to provide such Data.

13. The Debtor will not be required to incur any ***material*** time, cost, or expense in furtherance of its obligations set forth in paragraph 11—**the Advisors' witness having represented to the court that the copying and/or transfer of the Data would be fairly easy to achieve and that the Advisors stood by ready to receive the Data**. To the extent any requests require material time, cost, or expense, the Debtor may petition this Court for the payment of any fees, costs, or expenses incurred in connection with the fulfillment of its obligations under paragraph 11 (including the cost of such petition) and shall have no obligation to provide such Data until the Court has ruled on such petition.

14. If the Debtor cannot in reasonable good faith provide requested Data by February 28, 2021, or if the Advisors request any Data after February 28, 2021, and in each case if the parties cannot agree on the propriety of such request after conferring in good faith, the Advisors may petition this Court for access to such Data. Regardless, the Advisors will bear any and all costs associated with any requests for Data and the delivery of such Data under this paragraph.

15. Notwithstanding anything herein to the contrary, the delivery of Data to the Advisors will not constitute a waiver of any privileges, including attorney-client privilege, or any confidentiality requirements.

16. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

17. Based on the foregoing, the Motion is dismissed as moot.

End of Order

EXHIBIT 10

looking at. And at the end of the day, they came in -- you know, I wish they had done it last week. I wish they had told us last Thursday. I wish they had told us last Wednesday. I wish they had told us during the negotiations. I wish they had told us last Friday, instead of pulling Plan B. I wish they -- you know. But it doesn't matter. They don't have an obligation to do that and I'm not, you know, I'm not going to pretend that they do. It would have been better if they had. They didn't. But they did, they did what the Debtor needed them to do today, and that is present their plan to the Court.

And while we, you know, have questions about when it was prepared, whether it's fulsome, they like it, and that's the important part. And they're not going to look to the Debtor for any services in the future. That's the important part.

The risk that Mr. Seery was concerned about has been eliminated, and I, you know, appreciate that. And that's why I thought we came in here with a very rational and pragmatic solution, to just -- to just -- you know, they've done what we've asked for. We've gotten the relief that we've asked for. The Advisors have sworn under oath that they have an operating plan to obtain the essential services that the Debtor used to provide. That's the relief we were asking for. I'm not quite sure what there is left here.

THE COURT: Okay. Thank you.

All right. The first thing I'm going to say is that the

Court believes it has subject matter jurisdiction, bankruptcy subject matter jurisdiction, over the requested relief. If it's a pre-confirmation test that I am supposed to apply here -- that is, the *Wood v. Wood,* could this dispute have a conceivable effect on an estate being administered -- I find that that test is met.

I think the concern of potential liability and exposure on the part of the Debtor is well-founded, even if it was not articulated to the Advisors' satisfaction today. I think, based on the litigious history here between these parties and the contentiousness, I should say, between these parties during this case, there is certainly a well-founded concern, and certainly I think the Debtor is just being prudent, worried about the SEC, investors, the Advisors, the funds, someone else pointing fingers at the way the Debtor did or did not act in transitioning services over. I think that is a basis for subject matter jurisdiction under the pre-confirmation test.

If the post-confirmation test applies here, we know that Fifth Circuit cases such as *In re Craig's Stores*, *In re Case*, *National Gypsum*, among others, articulate the test of bankruptcy subject matter jurisdiction being could the outcome of the dispute bear on the implementation, the execution, or the interpretation of a confirmed plan? I think that test is likewise met here.

Obviously, the plan contemplated a separation, and this request for relief appears to be basically seeking some supplemental -- a supplemental order to supplement the confirmation order, to supplement the Debtor's attempt at divorcing these parties as part of the monetization plan.

So I think bankruptcy subject matter jurisdiction does exist here.

I didn't hear in oral arguments, closing arguments, anything about the arbitration, but I think there's a real question here whether the Advisors may have waived their right to invoke the arbitration clause that's in one of the shared services agreements, not both of them, by filing pleadings so often, participating in this bankruptcy case so often, without invoking that.

But again, as I see it, this adversary proceeding is largely -- essentially, I should say -- asking for an order supplementing the confirmation order, and it doesn't really seem like a dispute *per se* under the shared services agreements that have already been terminated.

So I think an argument can be made that there's been waiver here, but even if there's not, that this is core in that it bears on the plan confirmation, certainly more than a dispute arising under the literal terms of the shared services agreement.

I reserve the right to supplement and amend this, if I

need to, in a more thorough written ruling.

But anyway, based on the Court determining it does have subject matter jurisdiction here, I see it appropriate to enter an order that, based on the Court's several hours of testimony today from three different witnesses -- Mr. Seery, Mr. Dondero, Mr. Norris -- and based on many documents that have been submitted into the evidence, the Court finds that the shared services agreements were already terminated pursuant to their terms and can also be deemed rejected under 365 of the Code previously.

The Court will find that the Advisors do not need any further services from the Debtor under these agreements as of today's date, except access to data and records, which, based on the testimony of Dustin Norris, can be easily effectuated, Mr. Norris's testimony being that what the Debtor would need to do to allow access to the data is authorize the Debtor's IT director to transfer data and we stand ready to receive it. And data would include historical emails, vault emails, files in the system, and a number of other items, but, quote, there would almost be no work from the Debtor's end.

So, believing that to be the case, I would order that the Debtor stand ready between now and the 28th to provide that access and that the Advisors stand ready to receive that access. And if the process extends beyond February 28th, then it will have to be subject to further orders of this Court,

but the Court would expect there to be a cost if it extends past February 28th. And again, the Court would consider that in a further hearing, how much cost should be imposed on the Advisors. But the advisors have represented to me through Mr. Norris it's easy, it can be accomplished easily, so therefore I would think it could happen between now and the 28th, and if it does, no cost imposed on anyone.

I will further find that the Advisors have represented and the Court therefore finds that there is an operating plan in place for the Advisors to continue to operate uninterrupted beyond today. And again, the only thing I would envision that needs to happen between today and February 28th is the access to data.

So, having made these findings, the Court believes that the request for a mandatory injunction is moot and is therefore denied.

Are there any questions? Mr. Morris, I want you to be the scrivener, and, of course, run it by Mr. Rukavina. But are there any questions or concerns about what I've just articulated?

MR. MORRIS: I just have one, Your Honor.

THE COURT: Uh-huh.

MR. MORRIS: You made reference to rejection of the contract. From our perspective, it's not rejection. We don't want to open this up to a rejection claim of any kind. It

really was just a termination of the agreement, in accordance with the terms. And I had put the provisions up before the Court during my opening and walked Mr. Seery through. That's the basis for the --

THE COURT: Okay.

MR. MORRIS: -- termination of the agreement. It's not rejection at all.

THE COURT: Fair point.

MR. RUKAVINA: And Your Honor, there's no -- there's no -- yeah, there's no problem. There's no problem on that. We do not disagree. We do not disagree with Mr. Morris.

THE COURT: Fair point. I made the mistake of belts and suspenders, trying to fill in any hole there might be. But yes, I had the evidence that there was a termination of both agreements on November 30th. One of them had a 60-day window before it became effective, the other a 30-day. So they are terminated.

All right. Mr. Morris, anything else from you?

MR. MORRIS: No. We'll prepare a form of order.

THE COURT: All right. Mr. Rukavina, anything further from you?

MR. RUKAVINA: Your Honor, obviously, I have questions. I have reservations. I need to look at whether the Court's findings are going to be binding in this adversary proceeding. So, at this point in time, I'm just not prepared

to really say anything lest I get myself in trouble. But I thank you for your time today.

THE COURT: All right. Well, they are what they are, and I hope we're not in an argument about that down the road. But it seems like my hopes are always dashed when I want things to be worked out.

I don't want you to think my calm demeanor means I am a happy camper. I am not. I am beyond annoyed. I mean, I can't even begin to guesstimate how many wasted hours were spent on the drafting Option A, Option B. Wait. Let me pull up the exact words. Mr. Norris confirming, We withdrew Option B after the Debtor accepted it.

I mentioned fee-shifting once before in a different context, and, of course, we haven't even gotten to the motion for a show cause order declaring Mr. Dondero in contempt. I don't know if the lawyers fully appreciate how this looks. Mr. Rukavina, you said that I have formed opinions that you don't think are fair and made comments about vexatious litigation and whatnot. But while I continue, I promise you, to have an open mind, it is days like this that make me come out with statements that Mr. Dondero, repeating his own words, apparently, he's going to burn the house down if he doesn't get his baby back.

I mean, it seems so obviously transparent that he's just driving the legal fees up. It's as though he doesn't want the

creditors to get anything, is the way this looks. If he wants me to have a different impression, then he needs to start behaving differently. I mean, I can't even imagine how many hundreds of thousands of dollars of legal fees were probably spent the past two weeks on Option A, Option B, and all the different sub-agreements and whatnot. And as recently as Friday afternoon, the K&L Gates lawyer saying we have a deal, and then, oh, wait, maybe not, maybe we do, maybe we don't. And then Mr. Dondero acting like he had no clue what the K&L Gates lawyers were saying as far as we have a deal. And Mr. Norris distancing himself from having seen any of that, and I didn't have power. You know, I'm sure he had a cell phone, like the rest of us, that gets emails. I'm making a supposition. I shouldn't make that. But it just feels like sickening games.

And again, if this keeps on, if this keeps on, one day, one day, there may be an enormous attorney fee-shifting order. And, of course, I would have to find bad faith, and I wouldn't be surprised at all if I get there.

So I don't know if Mr. Dondero is listening. I suspect, if he is, he doesn't care much. But I am --

MR. DONDERO: I'm on the line, Judge.

THE COURT: Okay.

MR. DONDERO: I'm on the line.

THE COURT: I'm glad you're on the line. I cannot

overstate how very annoyed I am by hearing all these hours of testimony and to feel like none of it was necessary. None of it was necessary. Okay? There could have been a consensual deal --

MR. DONDERO: Judge, you have to pay attention -- Judge, you have to pay attention to what's going on, okay?

THE COURT: I am --

MR. DONDERO: When I was president of Highland, --

THE COURT: -- razor-sharp focused on what is going on. Okay? I read every piece of paper. I listen to every sentence of testimony. And what is going on --

MR. DONDERO: Okay. How about this, Your Honor?

THE COURT: -- is an enormous waste of parties and lawyer time and resources. People need to get their eye on the ball. Well, certain people do have their eye on the ball, but certain people do not. Okay? So we're done. You've got your divorce now. Okay? And if the operating plan is all shored up, as Mr. Norris testified, it sounds like you're in good shape. All right?

Mr. Morris, I'll look for the order from you.

MR. MORRIS: Thank you, Your Honor.

THE CLERK: All rise.

(Pause.)

THE COURT: Oh, Michael?

(Court confers with Clerk.)

THE CLERK: Hello? Hang on. Mr. Morris?

THE COURT: Is anyone still there?

THE CLERK: Mr. Rukavina is still there. Mr. Rukavina, Mr. Morris, are you all still there?

MR. RUKAVINA: Judge, this is Davor.

THE COURT: All right.

MR. RUKAVINA: I think we're all wondering whether we're going to have the contempt hearing.

THE COURT: Well, yes, that's why I came back in.

MR. RUKAVINA: I can't hear you, Judge. We can't hear you.

THE COURT: I realized I -- it's 4:19 Central time. We are not starting the contempt hearing.

Mr. Morris, are you there now?

MR. MORRIS: I am. I did have one suggestion.

THE COURT: All right. I neglected to mention our other setting, but we are not going to start at 4:19 Central time. Do we want to talk about scheduling on that?

MR. MORRIS: I did, Your Honor. And it's just an idea, and I understand we've had a long day. But I was going to suggest if there was any way to just get their motion *in limine* out of the way today, so that when we come back for the evidentiary hearing parties are fully prepared. If you don't want to do it, that's fine. Otherwise, I'm available at Your Honor's convenience.

THE COURT: All right. I am going to have you all communicate with Ms. Ellison about rescheduling that. I have no idea what my calendar looks like next week, but I'm not going to do it this week. I've got a backlog of other case matters that I need to get to this week.

MR. MORRIS: Okay.

THE COURT: So, you know, maybe we'll do it next week. On the motion *in limine*, you've not filed a response? It was just filed yesterday, so I'm guessing there's no response.

MR. MORRIS: Yeah. I was going to do -- I was going to do it orally. I'm happy to do a written response, and I'm happy to just proceed on the papers. I just think it would be helpful to have that, you know, or if we could put aside an hour later this week to do that, because then preparing, if we know the evidence is in or out, I think it'll just make the trial a lot more smooth.

THE COURT: All right. I barely had time to pore over it, so let me have Traci reach out to you all tomorrow and let you know do I want a hearing on it or not. I have an initial reaction. I don't know if Mr. Dondero's counsel is on the phone. I don't want to talk about this too much if he's -- do we have Dondero's counsel?

MR. WILSON: I'm present, Your Honor. John Wilson.

THE COURT: Okay. I will tell you right now that,

having done a quick review of it, I didn't feel inclined to grant it. I'm going to have the TRO in front of me and I'm going to hear the evidence of what happened, and it's either going to match up as a violation of the provisions of the TRO or not. You know, I feel -- I'm not a jury. I can decide whether it is violative of the TRO or not. The theme of it was, oh, it's going to have a prejudicial effect. I mean, I've already heard about a lot of this. So I'm inclined not to grant it. But, again, I did a very quick look at it at 5:00 o'clock last night. And that's why I asked Mr. Morris, was he going to have a response, because --

MR. MORRIS: Yeah. I was planning to do it orally today, Your Honor. If I may just have until 5:00 o'clock tomorrow, I'll submit an opposition that won't exceed five pages.

THE COURT: Okay. So that's what we'll do. And then once I've looked at the motion more carefully, as well as the response, I'll decide if I need oral argument or if I'm just going to rule on the pleadings, okay, and Traci will let you all know. All right? And again, Traci will coordinate with you tomorrow or sometime this week about a resetting on the contempt motion.

All right. Thank you.

MR. MORRIS: Thank you, Your Honor.

MR. WILSON: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 4:23 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 **02/24/2021**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

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