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

HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., Defendant.	§	Adv. Proc. No. 21-3004 Case No. 3:21-cv-00881-X

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HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.	§	Adv. Proc. No. 21-3005 Case No. 3:21-cv-00881-X
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.	§	Adv. Proc. No. 21-3006 Case No. 3:21-cv-00881-X
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HCRE PARTNERS, LLC (n/k/a NexPoint Real Estate Partners, LLC), JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.	§	Adv. Proc. No. 21-3007 Case No. 3:21-cv-00881-X

SUPPLEMENTAL DECLARATION OF JOHN A. MORRIS IN SUPPORT OF PLAINTIFF'S OMNIBUS MOTION (A) TO STRIKE CERTAIN DOCUMENTS AND ARGUMENTS FROM THE RECORD, (B) FOR SANCTIONS, AND (C) FOR AN ORDER OF CONTEMPT

I, John A. Morris, pursuant to 28 U.S.C. § 1746, under penalty of perjury, declare as follows:

1. I am an attorney in the law firm of Pachulski, Stang, Ziehl & Jones LLP, counsel to Highland Capital Management, L.P., the reorganized debtor in the above-captioned chapter 11 case and plaintiff in the above-referenced adversary proceedings, and I submit this Supplemental Declaration in support of *Plaintiff's Omnibus Motion (A) to Strike Certain Documents and Arguments from the Record, (B) for Sanctions, and (C) for an Order of Contempt* (the "Motion"). I submit this Supplemental Declaration based on my personal knowledge and review of the documents listed below.

2. Attached as **Exhibit 10** is a true and correct copy of the transcript of the hearing held on December 13, 2021 **(Adv. Pro. Nos. 21-3005, 21-3006, and 21-3007)**.

Dated: March 14, 2022.

/s/ John A. Morris
John A. Morris

EXHIBIT 10

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

In Re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	**Case No. 19-34054-sgj-11** Chapter 11 Dallas, Texas Monday, December 13, 2021 10:30 a.m. Docket
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. NEXPOINT ADVISORS, L.P., et al., Defendants.	**Adversary Proceeding 21-3005-sgj** MOTION TO EXTEND EXPERT DISCLOSURE AND DISCOVERY DEADLINES
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., et al., Defendants.	**Adversary Proceeding 21-3006-sgj** MOTION TO EXTEND EXPERT DISCLOSURE AND DISCOVERY DEADLINES

HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. HCRE PARTNERS, LLC (n/k/a NEXPOINT REAL ESTATE PARTNERS, LLC), Defendant.	**Adversary Proceeding 21-3007-sgj** MOTION TO EXTEND EXPERT DISCLOSURE AND DISCOVERY DEADLINES

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

WEBEX APPEARANCES:

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For NexPoint Advisors, LP:	Davor Rukavina Julian Preston Vasek MUNSCH HARDT KOPF & HARR, P.C 500 N. Akard Street, Suite 3800 Dallas, TX 75201-6659 (214) 855-7587
For HCMS and HCRE:	Michael P. Aigen Deborah Rose Deitsch-Perez STINSON LEONARD STREET 3102 Oak Lawn Avenue, Suite 777 Dallas, TX 75219 (214) 560-2201
Recorded by:	Michael F. Edmond, Sr. UNITED STATES BANKRUPTCY COURT 1100 Commerce Street, 12th Floor Dallas, TX 75242 (214) 753-2062

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

DALLAS, TEXAS - DECEMBER 13, 2021 - 10:55 A.M.

THE COURT: I will now take up the Highland three motions to extend expert deadlines. So let me get appearances from lawyers. First, who do we have appearing for the Debtor this morning?

MS. WINOGRAD: Good morning, Your Honor. My name is Hayley Winograd of Pachulski Stang Ziehl & Jones appearing on behalf of Highland.

THE COURT: Okay. Good morning. For NexPoint Advisors, who do we have appearing?

MR. RUKAVINA: Your Honor, good morning. Davor Rukavina and Julian Vasek.

THE COURT: Good morning. All right. For HCMS and NPRE, who do we have appearing?

(No response.)

THE COURT: Okay. Maybe I should say these names in full.

MS. DEITSCH-PEREZ: I apologize, Your Honor. This is Deborah Deitsch-Perez. I believe Michael Aigen will be appearing for HCRE and HCMS. And I wonder if he's having technical difficulties. I saw him on the line a few minutes ago. I'm going to go off and call to make sure that there isn't a problem.

THE COURT: Okay.

MR. RUKAVINA: But Your Honor, I'll be handling the

bulk of the arguments, and Mr. Aigen will cover a much smaller amount.

THE COURT: Okay. Well, we'll --

MR. AIGEN: Your Honor, this is Michael Aigen. Are you able to hear me now?

THE COURT: I can hear you now.

MR. AIGEN: I apologize. Michael Aigen for HCMS and HCRE.

THE COURT: All right. I presume those are our only formal appearances, but is there anyone else who wished to appear?

(No response.)

THE COURT: All right. Well, Mr. Rukavina, I'll hear your argument.

MR. RUKAVINA: Thank you, Your Honor.

I'm sure that the Court has read our papers, and by this motion we seek to extend the expert deadline so that we can retain Steven Pully as our expert on the standard of care. Mr. Pully is on the video. I can see him right now. So, good morning, Mr. Pully.

And Your Honor, I'd like for you to be aware that Friday evening I did file on the docket Mr. Pully's report. Obviously, the Court hasn't granted this motion, but I wanted the Court to know that we moved as rapidly as possible, and Mr. Pully has now finalized his report. So there's no future

need for additional time on my end if the Court grants this motion.

Your Honor, before I get to the actual merits of this motion, I feel it important to address a hearing that occurred a few weeks ago that I was not present at because this motion was discussed briefly at the end. This was a hearing held on Ms. Deitsch-Perez's motion to dismiss and compel arbitration.

And Mr. Vasek, if you could please pull up the transcript of that and scroll down to near the end where this motion is discussed.

Your Honor will maybe recall that we have the transcript where Ms. Deitsch-Perez mentioned as a scheduling matter that this motion had been filed. And the Court says, What on earth does that have to do with this litigation? I don't mean to be flippant and laugh, but what on earth does that have to do with notes?

And if we scroll down some more, Your Honor, Ms. Deitsch-Perez was attempting to explain to the Court the purpose of this motion, and the Court notes that, It sounds like you're talking about an affirmative defense that hasn't been articulated yet.

And if we scroll down some more, Ms. Deitsch-Perez attempts to tell the Court that, in fact, this is an affirmative defense that has always been asserted.

And the Court notes there in her dialogue with Ms.

Deitsch-Perez that, I'm just letting you know you have a very uphill battle convincing me that experts regarding shared services agreements would be germane.

And the Court goes on to say that it has heard a lot about shared services agreements during the past few years, including experts on the witness stand in the *Acis* case. And the Court notes that, Under the pleadings as now in the record, I just can't imagine why experts on shared services agreements are going to be relevant evidence.

I think, Mr. Vasek, you can pull that down.

And I point this out only because, again, I know that the Court has prepared for this hearing, but this is an affirmative defense that has always been pled from the beginning. It does not involve the interpretation of the contract. We're not talking about the shared services agreement. We're not talking about the contract. And recall, Your Honor, that both Your Honor and the District Courts have agreed that jury rights do attach here. So the question really is not the Court's familiarity with shared services agreements but whether expert testimony will be relevant to help the jury.

So, what is that expert evidence, Your Honor, and how did this arise? NexPoint is the obligor, the maker on a $30 million note -- I'm using round numbers -- and that note had been paid down to some $24 million.

The note purports to require a payment every year on December the 31st. And in the year 2020, although we argued that the payment was prepaid, that payment was not made timely. It was made a couple weeks later, when Mr. Dondero realized what had happened.

Our version, NexPoint's version of why this payment did not happen has until recently been that the Debtor dropped the ball. Under the shared services agreement, and as Mr. Dondero and Mr. Frank Waterhouse, the Debtor's former CFO, confirmed, the Debtor was for years responsible to facilitate the annual payment. The Debtor didn't pay from its own funds. It would pay it from our funds. But that was both in the contract and that was the practice. Again, Mr. Waterhouse -- and Your Honor has seen in my papers and in his transcript -- confirmed that it was reasonable for NexPoint to rely on the Debtor to ensure that this payment would be made.

So Mr. Vasek, if we can pull up the shared services agreement here.

I know that the Court likes to look at contracts, so I will briefly take Your Honor through some of the pertinent provisions, because this relates to directly to Mr. Pully.

And Mr. Vasek, if you'll please scroll down to the definitions of Covered Person.

And Your Honor can read it for herself. This is just a definitional that we need as we go forward. But Covered

Person means the staff and services provider. That is Highland. That is the Debtor. And it includes managers, members, employees, et cetera. Well, that would be Mr. Frank Waterhouse. Mr. Waterhouse at that time was the Debtor' chief financial officer, and he was also an officer of NexPoint. So he, like many people here, wore two hats.

Mr. David Klos at that time was the controller for Highland, and Ms. Kristin Hendrix was a senior accountant at Highland. Both Mr. Klos and Ms. Hendrix were providing the services we're going to discuss.

If you'll scroll down, Mr. Vasek.

The next provision, Your Honor, relates to what services were being provided.

Scroll up just a -- just a tad.

So you'll see under Section 2.02 the parties are now agreeing here's the services that Highland will be provided. And it's important to note, Your Honor, that at this time this agreement was in place. This agreement was terminated I want to say at the end of February this year. But in December and November of 2020, this agreement was in place.

And if the Court looks at the services being provided, the first one there is assistance and advice. That word "advice" is important. Assistance and advice with respect to various things. And you see down there those things include finance and accounting, payments, bookkeeping, cash management, cash

forecasting, accounts payable, et cetera.

Keep scrolling down, Mr. Vasek. Obviously, as the Court very well knows, the Debtor was also providing legal services.

And if you keep scrolling down, Mr. Vasek, to the next page, there you go, to K and L.

These are more catch-all. So if the language of what I just showed you is not express or specific enough, here you have these catch-alls, such as advice on all things ancillary or incidental to the foregoing and advice relating to other back- and middle-office services in connection with the day-to-day business.

So, again, we're not here today, we're not asking the Court to decide, nor do I think that it would be this Court to decide, whether the Debtor had a duty to facilitate the December payment. I'm just pointing out that we have, I think anyone would agree, at least a *prima facie* colorable argument that the Debtor would have such duty.

And just to address an issue that the Debtor raised, Mr. Vasek, if you'll scroll down to 6.01, and then if you'll zoom in.

Here, now, Your Honor, is the language that is of relevance, the direct relevance. So we've seen that Covered Person is defined, and we have seen that -- and we can now see that this agreement requires Covered Person -- that includes the Debtor; that includes Mr. Waterhouse; that includes Mr.

Klos -- to discharge its duties under this agreement. We've seen that there's certainly a colorable argument that the duties under this agreement include facilitating payments and advice with payments and accounts payable and the like, and that the Debtor has to discharge its duties with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

That, Your Honor, is what we need the expert on. Not to tell the jury what this contract says, not to tell the jury that the Debtor had a duty, but to look at, under the facts, did the Debtor's performance or lack thereof -- and I'll tell you why that's important in a moment -- did that performance or lack thereof comport with this standard of care?

This is a matter for an expert. The average juror, the average layperson, myself, I would not know what the care, skill, prudence, and diligence of a reasonable prudent person in this situation would be. I can theorize on that. I can opine on that. I'm not an expert on that. This is a matter for an expert, the same as with medical malpractice, legal malpractice, breach of fiduciary duty.

While we're on this agreement, just to address another argument that the Debtor makes, the Debtor says that this agreement exculpates negligence.

Mr. Vasek, if you'll please scroll down to the exculpation.

And there is an exculpation provision. But if Your Honor -- and it does exculpate negligence. It doesn't exculpate gross negligence, et cetera. But it talks about that only acts or omissions -- it's Romanette (i) -- acts or omissions arising out of or in connection with the conduct of the business of the management company that is exculpated. Again, we're not here today to decide what this means, but the business of NexPoint is not note-making; the business of NexPoint is advising thousands of investors and funds with respect to a billion dollars of investments.

It is -- the Debtor does have an argument, and either the Court or the jury will have to decide whether this exculpation provision applies. And then if -- and you can remove this, Mr. Vasek -- the Debtor likewise says that the agreement's indemnification provision prohibits this argument. We pointed out in our briefing, Your Honor, that, in fact, indemnification under Texas law does not apply to the parties to the contract. It applies to claims made by third parties. But, again, that's an argument that the Debtor has.

So we have this contract in place. Late November/early December rolls around, and both Mr. Dondero and Mr. Waterhouse testify that they had a meeting. What was said at that meeting is in dispute.

Mr. Dondero believes that he told Mr. Waterhouse, stop paying on the shared services agreement. It's NexPoint's position -- Your Honor knows we filed an administrative claim -- it's NexPoint's position that it had overpaid millions of dollars under the shared services agreement, in part because many of the employees of the Debtor that we were supposed to be paying our respective share of weren't there anymore. So Mr. Dondero says to Mr. Waterhouse, stop paying on this shared services agreement.

Those are the facts as we knew them going into late October. Based on that fact, and based on the fact that the Debtor did not facilitate the payment, we've always asserted as an affirmative defense that our lender, who is also our lawyer, who's also our accountant, who's also our treasury management people, and who have always facilitated these payments in the past, dropped the ball. They committed simple negligence, they dropped the ball, thereby causing the alleged default.

We did not need an expert opinion on that at that time. You've seen in my reply briefing, Your Honor, that, in fact, the Fifth Circuit holds in multiple instances that when it's simply a matter of missing a deadline -- a lawyer missing limitations, if you will -- expert testimony is not required, and in fact may be inappropriate because a lay person can figure out that, a lay juror can figure out that, well, if you

just simply didn't do something, whether that's -- whether that comports with the standard of care or not.

On October the 19th of this year, the Debtor and we deposed Mr. Waterhouse. And Mr. Waterhouse had a different testimony. He had a different recollection of that meeting. Mr. Waterhouse said that Mr. Dondero told him in late November or early December, don't make this NexPoint payment. In other words, that Mr. Dondero expressly said the payment that's coming up for NexPoint, do not make this payment.

That was news to us. I was so surprised by that testimony that I actually asked Mr. Waterhouse that question four times. And opposing counsel actually got angry at me, kept saying, how many times are you going to keep asking this question? I was surprised.

I was not able to talk to Mr. Waterhouse meaningfully before that. Mr. Waterhouse has attorneys, Mr. Waterhouse is in litigation with the Debtor, and those attorneys require that I not communicate with him directly, I communicate only through them. I never took up the chance to ask them about this meeting because the only information that I had and that my client had was that there was no such instruction. The Debtor may or may not have been surprised as well.

Mr. Vasek, if you'll please pull up discovery.

Your Honor, we're sharing with you now certain of the discovery in this case -- in particular, the Debtor's

responses.

And if you'll go to Interrogatory No. 1, Mr. Vasek.

So, Your Honor obviously can read this. But I ask the Debtor, if it contends that it was not responsible for making payments under the note on NexPoint's behalf, please explain the legal and factual basis for such contention. I asked for a factual basis as well. And Your Honor can see in the response that the Debtor objects, the Debtor says that it was not required to make the payment, but nowhere here does the Debtor say that it had received an instruction not to make the payment.

Pardon me, Your Honor.

This was, I believe, from May or June. In any event, it was early in this litigation. Nowhere here am I put on any kind of notice that it's the Debtor's position that it received an instruction not to make the payment.

If we scroll down to Request for Production, I believe it's No. 1, Mr. Vasek.

Here, we -- I ask for all communications pursuant to which the Debtor was advised or instructed not to make the payment or to cause the payment to be made. And the Debtor's answer includes the following: Any communications responsive to Request for Production No. 1 were verbal.

Okay. I had to await depositions. That's fine. I had asked in an interrogatory, I didn't get a factual response,

and then I'm now being told that any communications were verbal.

Now, the Debtor may not have known about Mr. Waterhouse's instruction, it may not have, in which case I don't think it's fair to accuse NexPoint or its counsel of dropping the ball. Or the Debtor may have known of the instruction, in which case the Debtor should have answered Interrogatory No. 1 factually by saying, oh, wait, not only were we not required to make the payment, et cetera, et cetera, but we received an instruction from your boss, NexPoint, not to make the payment.

You can remove that.

So, here we go into October 19th. We depose Mr. Waterhouse. We now see that, in fact, I guess it's -- I forget who -- who the author is, but the plot has thickened. The situation is now much more complicated. Whereas previously we argued that the Debtor had dropped the ball, the question now is, okay, if in fact the jury believes that Mr. Dondero went to Mr. Waterhouse and said, don't make this payment, did that discharge the Debtor's duties as specified by the contract or not?

It's our belief that it did not. It's our belief that Mr. Waterhouse should have, at a minimum, asked Mr. Dondero after that, did I get you right, Jim? Did I understand correctly? Did you mean not to make this payment? It's our belief that the Debtor -- our legal advisers, our accountants, people that

are supposed to advise us -- should have called back and said, Jim, you know that if you don't make this payment you're going to have a note accelerated and it's going to be $24 million. They should have advised Mr. Dondero of the potential consequences, especially given their clear conflict of interest.

At the same time, they're our lender to the tune of $24 million, and they're providing us all this assistance and advice that we're paying millions and millions of dollars for.

And then also, if Mr. Dondero gave such an instruction, did the Debtor have some duty to try to dissuade him by saying, Jim, you're being a hothead, this is a very serious matter, it's only $1.4 million, make the payment? In fact, we did make the payment in January, after this issue was learned about. But the Debtor didn't do any of those things.

So, again, the question now is, did the Debtor's lack of any subsequent follow-up -- putting its head in the sand, so to speak -- did that comport with the duties as specified, what would a reasonable person discharging his or her duties under the facts and circumstances in that industry then in place, what should or would have such a reasonable person done? That's where Mr. Pully comes in.

I deposed Mr. Seery a few days after this deposition and I asked him about this, and Mr. Seery said that no, in his view, Mr. Waterhouse acted perfectly appropriately, that Mr.

Waterhouse had no duty to seek clarification or explain the ramifications or anything else. And it was clear to me that Mr. Seery is going to testify to that effect.

So at that point in time, now that we knew Mr. Waterhouse's testimony, we decided that it is not only advisable but perhaps necessary to retain an expert. And we moved very quickly. I have had the fortune of working with Mr. Pully before, so I knew him. I was able to rapidly retain him because of our prior familiarity with each other. Mr. Pully reviewed all the transcripts. He reviewed the discovery. He prepared a full and final report. So, from beginning to end, we were done in maybe five weeks, maybe six weeks.

And we're not proposing, Your Honor, that the Debtor doesn't have whatever time it needs to prepare a rebuttal. We're not proposing that the Debtor can't depose Mr. Seery [sic]. Of course it can.

So where this adversary proceeding now is is that discovery is over. The Debtor will be filing by December the 17th a motion for summary judgment. Your Honor will recall that Your Honor approved a scheduling order on that. And there will be hearings before this Court on summary judgment, and perhaps opposing counsel can remind me, but it's going to be in late January, or I'm going by memory here, maybe early February.

So that is, Your Honor, what happened. That is how it happened. It's the truth. It's -- there's no laying behind the log here. There's no litigation decisions that are now backfiring and we're trying to get out of them. What happened here is exactly what should happen in a lawsuit like this, where discovery has illuminated various issues and now we have to deal with the consequences of that discovery as we prepare for trial.

October the 29th was the date in the scheduling order to disclose experts and provide their reports. Mr. Pully couldn't even hypothetically do that in time since I had retained him a few days before that. But we moved very quickly to file this motion, to file it before the deadline actually expired, in hopes, again, of not -- not only of showing Your Honor that we moved diligently and rapidly when this issue unfolded, but also that we didn't need *nunc pro tunc* relief.

So, Rule 16 does apply. The good cause requirement does apply. But this is not some talismanic super-high burden to meet. Yes, there's a burden. Yes, I must demonstrate to Your Honor why leave based on good cause is required. But we're not trying to unscramble the eggs, and we're not seeking something extraordinary or exotic here.

The Fifth Circuit has specified the four factors that the Court should look at. In the Fifth Circuit cases that we've

seen and that we've briefed, the deadline had already expired and the people were seeking *nunc pro tunc* relief. I don't think we have that high of a burden here, but even if we do, we've analyzed those four factors.

And the first factor is the explanation for the lateness. Again, did NexPoint act diligently? Did NexPoint hide behind the log? Is there some litigation strategy here that has backfired? None of that, Your Honor, is present. There's been no delay. We deposed, pursuant to agreed deposition schedules, we deposed all of the main witnesses in October. When we deposed Mr. Waterhouse, this issue arose. We moved as rapidly as we could thereafter. And you've seen, Your Honor, in the interrogatory answer, that if the Debtor knew about this instruction, then, really, the Debtor should have answered its interrogatory to say, we got an instruction not to pay and that's why we didn't pay.

Maybe the Debtor -- maybe the Debtor didn't know that. But when we deposed Mr. Klos and Ms. Hendrix, who are still employees of the Debtor, they testified that they heard Mr. Waterhouse tell them that in late November last year. So they -- they testified that in late November last year Frank Waterhouse told them, Jim Dondero told me, don't make this payment.

So, even if the Debtor didn't know what Mr. Waterhouse would testify to, Mr. Klos and Ms. Henderson [sic] did.

Again, I am not pointing the fingers here at the Debtor. I'm not saying that their answer to Interrogatory No. 1 was manipulative, that it was calculated to deceive. I'm not suggesting that. I'm just suggesting that, had the Debtor given a more fulsome answer, we would have immediately investigated and immediately retained an expert back in May or June of this year.

The next element, or the next factor, rather, is the importance of this extension. And Your Honor, we have quoted at length Fifth Circuit opinions that say that when the standard of care is involved, expert opinion is appropriate and may be required.

It goes back to, again, if the Debtor just dropped the ball and didn't facilitate the payment, that's easy. That doesn't need an expert. But if the Debtor was instructed by Mr. Dondero not to make the payment and there was a month left before the payment was to be made, did the standard of care as specified in the contract require the Debtor to do something that it failed to do?

So we are talking about the standard of care. That is appropriate expert testimony. It may be required. And it is not something that I can argue to a lay juror just based on a deadline being missed.

So, yes, this -- the relief we're seeking is important, especially given the jury nature of this trial.

The third factor is the potential prejudice. So, the Debtor says, well, this will increase costs. Yes, it will. But costs alone is not the legally -- the legal standard here. Every litigation has costs. Every litigation has burdens. And if the Debtor prevails in this lawsuit, they will claim attorneys' fees and costs. They're entitled to that under the note and under Texas law.

So there will be an incremental cost for the Debtor to retain an expert, but that would have been present as of October the 29th anyway.

Remember, I filed this motion on the deadline. We're seeking six weeks of delay here. This is not late-stage litigation where all the facts are known, all the witnesses have been deposed, everyone's ready for trial, and suddenly a party seeks to increase its opponent's litigation costs here with a last-second expert. This is not that case.

So, there is no prejudice, at least not in the legally relevant way by way of costs, nor is there any prejudice by delay. And this also ties into the fourth factor, which discusses a continuance. There is no prejudice here because we're not trial-set. We don't know when we're going to be trial-set.

Even if the Court denies summary judgment in whole or in part at the end of January or early February -- which I don't think that's very realistic because I think the Court is going

to want to think about it some, the Court is going to want to prepare a report and recommendation -- this is not going to be a straightforward summary judgment proceeding.

What is also out there is that the Debtor has filed a motion to consolidate all these note cases in front of one District Court judge. That's going to have to be reviewed by the District Court judges and ruled on.

So we are months, months away from being trial-ready, and then we don't know how long it's going to be before we're up for a week or two long jury trial. No one knows that. That is plenty of time for the Debtor to get a rebuttal expert. It's plenty of time for the Debtor to depose Mr. Pully. It's plenty of time for everything to come to play so that this case will be certified trial-ready, irrespective of whether there's an expert or not. This is not going to delay the process. We're not seeking to delay the process.

Nor are we seeking to derail the summary judgment proceedings. If the Debtor wants to retain an expert for summary judgment proceedings, that just proves that there is a question of fact here that precludes summary judgment.

But as far as continuance or trial-setting, that's just not present here.

And I've quoted Your Honor at length a District Court's opinion from the Eastern District of Texas that talks about prejudice, that talks about costs. And that judge basically

said, look, when it's -- when it's an affirmative defense that you've known that since the beginning, which the Debtor has known here since the beginning, then, really, it's not a last-second tactic. It's not real prejudice. Yeah. Yeah, there's a delay. Yeah, there's an increased cost. But the plaintiff is now trying to fundamentally change this lawsuit, to fundamentally interject something new here. The plaintiff just needs some more time. And the question is, should the plaintiff have more time?

Your Honor, those are the factors. We have -- we have the exhibits. We have the record prepared. It's a part of the motion and the Debtor's response. And Your Honor, we ask that the Court grant this motion -- again, reminding the Court that this does relate to an affirmative defense that's been around since the beginning. It does relate to one that was -- only -- only really became the subject of expert testimony in late October. And it's only because discovery in this case worked as it should. No one laid behind the log. No one made a calculated decision that has backfired. No one delayed anything or was less than diligent.

Under these circumstances, Your Honor, because the point of a trial in front of a jury is to get to the truth and it's to enable the jury to have what it needs to make a true, full, and informed decision, we believe that good cause exists, and we'd ask -- NexPoint would ask that the Court grant this

motion.

THE COURT: All right. Thank you.

I'll ask Mr. Aigen, does he have anything he wants to supplement with?

MR. AIGEN: Yes, Your Honor. I can make a very quick argument here.

As you know, HCMS and HCRE have filed a joinder, asking for the same relief. The only thing I want to quickly point out is that the only difference between our clients and Mr. Rukavina's client is the lack of a written services agreement. But I would point out, as the evidence we submitted in our briefing shows, the undisputed testimony is that there was an oral agreement to provide these services, that the Debtor did provide these same exact services that they provided from -- for NexPoint to HCMS and HCRE, that they had done this for years, and this included making loan payments.

So I just wanted to point that out, and I think what this means is that, for the same reasons that Mr. Rukavina asked for this relief, we believe we are entitled to the same relief. And I won't bother to go through all the same arguments that Mr. Rukavina just made to the Court. So that's all I have, Your Honor.

THE COURT: All right. Thank you. Ms. Winograd?

MS. WINOGRAD: May it please the Court?

THE COURT: You may proceed.

MS. WINOGRAD: Your Honor, the motion should be denied because there is no good cause for modifying the scheduling order. The motion is untimely. The expert testimony Defendants seek to gather is both improper and irrelevant. And if the motion is granted, Highland will be prejudiced.

This is -- this adversary -- adversary proceeding is a garden-variety collection action on a simple note, it has been going on for roughly a year, and it continues to get delayed due to unnecessary and costly motion practice. Defendants' latest motion is not only another delay tactic, but it is also completely unsupported.

And before I tell you why it is unsupported, I want to take a step back and just summarize the context of Defendants' motion. Defendants have always and continue to assert the same affirmative defense, which is that their default under the note was the result of Highland's negligence under the shared services agreement. It is Defendants' position that before Mr. Waterhouse's deposition an expert was not needed to testify regarding Highland's duties under the shared services agreement.

Mr. Waterhouse then testified that Mr. Dondero gave him instruction not to make a payment under the note. It is now Defendants' contention that, solely in light of this testimony, all of a sudden an expert is needed to testify

regarding whether Highland owed an affirmative duty under that same shared services agreement to ask Mr. Dondero if he understood the implications of his instruction, and if so, if Highland breached such a purported duty.

First of all, Your Honor, based on the clear terms of the shared services agreement, there is no affirmative duty for Highland to ask Mr. Dondero if he understood the implications of his own instruction.

Moreover, Your Honor, the question of what Highland's duties are is a legal issue reserved for the Court, and the issue of whether Highland breached -- and Highland submits there was no such breach -- but that issue is reserved for the jury.

Your Honor, if expert testimony wasn't needed before, it is not needed now.

This Court entered a scheduling order in September of 2021. Under Rule 16(b) of the Federal Rules of Civil Procedure, an existing scheduling order can only be modified upon a showing of good cause. The purpose of Rule 16 is for the Court to prevent unforeseeable and never-ending litigation expenditures.

So the critical question before Your Honor today is whether there is good cause to modify the scheduling order. And Highland submits there is not.

Courts consider four general factors to determine whether

there's good cause. It's the party's explanation for failing to previously identify the witness. It's the importance of the witness's testimony. And it's the prejudice to the other side in allowing the testimony. All of these factors weigh in favor of denying the motion.

Regarding the first factor, Defendants' explanation for failing to previously identify the witness is entirely without merit. Again, NexPoint first raised its affirmative defense that its default under the note was the result of Highland's own negligence back in March of 2021. In other words, NexPoint had nine months to retain an expert to testify regarding Highland's duties for nine months.

NexPoint seeks to create -- to distinguish between these notions of Highland somehow, quote, dropping the ball versus Highland not asking Mr. Dondero if he understood the implications of his own instruction. Defendants cite no authority in support of the notion that one of these factual circumstances would somehow require an expert but that the other would not.

What this comes down to, Your Honor, is that Defendants are using this testimony as an excuse to muddy the water, to muddy the waters as to the critical issues in this case and as a latch-ditch attempt to bolster their defense.

I don't want to bog you down with case law that's already cited in our brief, but I want to flag a particularly on-point

case, and that is *Reliance*, 110 F.3d at 257. The Fifth Circuit affirmed the lower court's denial of a party's motion to modify the scheduling order when that -- when a deposition didn't go well, specifically holding District Courts have the power to control their dockets by refusing to give ineffective litigants a second chance to develop their case.

The suggested expert testimony also is improper as a matter of law. It is well-settled law in the Fifth Circuit that an expert cannot testify regarding the scope of a party's contractual duties under an agreement and whether that party fulfilled such duties. And that is exactly what NexPoint and Defendants are trying to do here. It is trying to have its expert interpret the terms of a shared services agreement and testify regarding Highland's duties thereunder and ultimately whether it thinks Highland breached those duties.

This is an improper subject for expert testimony and precisely the type of expert testimony that the Northern District of Texas rejected in *Panhandle* and which the Fifth Circuit affirmed the rejection of in *Askanase*, two cases cited in our papers.

Even if the suggested expert testimony were proper, which it is not, it is also irrelevant. In order to be relevant, expert testimony must assist the trier of fact understand a complex or distinct issue in a case. Here, the critical issue for Defendants is whether they can prove that their default

under the note was the result of Highland's negligence. This issue is well within the common understanding of a lay person.

Again, this is a garden-variety collection action. All of the cases NexPoint cites in its papers in support of the notion that expert testimony is required, all of those cases involve professional malpractice cases, whether legal or medical. And in those cases, an expert was required to testify regarding the general standard of care in a particular industry.

Here, NexPoint doesn't seek to have an expert testify regarding the general standard of care in a particular industry. That is not an issue in this case. And this certainly is not a professional malpractice case.

NexPoint seeks to have its expert opine as to the scope of Highland's legal duties in a shared services agreement and ultimately whether Highland breached the purported duties, which, again, we submit it did not.

The other case NexPoint cites to, *In re Schooler*, that case also doesn't support Defendants' position, and in fact supports Highland's position. In that case, the Fifth Circuit noted, and I quote, Expert testimony is not needed in many, if not most, cases.

I also want to briefly address NexPoint's argument raised for the first time in its reply that Highland was also acting as an attorney to Defendants during this time. As a

procedural matter, this argument is entirely improper because it is not proper to raise an argument for the first time in a reply.

And on the merits, again, this is not a professional malpractice case. So for these reasons alone, such a contention should be summarily disregarded by the Court.

Finally, Your Honor, Highland would suffer prejudice if the motion is granted because it would be forced to expend significant and costly resources responding to the testimony in the form of retaining a rebuttal expert, taking and defending additional depositions, and engaging in more motion practice. This would be a waste of resources for both parties and for the Court because this testimony isn't ultimately going to be needed at trial.

It is improper because it opines as to the ultimate legal issues in this case that are reserved for the Court and then for the jury. And it is also irrelevant because all of the issues in this case are well within the common understanding of a lay person.

I also want to note that HCRE and HCMS's motions asking for the same relief are equally if not more frivolous than NexPoint's because HCMS and HCRE aren't even parties to the shared services agreement. To the extent HCMS and HCRE are asking an expert to testify regarding Highland's alleged duties under an oral agreement, the terms of which are

unknown, such a contention is frivolous on its face.

But even if such an alleged oral agreement exists, which it does not, this does not change the Rule 16(b) analysis. The Defendants fail to show good cause for modifying the scheduling order.

In brief, Your Honor, this motion is simply a delay tactic, the expert testimony is improper, and the motion should be denied. Thank you.

THE COURT: Thank you.

All right. Movants get the last word. Mr. Rukavina, anything further?

MR. RUKAVINA: Yes, Your Honor. Most of what opposing counsel says is the topic of a *Daubert* issue. We're not seeking to prejudice *Daubert* today, and they have every ability in the future to argue that Mr. Pully's testimony should not be admissible.

Second, this is not a garden-variety case. It is not. It is a case where, again, our lender was also our officer, was providing all kinds of payment services, accounting services, and legal services. It may not be unique, it may not have never happened before, but it is not a garden-variety.

I do take issue with the notion that there has been any delay in this case. That is not correct. I just looked at the docket again to refresh my memory. We had a contested hearing on my motion to withdraw the reference that the Debtor

objected to, arguing that 542 was a core matter. Your Honor rejected that argument, and Your Honor agreed with me, as did the District Court, that the reference will be withdrawn when this trial -- when this case is certified trial-ready.

So the notion that there has been delay, intentional delay by us, that this is a matter of delay, is absolutely wrong. In fact, this lawsuit has gone on quickly. It's been handled professionally. Both sides have been cooperative, giving each other various accommodations. And I am proud, I think, of how every lawyer has handled themselves in this lawsuit. To suggest delay or intentional delay is wrong.

On the law, Your Honor, *In re Schooler*, I heard counsel argue that it's just illogical and wrong to argue that an expert wasn't required in one situation but now is. But that's *In re Schooler*, the Fifth Circuit, Your Honor, 725 F.3d 498, that I quote at length from. That's one where the trustee dropped the ball, a Chapter 7 trustee failed to give property of the estate. And that's the one where the Fifth Circuit does say, Accordingly, we have explained that, as a general rule, expert testimony is not needed in many, if not most, cases. And then the Fifth Circuit says that, It requires no technical or expert knowledge to recognize that she -- the trustee -- affirmatively should have undertaken some form of action to acquire for the bankruptcy estate the assets to which it was entitled.

But, again, this is not that case. This was that case before Mr. Waterhouse testified, and now it's not. This is not a case anymore where the debtor simply dropped the ball, as did that trustee, or as does the doctor who amputates the wrong leg, or as does the lawyer who misses a limitations deadline. This is now a case where, if the jury believes Mr. Waterhouse, the plot has thickened.

And finally, Your Honor, again, I'm not here to point fingers, but look at the Debtor's response to Interrogatory No. 1. All that the Debtor needed to say six or seven months ago to avoid this delay is that, oh, wait, we received an instruction not to pay. It would have taken ten words, one sentence, by the Debtor to fully answer an interrogatory and this motion would not have been necessary.

Thank you.

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

MR. AIGEN: No, nothing further, Your Honor. We just join in Mr. Rukavina's reply points.

THE COURT: All right. As I understand it, the deadline was October 29th for disclosure of experts, and the record shows that at 5:22 p.m. on October 29th the Defendants -- let me double-check that. That was actually the declaration of Mr. Rukavina. No, 5:22 p.m. on the deadline, the motion of the Defendant to extend the expert disclosure

and discovery deadlines was filed.

The legal authority that governs here is Rule 16(b). As everyone has acknowledged, it provides that deadlines in scheduling orders may be modified for good cause. I think the standard does apply here. While I guess a lot of the cases analyze it in terms of a request after a deadline has expired, I think a motion on the day of the deadline at 5:22 p.m. is going to be governed by Rule 16(b).

So, as the parties have argued to the Court, the Fifth Circuit has specified four factors in guiding a decision in this situation: the explanation for failure to timely move for leave to amend; the importance of the amendment; potential prejudice in allowing the amendment; and availability of a continuance to cure such prejudice.

Here, as I think everyone readily acknowledges, these Defendants have always asserted as a defense that the Debtor dropped the ball, I think was one phrase used. That, in any event, it was the fault of the Debtor that the Defendants did default on the payment of these notes. I do not think the sudden statement of Frank Waterhouse suddenly is a game-changer that creates some new need for an expert. So, therefore, looking at the factors, I don't think the explanation here to extend the deadlines has merit.

Moreover, as far as the importance of the amendment, Factor No. 2, I think it is appropriate to look at the big

picture here a little bit, even though we're not in a *Daubert* situation, and look at what the expert is argued to be needed for. And I do not think an expert can testify about contractual duties and attempt to interpret its provisions. That is the job of the Court, and I think it is improper subject matter for an expert.

I don't buy into any notion that this is terribly unique territory or exotic. I mean, it was a contract. Shared services agreements are not all that unique, shall we say? It's not a device that is used solely in the investment advisor fund world. It's in the corporate world generally. Courts see these in all kinds of cases. So, again, I don't think contract interpretation needs an expert here or should have an expert here.

And just because experts are sometimes -- often, I should say -- appropriate in legal malpractice or medical malpractice or other kinds of tort cases where duties might be needing of elaboration, here, the contract spells out the duties, and I just don't think any of those cases argued are applicable.

Prejudice, I do think there is potential prejudice in allowing an extension of this deadline. It will be costly, add a layer of expense and delay to this litigation, when I don't think it would be admissible at trial ultimately.

So the motions are denied.

Ms. Winograd, could you please prepare a form of order?

It can be a simple form of order. Run it by opposing counsel before you upload it, please. All right?

MS. WINOGRAD: Yes, Your Honor.

THE COURT: Thank you. We're adjourned.

MS. WINOGRAD: Thank you.

THE CLERK: All rise.

(Proceedings concluded at 11:47 a.m.)

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CERTIFICATE

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

/s/ Kathy Rehling **12/13/2021**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

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