

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 ) Dallas, Texas  
MANAGEMENT, L.P., ) November 30, 2021  
 ) 1:30 p.m. Docket  
Debtor. )  
 ) - DEBTOR'S MOTION TO  
 ) DISQUALIFY WICK PHILLIPS GOULD  
 ) & MARTIN, LLP AS COUNSEL TO  
 ) HCRE PARTNERS, LLC AND FOR  
 ) RELATED RELIEF [2196]  
 ) - HIGHLAND'S SUPPLEMENTAL  
 ) MOTION TO DISQUALIFY [2893]  
 ) - MOTION TO COMPEL FILED BY  
 ) DEBTOR [2893]  
 )

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

APPEARANCES:

For the Debtor: John A. Morris  
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1 DALLAS, TEXAS - NOVEMBER 30, 2021 - 1:37 P.M.

2 THE COURT: All right. We are here for a setting in  
3 Highland Capital Management, Case No. 19-34054. It's  
4 Highland's Motion to Disqualify Wick Phillips as Counsel to  
5 HCRE Partners.

6 So, we're starting later than originally planned, and  
7 we'll talk about the record in a minute. But let's get  
8 appearances, first from Highland.

9 MR. MORRIS: Good afternoon, Your Honor. This is  
10 John Morris from Pachulski Stang Ziehl & Jones, LLP on behalf  
11 of the Reorganized Debtor, Highland Capital Management, LP.  
12 Can you hear me okay?

13 THE COURT: I can. Thank you.

14 MR. MORRIS: Okay. For some reason, I'm not -- I  
15 don't know if anybody else is having this issue, but I don't  
16 have the camera on in the courtroom.

17 THE COURT: Oh. Okay. Let's check on that. Mike,  
18 do you know why?

19 THE CLERK: I don't know why, but we can see him fine  
20 here.

21 THE COURT: Okay. I can see you, by the way, but  
22 he's saying he can't see me in the courtroom.

23 MR. MORRIS: Okay.

24 THE CLERK: Oh.

25 THE COURT: Okay. So, can someone else speak up?

1 Traci, I see you out there. Are you -- can you see me?

2 MS. ELLISON: No, I cannot, Your Honor.

3 THE COURT: Oh, okay. Well, --

4 MR. MORRIS: I'm happy to proceed. I think it's more  
5 important that you see me and the documents that we're putting  
6 up on the screen, --

7 THE COURT: All right.

8 MR. MORRIS: -- but you or others may have a  
9 different view.

10 THE COURT: Well, I'll keep taking appearances, and  
11 maybe you can walk around to this camera, the one that faces  
12 me, and just see if a button needs to be pushed. Does it look  
13 fine?

14 MR. MORRIS: Can anybody see --

15 MR. HELLBERG: Your Honor, this is Jeff Hellberg.  
16 I'm here on behalf of the Respondent, HCRE Partners, NexPoint,  
17 and Wick Phillips.

18 THE COURT: Okay. Hang on a minute. You couldn't  
19 see me, but I was looking --

20 MR. HELLBERG: And I cannot -- I cannot see you.

21 THE COURT: Oh, you can see me?

22 MR. HELLBERG: I cannot see you.

23 THE COURT: Oh, you cannot?

24 MR. HELLBERG: I can see John and Lauren.

25 THE COURT: Okay.

1 MR. MORRIS: Yes. And I can see you as well. Yep.

2 THE COURT: Okay. Well, we're going to get an IT  
3 person up in the courtroom to see if he or she can make an  
4 adjustment to the camera that faces the bench.

5 All right. So let me just continue taking appearances.  
6 I'm sorry. That was Mr. Hellberg, and you're representing  
7 Wick Phillips and HCRE? Or I know that was the former name.  
8 NexPoint.

9 MR. HELLBERG: Yes.

10 THE COURT: Is that correct?

11 MR. HELLBERG: Yes, Your Honor. That's correct.

12 THE COURT: All right. Do we have other lawyer  
13 appearances today?

14 (No response.)

15 THE COURT: All right. Well, again, we're going to  
16 have an IT person come up, but I can see you and you can see  
17 each other; you just can't see me.

18 So let's talk about what's going to be in the record. As  
19 you know, we were supposed to start at 9:30 this morning.  
20 Then I got the message last night from my courtroom deputy  
21 that you all had agreed that the Court could read certain  
22 deposition testimony in lieu of having the live witnesses here  
23 today.

24 So let me tell you what I did this morning. I have  
25 reviewed the deposition transcript of Rob Wills; of Robert

1 Kehr -- I don't know if I'm saying that correctly, K-E-H-R,  
2 the expert witness for Highland; third, the deposition of Mark  
3 Patrick; and fourth, the deposition of Ben Selman. So that's  
4 all I have looked at as far as what was on your witness and  
5 exhibit list.

6 So, to make the record extra clear, I've looked at Exhibit  
7 11 on the Debtor's witness and exhibit list, which is the Rob  
8 Wills deposition transcript. I've looked at Exhibit 12, the  
9 deposition transcript of Robert Kehr. Again, that's on the  
10 Debtor's witness and exhibit list. And I'm looking at Docket  
11 Entry 3051, which is the Debtor's original witness and exhibit  
12 list.

13 And then as far as where in the record the other two  
14 depositions occur, Exhibit 11 is the Mark Patrick deposition  
15 in the NREP exhibit list, which appears at Docket 3060; and  
16 then Exhibit 12, the transcript of Ben Selman, once again, in  
17 the NREP witness list at Docket 3060.

18 So I'm considering those four exhibits admitted.

19 (Debtor's Exhibits 11 and 12 are received into evidence.)

20 (NexPoint Real Estate Partners, LLC's Exhibits 11 and 12  
21 are received into evidence.)

22 THE COURT: So, with that, I'll turn to the parties.  
23 And do you all have other stipulations as far as what exhibits  
24 I should be considering?

25 MR. MORRIS: We do, Your Honor. This is John Morris,

1 again, from Pachulski on behalf of Highland. Mr. Hellberg and  
2 Ms. Drawhorn from Wick Phillips and Ms. Winograd from my firm  
3 and I have spent a fair amount of time over the last couple of  
4 days trying to streamline this matter in a way that would be  
5 most efficient for everybody, including the Court. And I'm  
6 pleased to inform the Court that we've not only agreed to  
7 admit the deposition transcripts, but we have agreed to admit  
8 into evidence all of the exhibits on each other's exhibit  
9 lists, and we have certain other factual stipulations that I'd  
10 like to read into the record, if I may.

11 THE COURT: All right. Well, before we hear that, if  
12 I could just get Mr. Hellberg to confirm what Mr. Morris just  
13 said.

14 MR. HELLBERG: Yes, Your Honor. To confirm, we have  
15 a drafted agreed-upon stipulation that I believe Mr. Morris is  
16 going to read into the record. I will confirm it at the  
17 conclusion. And I have every expectation that he'll read it  
18 as we discussed.

19 THE COURT: Okay. Well, what I was getting at right  
20 now was the exhibits. So, I understand you've stipulated to  
21 the admissibility of all the Debtor's exhibits, and those  
22 appear -- it looks like it's Exhibits 1 through 15, which are  
23 -- you know, 1 through 13 are at Docket 3051, and then 14 and  
24 15 are at Docket Entry 3054. So, those will be admitted by  
25 stipulation.

1 (Debtor's Exhibits 1 through 15 are received into  
2 evidence.)

3 THE COURT: And then turning to the Wick  
4 Phillips/NPRE exhibits, again, they all are at Docket Entry  
5 3060, and it's Exhibits 1 through 14. So I'm admitting all of  
6 those by stipulation.

7 (NexPoint Real Estate Partners, LLC's Exhibits 1 through  
8 14 are received into evidence.)

9 THE COURT: All right. So we have our --

10 MR. HELLBERG: And --

11 THE COURT: -- documents in the record. Hang on a --

12 MR. HELLBERG: Your Honor, if I may, --

13 THE COURT: Oh, did you have a correction?

14 MR. HELLBERG: Your Honor, I just wanted to reference  
15 our amended -- our original exhibit list was Docket 3052. I  
16 don't believe you mentioned that. I think you just mentioned  
17 the amended one at 3060.

18 THE COURT: Okay. Thank you. I did have that noted  
19 and I failed to clarify that.

20 All right. Just a moment. Before we go further, let me  
21 ask the IT people. Have you got the camera working?

22 IT CLERK: We'll have to reboot the video system.  
23 It'll take about six minutes.

24 THE COURT: Okay. So what does that mean, that we  
25 would lose everyone and they would have to --



1 IT CLERK: Yes.

2 THE COURT: -- re-patch in?

3 IT CLERK: No, no, they would -- they could stay on.

4 THE COURT: Uh-huh.

5 IT CLERK: But this system would reboot, so we  
6 wouldn't see them. They would still be in the room. We would  
7 just not see them.

8 THE COURT: Okay. So can I keep going? Is there any  
9 reason why --

10 IT CLERK: Oh, yes, absolutely.

11 THE COURT: -- I can't keep going?

12 IT CLERK: Yeah.

13 THE COURT: Okay.

14 IT CLERK: As long as they're okay without seeing  
15 you. You'll be able to see them.

16 THE COURT: Okay. So here's what we're going to do.  
17 They're essentially going to reboot my camera, the camera that  
18 faces me.

19 IT CLERK: I'm sorry.

20 THE COURT: Just a moment.

21 IT CLERK: The audio will cut out while we reboot,  
22 yeah, if that's what you're asking.

23 THE COURT: Ugh. Okay. So we have to stop the  
24 proceeding for six minutes?

25 IT CLERK: If you want it fixed. We can do it later

1 if you want.

2 THE COURT: Okay. Let's do this. Let's keep going  
3 with regard to the stipulated facts, and then we'll take a  
4 six-minute break for them to reboot my camera. Okay. So, who  
5 is going to present those? Mr. Morris?

6 MR. MORRIS: Yeah, just because we're the Movant, for  
7 no other particular reason, Your Honor.

8 THE COURT: Okay.

9 MR. MORRIS: And there's only four other stipulated  
10 facts, but I believe that they're -- they're important facts,  
11 and they're facts that probably cut out a fair amount of the  
12 testimony that we otherwise would have heard from some of the  
13 witnesses who weren't even deposed.

14 THE COURT: Okay.

15 MR. MORRIS: So, with that, let me just read into the  
16 record the following four stipulated facts.

17 First, the parties stipulate that Wick Phillips did not  
18 provide any legal advice related to the negotiation or  
19 drafting of either the original LLC agreement or the amended  
20 LLC agreement.

21 THE COURT: Okay.

22 MR. MORRIS: Stipulation No. 2: Wick Phillips  
23 represented all of the borrowers, including Highland Capital  
24 Management, LP, in connection with the drafting and  
25 negotiation of the KeyBank loan agreement.

1 Stipulation No. 4: The parties agree and stipulate that  
2 at all relevant times, --

3 THE COURT: Did -- I missed No. 3. Was there a No.  
4 3?

5 MR. MORRIS: Oh, I apologize. It was because I  
6 eliminated -- one of them was a stipulation as to the  
7 admissibility of exhibits. So, my mistake, Your Honor.

8 THE COURT: Okay.

9 MR. MORRIS: No. 3 is the parties agree and stipulate  
10 that at all relevant times the following people worked solely  
11 for NexPoint Advisors, LP, notwithstanding the fact that they  
12 had an @highlandcapitalmanagement.com email address: Freddie  
13 Chang, C-H-A-N-G; Matthew Goetz, G-O-E-T-Z; Bonner McDermett,  
14 M-C Capital D-E-R-M-E-T-T; and Matt McGraner, M-C Capital  
15 G-R-A-N-E-R.

16 And the fourth stipulated fact is that the parties agree  
17 and stipulate that at all relevant times the following people  
18 who worked for -- the following people worked for HCMLP: Paul  
19 Broaddus, B-R-O-A-D-D-U-S.

20 THE COURT: Okay.

21 MR. MORRIS: Helen Kim, K-I-M. And Tim Cournoyer,  
22 C-O-U-R-N-O-Y-E-R.

23 So we have those four stipulated facts, Your Honor.

24 And with that, if you'd like to take a break, that's  
25 perfectly fine with Highland. When we return, I would just

1 expect to present an oral argument based on the evidence that  
2 would be -- you know, that has been admitted. Mr. Hellberg  
3 will respond in kind. And then I'll have an opportunity for  
4 rebuttal. And my hope is that this doesn't take more than 90  
5 minutes or so.

6 THE COURT: All right. Thank you.

7 First, Mr. Hellberg, you confirm you have stipulated as to  
8 the four facts read by Mr. Morris?

9 MR. HELLBERG: Yes, Your Honor. We do so stipulate,  
10 along with the procedure he outlined, if the Court would wish  
11 to continue under that protocol.

12 THE COURT: All right. Well, I agree to this format.  
13 So we are going to take what I'm told is a six-minute fix  
14 break, and you all can just stay put. You don't have to log  
15 out of WebEx. You'll just hopefully have the courtroom video  
16 in about six minutes. Okay. Thanks.

17 THE CLERK: All rise.

18 (A recess ensued from 1:50 p.m. until 1:56 p.m.)

19 THE CLERK: All rise.

20 THE COURT: All right. Please be seated. We're back  
21 on the record in Highland Capital. If everyone could turn  
22 their cameras on now. We got 'em? Okay. That took less than  
23 six minutes, so we're ready to roll. All right. And we have  
24 Mr. Hellberg there?

25 MR. HELLBERG: Yes, Your Honor.

1 THE COURT: Okay. All right. Well, Mr. Morris, you  
2 may proceed.

3 MR. MORRIS: Thank you very much, Your Honor. Again,  
4 for the record, John Morris; Pachulski Stang Ziehl & Jones;  
5 for the Debtor.

6 Your Honor, just a little bit of background before I move  
7 to the substance of my argument. As Your Honor may have seen  
8 in Highland's original memorandum of law, which was filed at  
9 Docket 2197, the then-Debtor Highland noted in a footnote that  
10 Wick Phillips was then representing four different Dondero  
11 entities in four separate matters. The Debtor only moved to  
12 disqualify Wick Phillips from representing these entities in  
13 one matter, and it's this particular matter, where HCRE claims  
14 that the amended and restated LLC agreement that's relevant to  
15 their claim contains a mutual mistake. And Highland at that  
16 time moved to disqualify Wick Phillips in that case, but  
17 didn't do anything in the other three cases.

18 Fortunately, Your Honor, you may be aware of this, but  
19 Wick Phillips actually withdrew from the representation of two  
20 of them. That involved representing HCRE and HCMS in two of  
21 the notes litigations. And they previously represented  
22 NexBank Capital in the pursuit of their administrative claim  
23 that was just resolved a week or two ago. We filed something  
24 on the docket.

25 And I point this out really for two reasons, Your Honor.

1 I point this out to show, I believe, that the Debtor is very  
2 deliberate in what it's doing here, that it's not -- has not  
3 brought this motion for litigation advantage. It has not  
4 brought this motion for an improper purpose. It's been very,  
5 very selective in how it's gone about its business under the  
6 leadership of Mr. Seery.

7 And the second reason is just to show again to the Court  
8 that I don't anticipate at this point any further disputes of  
9 this type with Wick Phillips, or as the world exists today, at  
10 least based on what I know, anybody else.

11 So this is kind of a -- it's an important -- very  
12 important issue for Highland. It's one that it's taken  
13 seriously. I appreciate the serious nature of the content of  
14 the argument today. But I just wanted to kind of lay that out  
15 there so that everybody knows that the Debtor is both taking  
16 this seriously and it's being very, very strategic and precise  
17 in what it's doing.

18 There's really two large pieces to what I want to do in my  
19 presentation. First, Your Honor, I know that you can read a  
20 case. I know that you do it all the time and you write  
21 decisions. But I think it's really important that we put in  
22 context the law, and the law as stated so well and so clearly  
23 in the *American Airlines* case from the Fifth Circuit, because  
24 that case is -- it's just -- it goes through so many of the  
25 issues that we're addressing today and I think it resolves the

1 legal issues that the Court has to consider.

2 And the second part of my presentation will be a focus on  
3 the facts. And at the end of the day, there's really only one  
4 question that the Court has to answer, particularly in light  
5 of the stipulation, because the stipulation just resolved some  
6 of the issues that the Court would otherwise had to have  
7 decided.

8 And the only issue is whether the current matter that Wick  
9 Phillips is representing HCRE on is the same as or  
10 substantially related to the prior work that it did on behalf  
11 of the Debtor. It's really -- I think that's -- that's part  
12 of the reason why we were able to come to the stipulation,  
13 part of the reason why -- and I do appreciate Mr. Hellberg and  
14 Ms. Drawhorn's cooperation in getting to this point -- that we  
15 can just have an argument, because the facts are the facts and  
16 the Court will decide what they mean.

17 So, with that, I do want to start with the *American*  
18 *Airlines* case. This case has many important guideposts, many  
19 important holdings. Obviously, it's binding on this Court.  
20 And if you're -- just briefly, *American Airlines* moved to  
21 disqualify Vinson & Elkins, a very prominent firm in Texas,  
22 from representing Northwest Airlines in a suit that Northwest  
23 had brought against American.

24 American had asserted several grounds for disqualification  
25 at the trial level and pursued several grounds on appeal, but

1 only one of which is really applicable here, and that really  
2 was whether Vinson & Elkins was representing Northwest in a  
3 matter adverse to American when Vinson & Elkins had previously  
4 represented American in either the same or substantially  
5 related matters.

6 The District Court denied American's motion for  
7 disqualification. They filed a petition for a writ of  
8 mandamus in the Fifth Circuit, which typically isn't granted,  
9 as the Fifth Circuit pointed out. Only in exceptional  
10 circumstances would it even grant a petition of that type.  
11 But they found it in that case, and they found it because the  
12 Court concluded that it pertained -- that the appeal pertained  
13 to the interpretation and application of ethical standards in  
14 disqualification cases.

15 The Court also found that the Texas Disciplinary Rules are  
16 not the sole source of authority in disqualification motions.  
17 The Court noted that the Texas Rules were patterned after the  
18 ABA Model Rules of Professional Conduct. And, indeed, in  
19 Footnote 2 -- and this will be important for reasons I'll  
20 describe later -- the Fifth Circuit specifically determined  
21 that ABA Rule 1.9 is identical to Texas Rule 1.09 in all  
22 important respects. And it's really 1.09 that is at the heart  
23 of the dispute today.

24 And I know, since Your Honor said that she read Mr. Kehr's  
25 deposition testimony, you saw that he may not be licensed in



1 Texas but he is more than familiar with the ABA Model Rules  
2 because he sat on the commission of the -- in California that  
3 adopted the rules in that state, after doing a survey of all  
4 50 states' rules.

5 And so I point that out really just to make it clear to  
6 the Court that while Mr. Kehr is not a Texas lawyer *per se*,  
7 these rules are more than familiar to him. And as the Fifth  
8 Circuit said, the rule that's at issue here is exactly the  
9 same rule as the Model Rule.

10 Let's just talk about that rule for just a moment, right,  
11 the elements of 109(a)(3). There are three. There are really  
12 three elements. But it provides, and I'm going to quote it  
13 here, that without prior consent a lawyer who has personally  
14 formerly represented a client in a matter shall not thereafter  
15 represent another person in a matter adverse to the former  
16 client, and Subpart (3) says, if it is the same or  
17 substantially related matter.

18 So there's three parts. Did the lawyer previously  
19 represent the objecting party? We have a stipulation that  
20 they did.

21 Is the matter adverse to the party that the law firm  
22 previously represented? Obviously, it is. This is the Wick  
23 -- this is the HCRE claim in which they're trying to stake  
24 entitlement to an asset that the Debtor otherwise believes  
25 it's theirs.

1 And then the third point, which is really the heart of the  
2 matter, is whether or not the representations are the same or  
3 they relate to substantially related matters.

4 The Fifth Circuit was urged by Northwest to take a very  
5 narrow view of disqualification, and they asked the Court to  
6 hold that disqualification was proper, quote, only in cases  
7 where a court also finds that the unethical conduct threatens  
8 to taint the trial. Okay? And there's some of that in the  
9 Wick Phillips response here, that, you know, it -- it's -- the  
10 prior representation won't have an adverse impact on the  
11 trial.

12 But the Fifth Circuit explicitly rejected this very narrow  
13 approach, stating at Page 611, and I quote: This circuit has  
14 struck a different balance, electing to remain sensitive to  
15 preventing conflicts of interest. We have squarely rejected  
16 this hands-off approach in which ethical rules guide whether a  
17 counsel's presence will taint a proceeding, holding instead  
18 that a district court is obliged to take measures against  
19 unethical conduct occurring in connection with any proceeding  
20 before it.

21 And the Court continued: To a very large extent, unless a  
22 conflict is addressed by courts upon motion for  
23 disqualification, it may not be addressed at all. More to the  
24 point, it is our business, our responsibility, to deal with  
25 these matters.

1       There was no dispute in *American Airlines* that an  
2 attorney-client relationship existed between the moving party  
3 and the attorneys sought to be disqualified. The same is  
4 true here, pursuant to the stipulation. There was no dispute  
5 that Vinson & Elkins was going to be adverse to its former  
6 client. Again, the same is true here. Therefore, the only  
7 issue, as here, was whether there was a substantial  
8 relationship between the prior representation and the current  
9 representation.

10       The Court relied upon and analyzed Texas Rules, ABA Model  
11 Rules, and the case law in analyzing the issues, and held,  
12 quote: The test is categorical in requiring disqualification  
13 upon the establishment of a substantial relationship between  
14 past and current representations.

15       In its analysis, the Fifth Circuit rejected many of the  
16 arguments that Wick Phillips makes here.

17       For example, you'll see references in Wick Phillips'  
18 papers and you might hear it in argument today that there were  
19 no confidences. Wick Phillips doesn't have any confidences of  
20 Highland. As Mr. Kehr pointed out and as the law I think  
21 holds, this was a joint representation in connection with the  
22 KeyBank loan. There aren't confidences in a joint  
23 representation. And in any event, the Fifth Circuit held that  
24 1.09(a)(2) is the section that deals with confidences. That  
25 section incorporates Section 1.05, which prohibits a lawyer's

1 use of confidential information that was obtained from a  
2 former client to that former client's disadvantage.

3 Highland is not seeking disqualification based on  
4 1.09(a)(2). It is seeking disqualification under 1.09(a)(3).  
5 And as the Fifth Circuit held, confidential -- issues of  
6 confidentiality have no bearing on that type of motion. As  
7 I'll discuss in a minute, what they really said is that it  
8 comes down to the duty of loyalty. And that's something that  
9 Wick Phillips has yet to address, and it's why the whole issue  
10 of taint and whether or not, you know, they're going to use  
11 the prior representation to the former client's disadvantage,  
12 the Court doesn't have to address those issues based on this  
13 case, based on binding Fifth Circuit precedent, because the  
14 issue is loyalty.

15 The Fifth Circuit said, and I quote from Page 616: A  
16 party seeking to disqualify counsel under the substantial  
17 relationship test need not prove that the past and present  
18 matters are so similar that a lawyer's continued involvement  
19 threatens to taint the trial. Rather, the former client must  
20 demonstrate that the two matters are substantially related.  
21 We adhere to our precedents in refusing to reduce the concerns  
22 underlying the substantial relationship test to a client's  
23 interest in preserving his confidential information.

24 The second fundamental concern protected by the test is  
25 not the public interest in lawyers avoiding the appearance of

1   impropriety, but in the client's interest in the loyalty of  
2   its attorney.

3           And it's really profound. I mean, that is the heart of  
4   the matter here. This is an issue that affects not only  
5   Highland but anybody who retains counsel. Do they expect  
6   their lawyer, when they walk into the office, to see them  
7   sometime down the road in connection with the very transaction  
8   that they represented them on? It's really a fundamental  
9   issue that I think the Fifth Circuit focused appropriately on.

10          The Court then reviewed prior decisions, including  
11   *Brennan's, Inc.*, which was a 1979 case from the Fifth Circuit,  
12   where the Court disqualified a former counsel even though  
13   there was no chance, according to the Fifth Circuit, that  
14   confidential information might be used against the former  
15   client.

16          After reviewing other cases, the Fifth Circuit observed:  
17   As these -- and this is from Page 618, quote: As these  
18   decisions suggest, the existence of a lawyer's duty of loyalty  
19   means that the substantial relationship test is not solely  
20   concerned with the adverse use of confidential information.  
21   That is because the substantial relationship test is concerned  
22   both -- concerned with both a lawyer's duty of confidential --  
23   confidentiality and his duty of loyalty. A lawyer who has  
24   given advice in substantially related matters must be  
25   disqualified, whether or not he has gained confidences.

1 And that -- I appreciate Your Honor letting me go through  
2 that because I know, again, that you know how to read cases.  
3 But I think it's really important to put into context the  
4 facts that we're going to talk about, right? There's three  
5 parts to 109(a)(3). We've stipulated -- we've stipulated to  
6 one of them: prior representation. Don't think there's any  
7 dispute as to the second one. It's adverse. So let's get to  
8 the facts and let's see what the evidence shows that's now  
9 been admitted into the record.

10 Wick Phillips is representing HCRE here in the prosecution  
11 of Wick -- HCRE's proof of claim in the Highland case. That's  
12 why there is adversity. And I think it's helpful to use that  
13 as the starting point. And I would ask my colleague Ms.  
14 Cantey to put up Exhibit 5 on the screen, which is the proof  
15 of claim.

16 So, up on the screen, Your Honor, is the document that's  
17 been admitted as Highland Exhibit 5. As you can see on the  
18 first page, it is a proof of claim that was filed by HCRE  
19 Partners. If we scroll down a little bit, you'll see that it  
20 was filed by the Bonds Ellis firm, Mr. Dondero's counsel. And  
21 if we continue to scroll down a bit, you'll see that it was  
22 filed on the last day of the period for filing claims, April  
23 8, 2020, and it was electronically signed by Mr. Dondero.

24 The important point is Exhibit A. And this is the  
25 entirety of the original HCRE proof of claim. If you look at

1 Exhibit A, it really doesn't say much. In fact, it doesn't  
2 even say that they have a claim.

3 Instead, HCRE contends that "or a portion" of Highland's  
4 interest in SEC [sic throughout] Multifamily "does belong to  
5 the Debtor or it may be property of the Claimant." HCRE "may  
6 have a claim against the Debtor."

7 HCRE stated that it was continuing to work and "it will  
8 update its claim in the next 90 days."

9 So that was filed a year and a half -- no, more. HCRE has  
10 never updated its claim. And it's notable that not only  
11 haven't they updated the claim, but the parties have largely  
12 completed the document discovery on the merits, because it was  
13 that discovery -- and I'll talk about that in a moment -- that  
14 actually led to the identity of the conflict.

15 But that's where we are. That was the proof of claim that  
16 was filed. Highland had given HCRE a number of extensions at  
17 the time. No, I apologize. Before we get to that point, at  
18 the end of July -- so this is July 2020 -- at Exhibit 6,  
19 Highland filed its first omnibus proof -- objection to claims.  
20 They included the HCRE claim as a note liability claim. So  
21 that's July 2020. Highland gave HCRE a number of extensions  
22 of time to respond to that objection. And in October, HCRE  
23 filed their initial response, which is at Exhibit 7. And if  
24 we could just put that on the screen and take a quick look at  
25 Paragraph 5.

1           So, it's not -- it's not a very substantive response at  
2 all. In Paragraph 5, for the first time, I believe, Wick  
3 Phillips now, on behalf of HCRE, identifies specifically  
4 mutual mistake, lack of consideration, and/or the failure of  
5 consideration with respect to the organizational documents and  
6 the improper allocation of the ownership percentages thereto.

7           So that's the state of play. This is their response. The  
8 parties thereafter adopted a scheduling order, they served  
9 written discovery, and they exchanged documents.

10          And fast forward to March of this year, on the eve of  
11 depositions, the Debtor found evidence that Wick Phillips had  
12 represented Highland in connection with the KeyBank loan  
13 transaction.

14          And with that information -- you know, I'm not a witness  
15 here, but the document is in evidence -- I wrote to Ms.  
16 Drawhorn and alerted her to Highland's concerns. I  
17 specifically provided a copy of the KeyBank loan document. I  
18 cited to the specific provision that identified Wick Phillips  
19 as Highland's counsel. And on behalf of my client, Highland  
20 demanded that Wick Phillips immediately withdraw as counsel,  
21 that it provide to the Debtor the engagement letters in  
22 relation to the transaction, and that it disclose the full  
23 nature and scope of Wick Phillips' work.

24          Exhibit 9 shows certain back and forth between probably me  
25 and Ms. Drawhorn about next steps, because that original



1 document, that original notice, was sent to her on March 29th.  
2 And, of course, I don't mean to personalize this at all. It's  
3 just the names on the document at this point.

4 And, yeah, Exhibit 9 shows the back and forth over the  
5 ensuing days, where the Debtor was asking for a substantive  
6 response and expressed concern that it was taking so long for  
7 Wick Phillips to be able to identify who its clients were in  
8 the transaction.

9 But about ten days later, and this is at Exhibit 10, Wick  
10 Phillips actually sent a very formal letter in response. And  
11 in that letter, Wick Phillips actually said, in the second  
12 paragraph, that it represented NexPoint Real Estate Advisors  
13 and HCRE in connection with the SEC Multifamily deal.

14 So, obviously, that conflicts with the stipulation that we  
15 just entered into the record. And I believe the stipulation  
16 is accurate, but it is notable that, after ten days, Wick  
17 Phillips was unable to correctly identify who its client was.  
18 And not only was -- not only did it make a mistake in  
19 identifying who its client was, it completely failed to  
20 address the issue that Highland actually raised, and that was  
21 the joint representation of the KeyBank loan agreement. Not  
22 even mentioned. Completely ignored.

23 So, well, in response, Highland filed its motion for  
24 disqualification, because this really left it with no choice.  
25 So we filed a motion for disqualification, and you know, there

1 is no dispute now, because it's a stipulated fact, that, in  
2 fact, Wick Phillips represented Highland and the other six  
3 borrowers on a joint representation basis in connection with  
4 the KeyBank loan documents. So that's a stipulated fact.

5 There are three pieces to the transaction that I'm going  
6 to try to go through as quickly as I can. The first piece is  
7 the creation of the original LLC agreement between Highland  
8 and HCRE. As we've stipulated, Wick Phillips was not involved  
9 in that representation, notwithstanding the letter that it  
10 sent to Highland in April of this year.

11 The second piece is the financing of the deal. That's the  
12 KeyBank loan.

13 And then the third piece is the amendment to the LLC  
14 agreement, where the parties to the LLC took in a new party.  
15 And that's the place where the mistake supposedly is made.

16 So let's just start with the Step No. 1 of this integrated  
17 transaction. This integrated transaction, Your Honor, was  
18 given a name by the parties. It was called Project Unicorn.  
19 And these three pieces are the three legs of the Project  
20 Unicorn stool.

21 Exhibit 1 up on the screen is the original limited  
22 liability company agreement. Again, keeping in mind my goal,  
23 my burden here, my burden, I don't want to -- I don't want to  
24 call it anything else, my burden is to prove to the Court that  
25 there is either a substantial relationship or the

1 representations are the same. And Point 1 of that is this  
2 document, because the proof of claim, the dispute, the  
3 adversary proceeding today, does not exist without this  
4 document. This document is a necessary component. It will be  
5 part of the evidence on the merits.

6 So this is Step 1. If we can go to, I think, the next  
7 page. It's dated April 23, 2018. And pursuant to this  
8 agreement, Highland and HCRE become members of a new limited  
9 liability company called SEC Multifamily Holdings.

10 If we could scroll down just to Section 1.3, you'll see  
11 that the stated purpose of the company was to acquire, invest,  
12 hold, maintain, finance, improve, and manage real estate.  
13 I'll just leave it at that.

14 If we go to Page 17, we'll see that Jim Dondero signed  
15 this LLC agreement on behalf of both parties.

16 And if we go to Schedule A, we'll see that, in Step 1,  
17 HCRE and Highland Capital Management, LP had percentage  
18 interests in the SEC Multifamily limited liability company on  
19 a 51/49 basis, consistent with their capital contribution.  
20 That's the first leg of the dispute.

21 The second leg is the financing of the transaction, and  
22 that happens pretty quickly thereafter. It happens in  
23 September of 2018. This is Exhibit 2, Debtor's Exhibit 2 or  
24 Highland's Exhibit 2. And pursuant to this bridge loan  
25 agreement, HCRE and the other borrowers obtained access to

1 capital through loans of over \$500 million.

2 Now, one of the things that I know was asked in the  
3 depositions is, doesn't it matter that this loan was only one  
4 part of the financing of Project Unicorn? And Mr. Kehr said,  
5 and I have no reason to quarrel with him, of course not. What  
6 difference does it make? What matters here is that -- again,  
7 and you're going to hear a lot of attempts to minimize Wick  
8 Phillips' role. You're going to hear a lot of attempts to  
9 minimize the import of these transactions.

10 This is a loan for more than a half a billion dollars. I  
11 don't care -- I don't think the law cares if they got a couple  
12 of hundred million dollars or a billion dollars or three  
13 billion dollars from somebody else. It's a \$500 million  
14 transaction.

15 According to Wick Phillips, the purpose of the loan was to  
16 provide financing to Project Unicorn. Again, as I'm going to,  
17 I think, hopefully prove, HCRE's proof of claim and the  
18 adversary proceeding does not exist without this loan  
19 agreement. And let's talk about the reasons why.

20 At Page 46 -- I apologize; I forget his name. Wick  
21 Phillips' 30(b)(6) witness. Mr. Wills. Okay? So, we don't  
22 have to go to the transcript itself, but I'll just point out,  
23 Your Honor, that on Page 46 Mr. Wills acknowledged that the  
24 purpose of the loan was to provide financing to Project  
25 Unicorn.

1 Highland was one of the borrowers under the loan that Wick  
2 Phillips represented. But interestingly, Your Honor, you've  
3 read Mr. Wills' transcript and you saw that Wick Phillips made  
4 another mistake in trying to identify its clients, because he  
5 initially said they never represented Highland, not even in  
6 the loan agreement. He initially -- then he backtracked a  
7 little and he said, well, we did, but only for purposes of  
8 rendering an opinion.

9 It's not what the loan document says. I have a  
10 stipulation to that effect, so I'm not going to burden the  
11 Court with it. But it's just -- it's just the perspective,  
12 Your Honor, of they can't get their client right. I don't  
13 know what it is. It was only when my partner, Mr. Brown,  
14 showed Mr. Wills Wick Phillips' own written response in this  
15 litigation where it acknowledged that it had represented  
16 Highland as one of the borrowers in the KeyBank loan that he  
17 finally relented and said yes, okay.

18 But you've read that. That's at Pages 23 to 31 if you  
19 want that. But I think that's a very -- it's very important  
20 to understand that not once, but twice, Wick Phillips had  
21 difficulty either admitting or identifying its own client.

22 I don't mean to pick on the (inaudible) at all, but that's  
23 what the evidence is. And so that's twice. Exhibit 10, which  
24 was contradicted by Wick Phillips' later pleading, and that  
25 portion of Exhibit 11 that was contradicted by the loan

1 document, and, again, today's stipulation, that show that Wick  
2 Phillips just has a devil of a time identifying its clients.

3 In any event, the evidence shows that Highland was brought  
4 into the deal, according to Mr. Wills, because the banks  
5 needed a credit enhancement on the borrower side. At Exhibit  
6 11, Page 25, Line 7, through Page 26, Line 17, and again on  
7 Page 46, you'll find Mr. Wills testifying under oath that  
8 Highland was brought into the deal for a very specific  
9 purpose, and that was because the banks needed a credit  
10 enhancement on the borrowers' side.

11 The deal itself created -- you know, had incredible  
12 implications for Highland. They weren't here by accident.  
13 They were here because they were needed as a credit  
14 enhancement. But there's at least three different  
15 implications of this agreement that Wick Phillips negotiated  
16 and drafted and represented Highland on that I want to make  
17 sure the Court is aware of.

18 The first was that all of the borrowers, including  
19 Highland, were jointly and severally liable for all of the  
20 obligations under the loans. If we can go to Page 3, I want  
21 to try to just establish this quickly. Page 3 has the  
22 definition of borrowers. You'll see that borrowers means  
23 individually and collectively, jointly and severally, Highland  
24 Capital, and then there are others, including HCRE.

25 If we go to Page 12, we can remove any doubt that Highland

1 Capital referred to Highland Capital Management, LP, the  
2 debtor, now Reorganized Debtor. That's at the bottom of Page  
3 12.

4 And if we go to Page 70, we'll see in Article 7 that  
5 Highland, as one of the jointly and severally liable  
6 borrowers, was liable for all of the amounts that were to  
7 become due and paying under the -- under the loan. So, in --  
8 an event of default occurs if the borrower fails to pay any  
9 principal on the loans when they become due and payable.

10 So this transaction was very important to Highland because  
11 they were both needed for credit enhancement purposes and were  
12 taking on the entire liability of the loan.

13 The second reason that this loan was very important to  
14 Highland, or, actually, had enormous impact on Highland, is  
15 the provision in the loan that granted HCRE Partners, LLC the  
16 status as lead borrower. If we go to Page 14. Because this  
17 is the core of the mistake. This is the core of the mistake.  
18 On Page 14, we have the definition of lead borrower. A little  
19 bit lower. You'll see that that means HCRE Partners, LLC.  
20 And if we can go to Pages 25 and 26, we'll see that under  
21 Section 105(b) of the loan agreement, HCRE, as the lead  
22 borrower, was given the sole authority to borrow money and to  
23 decide how it would be distributed among the borrowers.

24 Okay? Very important provision, negotiated and drafted by  
25 Wick Phillips on behalf of all of the borrowers. As we'll

1 discuss, this is the linchpin of the whole dispute, because  
2 HCRE used this provision to take all of the proceeds for  
3 itself and is now in a position to claim, see, we put in all  
4 the capital so therefore the whole asset is ours. That's all  
5 this is about. It's really not more complicated than that.  
6 But this is Wick Phillips' work that we're talking about here.

7 The third issue that's very important in this dispute and  
8 why this loan document is substantially related to the current  
9 dispute is that the loan agreement effectively ratified the  
10 allocation of HCRE and Highland's interest in HC -- in SEC  
11 Multifamily. I'm sorry. SE Multifamily. And I'll just go  
12 through a couple of provisions to show how that came to be.

13 If we go to Page 43, you'll see in Article 3 there's, at  
14 the beginning of representations and warranties that are made  
15 by the borrower -- again, the borrower is defined jointly and  
16 severally as all of the borrowers, including Highland. So the  
17 borrowers had to make certain representations and warranties.  
18 And if we could just go to Page 49, let's just focus on  
19 Section 3.15.

20 In Section 3.15, the borrowers represented and warranted  
21 to the lenders that, as of the effective date, no person owns  
22 any equity interests in any of the portfolio of properties --  
23 Summer's Landing property or HCRE property -- except as set  
24 forth on Schedule 3.15. And I'm not going to ask my colleague  
25 to go there; I'll just represent to the Court that if you went



1 to Schedule 3.15 you'll see a series of almost two dozen  
2 organization charts that relate to the ownership structure of  
3 various properties that are going to be financed through this  
4 document, through this loan document. And to the extent that  
5 Highland and HCRE are mentioned -- which is in almost all of  
6 them, but I think there's one or two where I guess they  
7 weren't participating for one reason -- on every single one of  
8 them, the ownership is 51/49. Okay. So that's where we are  
9 here.

10 And this representation and warranty was very important,  
11 as every single one of them was, because if we go to Page 71  
12 we'll see that under Article 7, which is the default  
13 provision, it's a default in Item C, Article 7, Item C, if any  
14 of the representations and warranties made on behalf of the  
15 borrowers and/or in connection with any loan document were  
16 incorrect in any material respect when made or deemed made.  
17 So, I'm summarizing a little bit, Your Honor, but if you took  
18 the time, if we took the time to look at the definition of  
19 loan document, it certainly includes the document that we're  
20 talking about or I'm talking about right now.

21 So if the representation and warranty in 3.15 was  
22 incorrect in any material respect, then the entire loan would  
23 default and Highland and every other borrower would all of a  
24 sudden become jointly and severally liable for all amounts due  
25 and owing. This is serious stuff. This is, like, really

1 serious stuff. And our lawyer is suing us now on this -- you  
2 know, on a transaction that involves these very -- these very  
3 matters.

4 But I'm happy to report that Wick Phillips did its job.  
5 This isn't a negligence case. This isn't a malpractice case.  
6 Wick Phillips actually did its job. They don't want to say it  
7 as clearly as I do, but they did exactly what they were  
8 supposed to do. And if you read Mr. Wills' transcript, as I  
9 know you did, I just want to point out a few acknowledgements  
10 and admissions that he made to show that Wick Phillips  
11 understood the importance of Section 3.15.

12 Mr. Wills acknowledged that the allocation in the LLC was  
13 a component of the loan agreement as far as which entity had  
14 which percentage of interest. That can be found on Page 47 at  
15 Lines 12 through 18.

16 While he attempted to minimize Wick Phillips' role as a  
17 mere conduit with respect to the organizational charts, he was  
18 forced to admit that he -- as the 30(b)(6) witness, that Wick  
19 Phillips made a determination that Schedule 3.15 was accurate.  
20 That admission can be found at Page 49 of Exhibit 11.

21 Mr. Wills also admitted that all of the charts in Schedule  
22 3.15 were accurate. That can be found at Page 58.

23 He also admitted that in the course of doing its diligence  
24 Wick Phillips consulted with different people at NexPoint and  
25 Highland to ensure the accuracy of the organizational charts

1 and representations.

2 And, of course, we have documentary evidence in the record  
3 now that corroborates Mr. Wills' testimony in this regard. If  
4 we can put up Exhibit 3. Exhibit 3 is an email, a  
5 contemporaneous email chain. You'll see that it's dated  
6 September 17 and 18, 2018. It's on the cusp of the closing of  
7 the KeyBank loan document. And if you start at the first  
8 email from Rachel Sam, Rachel Sam is an attorney at Wick  
9 Phillips, and you'll see that she sends to certain people that  
10 were identified in the stipulations, some of whom were  
11 employed by -- by Highland, some of whom were employed by  
12 NexPoint Capital Advisors -- NexPoint Advisors, LP. And then  
13 -- and then Ms. Sam copies her then-colleague, D.C. Sauter,  
14 who was then an attorney at Wick Phillips. And she writes to  
15 the -- to her clients -- there's nothing else to call them but  
16 her clients -- she writes to her clients and she says, among  
17 other things: Attached are updated versions of the  
18 organizational charts. Can you take a look and let me know if  
19 they're okay?

20 I'm summarizing. Okay? So, she's got control of the  
21 organizational charts. She's updated the organizational  
22 charts. And she's giving them to her clients to confirm their  
23 accuracy.

24 She follows up later the same day: I just wanted to  
25 follow up on the organizational charts. Let us know if you

1 have any comments or if they are okay to submit to Freddie.  
2 Freddie Mac, the other lender that's not part of the KeyBank  
3 loan.

4 What this email chain shows, Your Honor -- I don't want to  
5 spend too much time on it -- but it shows that it's a  
6 collaborative effort. It shows that Wick Phillips is doing  
7 its job. It shows that they're doing the diligence that one  
8 would expect of able counsel to make sure that their clients  
9 are not making misrepresentations or trip-wiring a warranty  
10 upon execution of a document. And I think that that's very,  
11 very important.

12 So that's the second leg of the stool. And, of course, it  
13 would fall down if it didn't have a third leg, but luckily we  
14 do have a third leg, and that's Exhibit 4. The following  
15 spring, Highland and HCRE decide to admit a new member to the  
16 SEC Multifamily limited liability company, so they amend and  
17 restate their limited liability company agreement. We have  
18 stipulated that Wick Phillips did not play any role in the  
19 negotiation or drafting of this document. But this document  
20 is the third leg of Project Unicorn, and it is the third  
21 document that must exist in order to establish -- you know,  
22 it's just relevant to the Wick Phillips -- to the HCRE proof  
23 of claim. All three of these documents will be part of the  
24 evidence.

25 And the important part of this document is that it

1 piggybacks on the very representations that were made in the  
2 KeyBank loan document, 51/49. That is the jumping-off point,  
3 and that's why all of this -- or it's really the same  
4 transaction, but at a minimum, it's certainly substantially  
5 related. You have 51/49 in the first document. You have  
6 51/49 that Wick Phillips confirms on behalf of their clients  
7 is still true and accurate in the second document. And that  
8 becomes the foundation for the percentage interests in the  
9 third document.

10 So let's just spend a couple of minutes on the third  
11 document. There is no dispute that an entity -- if we can go  
12 to the next page -- that an entity called BH Hold -- BH  
13 Equities, LLC was admitted as the third member. I don't know  
14 anything about their background, but suffice it to say that I  
15 don't think anybody will dispute that this document gave them  
16 six percent. And the important point is, how did it get  
17 there?

18 If we go to the next page, you'll see that the purpose of  
19 the enterprise remained exactly the same. Basically, to  
20 acquire, invest, develop, and ultimately sell real estate.  
21 But if you go down to the bottom of the page, there's a very  
22 important provision here. Company ownership: 47.9 percent to  
23 HCRE; 46.06 percent to HCMLP; and six percent to BH.

24 And how did they get to those percentages? They got to  
25 those percentages, Your Honor, it's just math. There's

1 nothing magical here. But this is why it's linked to the  
2 KeyBank loan document. You get to 47.94 percent by  
3 multiplying six percent times 51 percent and reducing 51  
4 percent by that product. You get to 46.06 percent by  
5 multiplying 49 percent by six percent and taking the product  
6 and reducing 49 percent by that. Those numbers aren't made  
7 up. They're very, very deliberately calculated.

8 But it's this allocation that Wick Phillips -- Wick  
9 Phillips is now -- I mean, HCRE is saying is a mistake. But  
10 it's based on the very document that HCRE, Highland all signed  
11 with jointly-represented counsel.

12 Let's go to Schedule A, because it's even more  
13 instructive. It's right after Page 19. So, Schedule A. You  
14 know, this is -- this page links everything together as well  
15 as I could possibly do it. It shows a capital contribution of  
16 HCRE Partners of \$290 million. That's the money that that  
17 took for themselves in the provision that we looked at earlier  
18 in the KeyBank loan document, where Highland was left with the  
19 liability and HCRE allocated all of the loan proceeds for  
20 itself. And despite the very words on the page, just look at  
21 that page. It tells you exactly what the capital  
22 contributions are, but they don't change the percentage  
23 interests at all.

24 So the mutual mistake that Wick Phillips is going to try  
25 to prove on behalf of its client, of course, has to be a

1 mutual mistake, has to be a mutual mistake among all three of  
2 the members. It's stated not once but twice in the document.  
3 And the funny thing is that the percentage interests are  
4 calculated off the very document that Wick Phillips did the  
5 diligence on, which, if they were wrong about, would have  
6 resulted in a material default under the loan agreement.

7 Without the LLC agreement, there is nothing to amend or  
8 restate. More importantly, you have no starting point for the  
9 allocation.

10 The loan document is probably even more important. It not  
11 only validates the 51/49 split in the LLC agreement, but it  
12 provides now the basis for HCRE's whole mistake claim, because  
13 they took the money for themselves. Somehow -- it will be  
14 interesting to see who falls on the sword on this one when  
15 they say, I read this document, I was responsible for this  
16 document, I noticed that we had \$291 million, Highland only  
17 had \$49,000, but I didn't notice that the percentage interests  
18 were exactly consistent with the loan document that Wick  
19 Phillips negotiated on behalf of all of the borrowers, subject  
20 to a six percent reduction.

21 I just want to finish by, you know, thanking Mr. Kehr for  
22 his advice. I think he's eminently qualified. There's no  
23 *Daubert* motion or anything like that. I know there was some  
24 suggestion in his deposition that perhaps, you know, he didn't  
25 have sufficient expertise. I would encourage the Court to

1 look at Exhibit 14, which contained not only a summary of his  
2 opinions but 122 paragraphs of his background, his expertise,  
3 his authorship, his presentations, his lectures. A hundred  
4 and twenty-two paragraphs. Over fifty years he's been dealing  
5 with these issues.

6 In hindsight, I don't know if I needed to call him,  
7 because he's got no -- got no personal knowledge of any of the  
8 facts, and I think the law is the law. But his testimony is  
9 in there. His testimony is corroborative. His testimony is  
10 instructive. And I'm grateful for his work on Highland's  
11 behalf.

12 But at the end of the day, I think if you look at *American*  
13 *Airlines*, if you look at the stipulation, we've got Highland's  
14 former lawyer suing it -- adversely, obviously -- in matters  
15 that could not be -- they're the same matter, Your Honor.  
16 You're not -- there is no chance that Wick -- that HCRE can  
17 prove its claim without referring to the loan document. That  
18 is how they got a capital contribution of \$291 million.

19 I have nothing further, Your Honor. Thank you very much.

20 THE COURT: All right. Thank you.

21 All right. Mr. Hellberg, I'll hear from you now.

22 MR. HELLBERG: Thank you, Your Honor. May it please  
23 the Court. And if I may, if I could share the screen?

24 THE COURT: All right.

25 MR. HELLBERG: Permission?



1 THE COURT: You may.

2 MR. HELLBERG: Thank you, Your Honor. I don't know  
3 if the Court can see.

4 THE COURT: I can.

5 MR. HELLBERG: Okay. Thank you, Your Honor.

6 Your Honor, I want to -- I want to address this, and I'm  
7 going to hit it the opposite way than Mr. Morris did, is I  
8 want to talk about the facts first and then get into the legal  
9 discussion, because I do think that there are -- there are a  
10 number of facts that certainly are not in dispute, but he  
11 raises a few that we certainly dispute, and I will call those  
12 out as I proceed through here.

13 But I think the point of beginning that we're talking  
14 about here is with respect to -- you've heard about the  
15 original LLC agreement and an amended LLC agreement, but we  
16 know that on August 23rd the original LLC agreement was  
17 formed. We know from Exhibit 3 -- that I believe is a  
18 confidential document but the Court should have it in its  
19 notebook -- that Wick Phillips did not have any involvement  
20 with the decision related to the allocation of percentages. I  
21 believe it's -- Exhibit 3 is the -- is what we marked as the  
22 original agreement. Exhibit 2 is an email where that decision  
23 was made prior to this agreement, or it may be the same day,  
24 but certainly Wick Phillips did not participate in any of the  
25 discussions or decisions related to the colloquial, hey, look,

1 let's make it 51/49 percent. We weren't involved.

2 Now, we were involved in preparing the bridge loan, what I  
3 would call the bridge loan. It's our Exhibit 4. The Court's  
4 already seen it. We've gone through it. But it is -- it is  
5 clear that Wick Phillips assisted NexPoint, Highland was a co-  
6 borrower, but it's important that -- it's important to note,  
7 because this will come up later, is that NexPoint was the lead  
8 borrower and Highland was added after the fact as an  
9 additional borrower.

10 And what that reflects is the 51/49 percent that was  
11 already predetermined by people other than Wick Phillips. And  
12 you also, under the -- under Mr. Wills' depo, we know that  
13 Wick Phillips did not prepare the schedules.

14 Now, Mr. Morris called out Exhibit 3, his Exhibit 3, which  
15 is the email involving Rachel Sam, but I would encourage the  
16 Court to look through that. No advice was given with respect  
17 to those schedules. It was simply some cleanup and passing  
18 along what was already predetermined back when the LLC  
19 agreement was formed.

20 Now, I want to pause for a second and I want to address  
21 something that Mr. Morris addressed, is with respect to that  
22 loan document he said that because NexPoint was the lead  
23 borrower it could decide what the capital contributions would  
24 have been. And I disagree with that, and I'd encourage the  
25 Court to look at Section 2.02 of that loan document. That's

1 not what the loans were for. The loans were for the purchase  
2 of properties, not for the capital contributions that the  
3 parties were intending to make to the deal. And that seems to  
4 be a central theme that he was trying to argue, but that is  
5 not what the documents say. And that is one of the reasons  
6 why you're going to hear me later argue that there is no  
7 substantial relationship here.

8 But I do want to point out that 2.02 -- because this was a  
9 half a billion dollar loan, and the capital contributions  
10 don't even come up to that. And you just saw Mr. Morris put  
11 up on the screen numbers of \$291 [million] and 21,000. That's  
12 not half a billion dollars. That's not -- that is not where  
13 those came from. The loan was not to fund the capital  
14 contribution in the LLC. It was being used to purchase  
15 properties by the LLCs. And I think that's -- that's an  
16 important distinction that needs to be highlighted.

17 So, what happened next is on March 15th -- so, we're  
18 talking six months later, and we've got the stipulation that  
19 six months later they, the parties to the LLC agreement, they,  
20 without the assistance of Wick Phillips, changed the  
21 percentages. Wick Phillips wasn't involved, and that's where  
22 the core of the dispute lies.

23 Now, fast forward. We've got April 8th. That's where  
24 NexPoint files the proof of claim. We didn't prepare that.  
25 We didn't file it. But it was filed, and it talks about

1 challenges to the distributions under the amended LLC  
2 agreement, because that's the only -- that's the only LLC  
3 agreement that existed at that point in time.

4 Now, I would point out that on July 15th, under Docket  
5 847, Wick Phillips appears as counsel. We are responding to a  
6 subpoena. So they knew as of July 15th that Wick Phillips was  
7 representing NexPoint in this case.

8 As you heard, Docket 906, July 30th, Highland files their  
9 objections to the claims. And on October 19th, Wick Phillips,  
10 on behalf of NexPoint, files their response to the objections,  
11 and we've got them, Docket -- Docket 1212.

12 The point is, it was eight months after we initially  
13 appeared in this case and five months after we filed a  
14 response was when they sought to disqualify. And I think the  
15 point is waiver, given the -- given the passage of time that  
16 they waited so long.

17 Now, they may say, well, we didn't know, but the point is  
18 that they -- they found out based upon looking in their own  
19 documents. They had those documents available to them from  
20 day one. They can't say, well, we just found our own  
21 documents, and then come in and say, oops, now we want to  
22 disqualify them. They've had those documents all this time.  
23 And on April 14th, that's when they file their motion to  
24 disqualify.

25 So that brings us to what is -- what is the claim? Mr.

1 Morris highlighted some of this, and I just want to talk about  
2 it because it makes a difference here, which is the dispute is  
3 there's an -- there is an allocation of the ownership  
4 percentages and there's a dispute over those allocations based  
5 upon mutual mistake, lack of consideration, and failure of  
6 consideration, as they are reflected in the only document that  
7 could be reflected in, which is the amended LLC agreement, a  
8 document that was created six months after Wick Phillips  
9 concluded any of its representation in this matter.

10 So that is the -- that is the benchmark, and that is what  
11 the Court should look at when it decides this issue, because  
12 substantially -- we're going to get into the substantially  
13 related issue, but it is measured on this.

14 Now, let's talk about the -- how do we address this? How  
15 should the Court approach this problem? Well, I want to take  
16 issue with Mr. Kehr, and I think the Court can disregard, and,  
17 frankly, should disregard his opinions, because, as the Court  
18 will read and as I'm sure the Court did read, you know, Mr.  
19 Kehr doesn't have a Texas bar card, he's never -- he's never  
20 taught a class under the Texas Disciplinary Rules, the  
21 Disciplinary Rules of Professional Conduct, he's never opined  
22 as an expert on the Disciplinary Rules of Professional Conduct  
23 in Texas, yet he wants to come in and say, I'm an expert on  
24 it, even though he's never done it before and he doesn't hold  
25 a Texas bar card.

1 And when you read his opinion, part of it is based upon --  
2 I think it's the 1897 *In re Boone* case out of California that  
3 doesn't even -- doesn't even -- obviously, 109 didn't exist at  
4 the time with respect to that opinion. And he talks about  
5 appearance of impropriety, which we -- which I'll get into,  
6 which isn't even applicable anymore when we talk about  
7 *American Airlines*. But we know, we know that the Northern  
8 District Bankruptcy Courts adopt Texas Disciplinary Rules for  
9 determining these types of matters. That's the Local Rule  
10 2090-2.

11 So let's look at 109 and address it from a 109 analysis,  
12 which is, you know, Mr. Morris talked about the three points.  
13 Let's talk about those three points. One is, so, the first  
14 point. I don't think he's challenging these, but I want to at  
15 least address them, which is they're not -- the suit doesn't  
16 question the validity of Wick Phillips' services to their  
17 former client. We're not challenging -- there is no challenge  
18 to the bridge loan. The challenge is to the amended LLC  
19 agreement.

20 And there is nothing in these pleadings that suggest that  
21 there is a potential Rule 3.08 issue, which is the lawyer  
22 testifying as a witness. It can't conceivably be possible,  
23 because if the challenge is to the amended LLC agreement and  
24 Wick Phillips had no involvement with it, as stipulated, there  
25 is no scenario where a Wick Phillips lawyer would ever be

1     testifying related to the amended LLC agreement. So that's  
2     one of the key issues, and that's why Element 1 wouldn't apply  
3     and warrant disqualification.

4             Now, with respect to Point 2, is, could there be a  
5     violation of 105? And the answer is no. Even Kehr admits  
6     that there -- that there is no confidential information that  
7     could be revealed and create a 105 violation. He says that  
8     right at Page 57 and 58. So, and I didn't hear Mr. Morris  
9     even challenge that. I think he just kind of went straight  
10    into the substantially related, which is going to be the next  
11    point.

12            But the point is you don't have Element 1, you don't have  
13    Element 2, and reminding the Court that this is a harsh remedy  
14    of disqualification, to deny a party their right to chosen  
15    counsel, and they do have the burden. They have the burden to  
16    establish substantially related, which is where we get here,  
17    which is, is it -- if it is the same or substantially related  
18    matter. And our position is that it is not, because a dispute  
19    over the allocation or percentages in the amended LLC  
20    agreement signed six months after is not substantially related  
21    to the work done on the bridge loan.

22            Now, if I can get into a couple of -- I want to address  
23    three different cases because I think they may be instructive  
24    in dealing with the issues here, and I want to highlight where  
25    there may be some variance in the law. And the cases I want

1 to talk about is this *Classic, Inc.*, the *American Airlines*  
2 case, and the *Mitsubishi* case.

3 All three have been cited -- all three were cited in the  
4 briefing. Pointed out that *American* was a 1992 case, *Classic,*  
5 *Inc.* was an opinion by Judge Lindsay in 2010 relying upon a  
6 Texas Supreme Court in 1998 case. And what this case  
7 indicates is that you can't have substantially related unless  
8 there is a threat that there may be the revealing of  
9 confidential information. That's what Judge Lindsay wrote  
10 about. That's what -- and that's what he relied upon when he  
11 denied a motion to disqualify in 2010.

12 So we need to at least address that, because the fact of  
13 the matter is they have not overtly admitted that there's no  
14 confidential information, but certainly they don't plead and  
15 you didn't hear any argument today that, oh, my goodness, if  
16 you allow Wick Phillips to continue the representation, there  
17 might be a revealing of our confidential information. That's  
18 not what they're arguing here, because there is no  
19 confidential information. And under *Classic, Inc.*, that is  
20 something that's required to get to substantially related.

21 Now, does that conflict with *American Airlines*? Yes, I  
22 believe it does. But one of the things -- and I put this  
23 slide up here because Mr. Kehr -- and I'll address two points  
24 with respect to *American Airlines*. Mr. Kehr talks about  
25 appearance of an impropriety as a basis to disqualify. And



1 the reason I'm calling this out is because even in the  
2 *American Airlines* case it says it's not part of the analysis.  
3 Whether or not something is -- whether or not there is a  
4 potential of an appearance of impropriety is not the standard.  
5 You look at, is it substantially related or not? And in  
6 *American*, they did talk about how they have the burden, they  
7 have to delineate with specificity the subject matter, the  
8 issues, and the causes of action common to prior and current  
9 representations.

10 Here, this is why I raised the issue of the claim. The  
11 claims are related to the percentage allocation in the March  
12 2019 amended LLC agreement, not related to the bridge loan.

13 Now, one of the things -- and before I leave the *American*  
14 *Airlines* case, I -- with respect to what the Fifth Circuit did  
15 is the Fifth circuit determined that disqualification was  
16 proper and they determined, and I'm looking at Page 619, they  
17 concluded that V&E should be disqualified because they say the  
18 relationship between the matters in which V&E has represented  
19 *American* and the instant litigation is so intimate that V&E's  
20 continued involvement does threaten to compromise the  
21 integrity of the present trial.

22 This gets back to what I was talking about here, which is  
23 the Court concluded that there was a threat and that  
24 disqualification was proper.

25 Now, the Fifth Circuit also said that that's not the end-

1 all, be-all, and because -- that's not going to be -- we're  
2 not going to set that as the standard, but it's important to  
3 note that in *American* they did make this determination that is  
4 consistent with the *Classic, Inc.* opinion, which is -- which  
5 is you have to look at the taint.

6 So there is a link between Point 3, substantially related,  
7 and a potential 105 violation. That's what *Classic, Inc.*  
8 says, that's what the Texas Supreme Court says, and it's not  
9 what the Fifth Circuit said in *American* but they reached the  
10 conclusion that they should be disqualified. And what the  
11 Court did is they went through and they disqualified V&E  
12 because in the prior litigation -- there were three that the  
13 Court put in a detailed analysis of the three prior  
14 representations, and said it is substantially related and  
15 here's why. And that's consistent with what a movant has the  
16 burden to prove so that the Court can write and go through  
17 this what *American* talks about, the painstaking analysis of  
18 the facts and precise application of precedent. And here  
19 there is just no connection.

20 But let me get to the third case I want to talk about.  
21 This is a -- Judge Solis wrote this opinion in 2009, and we  
22 cite it in the briefs. And what it talks about is, even if  
23 there's just an overlap of subject matter, that is not  
24 sufficient. If you're talking about the same item, it's not  
25 sufficient to create a substantial relationship, because it

1 has to be focused on here. Like here, they were talking about  
2 this titanium, but there -- the common subject matter between  
3 the two cases, the old one and the new one, was not similar in  
4 a way that was important to an issue in both cases.

5 So, here, whether or not there's a failure of  
6 consideration and whether or not there was a mutual mistake is  
7 not, was not an important issue with respect to the loan  
8 documents that we prepared because, as the Court saw, it was  
9 predetermined at 51/49 before we ever got involved, and Wick  
10 Phillips did not participate in any of the decisions related  
11 to the 51/49 allocation.

12 Now, when we -- when the Court looks at this and the  
13 application of Rule 109, I think it's important to note that  
14 there was eight months in the -- in the distance between our  
15 first appearance and the filing of the motion. The claim does  
16 not challenge the validity or substance of the bridge loan.  
17 And we've got the stipulation now that we did not draft either  
18 the original or amended LLC agreement. And there is a natural  
19 break in the representation timeline from when the bridge loan  
20 was done in September of '18 and when the LLC agreement was in  
21 March '19.

22 Now, I want to address one other point because I think  
23 it's not -- it's not controlling, but I think it's a factor  
24 that the Court ought to consider and should consider. When  
25 you read Mr. Wills' deposition, you know he testifies that

1 NexPoint was the lead borrower, they started the process, and  
2 Highland was brought in as a tagalong borrower here. So when  
3 the Court does its analysis, we would ask that you look at  
4 Comment 2 to Rule 109. And what it says is it says, among the  
5 relevant factors, however, would be how the former  
6 representation actually was conducted within the firm, the  
7 nature and scope of the former client's contacts with the  
8 firm, and the size of the firm.

9 And the point I want to make here is that, as a tagalong  
10 borrower, yes, we represented -- we represented Highland. I  
11 don't think there's any question that we did. But with  
12 respect to what did we do, what interaction did we have with  
13 them, I think that is an important factor to consider,  
14 especially in light of the fact that there is no allegation  
15 that we have any of Highland's confidential information that  
16 they can or could argue we could or would be using against  
17 them in this case. And that is a factor we believe the Court  
18 should consider with respect to the analysis as to whether or  
19 not there's a substantial relationship here.

20 THE COURT: Could you --

21 MR. HELLBERG: So, --

22 THE COURT: -- elaborate on that point a bit? I'm  
23 not sure I follow.

24 MR. HELLBERG: Yes, Your Honor.

25 THE COURT: It almost sounds like you're saying,

1 technically, they were a client, but we didn't get  
2 confidential information from them, so you really ought to  
3 analyze this differently. Is that what you're saying?

4 MR. HELLBERG: No. What I'm saying is the Court  
5 should look at the scope of the representation. And what I  
6 mean by that is we all know that there are -- it's part of the  
7 Court's weighing the factors, and it's just a factor, which  
8 is, for example, if I have a client and I've met with them for  
9 eight hours a day for four weeks and I've got all their -- all  
10 their confidential information, I think that would be weighted  
11 more heavily than a situation where I've got two clients and  
12 one of them is driving the bus and the other one is just along  
13 for the ride in the -- in the preparation of a document. And,  
14 again, it's a factor that the Court should consider not  
15 because I say so but because the -- Comment 2 talks about how  
16 the former representation actually was conducted within the  
17 firm.

18 And what I mean by that is here the primary contact was  
19 NexPoint. All the communication was with NexPoint with  
20 respect to the bridge loan. I believe there was minimal -- I  
21 believe there was some, but it was minimal communications with  
22 the Highland representative, Pete Broaddus. But the point is  
23 that is one of many factors the Court can and should consider,  
24 not as an end-all/be-all, but it's a factor that the Court can  
25 consider as to whether or not there is substantial

1 relationship to the point where you have confidential  
2 information that could threaten the integrity of the  
3 proceeding.

4 And here, again, we don't have anything.

5 THE COURT: Okay. I guess what you're saying is, and  
6 I'm just trying to understand, it's almost like you're saying  
7 to me being a client is a matter of degree. You can be kind  
8 of an after-the-fact technical, not so much of a client that  
9 you're getting confidential information, versus some full-  
10 fledged client, and Highland here was the former and therefore  
11 I analyze this differently.

12 MR. HELLBERG: I think you weigh it. I think -- I  
13 think, given -- given Comment 2, if the Court's going to -- if  
14 the Court is not going to incorporate Comment 2, then we don't  
15 need to -- we don't -- the Court doesn't even need to address  
16 this. But under 109, Comment 2 does say how the former  
17 representation actually was conducted within the firm. And my  
18 read of that is that you can do some weighted analysis with  
19 respect to that.

20 Obviously, the Court can decide not to, but I think it's a  
21 factor that comes into play here. And, again, we're not --  
22 we're not kicking away from saying they weren't our client.  
23 What we're saying is that they were not the lead client and  
24 that, if you are applying the Comment 2 analysis -- that's  
25 what I'm -- that's what I'm trying to convey to the Court with

1 that argument.

2 THE COURT: Okay. So my related question is, are you  
3 saying that Mr. Kehr, his analysis is all wrong when he says  
4 this is about loyalty? He basically -- he, you know, he makes  
5 a differentiation between duties to maintain confidential  
6 information and duties of loyalty, and he says this fact  
7 pattern before the Court is really about loyalty.

8 MR. HELLBERG: But with respect to that argument,  
9 it's -- that argument doesn't work because in that instance  
10 one could never represent a former client. If all we're -- if  
11 all we're biting on is loyalty, you represent someone and for  
12 all time into perpetuity you can never be adverse. And that's  
13 not what the rules provide and that's not what the Fifth  
14 Circuit talks about in *American Airlines*. They talk about the  
15 substantial relationship test. So if it is substantially  
16 related, then you can't do it. If it's not substantially  
17 related, then you can, and that's what -- that's what *Classic*  
18 *Industries* and *Classic, Inc.* talk about. It's not a -- it's  
19 not an end-all, be-all once you represent a client for all  
20 time.

21 And that's what Mr. Kehr is attempting to argue in trying  
22 to tie all this together, without talking about the -- the --  
23 what's -- the *Epic* case, where there's a threat of revealing  
24 confidential information. And again, I acknowledge that  
25 *American Airlines* doesn't take that hard line, but the

1 subsequent cases do.

2 And with respect to the -- if you want to talk about the  
3 duty of loyalty, we did not represent Highland in connection  
4 with the LLC agreements. We represented them as a co-borrower  
5 under the loan documents, not under the amended LLC agreement.  
6 And that is what is in dispute today, and that's why there's  
7 no substantial relation. And that's the point we are trying  
8 to make and argue with respect to this.

9 Unless the Court has another question, I'll try and get  
10 back to my PowerPoint, if I may.

11 THE COURT: Well, I guess my last question is this.  
12 Highland obviously argues that you have to look at Project  
13 Unicorn as one integrated matter, and Wick Phillips  
14 represented Highland in connection with Project Unicorn, and I  
15 think they're suggesting you're dicing and slicing it a little  
16 too finely by saying oh, no, no, no, we only represented  
17 Highland in connection with one subpart of Project Unicorn,  
18 the loan agreement.

19 So just, if you could, I don't know, address, I guess,  
20 squarely the integrated matter argument, why I shouldn't view  
21 Project Unicorn as one giant integrated matter in which you  
22 did represent Highland to some extent.

23 MR. HELLBERG: And Your Honor, if I -- my screen got  
24 all buggered up, and I apologize. I'm trying to figure out  
25 how to get out of the mini view. For some reason, I can't



1 open. Okay. I'm sorry. (Pause.) Okay. I fixed it.

2 Your Honor, with respect to that integrated argument, and  
3 under -- in the Kehr deposition, Mr. Martin had a dialogue  
4 with Hill, and the point here is when you have a transaction  
5 such as this you have multiple firms doing multiple aspects of  
6 it. And, you know, for example, you have one firm doing the  
7 financing, one firm doing the title work, one firm doing the  
8 corporate formation, one firm doing the diligence, one firm  
9 doing the tax. And each firm does their own independent work  
10 with respect to the transaction.

11 And the point is Mr. Kehr suggests and argues that it  
12 falls under the rule of "you touched it." And I'm not trying  
13 to be cute, but that's basically what he's saying, is if you  
14 touch any aspect of this transaction you can't do anything  
15 further in conflict with the client down the road. And the  
16 point is that is broader than what we're talking about,  
17 because we have cases that say -- we have the *Classic, Inc.*,  
18 we have the *Classic Industries* cases. And it has to be tied  
19 to the work that the lawyers did and not simply falling under  
20 the rule of "you touched it."

21 Just like we highlighted in the *Mitsubishi* case, where,  
22 you know, just because the subject matters overlap doesn't  
23 make it substantially related. And it has to be an issue --  
24 if you look at *Mitsubishi*, the issue in dispute has to be an  
25 issue that's important to both the former representation and

1 the current litigation. There has to be a link there. And  
2 here -- that's why Mr. Kehr's opinion doesn't work, because if  
3 one lawyer is doing title work and someone else is doing the  
4 corporate formation documents, under Mr. Kehr's broad, let me  
5 through a broad net here, that would prevent a firm that did  
6 the title work from getting involved in a dispute involving  
7 the corporation formation and violate -- and even if there's  
8 -- even if the issue wasn't important to both the former  
9 representation and the current litigation. And that's why Mr.  
10 Kehr's opinion is -- it fails under the precedent in the  
11 Northern District and the Fifth Circuit. That's the point I'm  
12 trying to make here.

13 THE COURT: Okay. All right.

14 MR. HELLBERG: And if you look at the case --

15 THE COURT: Go ahead.

16 MR. HELLBERG: I'm sorry.

17 THE COURT: Go ahead.

18 MR. HELLBERG: I'm just saying if the Court would  
19 consider those cases and look at them and then tie, what is --  
20 what is the relationship? What is the challenge? The dispute  
21 here is the amended LLC agreement fails for lack of  
22 consideration -- lack of consideration, failure of  
23 consideration, mutual mistake. That's what the claim is here.  
24 How does that relate and how is that similar to Wick Phillips'  
25 representation of Highland as a co-borrower, when there's no

1 threat of revealing confidential information to that dispute?  
2 And that's the answer that needs -- that's the question that  
3 needs to be answered if the Court is going to take the drastic  
4 measure of disqualifying Wick Phillips.

5 THE COURT: Okay.

6 MR. HELLBERG: And we don't believe that there's a  
7 connection.

8 THE COURT: I have a couple of other questions.

9 MR. HELLBERG: Yes, Your Honor.

10 THE COURT: I thought that was my last question.  
11 This is actually pretty important, I think. How relevant or  
12 irrelevant to the Court's analysis is the fact that I have no  
13 engagement letter here, no retention letter, no waiver letter?

14 MR. HELLBERG: The fact that there is no -- we have  
15 stipulated that we represented Highland. That addresses Step  
16 1. So the fact that there is no engagement letter is, in my  
17 opinion, of no particular moment in the analysis because that  
18 would address the issue related to the -- whether or not we're  
19 a lawyer. There's no dispute as to the scope of what we did.  
20 And, again, because there's no dispute that we represented  
21 them and no dispute as to the scope of what we did for them,  
22 the fact that there's no engagement letter identifying those  
23 two things I believe is irrelevant to the analysis.

24 THE COURT: Okay.

25 MR. HELLBERG: Now, with respect to the no waiver, to

1 address that point, with respect to the no waiver we are not  
2 here asserting that there has been a waiver or consent under a  
3 109 analysis. So we're not asking the Court to look at 109  
4 and say -- you know, because it does say without prior  
5 consent. We're not suggesting that we have prior consent.  
6 What we are suggesting is that there is no substantial  
7 relationship between what we're doing now and what we did.

8 THE COURT: Okay. And I really do think this is my  
9 last question for you. You said almost at the very beginning  
10 of your argument that there's been no allegation here that any  
11 Wick Phillips lawyer would be a potential witness. I thought  
12 I remembered reading something in the pleadings of Highland to  
13 that effect. Maybe I just kind of wondered in my mind, as  
14 opposed to having read it. But is it your position that you  
15 can think of no scenario where a Wick Phillips lawyer would  
16 need to be a fact witness?

17 MR. HELLBERG: Not -- I can think of no scenario  
18 where a Wick Phillips lawyer would be a fact witness where  
19 that information could not be obtained from another witness,  
20 creating a potential 308 violation.

21 And back to the *Classic, Inc.* case, Judge Lindsay's  
22 opinion, he addressed that very issue under 308, which is what  
23 could conceivably be the need for a Wick Phillips lawyer to  
24 testify, because we're not challenging the loan documents.  
25 There's no issue with respect to the loan documents. The loan

1 documents speak for themselves and say what they say, just  
2 like what we talked about during the argument, which is we  
3 have this dispute. Mr. Morris says, well, the loan was to  
4 create the capital contributions. We disagree with that. But  
5 whether or not it does or doesn't is not something you need to  
6 resolve today, but it's going -- whatever the resolution is,  
7 it's going to be look at the documents.

8       You know, he argues that NexPoint gets to choose. We say,  
9 under 2.02, no. You can read the document. You don't need a  
10 Wick Phillips lawyer to be able to provide testimony as to  
11 intent because it's an integrated document.

12       So to -- so that's a longwinded way of answering the  
13 Court's question of no, I don't see any scenario where anyone  
14 from Wick Phillips would have to testify in this dispute over  
15 an amended LLC agreement that was created six months later and  
16 for which Wick Phillips had no involvement. It is not an  
17 integrated transaction, as Mr. Morris would suggest. You  
18 know, the argument is that they could amend this thing into  
19 perpetuity and it would still not -- under his argument, they  
20 amend it 15 more times over the next five years and his  
21 argument would be the same, which is, well, you're still  
22 disqualified, even though it's a dispute that is under a  
23 document that was created 15 iterations down the line five  
24 years later.

25       And the rules don't govern that broadly, because we have

1 to consider, back to the *Mitsubishi* case, is it similar  
2 enough? And I think the quote is the common subject matter  
3 between the two cases -- this is them, the Court talking about  
4 it -- is not similar in a way that is important to an issue in  
5 both the SASI litigation and the current litigation.

6 THE COURT: Okay. Thank you. All right.

7 MR. HELLBERG: Thank you.

8 THE COURT: Movant always gets the last word, so Mr.  
9 Morris, you can have your rebuttal.

10 And I will tell you, one thing I would like you to follow  
11 up on in your rebuttal is this discussion of Section 2.02 of  
12 the loan agreement. You had made a comment in your argument  
13 that this was a section wherein HCRE was made the lead  
14 borrower, and this meant it could decide how distributions  
15 were allocated, this is very significant, this was Wick  
16 Phillips' handiwork, or something to that effect. I  
17 paraphrase. Did I misunderstand some of your words?  
18 Obviously, Mr. Hellberg has a very different idea about that  
19 section.

20 MR. MORRIS: That's right. Thank you. I'll just  
21 address that point quickly, Your Honor.

22 I stand by what I said. I appreciate the fact that Mr.  
23 Hellberg's client has a different view. It is a factual  
24 dispute whether or not, you know, a Wick Phillips attorney  
25 ultimately has to testify on it. I can't say. I don't think

1 it's dispositive at the end of the day anyway. I think  
2 there's so much here that, you know, even if I were wrong, it  
3 wouldn't matter. But I don't think I'm wrong.

4 So that's how I would address it, is that clearly the  
5 Court now has in front of it a raw difference of opinion as to  
6 one aspect of the agreement in which Wick Phillips represented  
7 multiple parties. And it kind of highlights for me, if you  
8 will, the substantial relationship between the loan document  
9 and the LLC agreement as amended yet again. You know, the  
10 facts will be what they are.

11 I will point out, Your Honor, that I'm kind of hearing  
12 this argument for the first time today, even though if you  
13 went back to our original briefing we have made this point  
14 repeatedly about the allocation of the loan proceeds, you  
15 know, on more than one occasion from the beginning. So I'm a  
16 little bit -- you know, it's not to be critical of my  
17 adversary here, but I -- that's what I believed and that's  
18 where we are.

19 THE COURT: Okay.

20 MR. MORRIS: All right. So I just -- I don't want to  
21 take a lot of time, frankly. As I suggested in my initial  
22 presentation, Your Honor, you would hear and you did hear a  
23 lot of attempts to slice and dice and minimize and that kind  
24 of thing, and that's exactly what the duty of loyalty is  
25 intended to prevent. So I just want to point out a couple of

1 them.

2 You know, you were told that Wick Phillips didn't  
3 participate in the original allocation. We stipulated to  
4 that. So I'm not sure why that's relevant.

5 He did emphasize, and I appreciate the Court following up  
6 on the point, he did emphasize that Highland came along, was  
7 added later. I don't understand how clients can be treated  
8 differently depending on the day on which they joined the  
9 joint representation. I've never heard anywhere, there is no  
10 place law. In fact, it's antithetical to anything I would  
11 ever believe in that you treat jointly-represented clients  
12 differently depending on when they came along.

13 The fact of the matter is the Wick Phillips witness  
14 testified that Highland was needed as a credit enhancement. I  
15 mean, if anything, they should have been treated like royalty,  
16 because it doesn't sound like the deal was going to get done  
17 without them.

18 There was a lot of focus on the timing and the fact that  
19 it came six months later. I don't see that being relevant at  
20 all. I will say yet again, Your Honor, that you will not  
21 conduct the trial on HCRE's claim without hearing about the  
22 loan document. The loan document ratified the allocation.  
23 Wick Phillips did its job. They made sure that that  
24 allocation was correct.

25 And we will assert factually that you don't get to the LLC



1 agreement. There was no mistake because they did exactly what  
2 they were supposed to do. They took in a six-percent partner  
3 and they reduced the percentages that Wick Phillips validated  
4 by six percent. So whether or not HCRE ultimately decides to  
5 rely on the bank loan document, I assure you that Highland  
6 will.

7 They attempt to distance themselves further by saying they  
8 didn't file the proof of claim. Not quite sure why that's  
9 relevant.

10 I heard for the first time today that Highland waived its  
11 right to seek disqualification. I haven't heard that before,  
12 Your Honor. I think it's not -- it's not a very well-founded  
13 argument. Your Honor can see from the evidence in the record  
14 that I personally identified the issue as I was preparing to  
15 take a deposition. This is not the only matter that I handle  
16 in this case -- I actually have other cases, too -- and I  
17 prepare for my matters as I need to, not at my -- in my  
18 leisure. I've got a deposition tomorrow in Highland I haven't  
19 prepared for yet, so I'll be doing that tonight and tomorrow.  
20 I may learn something there. I don't know. I hope it's not  
21 held against me. I don't think the waiver argument is well  
22 thought out at all.

23 The reference to the *Classic, Inc.* case. I don't know  
24 what to say about that, Your Honor, other than the Fifth  
25 Circuit trumps it, number one. Number two, the whole notion

1 of the *Classic, Inc.* case, as at least described by counsel,  
2 renders Texas Disciplinary Rule 1.09(a)(2) completely  
3 irrelevant. And that's exactly what the *American Airlines*  
4 case said, that 1.09(a)(2) deals with confidential  
5 information, and it refers to 105. And if you are  
6 representing a client against a former client and you're  
7 adverse and you have confidential information, it doesn't  
8 matter if the cases are substantially related, it doesn't --  
9 you don't get substantially related and say -- is a 1.09(a)(3)  
10 issue. It's not a 1.09(a)(2). Just by the plain language of  
11 the Disciplinary Rule, they are completely distinct concepts.

12 And, you know, it was interesting to watch the evasion of  
13 what 1.09(a)(3) is about, and that is the duty of loyalty.  
14 Okay? That's what *American Airlines* said. That's what the  
15 citation from Geoffrey Hazard, one of the leading experts on  
16 the legal profession and ethical issues, that the Fifth  
17 Circuit relied upon. There's two completely separate  
18 concepts, confidentiality and loyalty. And confidentiality is  
19 1.09(a)(2) and loyalty is 1.09(a)(3).

20 We're not in 1.09(a)(2). I did mention it in my opening.  
21 Mr. Kehr did say it consistently. I think it's beyond dispute  
22 that this was a joint representation, and where there's a  
23 joint representation there's no confidentiality. That is the  
24 nature of doing it. And all of these were entities controlled  
25 by Mr. Dondero. We're here kind of pretending that this --

1 these are some arm's-length parties. He signed the document  
2 on behalf of both parties. Every single person on every  
3 single one of these emails reported to him. Right? We know  
4 that. We know that from the history of this case.

5 So the notion that somehow these are arm's-length people  
6 and they're being treated as such, just look at the -- that's  
7 why it's important that he -- that I point out that he signed  
8 both documents, because it shows the joint nature of the  
9 representation.

10 No, there's no confidential information. *American*  
11 *Airlines* says it's irrelevant when you're dealing with  
12 1.09(a)(3) because that's a test of loyalty.

13 We heard some argument about, you know, basically there's  
14 no evidence that there's going to be a taint in the  
15 proceedings. Again, completely addressed by *American*  
16 *Airlines*.

17 There was some reference to Mr. Kehr in an attempt to kind  
18 of overstate his opinions and say that, you know, his opinions  
19 are so far you can never sue a former client. It's not what  
20 he said at all. What he said is consistent with *American*  
21 *Airlines* and 1.02(a)(3), and that is, without consent, you  
22 can't sue and be adverse to a former client if the matters are  
23 the same or substantially related.

24 He may have been asked hypotheticals that, you know, that  
25 tested the limits of that. They're interesting, but that

1 academic exercise isn't what's going to be determinative here.  
2 What -- the only thing that's going to be determinative is  
3 whether the Court finds that the matters are substantially  
4 related.

5 And I think the evidence is crystal clear that it is. I  
6 don't think you get to the percentages and the amended LLC  
7 agreement without the stepping stones of the original LLC  
8 agreement and the bank loan agreement. There's a whole host  
9 of other issues in the bank loan agreement that I identified  
10 earlier, but if we really want to focus on the dispute, the  
11 dispute is very narrow. Even if you looked at it very  
12 narrowly, and I don't think the Court needs to do that, but  
13 even if you did, what's the dispute? The dispute is  
14 supposedly that the allocation was a mistake, not once but  
15 twice, not among HCRE but among HCRE, Highland, some other  
16 third party. A mistake that was made when they actually set  
17 forth the capital contributions right there in black and  
18 white. There's going to be a lot of people with egg on their  
19 face.

20 But the point of the matter is, Your Honor, three-legged  
21 stool. You start with 51/49. I understand that Wick Phillips  
22 had nothing to do with that. It's not part of our case. But  
23 the next part is very critical. Joint representation. No  
24 confidential information. Wick Phillips does its job. It  
25 validates that percentage.

1 That percentage allocation is critical in the document.  
2 It's a representation and warranty that if materially  
3 incorrect will result in an immediate default, for which  
4 Highland would be jointly and severally liable for the whole  
5 thing. I know they were late to the table, Your Honor, but  
6 somehow they got burdened with the entire obligation. That's  
7 kind of important. Right?

8 Without those first two steps, you never get to the  
9 amended and restated agreement. It's simply not possible.

10 THE COURT: All right. Well, I thank you for your  
11 arguments, each of you.

12 It is 3:38 Central Time. We're going to go back in  
13 chambers and deliberate on this a little bit. We'll come back  
14 at 4:15 Central Time and I'll give you a ruling. All right.  
15 So we're in recess.

16 MR. MORRIS: Thank you, Your Honor.

17 MR. HELLBERG: Thank you, Your Honor.

18 THE CLERK: All rise.

19 (A recess ensued from 3:38 p.m. until 4:22 p.m.)

20 THE CLERK: All rise.

21 THE COURT: All right. Please be seated. We are  
22 back on the record in Highland, Case No. 19-34054.

23 This will be the Court's ruling pursuant to Bankruptcy  
24 Rule 7052 and 9014(c).

25 The Court reserves the right to supplement or amend this

1 ruling in a more detailed written set of findings,  
2 conclusions, and order.

3 The Court has jurisdiction in this contested matter  
4 pursuant to 28 U.S.C. Section 1334, and this is a core  
5 proceeding pursuant to 28 U.S.C. Section 157.

6 Before the Court, of course, is a motion filed by Highland  
7 Capital, or the Reorganized Debtor, to disqualify the law firm  
8 of Wick Phillips from representing a purported creditor, I'll  
9 call them, NexPoint Real Estate Partners, LLC, formerly known  
10 as HCRE Partners, LLC, in connection with its disputed proof  
11 of claim filed in the Highland case. For ease of reference, I  
12 am going to call that entity, the Wick Phillips' client,  
13 Claimant from here on out.

14 Claimant was formerly closely related to Highland, both  
15 entities being under the management and control of James  
16 Dondero. Now Highland and the Claimant are adverse because of  
17 the proof of claim that Claimant has filed.

18 The proof of claim at issue revolves around, at a minimum,  
19 an LLC agreement primarily between Highland and Claimant. The  
20 LLC agreement was dated August 23, 2018, and was amended March  
21 15, 2019 but to be effective August 23, 2018, and when it was  
22 amended it added in a new six-percent member.

23 Claimant's proof of claim essentially seeks to reform the  
24 ownership allocations in the amended LLC agreement, arguing  
25 that the LLC agreement improperly allocated the ownership

1 percentages, giving Highland more of an ownership interest  
2 than it was entitled, through either mistake or lack of  
3 consideration and/or failure of consideration.

4 Highland argues that Wick Phillips has a conflict of  
5 interest and must be disqualified with regard to litigating  
6 the proof of claim issues and the legal theories embodied in  
7 the proof of claim because of Wick Phillips' prior  
8 representation of both Claimant and Highland in connection  
9 with matters substantially and integrally related to the proof  
10 of claim.

11 Specifically, the LLC agreement formed an entity known as  
12 SE Multifamily that was formed to acquire approximately \$1.1  
13 billion or so of real estate, an acquisition the parties  
14 nicknamed Project Unicorn. SE Multifamily was essentially the  
15 acquisition vehicle, and several co-borrowers, including  
16 Highland and Claimant, obtained an approximately \$500 million  
17 bridge loan from KeyBank to facilitate, to help facilitate the  
18 acquisition of the real properties on which all co-borrowers  
19 were jointly and severally liable.

20 The acquisition and loan closed on or around September 26,  
21 2018. With respect to the loan agreement, Wick Phillips does  
22 acknowledge and it's stipulated that it represented both  
23 Highland and Claimant as co-borrowers in connection with the  
24 loan agreement with KeyBank, with Claimant being the so-called  
25 lead borrower on the loan.

1 But Wick Phillips denies and it's stipulated that it did  
2 not draft the LLC agreement or the amended LLC agreement now  
3 being challenged, and it is stipulated that it did not -- Wick  
4 Phillips did not provide any legal advice to Highland or  
5 Claimant in connection with the LLC agreement or amended LLC  
6 agreement.

7 The evidence, the Court notes, suggests that the LLC  
8 agreement was drafted by Highland in-house or perhaps with  
9 some involvement of the law firm of Hunton Andrews Kurth.

10 Highland essentially argues that you cannot slice and dice  
11 Project Unicorn up into representation pieces the way Wick  
12 Phillips suggests. In other words, the LLC agreement piece  
13 and the loan agreement piece, the loan and acquisition, were  
14 all part of one unified transaction -- *i.e.*, a billion or so  
15 dollar real estate acquisition transaction -- and Wick  
16 Phillips was involved representing both Highland and Claimant  
17 during the overall implementation of Project Unicorn.

18 Wick Phillips has no engagement letter or retention letter  
19 or waiver letter that might shed light on any of this. The  
20 Court notes that under Section 1.07 of the Texas Rules of  
21 Professional Conduct, a written consent is required for common  
22 representation.

23 Other facts that seem relevant to the Court are that Wick  
24 Phillips supplied organizational charts to KeyBank, more than  
25 20 times it did, showing the ownership allocation under the



1 LLC agreement, and these were attached to the loan agreement.  
2 It appears to this Court this could make Wick Phillips a  
3 potential fact witness in litigation over the proof of claim  
4 involving ownership allocation as to what Wick Phillips knew  
5 and why it would use these charts and such.

6 But, in any event, Wick Phillips is adamant that it had a  
7 siloed role in Project Unicorn, only representing Claimant,  
8 except with regard to the loan agreement. It says it was  
9 actually, at most, a conduit with regard to sending those  
10 organization charts showing ownership allocation to KeyBank.

11 The Court has considered this all heavily. These are not  
12 pleasant issues. They're not simple issues. But the Court  
13 does not accept this silo concept that Wick Phillips has  
14 argued. The Court believes that Wick Phillips' prior  
15 representation of Highland and the other co-borrowers under  
16 the loan agreement was substantially related to the current  
17 allocation dispute raised by the Claimant's proof of claim.  
18 The loan agreement, the LLC agreement, the amended LLC  
19 agreement -- which I note was effective as of August 23, 2018,  
20 although executed on March 15, 2019 -- they were all a part of  
21 an integrated real estate acquisition project referred to as  
22 Project Unicorn.

23 Wick Phillips therefore cannot be adverse to its former  
24 client Highland in this matter involving the proof of claim  
25 seeking to reallocate the ownership interest between Highland

1 and Claimant. Wick Phillips is precluded by Texas Rule  
2 1.09(a)(3).

3 Specifically, we have a previous representation of Wick  
4 Phillips' representation of Highland. The matter on which  
5 Wick Phillips is now seeking to represent Claimant is adverse  
6 to Highland.

7 And, finally, the Court is finding the representation now  
8 before the Court is substantially related to the prior  
9 representation, again, in connection with the loan agreement  
10 which the Court finds to be part of an integrated, very large  
11 project referred to as Project Unicorn, which was primarily  
12 about property acquisition.

13 The Court does consider this to be largely a matter of  
14 loyalty. The Court finds, and I think it's undisputed, that  
15 Highland was brought into the loan agreement, in which Wick  
16 Phillips represented it and Claimant and others, Highland was  
17 brought in for credit enhancement purposes. The loan  
18 agreement was not going to be implemented without Highland  
19 being brought in. And Highland at that point became obligated  
20 jointly and severally on something like a \$500 million loan  
21 from KeyBank.

22 It would seem to this Court there's just no way you can  
23 separate this critical component from the overall Project  
24 Unicorn transaction.

25 The Court has gone back and reviewed, reread *American*

1     *Airlines*, and I do think it is very germane and controlling,  
2     obviously, in this situation.

3             Of course, the main issue there was a law firm, Vinson &  
4     Elkins, having provided antitrust-related advice to American  
5     Airlines, and then later on it is involved in a lawsuit  
6     representing Northwest or Continental, adverse to American, in  
7     antitrust litigation. That was found by the Fifth Circuit to  
8     be substantially related prior representation, and I think I  
9     agree with Highland's counsel, there is a message in there  
10    that you don't really even need to go down the road of showing  
11    a threat of a taint where there's been substantially related  
12    prior representation.

13            So that is the ruling of the Court. So I am ordering that  
14    Wick Phillips is disqualified and HCRE will need to retain new  
15    counsel in this matter. The request was within 14 days from  
16    entry of an order ruling on this disqualification motion. I'm  
17    going to give 30 days to HCRE, considering we're close to the  
18    holidays and that might be a bit difficult to line up new  
19    counsel.

20            I am not going to order reimbursement of Highland for the  
21    costs and fees incurred in making this motion. I do think  
22    this was probably an expensive war that Highland had to wage.  
23    I hate to say war. Everyone was very polite. I think this  
24    was, you know, an expensive endeavor, and so I've thought  
25    about that one hard, but I'm not going to order reimbursement

1 of fees on this one.

2 So, Mr. Morris, can I look to you to upload a form of  
3 order that's consistent with this bench ruling?

4 MR. MORRIS: Yes, Your Honor.

5 THE COURT: All right.

6 MR. MORRIS: We'll try and get that to you tomorrow.

7 THE COURT: Please run it by Mr. Hellberg before you  
8 upload it to the Court. Okay?

9 MR. MORRIS: Will do. Yes, ma'am.

10 THE COURT: All right. We're adjourned.

11 THE CLERK: All rise.

12 MR. HELLBERG: Thank you, Your Honor.

13 (Proceedings concluded at 4:37 p.m.)

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CERTIFICATE

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

22 **/s/ Kathy Rehling**

**12/04/2021**

23

24 \_\_\_\_\_  
Kathy Rehling, CETD-444  
Certified Electronic Court Transcriber

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Date

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PROCEEDINGS

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WITNESSES

-none-

EXHIBITS

Debtor's Exhibits 11 and 12

Received 6

Debtor's Exhibits 1 through 15 (Dockets 3051 and 3054)

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NexPoint Real Estate Partners, LLC's Exhibits 11 and 12

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NexPoint Real Estate Partners, LLC's Exhibits 1 through 14 (Dockets 3052 and 3060)

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RULINGS

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Debtor's Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief (2196)

Highland's Supplemental Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief (2893)

Motion to Compel filed by Debtor Highland Capital Management, LP (2893)

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