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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

)
) Chapter 11
)
) Case No. 19-34054-sgj11
)
)
)
)

**DEBTOR'S MOTION FOR ENTRY OF (I) A PROTECTIVE ORDER, OR, IN
THE ALTERNATIVE, (II) AN ORDER DIRECTING THE DEBTOR TO
COMPLY WITH CERTAIN DISCOVERY DEMANDS TENDERED BY THE
OFFICIAL COMMITTEE OF UNSECURED CREDITORS, PURSUANT TO
FEDERAL RULES OF BANKRUPTCY PROCEDURE 7026 AND 7034**

¹ The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



Highland Capital Management, L.P. (the “Debtor”), the debtor and debtor-in-possession in the above-captioned chapter 11 bankruptcy case (the “Case”), hereby moves this Court (the “Motion”), pursuant to Federal Rules of Civil Procedure 26(b), 26(c), and 34, made applicable herein pursuant to Federal Rules of Bankruptcy Procedure 7026 and 7034, the for the entry of (I) a protective order, or, in the alternative (II) an order directing the Debtor to comply with certain of the discovery demands tendered by the Official Committee of Unsecured Creditors (the “Committee”). In support of the Motion, the Debtor respectfully represents as follows:

I. PRELIMINARY STATEMENT

1. On July 8, 2020, the Committee filed its *Emergency Motion to Compel Production by the Debtor*. Docket No. 808. Despite the adversarial nature of this case, this was the *first* discovery motion filed against the Debtor, and it is regrettable. There is one issue that the parties have been unable to resolve, an issue that was raised by the Committee for the first time on June 26, 2020; the Committee knew that the Debtor intended to seek a judicial determination to resolve the issue and even provided the Committee with a copy of this Motion. Yet, for reasons that remain unclear, the Committee went ahead with its own motion.

2. The Debtor brings this Motion to have the Court resolve two conflicting obligations arising from the Committee’s request for e-mail discovery: (1) the obligation to comply with certain confidentiality agreements on the one hand, and (2) the obligation to provide discovery to the Committee on the other hand. Resolution of these conflicting obligations will allow the Debtor to complete the last part of discovery requested by the Committee to date.²

3. In January 2020, the Debtor and the Committee reached an agreement pursuant to which the Committee was granted standing to pursue Estate Claims (as that term is

² As discussed below, the Debtor informed the Committee in mid-April 2020 that it was “substantially complete” with the production of all documents except for the e-mails.

defined in the Term Sheet (as defined below)). The Committee thereafter served discovery demands seeking certain documents and e-mails relating to Estate and non-Estate Claims.

4. To the best of its knowledge, the Debtor completed the production of all non-privileged, non-email documents responsive to the Committee's requests by mid-April, regardless of whether the documents related to Estate Claims or non-Estate Claims. For reasons discussed below, however, the review and production of e-mails has proved more difficult; nevertheless, the Debtor believed it was on the verge of reviewing and producing the e-mails but for one issue: it has written confidentiality obligations that, if adhered to, will take time to address and increase the cost of production.

5. This issue crystallized near the end of June when the Committee demanded that the Debtor dispense with any process that would allow it to comply with its confidentiality obligations. The Committee had reserved its right to object to the Debtor's proposed approach to document review; while the demand came late in the process, the Debtor understands the Committee's desire to move this process forward but has been placed in an untenable position with conflicting obligations. Thus, so that issue is properly joined, the Debtor has given notice of this Motion to all contract parties with whom it believes it has written confidentiality obligations.

6. By this Motion, the Debtor asks the Court to resolve these competing obligations by either (a) entering a protective order that will enable the Debtor to comply with its written contractual confidentiality obligations, or (b) enter an order directing the Debtor to comply with the Committee's demands notwithstanding its contractual confidentiality obligations.

II. RELIEF REQUESTED

7. By this Motion, the Debtor seeks the entry of (I) a protective order, or, in the alternative (II) an order directing the Debtor to comply with certain of the discovery demands tendered by the Committee, thereby clearing the way for the Debtor to complete the review and production of e-mails identified utilizing the Committee's search parameters.³

III. JURISDICTION AND VENUE

8. The Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue for this matter is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested in this Motion are section 105(a) of title 11 of the United States Code (the "Bankruptcy Code") and Rules 7026 and 7034 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

IV. BACKGROUND

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

10. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in the Delaware Court. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's Case to this Court [Docket No. 186].⁴

11. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections

³ The Committee has reserved the right to seek further e-mail discovery using different search criteria.

⁴ All docket numbers refer to the docket maintained by this Court.

1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 Case.

12. On January 9, 2020, the Court held a hearing on that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] during which the Debtor presented a Term Sheet (the “Term Sheet”).

13. The final version of the Term Sheet [Docket No. 354] provided, among other things, that (a) the Committee was granted standing to pursue Estate Claims; (b) the Committee would be entitled to privileged communications concerning Estate Claims; and (c) that the Debtor’s document management, preservation, and production would be governed by an agreed-upon set of “Document Production Protocols” (the “Protocols”). Docket No. 354-1.

14. The Protocols provide, among other things, that (a) the Debtor’s production of e-mails is “subject to completion of any review for privilege or other purposes contemplated by this Agreement,” and (b) that nothing in the Protocols impacts the Debtor’s right to, among other things, (i) object to the production, discoverability, and confidentiality of documents and ESI, (ii) assert any privilege or other protection from discovery, or (iii) “limit a Producing Parties [sic] right and ability to review documents for responsiveness” prior to production. *See* Docket No. 354-1, Protocols ¶¶ E.b, G.b-d.

15. In short, the Debtor and the Committee agreed that the Committee would have broad discovery rights with respect to Estate Claims, including the right to obtain privileged communications related to Estate Claims, but that the Debtor otherwise reserved its rights with respect to discovery unrelated to Estate claims. That dichotomy made sense since the Committee

was only granted standing to pursue “Estate Claims” on behalf of the Debtor, as that term was specifically defined in the Term Sheet.

V. RELEVANT FACTS

A. The Committee Seeks Broad Discovery of E-mails

16. In early February, the Committee served *The Official Committee of Unsecured Creditors’ Second Requests for Production of Documents to Highland* (the “Requests”). The Committee’s requests included nineteen separate requests for documents and information that covered Estate Claims and non-estate claims.

17. Request No. 19 sought “[a]ny and all Documents, including emails, contain[ing]” approximately 23 separate search terms (the “E-mail Requests”). The search terms for the E-mail Requests included broad terms such as “Beacon Mountain,” “Crown,” “HCMFA,” “Hunter Mountain,” “NexPoint,” “Promissory w/5 Note” and “Trussway.”

18. On or around March 5, 2020, the Debtor timely served its written responses and objections to the Committee’s Requests. Morris Ex. A. With respect to the E-mail Requests, the Debtor proffered the following response and objection:

The Debtor objects to each Request to the extent it calls for the production of “[a]ny and all . . . Communications” on the grounds that such Requests are overly broad, unduly burdensome, and fail to comply with Federal Rule of Civil Procedure 26(b). At the Committee’s specific requests, the Debtor has conducted multiple searches for e-mails responsive to Request No. 19. Each search has yielded over 1,200,000 unique e-mail “hits” (a number that potentially could double if attachments were included in the searches) and the parties continue to confer on ways to limit the e-mails searches in a manner that will be efficient and not wasteful of estate resources. The Debtor has also offered to begin searching for e-mails related to transactions already known to the Committee, such as the so-called insider loans, that constitute Estate Claims (as that term is defined in the Term sheet). The Committee has thus far declined the Debtor’s offer, choosing instead to focus on the broadest searches contained in the Requests (i.e., Request No. 19), even though Request No. 19 does not appear to be related to any Estate Claim for which the Committee has standing to pursue. Nevertheless, the Debtor has informed the Committee that it will (a) create searches for transactions identified as potential Estate Claims, and (b) use historic data to identify asset

transfers to or from the Debtor to or from James Dondero, Mark Okada or any Related Entity during the last five years as potential Estate Claims

Ex. A, General Objection No. 5.

19. The Committee has never taken issue with this objection or asked for the targeted e-mails searches related to Estate Claims that the Debtor offered to provide. In addition, the Committee never proposed any targeted searches limited to Estate Claims despite the Debtor's requests. Instead, over time, the parties worked together on various versions of the search terms and time periods until the number of "hits" approached approximately 800,000 in early May (the approximately 800,000 e-mails identified by deploying the Committee's modified search terms and time period are collectively referred to as the "E-mails").

20. To be clear, while the Debtor believes that targeted searches focused on known transactions constituting Estate Claims would have been more efficient, the Debtor acknowledges the Committee's right to proceed in any manner it sees fit and has never objected to the production of documents or e-mails on the ground that the Requests went beyond Estate Claims.

B. The Debtor's Written Confidentiality Obligations

21. The Debtor is a service provider and in that capacity has entered into various agreements that, among other things, obligate it to maintain certain information in confidence or otherwise concern the ownership of documents and information. Specifically, as of the Petition Date, the Debtor was party to the following shared services agreements (collectively, the "Shared Services Agreements"):

- *Third Amended and Restated Shared Services Agreement*, dated September 26, 2017 and effective September 1, 2017, between HCMLP on the one hand and NexBank Capital, Inc., NexBank Securities, Inc., NexBank Title, Inc., NexBank SSB on the other hand (the "NexBank Agreement," a copy of which is annexed hereto as Morris Ex. B);

- *Amended and Restated Shared Services Agreement*, effective January 1, 2018, between HCMLP and NexPoint Advisors, L.P. (the “NexPoint Agreement,” a copy of which is annexed hereto as Morris Ex. C);
- *Second Amended and Restated Shared Services Agreement*, effective January 1, 2017, between HCMLP on the one hand, and Charitable DAF Fund, L.P. and Charitable DAF GP, LLC, on the other hand (the “DAF SSA,” a copy of which is annexed hereto as Morris Ex. D); and
- *Second Amended and Restated Shared Services Agreement*, effective as of February 8, 2013, between HCMLP and Highland Capital Management Fund Advisors, L.P., formerly known as Pyxis Capital, L.P. (the “Fund Advisors Agreement,” a copy of which is annexed hereto as Morris Ex. E, and together with the NexBank Agreement, the NexPoint Agreement, the DAF SSA, and the DAF IAA, the “Shared Services Agreements”).

22. The Debtor is obligated under the Shared Services Agreements to maintain certain information in confidence or has otherwise entered agreements concerning the ownership of certain information. See NexBank Agreement ¶¶ 3.1(a), (b), (c)(iii), and 3.2(a); NexPoint Agreement ¶ 5.02; DAF SSA ¶ 4.02; and Fund Advisors Agreement ¶ 6.02 (collectively, the “Debtor’s Confidentiality Obligations”).

23. As previously explained to the Committee, the Debtor complied with its Confidentiality Obligations with respect to the production of non-e-mail discovery utilizing the following process (the “Compliance Process”): if the Debtor identified a responsive, non-privileged document that was subject to a Confidentiality Obligation, it gave written notice to the counter-party of the Debtor’s intention to produce the document absent the counter-party’s objection.

24. The Debtor utilized the Compliance Process on a handful of occasions but, as previously explained to the Committee, never withheld any non-e-mail document subject to the Confidentiality Obligations because no counter-party ever objected.

C. The Debtor Confers with the Committee on Its Document Review Guidelines and Prepares to Seek Court Approval to Retain a Third-Party Vendor to Review Documents and Begin Production

25. The Debtor has been cooperative and has put extensive effort towards negotiating an agreed email search and production protocol with the Committee. The proposals exchanged from February through June 25 were premised on the ideas that the Debtor (a) would gather emails from its server based on key word searches provided by the Committee, (b) review the resulting email “hits” for relevance and privilege, and (c) then produce the responsive, non-privileged emails. The Committee’s June 25 proposal was the first time that Committee sought blanket access, subject only to privilege review, for the nine custodian’s entire email files. Just as the Committee and the Debtor were on the precipice of finalizing a deal on email discovery, the Committee completely changed the proposed terms.

26. The Committee’s Requests served on February 3 proposed that the Debtor search key custodian’s emails for specific search terms. After Debtor expressed concern about the breadth of the search terms, the Committee sent narrowed proposed terms to the Debtor on February 26. Debtor reran all of its searches using these revised terms, and informed the Committee on March 3 that the terms still returned over 1.5 million emails. On March 5, the Committee responded that the Debtor should consider sending the 1.5 million emails to a third-party vendor to apply further limits to the number of documents to be reviewed. The next day, March 6, Debtor responded that the Committee’s additional search terms would expand the review set beyond the initial 1.5 emails and also asked the Committee to confirm that the outside vendor would be used “to greatly reduce the number of emails that will actually have to be reviewed and ultimately produced.”

27. As of mid-March, the momentum on discovery negotiations slowed. On March 17, the Committee responded to the Debtor’s March 5 communication. Notably, this

included the Committee standing that it understood the Debtor would produce documents “found to be responsive.” Again, the Debtor had to rerun all of its searches based on new search parameters from the Committee, which was completed by March 30. Debtor followed up with additional information regarding the search results on April 3 and the parties had a meet-and-confer call on April 10. With the final search parameters still undefined, the Committee went silent until mid-May.

28. In mid-May, the parties agreed to final search parameters. After culling the e-mails using the Committee’s final search parameters, and with the Committee’s knowledge and approval, the Debtor retained Meta-E to serve as the host for the production of the Debtor’s e-mails. Shortly thereafter, the Debtor delivered copies of all of the culled emails to Meta-E.

29. As discussed with the Committee, the Debtor intended to hire an outside, third-party vendor who would provide contract attorneys to undertake a “first line” review of the e-mails. The Committee was supportive of this concept. Thereafter, the Debtor solicited bids from three third-party vendors.

30. While soliciting the vendors, and again with the Committee’s knowledge and understanding, the Debtor was also working on a memorandum (the “Document Review Memorandum”) that would be used by the contract attorneys to identify the relevant players (including the “Related Parties” who would be subject to “Estate Claims,” as those terms are defined in the Protocols) and issues concerning confidentiality and privilege. The Document Review Memorandum was intended to (a) assist the contract attorneys in their review of documents, (b) provide a mechanism for the Debtor to comply with its confidentiality obligations under the Shared Services Agreements (the confidentiality review), and (c) to complete the

review and production of the e-mails, whether or not they concerned “Estate Claims,” as quickly and efficiently as possible.

31. To be transparent, on June 2, 2020, the Debtor shared an initial draft of the Document Review Memorandum together with a comprehensive list of attorneys and law firms that would have to be checked for privilege purposes.⁵ The Document Review Memorandum included, among other things, mechanisms for performing a review designed to enable the Debtor to comply with the confidentiality obligations under the Shared Services Agreements; once e-mails subject to the Confidentiality Obligations were identified, the Debtor expected to use the same Compliance Process that it had effectively used with respect to non-e-mail document production.

32. The Committee provided certain comments to the Debtor via e-mail and in the form of a mark-up of the draft Document Review Memorandum while reserving its right to object to the Debtor’s method of reviewing the e-mails. The Debtor incorporated nearly all of the Committee’s specific changes that it requested with respect to the Document Review Memorandum, and provided a detailed explanation for the one change it did not accept. Morris Ex. F.

33. At around the same time, the Independent Directors considered the bids for the provision of contract attorneys and exercised their business judgment to retain Robert Half Legal, a business division of Robert Half International Inc. (“RHL”), to conduct the initial review of documents.

⁵ The Committee has not objected to, or otherwise provided any comments with respect to, the list of lawyers and law firms created for this purpose.

34. On June 19, the Debtor informed the Committee of this decision and presented a form of notice pursuant to which the Debtor intended to seek court approval to retain RHL as an ordinary course professional (the “OCP Notice”).

35. Thus, as of June 19, 2020, the Debtor believed that its receipt of the Committee’s comments the OCP Notice, if any, was the last step before commencing the review and production of e-mails.

D. The Committee Asks the Debtor to Dispense with a Confidentiality Review Thereby Putting the Debtor in an Untenable Position

36. However, on June 25, the Committee informed the Debtor that it wanted to take a different approach to the review and production of e-mails. Morris Ex. G. The most problematic demand was that the Debtor forego the confidentiality review described in the Document Review Memorandum. On July 3, 2020, the Debtor explained to the Committee why it could not comply with this demand and proposed to file this Motion. *Id.*

37. The Debtor understands the Committee’s desire to dispense with the confidentiality review, but cannot unilaterally comply with that request without creating potential liability. Specifically, the Committee’s demand would leave the Debtor with no ability to comply with its confidentiality obligations under the Shared Services Agreements.

VI. ARGUMENT

A. The Court Could Enter a Protective Order so the Debtor Can Comply with Its Confidentiality Obligations

38. Federal Rule of Civil Procedure 26(c)(1), made applicable to the Committee’s Requests pursuant to Bankruptcy Rule 7026, provides, among other things, that a court may issue a protective order upon “good cause” shown and may fashion such protective order to fit the needs of the case. FED. R. CIV. P. 26(c)(1). As pertinent here, a court may require that confidential information be “revealed only in a specified way.” FED. R. CIV. P. 26(c)(1)(G).

39. To enable the Debtor to comply with its Confidentiality Obligations, the Court should enter a protective order authorizing the Debtor to (a) engage in the confidentiality review set forth in Document Review Memorandum, and, with the documents identified from such review, (b) effectuate the Compliance Process described above. Such a protective order would provide the counterparties to the Shared Services Agreements with specific notice of production and an opportunity to object if they choose.

40. Good cause exists for the Court to enter such an order. The Debtor has binding, written Confidentiality Obligations which, if ignored, could subject it to litigation and potential liability, all to the detriment of the Debtor's creditors.

B. Alternatively, the Court Could Deny the Debtor's Request for a Protective Order and Direct the Debtor to Comply with the Committee's E-mail Requests

41. If the Court declines to enter a protective order that would enable the Debtor to comply with its Confidentiality Obligations, the Court should direct the Debtor to produce the e-mails while providing the Debtor with protection from any claims that such production will violate any of the Shared Services Agreements.

42. The rules provide for such an order. In particular, Federal Rule of Civil Procedure 26(c)(2), made applicable to the Committee's Requests pursuant to Bankruptcy Rule 7026, provides, among other things, that if a court denies a motion for the entry of a protective order, in whole or in part, the court "may, on just terms, order that any party or person provide or permit discovery." FED. R. CIV. P. 26(c)(2).

43. Thus, if the court declines to enter a protective order as described above, it may order the Debtor to produce the e-mails on "just terms." Here, if the Court declines to enter the protective order, the Debtor respectfully requests that any order directing it to produce the E-Mails to the Committee specifically state that compliance is (a) mandatory, (b) pursuant to this

Court's order, (c) not in violation of the Confidentiality Obligations or any other agreed-upon restriction on production; but (d) with such production remaining subject to the attorney-client privilege and related protections to the extent the E-Mails are unrelated to Estate Claims.

VII. NOTICE

44. Notice of this Motion will be provided to: (a) the Office of the United States Trustee; (b) the Office of the United States Attorney for the Northern District of Texas; (c) the Debtor's principal secured parties; (d) counsel to the Committee; and (e) parties requesting notice pursuant to Bankruptcy Rule 2002.

VIII. PRAYER

WHEREFORE, the Debtor respectfully requests the entry of (I) a protective order, or, in the alternative (II) an order directing the Debtor to comply with the Committee's E-Mail Requests on the "just terms" described above.

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Dated: July 9, 2020.

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