Docket #0097 Date Filed: 11/16/2021

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

In Re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	**Case No. 19-34054-sgj-11** Chapter 11 Dallas, Texas November 9, 2021 1:30 p.m. Docket
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, v. JAMES DONDERO, et al., Defendants.	**Adversary Proceeding 21-3003-sgj** - MOTION TO DISMISS (82) - MOTION TO COMPEL (80) - MOTION TO STAY (85)
HIGHLAND CAPITAL MANAGEMENT, L.P. Plaintiff, v. NEXPOINT ADVISORS, L.P., et al., Defendants.	**Adversary Proceeding 21-3005-sgj** - MOTION TO DISMISS (68) - MOTION TO STAY (69) - MOTION TO COMPEL (66)
HIGHLAND CAPITAL MANAGEMENT, L.P. Plaintiff, v. HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., et al., Defendants.	**Adversary Proceeding 21-3006-sgj** - MOTION TO COMPEL (70) - MOTION TO DISMISS (72) - MOTION TO STAY (74)

HIGHLAND CAPITAL MANAGEMENT, L.P. Plaintiff, v. HCRE PARTNERS, LLC (N/K/A NEXPOINT REAL ESTATE PARTNERS, LLC), et al., Defendants.	**Adversary Proceeding 21-3007-sgj** - MOTION TO COMPEL (65) - MOTION TO STAY (69) - MOTION TO DISMISS (67)

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

WEBEX APPEARANCES:

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DALLAS, TEXAS - NOVEMBER 9, 2021 - 1:35 P.M.

THE CLERK: All rise. The United States Bankruptcy Court for the Northern District of Texas, Dallas Division, is now in session, The Honorable Stacey Jernigan presiding.

THE COURT: Good afternoon. Please be seated. All right. We have settings in four Highland adversary proceedings today, Adversary 21-3003, 21-3005, 21-3006, and 21-3007. I'll start by getting appearances from the lawyers. Who do we have appearing for Highland?

MR. POMERANTZ: Good afternoon, Your Honor. It's Jeff Pomerantz, Jordan Kroop, and John Morris, appearing on behalf of the Plaintiffs. Mr. Kroop will handle the oral argument in connection with the motion to enforce arbitration. I will handle the oral argument in connection with the motion to dismiss. And also John Morris, at the end of the hearing, would like to address the Court in connection with some scheduling issues.

And before Your Honor starts hearing argument on any of the motions, Mr. Kroop would like to address the Court with respect to the reply briefs that were filed late Friday afternoon.

THE COURT: All right. Thank you.

All right. Who do we have appearing for James Dondero?

MS. DEITSCH-PEREZ: This is Deborah Deitsch-Perez from Stinson, and I am here and I will speak for all of the

Movants. I do have with me my colleagues, Mike Aigen and Grant Dubois, who may assist in pulling up exhibits or other things if we need them, but I will handle the arguments.

THE COURT: All right. Well, I'll go ahead and get other appearances from the other Defendants, although it sounds like you're making a joint argument.

All right. So, who do we have appearing for Dugaboy?

MR. DRAPER: Douglas Draper on behalf of Dugaboy. And Nancy Dondero is present. And I will not be making the argument on behalf of Dugaboy, as counsel has just indicated.

THE COURT: Okay. All right. Who do we have appearing for NexPoint Advisors?

MR. BERGHMAN: Good afternoon, Your Honor. Thomas Berghman with Munsch Hardt for NexPoint Advisors.

THE COURT: All right. Thank you.

Who do we have appearing for Highland Capital Management Services, Inc.?

MS. DEITSCH-PEREZ: Your Honor, I am.

THE COURT: Okay. For the record, that was Ms. Deitsch-Perez.

All right. What about NexPoint Real Estate Partners? Any separate appearance?

MS. DEITSCH-PEREZ: No, Your Honor.

THE COURT: Okay. So, once again, Ms. Deitsch-Perez.

All right. Do we have Mr. Dondero participating today on

the WebEx?

MS. DEITSCH-PEREZ: Yes, he is, Your Honor.

THE COURT: Okay. Do we have any other parties in interest that I've missed who want to appear?

(No response.)

THE COURT: All right. Well, let me, for the record, just say a couple of things in the way of introduction. And it's basically going to be my understanding of what we have set today, and then you'll correct me or confirm when I hear from counsel.

We have what looks like a lot of matters, but I don't think really it's as much as it looks like. We have four adversary proceedings, as I announced. They all began as suits on notes. In other words, Highland suing various makers on notes that were payable to Highland. Original counts: breach of contract and turnover.

We have previously had motions to withdraw the reference. I believe in all four of these we've had Reports and Recommendations I think accepted by the District Court -- someone will correct me if I'm wrong -- reflecting that the District Court will preside over any future trial but this Bankruptcy Court will essentially serve as a magistrate with regard to pretrial motions.

Then I would next say that each of the four adversary proceedings morphed, so to speak, with additional counts being

brought by Plaintiff Highland. We had Counts Three and Four, which are fraudulent transfer causes of action under 548 as well as 544 TUFTA. Actually, I'm not sure when the timing of those were added. But what then was added that's relevant for purposes of today were Counts Five, Six, and Seven, a declaratory judgment count which pertains to the Highland partnership agreement as well as a breach of fiduciary duty count against Dugaboy and an aiding and abetting breach of fiduciary duty against Nancy Dondero.

So we have these morphed adversary proceedings. And as I understand it, the motion to compel arbitration, motions to compel arbitration, virtually the same in all four adversary proceedings, are aimed at Counts Five, Six, and Seven only: the declaratory judgment action, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty.

And then the motions to dismiss under 12(b)(6) have been filed in the alternative, with the Movants asking me to dismiss Counts Five, Six, and Seven if I don't compel arbitration.

And then, last but not least, I have a motion, I think, to stay all litigation if I compel arbitration on Counts Five, Six, and Seven, but I'm not entirely clear on whether I'm really being asked to stay all the litigation or -- so we'll get to that.

So that's my understanding of where we are. So let's talk

about how we are going to approach this today in the most efficient manner possible.

I've already heard something very good from Ms. Deitsch-Perez, that she is going to be making a joint argument on behalf of all the Defendants. And so I guess my next question is, I guess what you'll do is you'll make your argument -- I saw a witness and exhibit list.

MS. DEITSCH-PEREZ: Yeah, it --

THE COURT: You're not putting on evidence? Okay.

MS. DEITSCH-PEREZ: No, Your Honor. It was in an excess of caution, we put it in there. And the exhibits are all of the same exhibits that were already included with the motion.

THE COURT: Okay.

MS. DEITSCH-PEREZ: With the motion to compel arbitration.

THE COURT: Okay.

MS. DEITSCH-PEREZ: Obviously, the motion to dismiss, not evidentiary.

THE COURT: Okay. All right. So, no witnesses and exhibits.

So I presume what everyone thinks it makes sense to do is take this sequentially, where we hear arguments on the motion to compel, responses, reply, and then I rule however I rule.

If I were to rule today not compelling arbitration, then

you would want to roll into your 12(b)(6) oral argument? Okay. You're --

MS. DEITSCH-PEREZ: Correct.

THE COURT: -- shaking your head yes?

All right. Well, now I'll turn to Highland. Who wants to address this? Mr. Kroop, do you agree with everything you have heard? Do you have any disagreement with what we've laid out?

MR. KROOP: Not a bit. Not a bit, Your Honor. And I just wanted to take one second to say hello and thank you for allowing me to appear now for my second law firm in a few months in front of Your Honor, at least on your video screen.

THE COURT: Uh-huh.

MR. KROOP: So, thank you again. For the record, Jordan Kroop for Pachulski Stang Ziehl & Jones.

I just wanted to spend one minute alerting the Court to something that, frankly, was disconcerting for us as litigants, and that is to remind the Court both of these motions that are being heard today were filed on September 1st.

We filed our response to both of these motions on September 28th. That included an agreed one-week extension of time to file. The other side agreed to allow us to do that. That took it to September 28th.

The time for reply briefs, in accordance with Local

District Rule of Civil Procedure 7.1(f), the time to file reply briefs by the Movants on an opposed motion is 14 days from the date the response was filed. These Defendants did not file that response until later in the day on Friday, November 5th. That's 37 days after our response and less than two business days before now, before this hearing.

MS. DEITSCH-PEREZ: May I respond?

THE COURT: Well, --

MS. DEITSCH-PEREZ: May I respond, Your Honor?

THE COURT: -- I will give you a chance, but I don't think Mr. Kroop was finished. Are you -- do you have more, Mr. Kroop?

MR. KROOP: I'm not finished. I'm not finished, Your Honor, and thank you for that. I won't be long.

Your Honor, to be blunt, rules matter. These Defendants sought withdrawal of the reference of these adversary proceedings, and therefore they -- and they got it. And so they must abide by the District Court rules that now apply to these adversary proceedings. These rules matter. And to file a reply more than three weeks after it's due, I'm sorry, but it's just not okay.

It's discourteous to the litigants, sure, but that's not the only thing the rule is concerned with. It's concerned with ensuring that the Court has ample time to prepare for this hearing. Following rules indicates a respect for the

Court and a respect for the integrity of the litigation process. Rules matter.

Now, we're not going to ask your Court to strike these replies, but I did want to ensure that the Court was aware of our discontent with these Defendants' cavalier approach to the lead-up to these hearings today.

So I thank you for the couple of minutes to be heard on that.

THE COURT: All right. Ms. Deitsch-Perez, what do you have to say about this?

MS. DEITSCH-PEREZ: That rule does not apply. We are not presently in the District Court. Repeatedly in this case reply briefs have been filed a handful of days before the hearing.

And in fact, Mr. Morris tacitly confirmed that that was the case because he has been asking us to make a different schedule for a motion to extend the time to add experts, which is a tacit acknowledgement that we are right about the rules. And we, of course, were willing to give then more time. If --

THE COURT: Whoa, whoa, whoa. I want you to be more specific, because you made the comment that the Court has not followed the District Court rules many times in this case. I want you to be specific, because in the world of complex Chapter 11, as we all know, things so often happen on an expedited basis.

MS. DEITSCH-PEREZ: Uh-huh.

THE COURT: And adversary proceedings are a different creature altogether. And so if you're talking about someone filed a reply the day before a hearing in connection with, I don't know, a sale motion, a motion to compromise, particularly if it was set on an expedited basis, that's an altogether different context than this. So what did you mean when you said the Court has allowed this plenty of times?

MS. DEITSCH-PEREZ: Because, as I understand it, the Bankruptcy -- the Local Rules, the Bankruptcy Court Rules, do not provide a deadline for reply briefs. And so throughout these adversary proceedings replies have been filed on less than 14 days because we're not following the District Court rule.

And just today Mr. Morris acknowledged that by asking to set a specific schedule on a motion that's set to be heard on December 13th so they have more time.

And certainly, had they asked us for more time for their response, we would have given it to them. In fact, when they did ask, we gave it to them. When the day they supposedly thought the reply was due came and went, they didn't inquire about it. And we could have set a different schedule, but because there was no -- there is no rule in the Bankruptcy Court for the reply, we followed the practice that I have observed from the time I've been here, and consulted with

people who -- I am both a litigator and a bankruptcy practitioner, so I also consulted with my bankruptcy colleagues in this case and was told there was no particular deadline for a reply, just a reasonable time in advance of the hearing.

THE COURT: Okay. Well, next time you might consult with your adversaries in this adversary proceeding, or perhaps send an email to the courtroom deputy.

But here's what I'm going to say for purposes of going forward. You should apply the District Court rules in these adversary proceedings. I think that is especially appropriate considering the motion to withdraw the reference that the Defendants have filed and which the Court has said, yes, District Court, you should adjudicate this, but I'm just going to be acting as the magistrate. Okay?

Those rules are always subject to the parties agreeing to something different or, you know, doing mini scheduling orders, alternative scheduling orders, letter agreements, whatever. But absent agreements, assume the District Court rules apply from now on.

It does seem -- well, Mr. Kroop used the word cavalier. It just doesn't seem at all reasonable that you would file a reply 37 days after what would have been the District Court deadline if you thought it applied and two days before the hearing. But we'll let it stand for now. Mr. Kroop said he

was not asking me to strike it. We'll let it stand. But in the future, we will not. Again, we'll apply the District Court rules.

I can tell you, I mean, you probably know this, but the District Courts are very much sticklers for rules and procedures, and so I'm going to do what I think the District Judge would expect me to do on all future occasions and strictly apply the rules. Again, absent agreements.

All right. So, Mr. Kroop, was that all of your housekeeping matters or preliminary matters you wanted to raise?

MR. KROOP: It was, Your Honor. Thank you. And I actually am gratified. I think all of us benefit from hearing you say that everybody is going to be following the District Court rules for these adversary proceedings, given the withdrawal of the reference. And I think, more than anything, that's the takeaway from this. So, thank you.

THE COURT: Okay. All right. Well, with that, I'll just say I don't think I need to impose any time limitations. This is all I have this afternoon. But I do have a presentation, a virtual CLE presentation that I am a part of at 5:30. So, please, let's not cut it too close to that, so I can get out of here and do what I need to do. So I don't need to impose time deadlines, right? We're going to be finished well before that? Everybody agree?

MS. DEITSCH-PEREZ: Yes, Your Honor.

THE COURT: Okay.

MR. KROOP: Agreed.

THE COURT: Okay. All right. Well, with that, then, Ms. Deitsch-Perez, I'll hear your argument on the motion to compel arbitration.

MS. DEITSCH-PEREZ: Okay. And I -- do you mind if I share the screen?

THE COURT: That would be great. And I'm going to ask you, are you working on a laptop or --

MS. DEITSCH-PEREZ: I am working on a laptop.

THE COURT: Okay. I got it. I got it. I'm just asking. Sometimes we have some problems for some reason, but, anyway, I got it. I assume everyone can see it, right?

MS. DEITSCH-PEREZ: Okay. And are you seeing the whole screen or are you seeing the screen with black around it? Because I can swap it if the wrong one is up.

THE COURT: Well, I'm seeing the screen with black around it, but I can -- I can see it just fine.

MS. DEITSCH-PEREZ: How's that?

THE COURT: Okay. That's bigger. Uh-huh.

MS. DEITSCH-PEREZ: That's now the full screen? Perfect.

THE COURT: Yes.

MS. DEITSCH-PEREZ: Okay. Thank you, Your Honor.

And we're here on the Defendants' motion to compel arbitration. We're going to go through -- I'm telling you now what we're going to do. We're going to talk about the enforceability of the arbitration provision, the impact or lack thereof of rejection of the partnership agreement, the issue of waiver, the strict case law on compelling arbitration, and the issue of what the Court should stay.

Okay. So, first of all, the FAA is very clear. It requires the District Court -- and as Your Honor has just said, you are acting on behalf of the District Court -- to direct the parties to arbitrate anything that's covered by a valid arbitration agreement. And there's no doubt about this. This is clear Supreme Court law.

So let's look at the arbitration -- the relevant part of the arbitration clause. It says, In the event there is a unresolved legal dispute -- that's very broad -- between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates, or other representatives -- that's also very broad -- that involves legal rights or remedies arising from this agreement, the parties then must submit their dispute to binding arbitration.

And there's no question here that what the Debtor is relying on to claim a breach of fiduciary duty and then aiding and abetting breach of fiduciary duty is the Fourth Amended Partnership Agreement of Highland.

And so, luckily, this Court has actually looked at a very similar agreement. It had almost the same language, sending to arbitration disputes that arose with regard to the agreements there. And just like the arbitration provision here, it talked about unresolved legal disputes between the parties arising from this agreement.

THE COURT: Time out. What did I send to arbitration in *Acis*?

MS. DEITSCH-PEREZ: Well, that's the thing.

THE COURT: I remember seeing this in your --

MS. DEITSCH-PEREZ: And --

THE COURT: I remember seeing this in your paper, and I thought --

MS. DEITSCH-PEREZ: No, no, you're exactly right.

THE COURT: Say again?

MS. DEITSCH-PEREZ: You're exactly right, Your Honor. In *Acis*, you did not grant arbitration, --

THE COURT: Okay.

MS. DEITSCH-PEREZ: -- although you said that it was a binding arbitration clause, the exact clause we have here, and that in other circumstances that would require you to send the case to arbitration. But in *Acis*, there was a -- there was an important dispositive fact, which was that the issues, you said, were integral to determining proofs of claim. And because they were integral to determining proofs of claim --

which, remember, was the issue in the withdrawal of the reference motion; you know, are these core matters, are they integral to a proof of claim -- and you said, in connection with the withdrawal of the reference motions, that, no, these kinds of claims -- and there, we were talking about the loan claim and the turnover claim -- were really state law claims not integral to any proof of claim. And so you granted -- you recommended withdrawal of the reference.

Here, it's even clearer, because the claims that are at issue are the declaratory judgment claim regarding breach of fiduciary duty and aiding and abetting and not any core claims.

So, for the very reasons that you said in *Acis*, well, in this case, even though there is an enforceable arbitration agreement, at least as of the time those claims arose, and you didn't compel arbitration because of the nature of the claims, using *Acis* as guidance, you should compel these claims to arbitration.

THE COURT: Okay. I'm sorry to interrupt you again, but --

MS. DEITSCH-PEREZ: It's okay.

THE COURT: -- could you please remind me what the context was in *Acis*? I don't remember. The only thing I remember is an argument that the involuntary petition, the contested matter on the involuntary petition under 303 of the

Bankruptcy Code, there was an argument that that should be arbitrated, that should be sent to arbitration because it was essentially a collection matter on the claim of the petitioning creditor, and the petitioning creditor was subject to an arbitration agreement. And I will know, that's the only time I remember an arbitration clause being at issue. Is that the dispute in *Acis*, just to help me put this into context?

MS. DEITSCH-PEREZ: I think that -- I think it was also an argument -- and I have to take a moment on a break and look back at it -- but I think there was also an argument that fraudulent transfer claims that were related to a proof of claim should go to arbitration. And you said no, no, no, no, no, these things are much too intertwined with an existing proof of claim for me to -- and they're related, they're integral to the bankruptcy, and they were core proceedings, so that you did not transfer them.

THE COURT: Okay.

MS. DEITSCH-PEREZ: Okay? And so then if you are not -- if they're not core claims and they're not integral to a proof -- to determining a proof of claim, which none of these are, then if you simply look at cases with similar phrasing, these are -- these are deemed by courts to be broad clauses that embrace any dispute that would have a significant relationship to the contract. And that's the case here because the Debtor relies on the limited partnership agreement

to make its breach of fiduciary duty and aiding and abetting claims.

So then the next point that the Debtor raises is that, well, we should not -- we shouldn't have to arbitrate because we rejected the contract and so this contract is gone now and we're no longer bound to arbitrate. But there are numerous cases saying the rejection of a contract, or even the breach of it, doesn't void an arbitration clause. And that arises out of a deep body of case law that says that arbitration agreements are separate agreements from the rest of a contract, and that's why, for example, when somebody claims a contract is void because of fraud, even that does not eliminate the parties' duty to arbitrate unless there's a specific claim that a party was defrauded into the arbitration agreement itself.

So, rejection doesn't prevent this Court from compelling arbitration here.

And so the Debtor points to the *Janvey* case. And that's -- there are a few -- there are a few reasons that that is misplaced. One, it involved a receiver in a Chapter 7. It acknowledged that many courts have held that arbitration clauses are severable agreements that survive rejection of the underlying contract.

But even more important, the Fifth Circuit, when it affirmed *Janvey*, it did it on much narrower grounds. It said,

we are not going to -- we're not going to endorse the broad policy arguments that the receiver made and that the -- that Judge Godbey made. It looked at this case and looked at the large number of Ponzi scheme claimants and the multiple defendants and the fact that the case would just fall apart if individual arbitrations had to be brought because the claims were not going to be big enough to be feasible to be brought if they had to be brought as individual arbitrations by a receiver.

And the proof is really in the pudding, because in the -- in the many -- in the, well, several years since the initial *Janvey* decision, and even the Fifth Circuit's affirmance of it, it has not been adopted by any other court. And so it is -- it's unique and it should be limited to its facts.

Okay. The next argument that the Debtor makes is that the Defendants waived their right to arbitrate. And that, that's -- humorous is maybe too strong a word for it, but basically the Debtor said you should have known when this case first stated that the LPA would become involved and it would eventually be an issue, and therefore your entire course of litigating and engaging in discovery means that you have waived the right to arbitrate. But that is not well-founded.

One, just as a general matter, a party claiming waiver has a heavy burden and there's a strong presumption against finding waiver.

Even if -- even if a party asserts a cross-claim, participates in discovery, that's not enough to show waiver.

And here, even more importantly, these claims that the Defendants are seeking to compel to arbitration are, in the scheme of things, brand new. We're here several months after the claims were made, but that's only because it took us quite a while, we could not get a hearing set immediately. And we understand this Court is very busy and we appreciate that. But we brought the motion to compel arbitration literally -- figuratively, rather, moments after the claims were made.

So there's no waiver here. We did what we were required to do in the case because of scheduling orders, but these claims are new. And so even if you could say there had been an acceptance of not arbitrating, obviously, when the new claims were brought, that triggered a right to seek to compel arbitration.

Okay. So, Counts Five, Six, and Seven, and the equivalent in each of the suits, are all noncore claims. They arise under the partnership agreement. And so there are many cases in the Fifth Circuit and in the District Court that say this Court should -- indeed, must -- compel arbitration if in fact the matters at issue are not core bankruptcy proceedings.

And that's true even for the declaratory relief claim, because that claim is based on the state law breach of fiduciary duty and aiding and abetting claims, and so these

are claims that could exist outside of bankruptcy and are noncore. And so it, like the other claims, must be compelled to arbitration.

Okay. In fact, the Fifth Circuit has looked at breach of fiduciary duty claims, and if it is interwoven with the agreement that contains the arbitration clause, it should be compelled to arbitration. And then the aiding and abetting is obviously interwoven with and dependent upon the breach of fiduciary duty claim, so that too must be compelled to arbitration.

And then here we come to the stay issue. Obviously, if you compel Claims Five, Six, and Seven to arbitration, anything relating to them must be stayed in this Court. That's the -- that's the plain vanilla, easy, easy argument. But it's also the case, and you could look at *In re Fleming*, that where there are clearly arbitrable claims and other related non-arbitrable claims, the Court should stay the entire proceeding so that the arbitration can proceed first, and then the findings in the arbitration can be used in any proceedings that are still necessary thereafter.

So, Your Honor was right that perhaps this was not as clear as it could have been. It's really two -- two asks in one. One, obviously, when you send matters to arbitration, they no longer proceed in the court and they should be stayed. But more than that, to really honor the arbitration clause,

Your Honor ought to allow the arbitrable claims to go forward and hold off on anything else until we have the findings of the arbitrator.

THE COURT: Okay. Let me --

MS. DEITSCH-PEREZ: And so I think --

THE COURT: Let me stop you there, because this one is a little vexing for me.

Isn't it hypothetically possible -- okay, well, just work with me here. Let's say I grant your motion to compel arbitration and say, I agree with you, Counts Five, Six, and Seven must go to arbitration. Well, we have the Counts, I guess, One through Four, you know, the suit on the note, turnover action. Now there are, of course, defenses argued by the Defendants that the notes aren't due to be paid because of, you know, subsequent agreement.

I mean, couldn't I go forward with Counts One through Four and hear the evidence or -- well, the District Court hear the evidence, or me, motion for summary judgment, maybe. Either I or the District Court adjudicate Counts One, Two, including the affirmative defense or defenses of the Defendants regarding a subsequent agreement, and even -- okay. Work with me. Let's say I or the District Court says, yeah, it looks like there's a subsequent agreement. Well, then the Plaintiffs could argue that was a fraudulent transfer.

It seems like all of that could go forward. And let's say

if all goes forward and either I or the District Court says, Plaintiff, you win. Either no subsequent agreement or, yeah, there was a subsequent agreement, but it had to be a fraudulent transfer. I mean, the Plaintiff could decide, well, we're not going to go forward with Counts Five, Six, and Seven. Right?

So I'm trying to understand the logic in staying Counts One, Two, Three, Four if I rule in your favor that Five, Six, and Seven must go to arbitration. So help me to understand your position.

MS. DEITSCH-PEREZ: I will, Your Honor. It's because -- because the Defendants have the right to have those later -- the Five, Six, and Seven arbitrated, there is a danger in going forward that these issues will arise, and it would be useful to Your Honor, or the District Court, to have the benefit of the findings of the arbitrator, because this is something the parties specifically agreed should happen, and it is possible -- and we don't want to have anything happen in the court cases that would prejudice the right to arbitration.

So I take Your Honor's point. I hear it's possible the Plaintiffs won't want to proceed. But the Plaintiffs chose to bring all of these claims together, and so this is -- it's really an issue of their own making.

THE COURT: I mean, just --

MS. DEITSCH-PEREZ: Plaintiff. Sorry.

THE COURT: Just furthering the discussion here on this point, I mean, to me, if anything should be stayed, it might be Counts Five, Six, and Seven, and let things go forward in the court system on Counts One, Two, Three, Four. And then we'll see where that ends up and then lift the stay to allow arbitration of Five, Six, and Seven, if that's where the Plaintiff wants to go, depending on the result on Counts One through Four.

Do you see what I'm saying? That seems like, if there's a deficiency, it's --

MS. DEITSCH-PEREZ: I do hear what you're saying -- I do hear what you're saying, but in fact, the Defendants have a right to arbitration on these claims that the Debtor has already brought. And so they should go to arbitration, and those findings, then, to the extent the Debtor tries to raise them in the court case, should -- there should be deference to the findings of the arbitrator.

THE COURT: All right.

MS. DEITSCH-PEREZ: I agree it's a thorny issue, Your Honor.

THE COURT: All right. Anything else?

MS. DEITSCH-PEREZ: Let me just look and see if I have messages from any of my colleagues with things I have forgotten.

(Pause.)

MS. DEITSCH-PEREZ: I am advised to remind Your Honor of the *Mission Products* case. So it's not -- I think we had only some -- the Fifth Circuit or Northern District of Texas cases. But the Supreme Court has also recognized that rejection of an executory contract is not tantamount to avoiding the contract and it doesn't take away the nondebtor's rights under it, particularly like arbitration.

And I think that may be the only -- that's all I have from my colleagues. Thank you.

THE COURT: Okay. One last question for you. Are all the Defendants entitled to invoke the arbitration clause in the limited partnership agreement, when they were not all parties to the limited partnership agreement?

MS. DEITSCH-PEREZ: Yes, Your Honor. And in fact, we had a slide on that and took it out because the Debtor -- we raised it in our moving papers. The Debtor didn't contest it. A non -- for example, Nancy Dondero in her personal capacity is not a signatory to the partnership agreement, but she is a signatory as Dugaboy.

THE COURT: Right.

MS. DEITSCH-PEREZ: And so a non-signatory who is being charged with something that arises out of the document with the arbitration clause is entitled to rely on the arbitration clause and compel arbitration.

And so there's a cite to the -- I think it's a Fifth

Circuit case in our moving papers on that. So, yes, the -- all of the Defendants who are moving --

THE COURT: Well, I don't remember what the cite was. I just feel like I've had people argue in my court before you have to be a third-party beneficiary of the agreement. Is that no longer the law?

MS. DEITSCH-PEREZ: That is -- that is no longer the law.

THE COURT: Okay.

MS. DEITSCH-PEREZ: That is one of the ways in which a non-signatory is bound. But the other and probably more common way that a nonparty is bound is when -- when someone is seeking to hold the nonparty liable for something that arises out of a contract that has an arbitration clause. And so they're entitled to the benefit of that arbitration clause. And -- or put another way, the claimant is estopped from denying that the affected party is entitled to use the arbitration clause.

But that -- it is very well-settled. If Your Honor would like anything more than what is in our moving brief, we could give you ample authorities. And indeed, the Debtor did not challenge the proposition.

THE COURT: All right. Thank you.

MS. DEITSCH-PEREZ: You're welcome.

THE COURT: All right. Mr. Kroop, I'll hear your

argument.

MR. KROOP: Thank you, Your Honor. Again, for the record, it's Jordan Kroop; Pachulski Stang; on behalf of the Plaintiffs in this adversary proceeding, in these adversary proceedings.

Your Honor, look, I think that we can get to a very straightforward way of understanding what this motion is about. These Defendants have invoked a right to arbitration that they don't have. They base their entire motion on a limited partnership agreement that's been rejected. They've repeatedly waived their nonexistent right to arbitrate. They attempt to make, in support of arbitration, the exact opposite argument that they're going to make in a few minutes in front of you on their motion to dismiss. You're going to hear that later. We call that judicial estoppel. And even if they did have a right to arbitrate, and even if they hadn't waived it, and even if they weren't playing games with their arguments, going back and forth and contradicting themselves, these Defendants seek relief in this motion that would tear up these adversary proceedings, proceedings that they stipulated to consolidate in front of this one Court, and then split everything into several pieces.

And look, this simple collection action can become either a rash on the North Texas judicial system for months and years, or it can be resolved exactly where these Defendants

repeatedly and enthusiastically agreed it would be resolved. Right here.

Let's talk about the rejection of the limited partnership agreement. The entire arbitration motion is based on that clause that's found in the limited partnership agreement. Let's be clear about something. We don't quarrel about what the arbitration clause says or that, in a vacuum, some of the issues alleged in the amended complaint may be arbitrable if we weren't in the procedural posture or the court that we're in.

So, rather than dwell on pointless nuance about core versus noncore, and heaven forbid we get into *Stern*-land, let's please not go there, we don't need to, because we can simply recognize an undisputed reality, and that is the limited partnership agreement was rejected. Even if we have all forgotten, the Court has heard from these very Defendants in their reply supporting their motion to dismiss that the limited partnership agreement was rejected and that rejection matters. Rejection has consequences.

And we agree with that, obviously. Rejection does matter.

Look, these Defendants say in their motion to dismiss, and I quote, Rejection is an affirmative declaration by the Debtor that the estate will not take on the obligations of a prepetition contract made by the Debtor. Rejection of the LPA relieved the estate of its postpetition performance

obligations.

That's the Defendants speaking. Now, they're quoting the *Lauter* case out of Houston, I believe. And of course they're exactly right. Rejection of the LPA excused the estate from all its obligations under the LPA. Not just the ones these Defendants don't care about: all obligations, including the obligation to submit to arbitration. And what these Defendants want is specific performance of a rejected executory contract. And these Defendants should know that they're not entitled that that. Anyone with a passing knowledge of how rejection works understands that, and nothing about the Supreme Court's case in *Mission Products v. Technology* is different from that.

That was a trademark case, by the way. You know, what made that interesting was the fact that, because 365(n) doesn't talk about trademarks and protecting a licensee's rights, that there had to be another way to save it, but I digress.

This Court obviously understands the consequences of what rejection of an executory contract is. And so does Judge Godbey in the *Janvey* case, which, respectfully, is controlling on this Court.

By the way, the Defendants grossly misunderstand that case. They keep calling it a Chapter 7 case. It wasn't. It wasn't even a bankruptcy case. To be fair, as we pointed out

in our papers, it was an equities receivership case. And *Janvey* -- and Judge Godbey, in *Janvey*, essentially analyzed the issues in that case as though it were a Chapter 11 bankruptcy case because there was absolutely nothing he had to go on to deal with an equities/securities receivership case. It wasn't something that he or the Court really had a lot of experience doing. So, because of the paucity of authority, he treated it as though it were a bankruptcy case and treated it as though it was a Chapter 11 bankruptcy case where there was an open decision about whether to assume or reject the executory contract.

Again, I don't wish to digress because, unlike all the other cases and a few other cases that the Defendants cite in support of this notion that rejection doesn't alleviate the need to arbitrate, Judge Godbey in *Janvey* said, look, an arbitration clause in a rejected executory contract can't be enforced because, he said, quote, the appropriate remedy in this circumstance cannot be for this Court to require specific performance by a trustee -- that is, to compel arbitration -- because injured parties cannot insist on specific performance by the trustee.

The Defendants' one case that they cited for -- mostly that they cited in their initial moving papers was the *Fleming* case out of Delaware. Now, that not just is a bankruptcy court decision out of Delaware that, needless to say, is not

controlling on this Court, but it also predates *Janvey* by some nine years. And it doesn't help them because it was -- and by the way, it was also affirmed by the Fifth Circuit, so we should bear that in mind as well.

But we pointed out something about that case that they never do, and that is in that case it was the debtor that was seeking to invoke the arbitration provision. That's the same party that rejected the arbitration clause that was also trying to invoke the arbitration. That's a big, big difference here.

It's the exact opposite here. It's the Debtor that rejected the executory contract, and it's the nondebtor defendant trying to invoke an arbitration clause in a rejected executory contract.

THE COURT: Okay. Let me --

MR. KROOP: The other two cases --

THE COURT: Let me make sure I heard correctly what you just said. You said in the *Fleming* case, you were talking about the *Fleming* case, it was the debtor trying to invoke an arbitration clause, and, of course, it was the debtor who rejected the agreement?

MR. KROOP: Correct.

THE COURT: Okay.

MR. KROOP: Correct.

THE COURT: All right.

MR. KROOP: And the other two cases the Defendants cite in their reply are bankruptcy court decisions as well, from Pennsylvania and Massachusetts. Both of them were decided some thirty years before *Janvey*. I was in college, I think, in the '80s when these decisions were made. And, frankly, they're neither persuasive nor binding. *Janvey* is.

So, the LPA has been rejected. So has the arbitration clause along with it. The arbitration clause is simply not enforceable at this point.

So, rather than spend time talking about whether issues could, in a vacuum, be arbitrable under this clause, which we take no issue with -- again, theoretically, if we weren't in bankruptcy, if the LPA weren't rejected, if we weren't in the procedural posture we're in, we could have these interesting discussions about core versus noncore and whether something fits within the arbitration clause or not. We're not taking the issue with that. We don't believe, frankly, and respectfully, that the Court ought to waste its time on those nuances because it's all irrelevant. There's no arbitration clause left for us to deal with. Controlling law in this circuit says so.

Let's turn to this case and these Defendants and talk about how they have waived their right to arbitration. Because, obviously, their right to arbitration is so important to them, so sacrosanct, that they have advised this Court and

they've advised their adversaries in these proceedings early and often about their intent to invoke this arbitration clause. Right? No. Of course, they have not. The motion filed in September is the very first time during the course of these entire -- this entire calendar year that these Defendants have uttered the word arbitration to this Court.

So let's look at a timeline from this case. And I believe that my assistant is going to be able to put something up and you will see this timeline. Here it comes. We wait with bated breath. There we go.

Now, these are the dates that we believe that these Defendants should have known that breaches of fiduciary duty claims were possible and therefore could be arbitrable claims. These are times when the Movants should have known because they knew what their defenses were, they knew where this case was going. They should have been able to say at that point, wait a minute, this is going to raise arbitrable issues, and we have an arbitration right.

So, did they raise the issue of arbitration when the Debtor made demands on these notes on December 3, 2020, almost a year ago? No.

Did they say anything about arbitration when the Debtor said, no, this is a default, a month later? No.

Following the filing of these adversary proceedings on January 22nd, did they oppose the Debtor's rejection of the

limited partnership agreement by citing the arbitration clause? No.

Did they object to confirmation in February based on the right to arbitrate the complaints that had been filed weeks ago? No. They didn't say that.

Did they even imply that the Debtor's plan projections, which relied critically, by the way, on the one hundred percent recovery of these demand notes, were in any way questionable because of this purported subsequent agreement to forgive the notes which directly gives rise to arbitrable issues? Did they say anything at that point about arbitration? No.

Did they say anything at all about arbitration during the very lengthy confirmation proceedings in this case in which these Defendants and affiliates of them opposed every piece of the plan? No.

On April 6th, when Mr. Dondero amended his answer to allege for the very first time this condition subsequent agreement defense that clearly implicates arbitrable issues, did they say anything about arbitration then? No.

When the other Defendants adopted the same defense a month later in May? No.

These Defendants, in their last-minute reply on Friday, they argue, ostensibly with tongue firmly planted in cheek, that they weren't clairvoyant enough to know that they had

arbitrable issues until right before they filed their arbitration motion in September. But we know, and respectfully, they know, that isn't true.

This next slide, Your Honor, is another timeline of when the Movants absolutely knew that breach of fiduciary duty claims were being asserted. Absolutely knew it. And it wasn't immediately before September 1st. The Debtor stated on the record at a June 10th hearing that they were present at that it would add claims for breach of fiduciary duty to the complaints. Did the Defendants say anything about arbitration then? No.

A month later, the Debtor provided a draft of an amended complaint that contained these new claims and provided factual predicates for them in the amended complaint. Did the Defendants raise the issue of arbitration then? No.

After a month -- a month after that, the Debtor filed an unopposed motion for leave to amend the complaint. They didn't object, and they stated that the Debtor had shown these Defendants the proposed amended complaint a month earlier, on July 13th. The Defendants raised arbitration then? No, they didn't.

Did they say anything at all about arbitration during the negotiation and proceedings in this Court to adopt the pretrial stipulations and agreed orders that consolidated these adversary proceedings, established all the discovery

deadlines, all the pretrial procedures? Did they say anything at all about arbitration during any of that? No.

Did they even attempt to insert a provision into those stipulations, taking -- talking at all about arbitration? No.

The Defendants say that any doubt needs to be resolved in favor of arbitration. You just heard that from Debtor's -- from Defendants' counsel. But we look in vain for any doubt about waiver here. Where is the doubt? If this Court looks again at those stipulations, we'll begin to understand not only did these Defendants squander dozens of opportunities to advise this Court and advise us about their intent to arbitrate, but we begin to understand by looking at those stipulations exactly why they didn't mention arbitration until after those stipulations had been entered as orders. And it's because they wanted to take advantage of the fact that the rules that would apply in court would give them far more discovery than they would be entitled to under the discovery -- under the arbitration clause limited discovery provisions.

After, again, after filing the arbitration motion on September 1st, these Defendants served discovery under the Federal Rules of Bankruptcy Procedure and those discovery stipulations, again, saying nothing about arbitration, and in accordance with those discovery requests they actually served -- and by the way, received -- responses from the estate on these discovery requests for 39 document requests -- that

doesn't include subparts, by the way -- 29 more than the arbitration clause allows. Nine depositions, including three nonparty depositions. That's three times more than the arbitration clause allows. And another 59 document requests, which brings the whole total to 98 document requests. And that, of course, is nearly ten times the amount permitted in the arbitration clause.

Still no mention of arbitration. No mention of the jurisdiction of the American Arbitration Association. No mention of the strict limits on discovery contained in the arbitration clause.

There is no doubt here, Your Honor. This is waiver. And the Fifth Circuit tells us time and again that this is waiver. Parties waive arbitration when, quote, it invokes the judicial process, to the detriment of the other party. When the party, quote, forces its opponent to litigate an issue and then later seeks to arbitrate that same issue. When the party, quote, engages in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration.

And in the *Drexel Burnham* case, also from the Fifth Circuit, and we cite it in our brief, that court held that the defendant waived arbitration because it, quote, initiated extensive discovery, answered twice, filed motions to dismiss, filed and obtained two extensions of pretrial deadlines, all

without demanding arbitration.

Sound familiar? These Defendants have done all that. They've participated in pretrial hearings before this Court. They've successfully moved for the withdrawal of the reference. They've negotiated and drafted detailed stipulations that contemplated pretrial litigation in this Court, with trial on the merits to be conducted in the District Court. They've engaged in pretrial litigation. And quoting from the Fifth Circuit, they have, quote, showered the opposing party with interrogatories and discovery requests.

They themselves have breached the same arbitration clause at the same time they waived it. They've breached it and waived it. They failed to move for -- to compel arbitration or even mention arbitration at any one of the innumerable opportunities they had to do so over the course of some eight months. They've kept this Court completely in the dark about their desire to invoke the arbitration clause. So whatever right they may have once had, they've waived it. And they've done it repeatedly and intentionally and assiduously.

But they've also gone farther than that, because it's now abundantly clear to this Court how these Defendants do one thing and then they say another. Or sometimes they say one thing and then, when it's expedient, they say that thing's exact opposite.

Courts don't permit litigants to play these kinds of games

because these games undermine the integrity of the judicial process. It's called judicial estoppel.

That's why the estate doesn't have to show that we were somehow detrimentally harmed by relying on their contradictory statements, because judicial estoppel isn't about us. It's about the -- indeed, it's intended to protect the judicial process, the judicial system, not litigants.

These Defendants have sought and obtained discovery and engaged in pretrial litigation in this Court, such that their conduct is plainly inconsistent with their arguments now in favor of arbitration.

This Court -- and I'm sure you're thrilled about it -- accepted these Defendants' statements in support of pretrial stipulations and gave these Defendants exactly what they wanted, exactly what they asked for. But what they asked for is plainly inconsistent with their argument now. Without even saying thank you for the relief they got before from you, they now ask you to give them the exact opposite of it.

Now, in my family, we call that chutzpa. These Defendants knew or should have known all along for eight months that they had what they believed to be arbitrable claims, and they said absolutely nothing. They conducted themselves in plainly inconsistent ways.

On this basis alone, the Defendants' willingness to misrepresent themselves to you, Your Honor, on that basis

alone, this motion should be denied.

Now, let's talk for just one minute about what the world looks like if there is arbitration in these adversary proceedings. Let's imagine for a moment the chaos that will ensue.

Some of the counts, as Your Honor pointed out, some of them will continue to be litigated here or -- and in the District Court. But not now. Not right away. No. Because those issues are not subject to the arbitration clause, they would be stayed under this motion so that some affirmative defense that they've concocted can be arbitrated.

Okay. How many separate arbitration proceedings, by the way, will there be? We just heard from the Defendants that there are several Defendants who claim an arbitration right. Do they all participate in the same arbitration? How many arbitrators are there going to be? And these Defendants, who with us wouldn't agree on what planet we're all on, how long do you think it's going to take for us to agree on even one arbitrator?

By the way, how could it possibly be that this arbitration could proceed under what is an obvious cloud of illegitimacy, because discovery has already been had that is well in excess of what's permitted under the arbitration clause. That bell has already been rung and cannot be unrung.

And so what happens if the arbitration proceeds under any

notion of illegitimacy? Well, we know because we look at the part of the arbitration clause that the Defendants didn't show you today, don't quote for you in their moving papers. It's the part about what happens when one party doesn't like what the arbitrator does.

The arbitration clause gives either party the right to seek de novo review of the arbitrator's decision in the same court where these trials will be, interestingly enough. And because a court of law must resolve, quote, any dispute regarding the arbitrator's decision, we're all going to be right back here where we are now, having, of course, wasted months and months of time and fees and effort and resources, just so that we can arbitrate something that we all know is going to be right back here de novo anyway. What on earth is the point?

Now, Your Honor also picked up on something that is really critically important to focus back on, and I want to spend, if I may, one minute on it, and that is this. I want to pick up where you were going before, I believe, respectfully, and that is that this stay that they've requested makes absolutely no sense because it's backward. It's not just unnecessary; it's actually backwards.

Here's how it's backwards. They have -- these Defendants have concocted a condition subsequent defense, and it relies on the existence of an oral contract between Mr. Dondero and

his sister. That's their affirmative defense. That's not the first time, respectfully, that Your Honor has heard that. That's their condition subsequent oral contract defense. And the existence of that contract, the existence of it, is not an arbitrable issue. Even the Defendants don't think that's true. The implications of that contract existing at all, it's those implications that may be arbitrable.

In other words, as Your Honor said at a previous hearing, well, if there was such an agreement, wouldn't that give rise to a potential breach of fiduciary duty claim? Yeah. But only if the agreement existed in the first place.

So that means, if there is no contract, there is nothing to arbitrate. The stay is backward. We should all be endeavoring to determine if there was ever a contract to begin with before we even think about arbitrating issues that only arise if that contract does in fact exist. Any arbitration should wait for that determination.

It's the arbitration that should be stayed, even if you order it. We should wait on the arbitration to see if we even have to do it, because this Court or the District Court, either on summary judgment or at trial, may find out that that purported contact either never existed and is a figment of someone's imagination, or wishful thinking, or was not an enforceable contract, for any number of things that we all learned about on the first day of law school.

But to freeze everything so that we can arbitrate issues that are at this point purely theoretical is ridiculous.

So even if you believe that we are wrong that these Defendants have waived their right to arbitration, even if you believe that we're wrong and you think that these Defendants absolutely do have a valid right to arbitrate issues like breach of fiduciary duty and imposing a stay on the litigation of the non-arbitrable issues, such as the very existence of that contract, it doesn't aid the arbitration, which is the whole point of staying litigation that's related to the arbitrable issues. All those cases that the Defendants cite, it's because it will -- it will interfere with the arbitration or prejudge the arbitration if the litigation goes forward on related issues.

Here, that's actually the exact opposite. It's not going to aid the arbitration. It makes the -- it puts the arbitration cart before the core-issue horse. We should be deciding the core issues first. And if there is ever to be an arbitration -- and, again, we believe there shouldn't be, under any circumstances -- however, if there were, only after there has been a determination in the core litigation that that purported contract even exists.

Your Honor, I've been talking long enough. This is a cynical -- this is a craven motion to delay these Defendants' day of reckoning on these notes that are clearly collectable,

clearly enforceable. Please deny this motion, Your Honor, and let us all move forward with this collection action. Thank you.

THE COURT: All right. Mr. Kroop, thank you.

I want to clarify one thing. With regard to the executory contract argument, you know, the limited partnership agreement that contains the arbitration clause was rejected, do I understand you to be telling me that there are really just four cases on point? I mean, on point, dealing with arbitration clauses, not more generically talking about the effects of rejecting an executory contract: *Janvey*, *Fleming*, and then the Pennsylvania case and the Massachusetts case? Four cases on point?

MR. KROOP: No, Your Honor. I actually don't believe that to be true. I think that there is a lot, as you suspect, --

THE COURT: Okay.

MR. KROOP: -- built into your question to me, there are a lot of cases out there at the bankruptcy court level that talk about the enforceability of arbitration provisions within contracts that had been -- that had been rejected. And the Defendants have cited to you some of them. They have not cited to you all of them.

And I will tell you that this issue nationwide, if we were going to do a seminar, you know, at an ABI conference about

this, there would be more than just this body of cases to talk about. However, what is important is that, in this district, in this circuit, *Janvey* is the last word on that topic.

THE COURT: Okay. And let me just make myself more clear. I know that the enforcement of arbitration clauses in bankruptcy is a hot, hot topic. And we have Fifth Circuit authority, among other authority, that I don't think is terribly germane to this dispute that talks about, you know, you look at are they noncore disputes, are they core disputes? And if they're core disputes, you know, the impact on the efficient resolution of the bankruptcy case. You have lots and lots of case law out there, and what is the Supreme Court going to do?

But this is a different issue than a lot of that authority. This is the issue of can a debtor reject an executory contract with an arbitration clause and therefore be relieved from some counterparty invoking the arbitration clause? And so I want to know how many cases uniquely deal with that. Because this is a very interesting, you know, narrower issue, I think, than a lot of the cases.

MR. KROOP: Your Honor has framed it perfectly, and I think that's exactly right. The vast bulk of the growing body of case law about arbitration in bankruptcy generally is big, and it's big and growing. This narrow band of cases that deal with the unique situation -- well, not unique, but the

peculiar situation where the arbitration clause is within an executory contract that has already been rejected by the time someone is trying to invoke the arbitration clause, there are not many cases out there on it. I believe, frankly, you probably have heard about all of them.

THE COURT: Okay. It's probably --

MR. KROOP: And I suggest --

THE COURT: -- just the four?

MR. KROOP: -- that you, again, respectfully -- yeah, if it's -- if it's not four, then it's five or six.

THE COURT: Okay.

MR. KROOP: And I don't want the Court to be under any misimpression that there are absolutely cases that go the other way than *Janvey* does.

THE COURT: Uh-huh.

MR. KROOP: The Defendants are not wrong. They haven't mischaracterized those cases and their holdings. No question about it.

However, they are bankruptcy court holdings in other places of this country on an extraordinarily controversial topic, and this Court -- again, I say this with all due respect -- this Court is bound by the decisions of the District Court of the Northern District of Texas and the Fifth Circuit Court of Appeals. And the *Janvey* case is not only the last word on this topic, but, by our research, which may be

incomplete, but by our research it is the only case in this district and in this circuit that deals specifically with that peculiar situation of the invocation of an arbitration clause inside of a previously-rejected executory contract.

THE COURT: Okay. Thank you.

By the way, who is our district judge on these four adversary proceedings? I don't even know.

MS. DEITSCH-PEREZ: It is --

THE COURT: Go ahead.

MS. DEITSCH-PEREZ: I think it is -- I believe it is split up among many.

THE COURT: Okay.

MS. DEITSCH-PEREZ: I think there -- there might be four different ones. I know it's at least Judge Brown, maybe Judge Starr. I've forgotten.

THE COURT: Okay.

MS. DEITSCH-PEREZ: But it might be actually four different judges.

THE COURT: Okay.

MS. DEITSCH-PEREZ: But it's several.

THE COURT: Okay.

MS. DEITSCH-PEREZ: May I --

MR. KROOP: And Your Honor, for what it's worth, I actually -- I think it is four different judges, and I think one of them is Judge Godbey, who --

THE COURT: Okay.

MR. KROOP: So that's even just an interesting coincidence, if nothing else.

THE COURT: Okay.

MS. DEITSCH-PEREZ: May I comment on what Mr. Kroop said?

THE COURT: You get the last argument on your motion in rebuttal.

MS. DEITSCH-PEREZ: Okay.

THE COURT: I'm most interested in this issue. I, like probably most bankruptcy judges out there, have been very -- very, I shouldn't say obsessed, but I have given actually two or three panel presentations on arbitration clauses in bankruptcy. And it's usually the more broad issue of the Federal Arbitration Act is one federal policy versus Bankruptcy Code and core or noncore, dah, dah, dah. But this is a very narrow subset of the bigger issues.

And do you disagree that Judge Godbey has pretty clearly written on this issue? And you know, just FYI, he was number one in his class at Harvard Law School. He's a pretty smart guy, in case people don't know that. People probably know he's a very smart guy. So what do you say to that, Ms. Deitsh-Perez?

MS. DEITSCH-PEREZ: He is. And for that case, what he did was -- was very different than what's at stake here.

What was at stake there was the Stanford, the Ponzi scheme, and it was -- it was -- it really would have been impossible to send all of these claims to arbitration and still administer the receivership efficiently.

And in fact, the Fifth Circuit -- and I commend you to the Fifth Circuit opinion in *Janvey*, because that really tells you that the District Court's view is one limited to its facts. And the Fifth Circuit said it would not -- it would not rule as broadly as Judge Godbey did, saying that the rejection justified not sending the case to arbitration. They said that's -- that's -- they wouldn't go there in light of the Supreme Court decisions that stress how important arbitration is and how, even in a bankruptcy, if the matters are not core, if they're not necessary to determining a proof of claim, the parties have a right to compel arbitration where their agreement so provides.

And so I do think that *Janvey* is perhaps dispositive, but I think it's the Fifth Circuit's opinion in *Janvey* that Your Honor should look to.

THE COURT: Okay. Well, --

MS. DEITSCH-PEREZ: And it makes it very clear --

THE COURT: -- just to be -- if you could elaborate a bit more on --

MS. DEITSCH-PEREZ: Uh-huh.

THE COURT: -- what the Fifth Circuit said. They --

MS. DEITSCH-PEREZ: The Fifth Circuit said, We -- I could -- I could summarize and I can, afterwards, I could send the exact quote, but it's something to the effect of, We do not endorse the broad view asserted by Judge Godbey in light of the Supreme Court's opinions stressing the importance of arbitration.

And if you give me a moment, I can tell you the page, if that's all right.

THE COURT: Okay. And my law clerk is pulling it up. But I, obviously, I need to go back and take a quick look at this.

MS. DEITSCH-PEREZ: And *Janvey* --

THE COURT: But I -- I just --

MS. DEITSCH-PEREZ: And *Janvey* says -- oh.

THE COURT: I'm just trying to understand if they full-out said, eh, we don't agree that you can reject an executory contract, Trustee, Receiver, Debtor, and be relieved of the arbitration clause therein, but, you know, we're still going to affirm his decision because we think core matters were involved and it would be in furtherance of the efficient administration of the bankruptcy case to go forward. You know, is that what they did? And --

MS. DEITSCH-PEREZ: Hang on. I'm going --

THE COURT: Okay. Well, if you don't know, we're pulling it up, --

MS. DEITSCH-PEREZ: Yeah.

THE COURT: -- we'll look, but --

MS. DEITSCH-PEREZ: No, no, I do think that is -- that is effectively what they said, and I will find you -- sorry -- the page. Okay. Nor do we reach the receiver's similar but broader policy argument that the underlying -- all right. Rather than read it, it's on -- it's Page 245.

THE COURT: Okay.

MS. DEITSCH-PEREZ: And they point out that the District Court raised important concerns about undermining Congress's goal of consolidating receivership claims before a single court. But they went on to say, We're wary of endorsing the broad policy arguments in the absence of specific direction from the Supreme Court.

And so what you're left with is the Fifth Circuit saying, in these circumstances, where you need to consolidate all of this, we're going to allow it, but that doesn't undermine the Supreme Court's guidance that arbitration clauses should be respected and it doesn't undermine the Supreme Court's guidance -- and, yes, *Mission* was a trademark case, but it still makes the point that rejection of a contract just -- is the equivalent of a breach. It's not the equivalent of rescission.

And so just like in nonbankruptcy cases, where an arbitration agreement is a severable contract, it's a separate

contract than the substantive contract, that -- that's binding on this Court and those are cases -- may not be in the bankruptcy context, the arbitration ones, but those are applicable here. And the -- and the rejection, the *Mission* rejection case is applicable here. You are not limited to looking at the District Court *Janvey* opinion.

THE COURT: All right.

MS. DEITSCH-PEREZ: Okay. Shall I move on to other issues?

THE COURT: Yes. And I hope you'll address the timeline waiver issue.

MS. DEITSCH-PEREZ: Absolutely. If ever -- if ever there -- I will use -- I will use the same word. It's chutzpa. It's what's called chutzpadik to argue that the Defendants should have anticipated that, months after the proceedings began, the Debtor would bring claims that give rise to a right to arbitration.

This motion to compel arbitration was the very -- was made on the very date, the first date that the Defendants were required to answer or otherwise move against the amended complaint. So there is nothing that happened before that, the umpteen different events on the timeline, none of those concerned claims that the Debtor was making that would have entitled the Defendants to move to compel arbitration.

So, yes, it is true. Were we supposed to have been

clairvoyant that they were going to bring this? And should we -- are we required to say, hmm, let us look into whether or not we have a right to arbitrate the moment the Debtor says we're thinking of amending our complaint?

We brought the motion to compel arbitration at the very first moment we were legally obligated to respond to the amended complaint. And to -- and that full timeline of months and months and months, during that entire time there was no claim that gave rise to a right to compel arbitration, and I haven't seen Mr. Kroop point to a single one.

If I can go on to the waiver argument. In general, Mr. Kroop points to the discovery that was done in the case. Well, I think he's forgotten that, apart from the three claims that we're seeking to compel arbitration of, there are four other claims on which discovery was required to be conducted, you know, and use it or lose it. We also had no way of being certain whether Your Honor would or would not compel arbitration, and we had a schedule that we had to meet. And so the discovery -- I think Mr. Kroop said there were 97 discovery requests. Well, the vast majority of those combined discovery requests related to claims that are not subject to arbitration. And so there is no waiver either in participating in things that we were required to participate in by virtue of this Court's schedules or by the timing of the motion to arbitrate.

I think Your Honor had asked me about the issues in *Acis* earlier. And one of my colleagues went back and looked. The claims that were sought to be compelled to arbitration were preference claims and fraudulent transfer claims, and they related to proofs of claim in the bankruptcy. And so that's why Your Honor did not send those claims to arbitration.

THE COURT: Okay.

MS. DEITSCH-PEREZ: I think -- oh, finally, on the -- on the judicial estoppel argument that the Debtor has raised for the first time here, obviously, judicial estoppel doesn't apply. It only applies when you assert something that is absolutely inconsistent and you prevail on the basis of that inconsistency. And none of that has happened here.

THE COURT: All right. Well, here's what I would like to do. I'd like to go ahead and hear the arguments on the motions to dismiss. And then I'm going to take a break and come back and hopefully give you a ruling on the motion to compel arbitration. And depending on how I rule, I'll either be in a position to rule on the motion to dismiss or not. So, hopefully you can continue without a break. Everyone good to roll into that? (No response.) All right. Well, let's do it. Okay.

MS. DEITSCH-PEREZ: Okay. All right. I'm going to share the screen again.

(Pause.)

MS. DEITSCH-PEREZ: And, again, are you seeing the full screen or are you seeing --

THE COURT: Not the full screen.

MS. DEITSCH-PEREZ: Are you seeing the full screen now, or is there still black around it? Okay. It's the full screen now?

THE COURT: Yes.

MS. DEITSCH-PEREZ: Perfect. Thank you very much. Okay. I'm going to first tell you generally what we're going to argue and then I'll go through it piece-by-piece.

So, first, we're going to address the declaratory judgment count. And the first argument is a very familiar one, probably. It's that declaratory relief can't be used to resolve disputes that are already before the Court. We'll also show you how there's no actual controversy here beyond the contract claims for this Court to decide. We have the *Lauter* argument that the Debtor referred to earlier. And then we also argue that declaratory relief can't be used to determine liability for a past act, and to some degree that -- that relates to the first argument, which is that you can't and you shouldn't use declaratory relief to resolve disputes that are otherwise already in front of the Court.

Next, we'll argue that Dugaboy did not owe the Plaintiff any fiduciary duty. That's under Delaware law. And also we argue that the plaintiffs lack standing to assert breach of

fiduciary duty under a rejected contract. And you will see that that is not inconsistent with the arguments that we made on the motion to compel arbitration.

And then, finally, we argue that neither Jim Dondero nor Nancy Dondero aided or abetted a breach of fiduciary duty. First, obviously, if the breach of fiduciary duty claim fails, then there's no aiding and abetting liability. The Debtor predicates all of this on Nancy Dondero acting -- aiding and abetting Dugaboy, but she can't -- she's one person, whether she's in her own hat or the Dugaboy hat. The Plaintiff doesn't sufficiently allege *scienter*. And, again, the Plaintiffs lack standing under the *Lauter* case.

Okay. So let's take the easiest proposition first, which is that courts routinely dismiss declaratory judgment claims if they're seeking to resolve matters that are already pending before the court. And so what is the declaratory judgment sought? Well, the Plaintiff asks this Court to declare Dugaboy did not have the authority to enter into the agreement and to declare it null and void.

But the agreement is already before this Court as an affirmative defense to Plaintiff's breach of contract claims, and a declaratory judgment claim should be dismissed where the questions would be resolved in the context of the breach of contract action. And that's a District Court case.

So then if you look at what the declaratory action seeks,

that's not actually the controversy here. So the issue that the Debtor raises is authority under the partnership agreement to enter the agreement. But the LPA expressly grants the majority interest, and that's defined in the LPA as Dugaboy, it expressly grants the majority interest the authority to approve compensation.

And let's look at the clause. It says, The general partner and any affiliate of the general partner shall receive no compensation from the partnership for services rendered pursuant to this agreement or any other agreements unless approved by a majority interest.

Well, let's stop there for a second, because the Debtor contends in the response brief that Dugaboy is not mentioned in the LPA. I would submit that's a little too cute. If you look up the definition of majority interest, it will take you to the definition, which says the majority of the Class A interest holders. And then if you look up the definition of the Class A interest holders, it points you to Exhibit A. And if you go to Exhibit A, it lists the relevant parties, and that's Dugaboy has roughly 74 percent, so by itself it's a majority, and then it also lists the other Class A unitholders.

In addition, that's not all Section 310 says about compensation. It says no compensation above $5 million per year may be approved even by a majority interest during a NAV

ratio trigger period.

And I'll just note, and this will become an issue later, that the Debtor says something like, oh, well, that gave unfettered discretion to approve any compensation. No, there was a hard stop if there was a NAV ratio trigger period. So the parties did negotiate constraints around this compensation provision.

So then the agreement, or the Debtor concedes it -- if it exists, it makes certain promissory notes potentially forgivable, *i.e.*, potentially compensation. The limited partnership agreement expressly permits Dugaboy to approve compensation. So the agreement was an act approving compensation. So if that's the question, is there authority for Dugaboy to approve compensation, that's not an actual controversy. That's on the -- that's -- the answer is yes on the face of the document.

Now, we're not denying that the Debtor raises other issues, but whether it's a breach of fiduciary duty or whether it was a fraudulent transfer or whether it shouldn't have been done for some other reason, but that's not this issue. They're just saying, is -- the declaratory relief says there's no authority to enter into this agreement, and we submit that's not actually a controversy. That's not a cognizable controversy because it's clear on the face of the document.

What the Debtor is really complaining about are its other

counts. And that goes back to the first point, which is that it's not appropriate to use a DJ to adjudicate your other claims. This comes up all the time in Texas state courts, less so in federal, and the reason it comes up in Texas state courts, and so there's a huge body of case law, is because under the Texas DJ statute it provides for attorney's fees. So people are constantly trying to take, you know, their claims or counterclaims or affirmative defenses and turn them into declaratory judgments for the purpose of trying to get fees. It's a little inexplicable why the Debtor is doing it here because the federal declaratory relief statute doesn't provide for fees as a right, but it's equally inappropriate.

Then we have the *Lauter* argument, which is that the Plaintiff rejected the limited partnership agreement on February 22, 2021 and so that results in it being considered breached the day before the petition was filed. That's not particularly controversial. So the Plaintiff materially breached the LPA on October 15, 2019. And then there is -- and then we look at the issue of accrual for this context. So, claims for declaratory relief don't accrue until there's an actual case or controversy.

And I'll acknowledge it was not easy to pin this down, but the *Muzquiz* case is particularly helpful. There, there was a declaratory judgment claim to declare a perpetual lease unconscionable, and the issue was, okay, has the statute of

limitations passed? Because the lease was entered into, like the agreement here, entered into many years ago. And the court said no, for a declaratory judgment claim, the cause of action accrues when the challenge is raised.

And so, here, there's no controversy that -- there wasn't any controversy about the agreement until the Defendants asserted it as an affirmative defense, and only then did the Plaintiff decide to contest the agreement's validity and seek a declaratory judgment. And so the claim for declaratory relief accrued when the Defendants filed their amended answer, after the bankruptcy was filed, making Plaintiff's claim a postpetition claim for relief.

And so that takes us to the *Lauter* case, which I'm sure Your Honor is going to ask is there more law on this, and we have not found any. And the *Lauter* court said it hadn't found any. And it has the common-sense ruling that a debtor can't reject the LPA, on one hand, and then claim injury under that same contract.

So that's why we say the Debtor, because it rejected the LPA, has no -- and that's a breach, not a rescission. It can't claim injury under that same contract. Not a lot of law, but --

THE COURT: Well, I have a couple of questions. Not the ones you predicted. I mean, for one thing, the Debtor is not asserting an injury here under a rejected contract. It's

seeking an interpretation. Right?

MS. DEITSCH-PEREZ: It is, but that's its cause of action. And it is seeking relief. That is relief. It may not be -- on the DJ, it may not be monetary relief, but it is relief that it's seeking.

THE COURT: Okay. And then my next question is -- I think Mr. Kroop foreshadowed this: On the one hand, you're saying that the Debtor's rejection of the LPA does not preclude your clients from invoking the arbitration clause and the rejected agreement, but on the other hand --

MS. DEITSCH-PEREZ: That's correct.

THE COURT: -- you're saying rejection of the executory contract precludes the Debtor from seeking interpretation of its provisions. Those sound --

MS. DEITSCH-PEREZ: And --

THE COURT: -- very inconsistent.

MS. DEITSCH-PEREZ: Your Honor, we don't think they're inconsistent, because the arbitration provision is severable. And so that is a separate contract that survives -- that survives the rejection. And the rejection is a breach. A breach has consequences for whether or not the Debtor can continue to seek other relief, but it does not have consequences for whether the parties are required to arbitrate. So I think they exist peacefully together. They coexist peacefully together.

THE COURT: Okay. Okay.

MS. DEITSCH-PEREZ: The other argument that the Debtor raises is it says, well, even if *Lauter* is right, the -- you're saying the claim accrued postpetition, and look at all of these cases that suggest the claim arises when the agreement was made, not when it -- not when there was a controversy about it.

And the difference is all of the Debtor's cases involve determining accrual when a claimant is bringing a claim against an estate and the court is trying to decide if there is administrative priority for payment. And so there are very different policies implicated. One, you want to encourage people to do business with the estate and for them to have confidence that they're going to be paid, and the Court also wants to not elevate some prepetition claimants over other prepetition claimants.

So the policies at issue in those cases have nothing to do with what we're looking at here, which is whether the Debtor can take advantage of a contract that it rejected. And so *Lauter* is actually the only case, the only case on point, because it's the only case that discusses an estate's standing to bring postpetition claims under rejected executory contracts.

And then this is fairly similar to the issue of, no, look at the actual claims being brought, not -- and don't use a DJ

for something that the plaintiff already has a remedy for, it has an avenue. And so generally the cases hold that a claim for declaratory judgment seeks to define the rights and obligations of the parties in anticipation of something in the future, and here the Debtor already has counts that deal with that.

Okay. And this is more of the same. Where the Debtor seeks relief, it does so in its fraudulent transfer, breach of fiduciary duty, and contract claims. It doesn't need a declaratory judgment for those claims.

Okay. Now we're going to the substance of the substantive claim. So, the issue is whether Dugaboy could possibly owe a fiduciary duty to Plaintiff under Delaware law. Dugaboy is a limited partner. No question there. And limited partners generally do not owe fiduciary duties. So -- and the Delaware statute is dispositive on this. So a limited partner does not participate in the control of the business when it's doing things that it's expressly authorized to do by the partnership agreement.

So the typical case where a court is examining whether a limited partner has become a general partner is where the limited partner steps in and overreaches and takes over management of a company. And that's when the courts will say, yes, a limited partner who participates in the -- actually participates in the control of the business, they become like

a general partner, and then have a general partner's fiduciary duties.

But here, the partnership agreement explicitly gives Dugaboy the authority to approve compensation. It's merely doing its assigned task. And so that's not participating in the control of Plaintiff's business, and therefore it doesn't give rise to any fiduciary duties.

And so there are -- there are Delaware cases that shed some light on this. In *Bond Purchase*, the issue is the limited partner making a mini-tender. And so in that case it says, In the absence of any provision in the partnership agreement engrafting duties onto the limited partner, the limited partner doesn't owe any fiduciary duties, and in that case, its acts, even though it affected the balance of ownership in the company, it was not found to give rise to fiduciary duties.

Another case, the limited partner was given the right to consent or not consent to a transfer of interest. And that was a right that the parties had bargained for, it was in the agreement, and the Court found that it wasn't a breach of fiduciary duty when the limited partner merely exercised his contracted-for rights under the LPA. It didn't matter whether the limited partner had good or bad motives in doing it, whether it was trying to benefit from it. If it was something that was in the agreement, it was -- it was their duty, and it

didn't give rise to a fiduciary duty.

And here, you can see that there is a limit on compensation. There was -- certain compensation couldn't be greater than five million a year if there was a NAV trigger-period limitation. And so there was bargaining, obviously, over the degree to which Dugaboy could approve compensation. Had anyone wanted a different limit, it could have been in there. And so just like in the *Estate of Conaway*, simply doing one's assigned task doesn't give rise to fiduciary duties.

And so the Debtor has -- cites some cases, but they are very distinguishable. One of them is *Trahan v. Lazar*, and there the limited partners had actually controlled a division of the company. And the court says, well, that was taking an active role in management. And so that -- it's no wonder that the court said you could have a fiduciary duty there.

In *KE Property Management*, it's true, the Debtor correctly cites the court musing about whether a limited partner controlled by the same entity that controls the general partner might acquire fiduciary duties as a result of that, but it expressly declined to decide that issue and found instead that the limited partner merely took an act it was entitled to take under the partnership agreement. And so in that case the limited partner was allowed to remove the general partner for fraud or willful conduct, and that's

obviously much more management, to remove a GP, than to simply approve compensation, as here.

Okay. The next issue we're going to address is no aiding and abetting. So, first -- and the Debtor doesn't really challenge this -- if Your Honor finds that Dugaboy didn't owe a fiduciary duty, well, then obviously there's no aiding and abetting claim because it's wholly -- it's a wholly-dependent claim.

Okay. Now we get to the tricky and I think much more interesting issue. And I'll agree, there's not a lot of Delaware law on whether one can aid and abet one's own actions. So when there's not a lot of law, Delaware uses the *Restatement of Second Torts* to fill the gaps, and there is a *Restatement* provision on aiding and abetting and concerted action. And it provides: For harm resulting to a third party from the tortious conduct of another, one is subject to liability if he or she does a tortious act in concert with the other, or pursuant to a common design with him, or knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or gives substantial assistance to the other in accomplishing a tortious result, and his own conduct, separately considered, constitutes a breach of duty to the third person.

I don't think they allege the third category. But for the

first two, it's perfectly clear -- and would be required also for the third category -- that aiding and abetting is all about acting in concert with another person. And here, what the Debtor alleges is that -- they only allege that Dugaboy has a fiduciary duty. Right? You have to aid and abet the party with the fiduciary duty. Well, they say Dugaboy has a fiduciary duty and Nancy aided and abetted Dugaboy. But Nancy is Dugaboy. I mean, the party acting as Dugaboy is the Dugaboy trustee. That's Nancy Dondero. She can't aid and abet herself. And there actually are cases on that.

But before we get there, we'll look at the analogous law of conspiracy. It's a basic law of conspiracy that you must have two persons or entities to have a conspiracy, and a company can't conspire with itself any more than a private individual can. That's pretty black letter.

And here, again, if you use the *Restatement* elements that we look at, Nancy Dondero was acting as Dugaboy in that she was the Dugaboy trustee. She entered into the agreement. Nancy was simply the agent through which Dugaboy acted. Because Dugaboy and Nancy are one and the same for the purposes of entering into the agreement, Nancy's acts were Dugaboy's acts. And therefore Nancy did not, could not aid and abet any other party as contemplated by the *Restatement* since -- and remember, the Debtor only alleges Dugaboy having fiduciary duties -- since her and Dugaboy's acts are one and

the same.

Okay. And so if we look at Delaware's elements for aiding and abetting, we'll again see the requirement for concerted action of a fiduciary and a non-fiduciary. So a plaintiff has to prove the existence of a fiduciary relationship; a breach of the fiduciary's duty; the defendant, who is not a fiduciary, knowingly participating in the breach; and damages to the plaintiff as a result of the concerted action of the fiduciary and non-fiduciary. Okay. And that's a Delaware bankruptcy case.

So the -- if the first three weren't enough, the fourth act, element, specifically references concerted action, a conduct that requires two separate actors. And since Nancy was acting as and for Dugaboy when Dugaboy made the agreement, there's only one actor and one act.

Other jurisdictions are useful here and provide some more guidance and are -- sort of say directly what we're saying, that one cannot aid and abet oneself. They call an attempt to do that circular. And so under these rulings, the *Restatement*, and the Delaware case and the conspiracy law, it is clear that Nancy Dondero did not aid and abet her own acts as the Dugaboy trustee.

So now we have, in addition to all of that, *scienter* is a requirement of aiding and abetting breach of fiduciary duty, and *scienter* isn't pled here. There's a lot of outrage that

the Debtor throws out, but not actual facts. And so the Plaintiff -- the Debtor doesn't allege facts that would establish that Jim or Nancy had actual knowledge that they were aiding and abetting a breach of fiduciary duty. Instead, they make blanket assertions -- and we'll look at them specifically in a minute -- that are unsupported by specifically-pled facts. And that's exactly what the courts found defective in *In re Draw* and *Capital* -- *Capitaliza-T*. And the courts will dismiss claims when they only have conclusory allegations.

So let's look at the actual allegations in the complaint. And while there are four different complaints, they're all alike in this respect.

So, in the response, Plaintiff contends that, unlike in *Capitaliza-T*, the amended complaint states that the Donderos were aware -- I guess that's the important word to them -- of Dugaboy's specific fiduciary duties to Highland and that they knowingly participated in the underlying illicit transaction, *i.e.*, the authorization of the purported alleged agreement. That's what's in the Debtor's response.

But let's look at the actual claim. Because how is -- in *Capitaliza*, the problem was all that the plaintiff alleged was that the conduct was knowing, and that was not enough. So how is aware different, materially different, than knowing? So let's look at the actual count.

James Dondero and Nancy Dondero were aware that Dugaboy would have fiduciary duties if it acted to bind the Debtor. And then a conclusory statement, the Donderos aided and abetted by knowingly participating, also conclusory, and the same with the last two allegations. They're all conclusory and so they don't support the claim.

And for all of those reasons, Your Honor, if you were to keep the case, it should be dismissed, but we say this without prejudice or argument, obviously, that we believe that the Court ought to compel the declaratory judgment, breach of fiduciary duty, and aiding and abetting claims to arbitration, where an arbitrator can decide the facts.

And I do believe Mr. Kroop inaccurately stated something. He said everything would go back to the Court for a determination de novo. It's only issues of law that would go back, and so the arbitrator would be the final word on the findings of fact. And that's where the motion to dismiss -- and so the motion should be heard by the arbitrator, and if the motion doesn't succeed, the case should be tried in front of the arbitrator.

But thank you very much. If you have any questions, I'm happy to answer them.

THE COURT: Okay. Not at this time.

All right. For the Debtor, was it Mr. Pomerantz that was going to respond to the motion to dismiss?

MR. POMERANTZ: Yes, it is, Your Honor.

THE COURT: Okay.

MR. POMERANTZ: And before I do, I'll just address the comment Ms. Deitsch-Perez made that I'm sure Mr. Kroop would have made if it was argued, actually, in the right hearing. She said that it's only issues of fact that would go to the District Court. I just point Your Honor to what I think we're up to is probably 15 appeals that have been taken by the Dondero parties. Is there any doubt in the Court's mind that, even if an issue of law, that we would end back up in the District Court? Because that's just the way the Dondero entities roll.

Okay, Your Honor. Before I respond to the specific arguments to the Court why the Court should deny the motion to dismiss and allow Highland to proceed with its actions, I do think it's important to provide the Court with some context and summary of how we got here. You alluded to that, I guess, a couple of hours ago when we stated, but I think it's particularly relevant to the issues here.

On January 22nd of this year, we commenced five separate lawsuits seeking to recover approximately $50 million in obligations owed to Highland pursuant to a series of demand and term notes executed by Jim Dondero and several of his affiliates. Indeed, in the Highland plan, there was express projections that Highland would collect all unpaid principal

and interest on these notes in 2021.

Well, at the February confirmation hearing, the Debtors (sic) aggressively disputed confirmation on many issues, a variety of grounds. They never argued to the Court, which you think they would have if there were these agreements, that Highland's anticipated recovery on the notes was unreasonable because of these what have been now known as the alleged agreements.

Thereafter, commencing with the initial answers to the complaints filed in March 2021, the Defendants have done everything possible to cloud the issues, make prosecution of the complaints more expensive, and delay the day of reckoning. That clearly is the Defendants' goal.

In his initial answer, Mr. Dondero contended that he was not liable on the notes at all because Highland had agreed to forgive them and not collect on them. Well, when Mr. Dondero was forced to admit that he paid no taxes on the alleged forgiveness of the notes, he realized that defense was kind of not viable, so he changed his story.

So, on April 6, 2021, he amended his answer, now contending that the obligations hadn't been forgiven but they were subject to forgiveness upon the fulfillment of conditions subsequent.

I would like to put on the screen and read into the record the last iteration of the affirmative defense that is

essentially raised in all of the answers: Plaintiff's claims are barred in whole or in part because prior to the demands for payment Plaintiff agreed that it would not collect the notes upon fulfillment of condition subsequent. Specifically, sometime between December of the year in which each note was made and February of the following year, Defendant Nancy Dondero, as representative for a majority of the Class A shareholders of Plaintiff, agreed that Plaintiff -- that Plaintiff would forgive the notes if certain portfolio companies were sold for greater than the cost or on a basis outside of Jim Dondero's control. The purpose of this agreement was to provide compensation to Defendant James Dondero, who was otherwise underpaid compared to reasonable compensation levels in the industry, through the use of forgivable loans, a practice that was standard at Highland and in the industry. The agreement setting forth the condition subsequent to demands for payment of the notes was an oral agreement. However, Defendant James Dondero believes there may be testimony or email correspondence that discusses the existence of this agreement that may be uncovered through discovery in this adversary proceeding.

So, under these alleged agreements, Jim Dondero, HCRE, HCMS, and NexPoint would collectively receive approximately $50 million reduction or elimination of their obligations on the notes as compensation for services rendered by Jim Dondero

if the assets were sold for one dollar more than cost or, say, if the Court appointed a trustee or new management.

Seriously?

There is no dispute that the agreements were oral, were not communicated to any Highland representative or its auditors, and no one else participated in any discussions between Jim and Nancy where these purported alleged agreements were made. And I can represent to Your Honor that even after the extensive discovery that has been completed in these cases, there will not be a single document in the world --

MS. DEITSCH-PEREZ: Your Honor?

MR. POMERANTZ: -- that will be --

MS. DEITSCH-PEREZ: Your Honor? I --

MR. POMERANTZ: Excuse me. There is not a single --

MS. DEITSCH-PEREZ: I would like to object. This is a motion to dismiss.

MR. POMERANTZ: Your -- Your Honor? She's -- she's --

THE COURT: Okay. Stop. You're making an objection to an oral argument? What is your objection?

MS. DEITSCH-PEREZ: Yes, because -- it's because this is a motion to dismiss, and so putting evidence in is not appropriate. And I have been very patient with Mr. Pomerantz citing to depositions and documents, but it is inappropriate. This is a motion to dismiss.

MR. POMERANTZ: Your Honor, I'm not citing to a deposition. I'm not citing to a document. All I am telling you, in context for Your Honor to hear what, yes, is a motion that'll be determined on the pleadings that the affirmative statement that was made -- and Ms. Perez can contest it if she wants and say that Your Honor will see a document -- but Your Honor is not going to see one document that will be presented to the Court that memorializes, reflects, or even mentions the existence of the terms of these agreements.

THE COURT: Okay. I overrule the --

MS. DEITSCH-PEREZ: Your Honor?

THE COURT: I overrule the objection. We're trying to get at has the Debtor pleaded plausible claims, and I think this is all context --

MS. DEITSCH-PEREZ: Exactly.

THE COURT: -- to support whether Mr. Pomerantz thinks the Debtor has pleaded plausible claim. So I don't find anything objectionable.

All right. You may proceed.

MR. POMERANTZ: Thank you, Your Honor.

In the weeks and months after Mr. Dondero asserted the condition subsequent defense, HCRE, HCMS, and NexPoint, the corporate obligors under the demand notes, who are affiliates that are either directly or indirectly controlled by Mr. Dondero, amended their pleadings to assert the same defense.

And in the spring of 2021, the Debtor (sic) moved to withdraw the reference on each of the complaints. Your Honor issued Reports and Recommendations in July, keeping the matters here for pretrial matters. The Debtors -- the Defendants, of course, challenged Your Honor's Reports and Recommendations in various motions filed in District Courts. And to date, four of the five Recommendations have been adopted. There's one, the Dondero action, where the Court has not yet ruled.

Thereafter, the parties agreed on the form of a scheduling order that required, among other things, the consolidation of the cases before this Court for discovery and procedural purposes. And in accordance with that stipulation and the revelation of these secret oral agreements, Highland amended its complaints to address the Defendants' contentions that this previous secret agreement would somehow exonerate them from liability.

Specifically, we added counts for declaratory relief, declaring that Dugaboy did not have the authority to enter into the alleged agreements; breach of fiduciary duty against Dugaboy; aiding and abetting against Jim Dondero and Nancy Dondero; and avoidance of a fraudulent conveyance against the obligors.

Highland believes that the alleged agreements are a complete fabrication. However, out of an abundance of caution, it added these additional counts just in case a fact-

finder would find to the contrary. And on September 1, Your Honor, Defendants filed the two motions before Your Honor today, the motion to compel arbitration we've heard and the motion to dismiss.

As Ms. Deitsch-Perez said, they only seek to dismiss the three causes of action that were added as a result of the debt -- the Defendants amending their answers to raise the existence of the alleged agreements. They don't seek to dismiss the fraudulent conveyance claim.

If the Court agrees with us that these agreements are complete fabrications, and we intend to move for summary judgment, which Mr. Morris will address the timing of at the conclusion of the hearing, then the causes of action, as Your Honor has commented, that are the subject of this motion to dismiss essentially will become moot. Why would Highland proceed on a fiduciary duty, aiding and abetting, all those claims, if the Court does not find that there's actually an existence of agreement?

If, however, the alleged agreements are found to exist, then these actions become relevant. And in that situation, Your Honor, what Defendants are really arguing in their motion to dismiss is that these causes of actions should just simply go away and the Court should neither scrutinize the substance of the agreements nor the reasonableness of the Defendants' conduct in agreeing to them. And as I will discuss, Your

Honor, neither the facts nor the law support such a result.

Your Honor, as Your Honor knows, Rule 12(b)(6) motions are disfavored. They should be denied where, as here, viewing the facts in the light most favorable to Highland, the claims are plausible on their face. And a claim is plausible where the Court can draw reasonable inferences that the Defendants are liable for the alleged misconduct.

I would like to initially address the Defendants' argument that the Court should dismiss the Fifth and Sixth claims for relief, and I guess also the Seventh, because Highland does not have standing to assert a claim for dec relief, fiduciary duty, and I guess also of aiding and abetting.

The standing argument relies on the flawed notion that these claims that Highland seeks to assert are postpetition claims that Highland lost the right to assert after it rejected the contract.

First, Your Honor, as an initial matter, taking the allegations in the amended complaint as true, which Your Honor must do in a 12(b)(1) motion, Highland plausibly alleges it has standing. It alleges an injury resulting from Defendants' actions and that are redressable by a judgment in favor of Highland. These allegations on their face are sufficient to over -- to deny the Defendants' motion to dismiss.

Second, the argument that the declaratory relief and breach of fiduciary duty claims are postpetition claims is a

frivolous argument for several reasons. We do not dispute that a debtor cannot pursue postpetition claims after a contract is rejected. That is the -- that is the holding of *Lauter*, a case from the Southern District of Texas which Ms. Perez has cited to the Court.

In *Lauter*, a liquidating trustee sued Citgo regarding Citgo's postpetition -- postpetition breaches of a vender agreement. The agreement had been rejected in connection with plan confirmation, and Citgo argued that the rejection, which was deemed to occur on the petition date, as we know, prohibited the liquidating trustee from asserting such claims.

The key difference between *Lauter* and this case is that the parties in that case agreed that the claims sought to be pursued after the contract was rejected were postpetition claims. The court specifically reasoned that rejection of a contract would not cut off the ability to pursue claims based upon prepetition liability. The court reasoned as follows. Rejection did not cut off the right of Gas-Mart's estate or its successor-in-interest to pursue claims based upon prepetition breaches of the agreement, and this is so regardless of whether the trustee later affirms or rejects the contract.

Stated otherwise, the issuance -- the issue of affirmance or rejection relates only to those aspects of a contract which remain unfulfilled as of the date the petition was filed.

So the real question for Your Honor is whether Highland's claims for declaratory relief and breach of fiduciary duty are prepetition claims, which Highland can pursue after rejection of the limited partnership agreement, or are postpetition claims, which it cannot.

As set forth in the numerous cases we cited in our reply, including Judge King's decision in the *Krisu Hospitality* case from the Amarillo division, to determine whether a claim is a prepetition claim or postpetition claim, the majority of courts look to when the acts giving rise to the liability took place.

Ms. Deitsch-Perez argued to Your Honor that those cases are irrelevant. Your Honor should not even consider them because they all dealt with a claim by a creditor against the debtor, as opposed to a claim asserted by the debtor.

We agree that those cases were administrative claim cases, but what Defendants really have no answer and didn't do a really good job in their opening is: Why does that matter? The key issue in determining whether a claim is a postpetition administrative claim and in determining whether a claim belonging to the debtor is a pre- or postpetition claim is when did the acts giving rise to the claim accrue. The Defendants have not pointed to one case that draws the distinction that they ask this Court to make, that the determination of whether a claim is post -- prepetition or

postpetition for purposes of contract rejection is any different than the test for an administrative claim.

And in fact, Your Honor, the District Court for the Western District of Texas, in the 2013 case of *Casarez v. Texas Roadhouse of El Paso*, 2013 U.S. Dist. LEXIS 207994, analyzed whether a tort claim is a prepetition claim or a postpetition claim. That case arose in the context of a Chapter 13 debtor who failed to list its slip-and-fall case in its bankruptcy schedules and Statement of Financial Affairs. The defendant moved to dismiss the case on the basis of judicial estoppel. The court had to determine whether the tort claim was required to be scheduled in the bankruptcy because it was a prepetition claim. And in concluding that it did, the court cited various Texas state court cases for the proposition that, as a general rule, when the elements of duty, breach, and resulting injury or damage are present, a tort action accrues.

And outside of bankruptcy, Your Honor, Judge Boyle, in the Northern District of Texas, in the *TIG Insurance Company v. Aon Re* case, 2005 U.S. Dist. LEXIS 47791, a case subsequently affirmed by the Fifth Circuit, had occasion to determine when a breach of fiduciary duty claim arose.

TIG entered into an agreement with Aon to have Aon act as an intermediary to assist TIG in reinsuring some of TIG's workers' comp policies. One of TIG's reinsurers failed to

subsequently pay TIG and blamed it on incomplete diligence provided to it by Aon as the agent for TIG on TIG's behalf.

TIG sued Aon for breach of fiduciary duty. Aon claimed that the claim was barred by the statute of limitations. So Judge Boyle, to determine whether the claim was statute-barred, had to decide when the fiduciary duty claim arose. Aon claimed that the fiduciary duty claim accrued when the reinsurer agreed to the insurance contract based upon the incomplete diligence package. TIG claimed that there was no injury until the wrongful act caused some injury, which was when the reinsured failed to pay.

In citing various Fifth Circuit authority, Judge Boyle ruled for Aon, holding that the statute started to run when Aon allegedly breached its standard of care as a fiduciary, and not later, when the insured denied payment.

Here, the breach of fiduciary duty claim arose prepetition when Dugaboy breached its fiduciary duty to Highland, and not postpetition, as the Defendants would have this Court believe, when the corporate obligors and Mr. Dondero refused -- refused to pay.

And the Defendants argue again that *Lauter* helps them on the issue of whether the claim is prepetition or postpetition, but as I had mentioned, they are wrong. All *Lauter* stands for is the proposition that, if a claim is postpetition, a debtor can't pursue it after the contract was rejected, and if a

claim is prepetition, it can. It does not determine whether a debtor claim is postpetition or prepetition.

Accordingly, *Lauter* is irrelevant to the issue before Your Honor.

So what does the Court need to do? It needs to examine the facts giving rise to both claims. And in the words of the *Casarez* court, the Court must determine when did the elements of duty, breach, and resulting injury occur, prepetition or postpetition?

Dugaboy entered into the alleged agreements prepetition. And as I will discuss shortly, by doing so Dugaboy assumed a fiduciary duty at that time in so acting. Those are indisputably prepetition actions where Dugaboy, not acting for itself but acting on behalf of Highland, essentially gave away tens of millions of dollars of Highland's assets, thereby exposing them to liability. Rejection of the limited partnership agreement has no effect on Highland's ability to assert those claims.

To avoid this result, the Defendants argue in their briefs that Highland suffered no injury when the alleged agreements were made and that any cause of action is a postpetition claim because the defense on the repayment of notes was first raised postpetition.

Now, of course, they ignore the fact that the agreements were concealed from the Debtor or the company and the

independent board and weren't brought to light until the amendments. They conveniently ignore that fact. But the argument is frivolous nonetheless.

There could be no genuine dispute that the notes would have immediately decreased in value if the alleged agreements were entered into. Why? Because prior to the alleged agreements, the notes were unconditional and could have been sold for an appropriate amount, discounted only by the creditworthiness of the payors, or collected in full. However, if these alleged agreements were entered into, the value of the notes would have went down since they contend there would be no obligation to pay anything because of the condition subsequent.

So, stepping back, let's look what the Defendants want this Court to rule. Highland loans money to each of the obligors, who contemporaneously execute and deliver unconditional promissory notes. Sometime later, Dugaboy entered into the agreements which materially impacted their value and collectability. The agreements are not in writing, were not reflected in Highland's records, were never disclosed in Highland's schedules or SOFAs, were not disclosed to Highland's CFO or its auditors, and were concealed from the independent board of directors, all facts alleged in the amended complaints.

Defendants never asserted that they were uncollectable in

connection with the confirmation trial.

Thereafter, with absolutely no knowledge of the terms or the existence of these agreements, Highland rejects the limited partnership agreement as part of the plan confirmation process, along with dozens of other contracts.

And now what do the Defendants say? Gotcha. Highland rejected the limited partnership agreement, so its claim that the alleged agreements were not authorized and constitute a breach of fiduciary duty go poof in the air and go away forever.

Your Honor, the argument is not only frivolous, it's actually offensive. Mr. Dondero and his sister and his trust apparently believe that they should be rewarded for concealing these agreements for all this time. That's not the law. The claims arose prepetition the moment they entered into the alleged agreement. Accordingly, there's no support for the argument that Highland lacks standing to pursue these claims.

Now turning to the declaratory relief action, Your Honor. They seek to dismiss the declaratory relief, arguing -- where we seek an order that Dugaboy was not authorized to enter into the alleged agreement. They say there's no actual controversy since the limited partnership agreement is clear on its face that Dugaboy was authorized to enter into the agreements.

Defendants argue that Section 310(a) of the limited partnership agreement, which provides that the holders of a

majority interest, which just happened to be Dugaboy but could have changed at any time, can agree to compensation for a general partner or an affiliate of a general partner under certain circumstances, and that -- that that sentence in the LPA conclusively establishes that Dugaboy is the holder of the majority interest who is authorized to enter into the agreement.

So the Court must determine whether there is an actual controversy between the parties regarding whether the limited partnership agreement, in fact, authorized holders of a majority interest to enter the agreements.

To make this determination, the Supreme Court, in the *MedImmune* case in 2007, said that the Court's task is to decide whether the facts alleged, under all circumstances, show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issue of a declaratory judgment. And we think they -- it does unequivocally, Your Honor.

I'd like to put on the screen Section 3.10(a) of the agreement, which I essentially just read, which provides the authority of the majority interest, subject to the limitation, important limitation, that it can't exceed $5 million during any NAV ratio period, to approve of compensation.

Your Honor, under the standard I just identified, there's clearly an actual controversy regarding whether the limited

partnership agreement authorized the holders of the majority interest to enter into the alleged agreements and whether they are null and void.

Contrary to Defendants' argument, it is not at all clear from the language of the limited partnership agreement that the alleged agreements were authorized. Other than the Defendants' bald, unsubstantiated assertions in that one paragraph of the answer that I read previously, which Highland vigorously disputes, there is nothing in the pleadings which conclusively establishes that the alleged agreements relate to Mr. Dondero's compensation.

Indeed, Your Honor, most of the notes were signed not by Mr. Dondero but by three of his corporate affiliates -- NexPoint, HCRE, and HCMS. What services did they render to the Debtor? The answer is none.

There's no dispute that these corporate obligors were the beneficiaries of the loans and -- raising substantial questions how the forgiveness of those notes could be deemed compensation under 310.

Our position, Your Honor, is that potentially relinquishing tens of millions of dollars of Highland's assets has nothing to do with compensation and is in fact management which Dugaboy was not authorized to do under the limited partnership agreement.

And, really, Defendants can't reconcile how the alleged

agreements -- which, if valid, would have authorized $50 million of value to Mr. Dondero and his affiliates -- would not violate the $5 million a year limitation in Section 310(a). For that reason alone, Your Honor, there is a dispute as to whether the agreements were authorized.

In *Kelly v. Continental Common Corp.*, Your Honor, it's cited in our materials, in our briefs, the court denied a motion to dismiss a declaratory relief action based upon the interpretation of contract language because the court found that the parties' rights under the agreement were unclear in the light most favorable to plaintiff and taking all pleaded facts as true, which the Court must do in a 12(b)(6).

In view of the facts in the light most favorable to Highland, Your Honor, it is clear that there's a significant disagreement between the parties regarding the interpretation of the limited partnership agreement.

In its reply and in its oral argument, the Defendants added new arguments on why the Court should dismiss the declaratory relief action, I guess using the 30 days they had to prepare their reply to do further research, none of which, Your Honor, none of those arguments are persuasive.

They argue that the Court should dismiss the declaratory relief action because the issue it relates to is already before the Court and it really doesn't add anything to the dispute.

They cite the 2014 Northern District case of *Merritt Hawkins* in support of the argument. And in *Merritt*, Merritt sued two employees for breach of their non-competition agreement. The employees counterclaimed for a declaratory judgment that the agreements were not enforceable. The Court dismissed the declaratory relief claim, finding it duplicative of the breach of contract claim, because -- here's the important thing -- in order for Merritt to prevail on its breach of contract claim, it would have to demonstrate that the contract was enforceable, the same issue sought to be adjudicated in the declaratory relief. So it was the same issue in the complaint and in the cross-complaint for declaratory relief.

But this case is different from *Merritt*. What is before the Court in connection with the Defendants' affirmative defense is that there are alleged agreements between Highland, acting through the majority interest, which happens to be through Dugaboy, and Dondero, to forgive tens of millions of dollars. That is what the Court is going to decide in connection with the affirmative defense. Do these agreements exist or do they not exist?

The declaratory relief action doesn't go to whether the agreements exist or not. It focuses on, if those agreements existed, were they authorized and can they bind Highland? Those are two distinct issues, Your Honor, and therefore the

declaratory relief action is not even relevant until the Court first determines, if ever, that the agreements exist, and does not need to be decided to adjudicate the affirmative defense.

Next, Defendants argue that the declaratory relief claim attempts to seek liability for a past act, and they are wrong. The Defendants continue to mischaracterize and misunderstand the declaratory relief action. Highland is seeking payment on the notes identified in the amended complaints. The Defendants have refused to pay, asserting that the alleged agreements exist and the amounts set forth in the notes are not yet due.

If the Court finds that the alleged agreements exist, they will only provide a defense to Highland's demands for payment if the Court finds that Dugaboy had the authority to enter into those agreements, a present dispute.

So declaratory relief is necessary to determine whether Highland presently has a right to recover the amounts under the notes or whether the parties have to wait for some future event to occur to determine whether the notes are payable.

This is a present, actual, justiciable controversy between the parties, and Highland has validly pleaded a claim for declaratory relief, and Defendants' motion on that count should be denied.

Turning to the breach of fiduciary duty claim, Your Honor, Defendants argue that the Court should dismiss the claim

against Dugaboy for breach of fiduciary duty because Dugaboy was only a limited partner in Highland and it did not owe any fiduciary duty to Highland.

We agree, probably one of the few things that we can agree on with it, that, as a general matter, a limited partner of a partnership does not owe a fiduciary duty to the partnership. And that makes sense, because limited partners generally don't manage the business or enter into agreements that bind the partnership.

However, where a limited partner takes an active role in the management of the partnership, the limited partner naturally assumes fiduciary duties to the partnership. This is not a controversial proposition, and is supported by several Delaware cases and Delaware Chancery Court rulings cited in our opposition, including *Feeley*, *Cantor Fitzgerald*, and *KE Property Management*. And as the *KE Property Management* court reasoned, to the extent the partnership agreement empowers a limited partner with discretion to take actions affecting the governance of the limited partnership, the limited partner may be subject to obligations of a fiduciary, including the obligation to act in good faith as to the other partners.

So what is governance, Your Honor? According to *Black's Law Dictionary*, governance is applying policies, proper implementation, and continuous monitoring typically done

through or by an organization's governing body, accountability, balance of power, and improving the worth and continuance of the firm or the mechanisms of governing. Also refer to corporate governance.

Dugaboy's exercising a right provided to the majority interest to assert control over Highland and agree to provide Mr. Dondero with compensation through the relinquishment of tens of millions of dollars of Highland's property, affecting Highland's value, in exchange for just one dollar of value over cost is clearly the type of governance that results in the imposition of a fiduciary duty.

The Defendants admit as much, that what Dugaboy was doing was not acting on its own behalf but acting on behalf of Highland when, in the amended answers, it said that they -- that Dugaboy agreed that Plaintiff would forgive the notes, that Plaintiff -- Dugaboy was acting for Plaintiff.

The Defendants cannot now credibly contend that such exercise of control over Highland's property such as to release this $50 million of potential assets is not the type of action that comes with the obligation to exercise due care in making such decisions.

And as the *Feeley* court ruled, questions about the extent to which a partner or other person owes duties will be answered by the role being played, the relationship of the entity, and the facts of the case.

In this case, what are the facts that we allege to set forth this fiduciary duty? Jim Dondero controlled Highland. Nancy Dondero is his sister. Nancy Dondero is the trustee of Dugaboy, a limited partner of Highland. Jim Dondero is the lifetime beneficiary of Dugaboy. Jim Dondero and certain of his affiliate entities borrowed approximately $50 million through a series of notes. Jim and Nancy Dondero allegedly entered into several secret agreements to make the notes go away based upon conditions subsequent. No one participated in these discussions, they were not subject to any negotiation, Highland's auditors or CFO were never informed of the agreements, and they were not reflected on the books and records.

If the alleged agreements are found to exist, which of course we contend they do not, the circumstances surrounding them that I just identified, which are set forth in our amended complaints, are exactly what the *Feeley* court had in mind when articulating that there are circumstances when a limited partner can assume fiduciary duties.

If you believe the Defendants' story about the alleged agreements, Nancy Dondero played the role of the shill for Jim Dondero to enable him and his affiliates to get out of paying $50 million in note obligations, all under the guise of compensation.

Against this backdrop, Defendants argue that, because

Dugaboy was only exercising the right provided to it under the limited partnership agreement to approve compensation, it cannot, as a matter of law, have fiduciary duty in exercising the right.

As a preliminary matter, and as I'd mentioned before, Your Honor, we do not concede that the alleged agreements were entered into for purposes of compensation. And just because the Defendants say it in their answer doesn't make it so. We will demonstrate at the appropriate time that those allegations and that defense is frivolous.

In any event, just a mere allegation is insufficient.

And really, also, Dugaboy wasn't giving any rights under the limited partnership agreement. The majority interest was, however. And Ms. Deitsch-Perez walked Your Honor through the agreement and said, well, that's so -- too cute of an argument, because it really is Dugaboy, but it's a distinction that matters because it was the majority interest. Just because it happened to be held by Dugaboy at that time, it could have been held by someone else. It was not Dugaboy's rights. If it was Dugaboy's right, it could have said Dugaboy has the right. It was not Dugaboy. It was the limited partner.

But even if the alleged agreements do relate to compensation, the arguments still fail. They're arguing that the right to set compensation is not, as a matter of law,

exercise and control.

I'd like to put up Section 4.2 of the limited partnership agreement, and that says, No limited partner shall take part in control, within the meaning of the Delaware Act, of the partnership's business, transact any business in the partnership name, or have the power to sign documents for or otherwise bind the partnership, other than as specifically provided for in the agreement.

So, 4.2 specifically contemplates that a limited partner may be asked to take control of the partnership's business and otherwise bind the partnership if that right is given to the limited partner to do so, and bind the partnership in the LPA, and 3.10(a) is such a provision.

Defendants say it's a right given to it. We say it's a right to exercise power and operate the partnership because it is specifically carved out, and that is -- that is the section -- that is the type of section that is referred to in the 4.02.

So, quickly, under the -- under the language of the limited partnership agreement, they exercise control by approving the compensation for the general partner and affiliate. And having done so, they undertake fiduciary duties.

So, the Defendants cite the two cases from Delaware and Texas in their briefs, and they've talked about -- Ms. Perez

talked about a couple of them. I'd like to briefly mention them.

The first case is *Bond Purchase v. Patriot Tax Credit*. In that case, the limited partner sought to exercise its rights to obtain a list of investors to do a tender offer. The limited partner objected and said -- the other limited partner objected and said that was a breach of fiduciary duty, and the court disagreed.

After acknowledging that a limited partner can assume a fiduciary duty if the limited partnership agreement authorizes it to exercise discretion affecting the governance of the limited partnership, the court said that exercising a contractual right of access to information was not the type of act that was in further of governance.

Your Honor, there's quite a difference between a limited partner exercising a right in its own name to obtain information to pursue its own agenda on one hand, and a limited partner exercising the rights granted to the majority interest to act on behalf of the partnership to make a major decision, the effect of which would be to forgive tens of millions of dollars.

The second case they rely on is *Estate of Conaway*. In that case, a general partner and limited partner argue that another limited partner's failure to consent to a transfer of the general partner and limited partnership's interest as part

of estate planning after death was a breach of fiduciary duty. And the court said the limited partner could not be sued for breach of the fiduciary duty for deciding whether or not to exercise a right that it had bargained for, the right to consent to a transfer.

Again, like *Bond*, the limited partner was exercising a right in its own behalf: Should I approve the transfer or not? In our case, as I mentioned, Dugaboy wasn't given any rights at all, it was given to the majority interest, and it just so happens that Dugaboy was the limited partnership -- was the majority interest.

But as the holder of the majority interest, and only in that capacity, Dugaboy can act on behalf of the partnership. And again, by being given that right, it has to exercise it with due care.

Defendants in their pleadings, they cite to the 2012 Texas court cases of *Strebel v. Wimberly* and *AON Properties v. Riveraine*. One of the issues in *Strebel* was whether a limited partner of a partnership owed a fiduciary duty to other limited partners. The court determined that a jury instruction providing that limited partners owe a fiduciary duty to each other was erroneous. After reviewing the cases, the court reasoned that, We reconcile these cases by holding that the status of a limited partner alone does not give rise to a fiduciary duty to other limited partners. That is not to

say, however, that a party who is a limited partner does not owe fiduciary duties to other limited partners when that party, wearing a different hat, exerts operating control over the affairs of the limited partnership. The existence and scope of that duty will be defined not by the law governing limited partners, but rather by the relevant laws and contracts governing the role under which the party is exercising such authority.

Therefore, *Strebel* does not hold that a limited partner exercising contractual rights gets a free pass to do whatever it wants.

To the contrary, whereas here Dugaboy acts on behalf of the majority interest to set compensation and bind the partnership, it is wearing a different hat, that being the hat of -- on behalf of Highland, because Highland had a conflict, or the general partner had a conflict, and it becomes subject to fiduciary duties.

Strebel also cited the case of *AON Properties* for the proposition that a limited partner cannot be liable for breach of fiduciary duty for taking action listed in the statutes, the Uniform Limited Partnership Act, which do not amount to control. And that case involved one partner alleging that another limited partner breached its fiduciary duty because it voted down an agreement to sell the limited partnership and voted to remove the general partner.

The court reasoned that such actions do not constitute exercise or control to cause there to be fiduciary duties. The court ruled that way because the Texas Uniform Limited Partnership Act at the time specifically said a limited partner does not exercise control by voting on a sale of an asset or the admission or removal of a partner, precisely the issue that was before the court.

This case has nothing to do with the issues involved here, the situation where a limited partner is authorized to act on behalf of the limited partnership.

In its replay and in its oral argument, they point to Section 17-303(b)(8)(O) of the Delaware Limited Partnership Act as, again, supporting the argument that exercising a right under the limited partnership agreement by definition and as a matter of law does not constitute control.

That statute, Your Honor, provides that a limited partner does not exercise control of the business of the partnership for purposes of determining whether the limited partner is liable for the partnership's debts if it acts in one of the -- more ways set forth in Subsection B.

Debtors argue -- Defendants argue that Section (b)(8) applies, and it states -- it talks about acts taken by the limited partner to propose, approve, consent, or disapprove, by voting or otherwise, of a variety of matters, typically things that a limited partner would have the right to do under

a partnership agreement.

Defendants argue that fixing compensation on behalf of the limited partnership falls within the catchall such other matters are stated in the partnership agreement or in any other agreement in writing. And they misinterpret these sections. These sections are clearly focused on acts taken by the limited partner in its own right and on its own behalf to consent or disapprove of these actions. They do not apply under the circumstances here.

They also argue that Highland's claims that Dugaboy would have boundless authority to authorize compensation is incorrect because of the limitation of the annual limitation. But they never can reconcile, as I mentioned before, how that would authorize the agreements which purported to authorize $50 million of alleged assets under the notes to go away.

Based upon the foregoing, Your Honor, there's no basis to dismiss the sixth count of the complaint for breach of fiduciary duty against Dugaboy.

Turning now to the last count, Your Honor, the aiding and abetting. Your Honor, were you -- did Your Honor want to say something?

THE COURT: No, no. Go ahead.

MR. POMERANTZ: Okay. That cause of action is against Jim and Nancy Dondero for aiding and abetting Dugaboy's breach of fiduciary duty.

The first argument that they make is that no aiding and abetting claim can exist against Nancy Dondero because she was at all times acting on behalf of Dugaboy and one cannot aid and abet oneself in the commission of a tort.

So, on the one hand, Nancy Dondero argues that she cannot be liable to Highland on a breach of fiduciary duty, that there was no fiduciary duty. On the other hand, she can't even be liable for aiding and abetting because she's essentially Dugaboy. Therefore, she's essentially arguing that there are no claims that could be brought against her for entering into these alleged agreements and that she is insulated from any liability for these acts, no matter whether the Court finds that they were unreasonable and unauthorized.

Ms. Dondero is wrong that the law precludes an aiding and abetting claim. In *USDigital*, a 2011 Judge Sontchi, Delaware, which the Defendants cite, then held that a director -- defendant director who had sued for breach of fiduciary duty could not also be sued for aiding and abetting that duty. And that decision was based upon the fact that the defendant was already subject to a suit for its wrongful conduct. The aiding and abetting claim was substantively duplicative and therefore didn't really add anything.

In this case, while Dugaboy is being sued for breach of fiduciary duty, Nancy Dondero is not. But Nancy Dondero, as I said, should be held responsible, making this case -- making

USDigital distinguishable from this case.

Defendants also cite the *Cornell* case, a Delaware Superior Court case from 2012, for the proposition that an agent cannot be held liable for aiding and abetting its principal. But *Cornell* does not go that far. Citing a 2008 Chancery Court case, the first -- the court first reasoned that a corporation generally cannot be viewed to have conspired with its wholly-owned subsidiary or its officers and agent. It then applied the principle to dismiss the claim that the officer had aided and abetted a defamation committed by the defendant corporation.

The case does not establish a *per se* prohibition on asserting aiding and abetting against an agent and a principal. And when Your Honor reads the case, you'll see what the court was really frustrated in that case about was the fact that parties were turning essentially a breach of contract claim by adding dozens of fraud claims. I'm sure Your Honor has seen that, and that's just what litigants do. That was really what was motivating it.

The bottom line is there is no control -- controlling law on this issue. And Ms. Deitsch-Perez didn't disagree with that. At this stage, the Court should not dismiss the action just based upon the pleadings.

We are convinced, Your Honor, when Your Honor hears the facts -- what facts that Highland has developed about Nancy

Dondero's contact during -- conduct during discovery, it will determine that the general rule that Defendants have cited to shield her from aiding and abetting should not apply and that she should be held liable for aiding Dugaboy in the decision to enter these preposterous alleged agreements.

Turning to *scienter*, Your Honor, Defendants argue that the aiding and abetting claim should be dismissed because Highland has not sufficiently pled *scienter*. Defendants are incorrect. One of the elements of an aiding and abetting claim that Ms. Perez put on the screen was the requirement that there be no participation in the breach by a defendant who is not a fiduciary. So what facts do Highland allege -- does Highland allege to support Jim and Nancy Dondero's knowing participation?

Ms. Deitsch-Perez conveniently only put forth on her screen the allegations in the specific counts. She ignored the many allegations of fact that gives contextual framework for these claims that was in the amended complaint. And I've said them before but I'll say them again. Jim Dondero owned and controlled Highland at the time of the agreements. He was a lifetime beneficiary of Dugaboy. She was the trustee of Dugaboy. Dugaboy held the majority interest. They enter into oral agreements to modify the notes. Not in writing, not subject to negotiation. No other parties participated in them. No one told Highland's CFO or outside auditors about

the agreements. The agreements were concealed by Mr. Dondero and Ms. Dondero from the Court. And the books and records don't reflect those agreements. And that based upon those facts, the Donderos participated in the authorization of the agreements and were aware that the entry of those agreements was a breach of fiduciary duty.

Under the cases we cite in our opposition, Your Honor, such facts are more than sufficient to satisfy the pleading requirements for the Donderos' knowing participation.

In *U.S. Bank National Association v. Verizon*, a trustee of a liquidating trust sued Verizon for aiding and abetting a board member of a subsidiary in authorizing a spin-off transaction that diverted billions of dollars of value from Verizon's subsidiary that later filed a Chapter 11 case. Verizon then installed one of its employees as a director at the subsidiary that authorized the transaction.

Based upon these factual allegations, the court found that a sufficient aiding and abetting claim had been pled because they allowed the court to reasonably infer that Verizon knowingly aided and abetted the director's breach of fiduciary duty.

Similarly, the allegations in the amended complaint that I just mentioned, Your Honor, more than create the inference that Nancy Dondero knew what they were doing when they facilitated Dugaboy's entry into the alleged agreements, and

that such conduct was wrongful.

Defendants argue that Highland's allegations are just circumstantial and do not meet the pleading standard, and cite two cases.

The first case they cited was *In re Draw Another Circle* that Ms. Deitsch-Perez put on the screen. And in that case, a trustee sued a debtor's former directors for breach of fiduciary duty and aiding and abetting a breach of fiduciary duty for failing to stop certain insider transactions. And Judge Carey in that case dismissed the claim. Why? Because the complaint pled that the directors knew or should have known that the directors were breaching their fiduciary duty. That was why the *scienter* wasn't met, because it knew or shouldn't -- or should have known.

In this case, we don't equivocate, and we allege in the complaint that the Donderos knew of Dugaboy's breach by entering into the agreement. That allegation, together with the significant contextual fact allegations in the amended complaint, distinguishes the case in *Draw*.

And in the *Capital-T -- Capitaliza-T* case, Your Honor, in that case, plaintiff gave an entity known as Majapara two and a half million dollars in connection with a currency exchange transaction. And unbeknownst to Majapara -- unbeknownst to plaintiff, Majapara, in violation of the banking laws, transferred the money to Wachovia Bank in the United States.

When Majapara defaulted to the plaintiff, plaintiff sued Wachovia, presumably as the deep pocket, alleging that Majapara obtained the funds from plaintiff fraudulently, and that Wachovia, among other things, aided in that fraud.

Judge Sontchi threw out the aiding and abetting claim. Why? Because there were no facts alleged that Wachovia had any knowledge of the plaintiff or of the transactions between the plaintiff and Majapara, or that any fraud had been committed.

This lack of any connection, Your Honor, between the knowledge of the wrong and the assistance of carrying out the wrong was fatal to the claim, which is completely different here. Ms. Dondero and Mr. Dondero knew what they were doing. We allege that they knew what they were doing.

Lastly, they claim that Highland needs to plead more than one act in order to have the viable claim for aiding and abetting. They cite no authority for that position, and to state a claim for aiding and abetting you have to prove an existence of a duty, a breach of the relationship, knowing participation in the breach, and damages. We pled that they were working in concert, Jim and Nancy, with Dugaboy, who owed a fiduciary duty. They aided and abetted that fiduciary duty by authorizing the alleged agreements, which caused harm.

The Court should reject the Defendants' attempt to engraft yet another element on the claim of aiding and abetting by

requiring multiple acts. Although even according to the Movants, there were multiple acts, because there are several agreements.

Your Honor, for all the foregoing reasons, the Court should deny the Defendants' motion to dismiss Counts Five, Six, and Seven of the complaints.

And I know, Your Honor, I was a little bit probably long-winded and you only have limited time before your engagement, but as Your Honor knows, these adversary proceedings are extremely important to the Debtor, they're extremely important to the case, and I want to make sure that Your Honor had the full perspective of why we believe we should be allowed to proceed with each of these causes of action at this time.

THE COURT: Okay. Thank you.

Well, as you mentioned, we are getting a little pressed for time.

Ms. Deitsch-Perez, you get the last word on your motions to dismiss, and I hope we can kind of not make it too lengthy, all right?

MS. DEITSCH-PEREZ: I won't. And much of what the Debtor said was in the nature of, 'cause I said so. Or the other thing that was noteworthy is, I'll promise -- I promise you you'll see, when we develop the case, *x*, *y*, or *z*. And remember, this is a motion to dismiss, and so what is important is what is there on the face of the pleadings. And

what Mr. Pomerantz promises he will deliver in evidence later is not relevant.

So, with that, let me quickly go to some of the points. On *Lauter*, we agree that the relevance of *Lauter* is dependent upon the claim being postpetition, and the *Muzquiz* case that we cite is an example of why the claims here are postpetition, because there was no controversy about the -- what the Debtor calls the alleged agreement until it was raised as a defense.

And so, in fact, the -- as far as we know, the forgiveness event hasn't even occurred yet, so this is definitely something that -- that both became relevant, became a controversy, and won't have consequences for some time.

The next thing I want to address is Mr. Pomerantz's definition of governance. I didn't get to write it all down because he was talking a little fast, but if you took that view of governance and said if -- if a limited partner touched any one of those things in that big definition of governance, you would completely eliminate the distinction between limited and general partners. And that can't possibly, as a result, be the touchtone, because that would turn Delaware law on its head.

Section 4.2 in the limited partnership agreement actually is helpful to Defendants, not hurtful, because it says -- it doesn't say that a limited partner becomes a general partner if it undertakes an assigned task. It in fact says limited

partners are not managers but they can do those tasks that are otherwise assumed -- otherwise assigned in the agreement.

I think that Mr. Pomerantz has also inaccurately stated the compensation provision a couple of times. He said, well, look, how could there be a forgiveness of -- potential forgiveness of $50 million worth of debt if there's a $5 million limitation? The limitation is that during a NAV ratio trigger period there can't be more than $5 million of compensation. And so if it is the Debtor's contention that at any point Highland was in a NAV ratio trigger period, it would need to prove that. And as far as we could see, it has made no effort to do so. So that is misstating the clause.

With that, I don't need to -- mean to accept what Mr. Pomerantz has said, but I do think it is squarely addressed by the briefs. And so, unless Your Honor has any questions, I have nothing further. Although, if you will give me one moment, I will look at my email and texts to see if my colleagues have pointed to anything that I have neglected to address.

THE COURT: Okay.

(Pause.)

MS. DEITSCH-PEREZ: I am reminded that while all of the exhibits that were annexed to our witness and exhibit list were attached to our moving papers on the motion to compel arbitration, to the extent Your Honor believes they need to be

separately included in the record, I would move those exhibits into evidence.

MR. POMERANTZ: Your Honor, may I be briefly heard on that?

THE COURT: You may.

MR. POMERANTZ: Your Honor, as relates to the motion to dismiss, Ms. Deitsch-Perez chided me a few times saying I was going beyond what was in the motion to dismiss. Now, the motion to dismiss could have been a factual motion to dismiss. They could have submitted evidence.

THE COURT: Let me --

MR. POMERANTZ: They didn't submit evidence.

THE COURT: Let me stop you. I think she was offering them in connection with the motion to compel arbitration. Did I hear that correctly?

MS. DEITSCH-PEREZ: That is correct. We're not offering them on the motion to dismiss.

MR. POMERANTZ: Very well, Your Honor.

THE COURT: Okay. Well, then if there's no objection to these exhibits in connection only --

MR. POMERANTZ: We have no objection, Your Honor, in connection with those.

THE COURT: Okay. So they will be admitted. All right.

MS. DEITSCH-PEREZ: Thank you.

(Movants' Motion to Compel Arbitration Exhibits received into evidence.)

THE COURT: Is that all, Ms. Deitsch-Perez?

MS. DEITSCH-PEREZ: Yes.

THE COURT: Okay. Well, I think Mr. Pomerantz previewed at the beginning of this setting that Mr. Morris was going to have something he wanted to present. But before we do that, let me just tell you all how I intend to move forward on everything I heard today.

Since it is 4:30 and I have to be involved in this presentation tonight -- what I had hoped to do was take a break and go back and look at a couple of these cases and at least give you a ruling on the motion to compel arbitration today. But I'm just afraid I'm going to be cutting it too close.

I've pulled up *Janvey*, for example. It's 60-something pages, the District Court opinion, and then the Fifth --

(Court confers with Clerk.)

THE COURT: Oh, well, okay.

MS. DEITSCH-PEREZ: The Fifth Circuit's a little shorter.

THE COURT: The Fifth Circuit's a little shorter. But, anyway, I'll be cutting it too close if I go back and break.

So what I'm going to do, I fully expect to give you all a

ruling on the motion to compel arbitration Friday by email from my courtroom deputy to all the lawyers. It's not going to be a flowery opinion, although I find this a very interesting issue, you know, whether, if you reject an agreement that has an arbitration clause, an executory contract, that the arbitration obligation is essentially rejected. But that's, of course, not the only issue involved here.

But anyway, as much as I might like to do a flowery opinion, you all want answers sooner rather than later, and the parties in interest deserve an answer sooner rather than later. So I fully expect, again, to give you an email ruling on Friday through Traci, and it will simply instruct the winning party to submit a written order consistent with the informal ruling I give you all through the email. So that's how that's going to be handled.

Now, I think there are three scenarios with regard to the motion to dismiss. If I were to grant the motion to compel arbitration, I think that's it for me. I have to defer to the arbitration panel with regard to the 12(b)(6) motion, even though I may have views about how that should turn out. So that's scenario number one.

Scenario number two is I deny the motion to compel arbitration. And if I do that, then maybe I deny the motion to dismiss. So that's scenario two.

And then scenario three would be I deny the motion to compel arbitration, but I may decide the motion to dismiss should be granted. But if I decided that, then I'd have to do a Report and Recommendation to the District Court, because it would be a dispositive motion. Except, as I think through that, what we trial courts tend to do is, rather than dismiss counts, give leave to amend under Rule 12(b) to see if any infirmities in Counts Five, Six, Seven could be addressed.

So, anyway, rambling explanation, but I'm going to give you a ruling on the motion to compel arbitration, and then there are three different scenarios that might play out as far as the motion to dismiss.

Here's the last thing I'm going to say, and then I'll ask Mr. Morris what his comments are. I can tell you right here and now I am denying the motion to stay these entire adversary proceedings -- in other words, Counts One through Four -- pending any possible arbitration. Okay? So if I hypothetically grant the motion to compel arbitration and say, yes, I agree, Defendants, Counts Five, Six, and Seven must be submitted to arbitration, I see zero reason to stay Counts One through Four going forward in this Court.

So you don't have to wait on how I'm going to rule Friday on the motion to compel arbitration to know it's full steam ahead on Counts One through Four in these adversary proceedings. It just would make no sense to me to stay that.

All right. So, with that, Mr. Morris, what did you want to say as far as a housekeeping matter?

MR. MORRIS: Sure. Good afternoon, Your Honor. John Morris; Pachulski Stang Ziehl & Jones; for Highland.

Your Honor, we informed the Defendants' counsel over the weekend that Highland intends to move for summary judgment. Discovery in this matter, both fact and expert discovery, is completed, with two exceptions. There are two depositions that will occur next week as a result of Highland's willingness to accommodate Mr. Rukavina's vacation schedule. So they're his client's witnesses, he's on vacation right now, and we agreed that we would put those two depositions off until he returned.

Under Federal Rule 56(b), we're required to file any motion for summary judgment within 30 days of the completion of discovery. Discovery will be completed -- I think the second deposition is November 17th. So what we proposed to the Defendants' counsel over the weekend was that we would file -- Highland would file its motion for summary judgment on December 17th. And notwithstanding Local Rule 7.1(e), which requires opposition to motions to be filed within 21 days, that we would give them actually 30 days, to take into account the holiday, so that their answering or opposition papers would be due on January 17th.

And then even though Local Civil Rule 7.1(s) states that

replies are due within 14 days, we didn't give ourselves an extra moment. And under our proposal, we said that we would file our reply on July (sic) 31st.

So they've had notice already that the summary judgment motion was coming and that it would be filed on December 17th. We gave them, you know, more than a week's time. We gave them ten additional days or nine additional days to take into account the holiday to file their opposition, and then we gave ourselves no additional time and simply took the 14 days as required under the Rules so that the summary judgment motion would be fully submitted to Your Honor by the end of January.

The response I received was that their -- they proposed to answer the motion in mid- to late March, and that we could have however much time we wanted thereafter. I asked why, and they said they would be busy dealing with the Litigation Trustee's complaint.

Your Honor should know that complaint was filed on October 15th, and the deadline for responding is not until mid-February. They were given four months to respond to that complaint, for reasons that I won't get into because I'm not directly involved at all in that matter. But it seemed to me that they already have four months to respond to that. I don't see how that can be an issue. I'm giving them ten days. I mean, even if they wanted to take off from Christmas to New Year's and not work one second, they're still getting more

time than is provided under the Rules.

We can't come to an agreement on the schedule, Your Honor. And while I'm loathe to burden the Court with such matters, I would appreciate some guidance, because we would like to get the schedule finalized. That's where we are.

THE COURT: All right. Well, Ms. Deitsch-Perez, what do you want to say? That sound reasonable to me at first blush. Why is it not reasonable?

MS. DEITSCH-PEREZ: It's not reasonable because -- for several reasons. And I also sort of object to being sandbagged to have this heard this way when I'm not sure I have the ability to speak for all of the various parties right now off the cuff.

But let me point out the things that I raised with Mr. Morris as we tried to work this through. One, the Debtor has been working on this for months. So to take until December 17th and then only give the Defendants a month is not equitable. There's a lot of issues. There are a lot of parties. Having more lawyers creates -- it doesn't necessarily make things faster. It requires the need for coordination so as to not burden the Debtor and the Court with duplicative pleadings, which, as you see, we have --

THE COURT: Okay. Let me --

MS. DEITSCH-PEREZ: -- tried to accomplish here.

THE COURT: Let me stop you right now. I started

this hearing today with saying this calendar looks kind of complicated, 12 matters, but it really wasn't. We had the same kind of motions in all four adversary proceedings, the same sort of issues.

So I don't understand why it's complicated. Help me to understand. We've got notes. We have a defense --

MS. DEITSCH-PEREZ: I don't --

THE COURT: We have a defense that there was an agreement that these notes wouldn't have to be repaid under certain circumstances. And so I'm going to see whatever the evidence is or is not of the agreement. And you know, I don't know if the summary judgment motion is going to include the fraudulent transfer counts, I guess that could get complicated, but I'm not sure. Mr. Morris, are you talking about summary judgment just on Counts One, Two, and Three?

MR. MORRIS: What I informed the --

THE COURT: Or, wait, that doesn't make sense.

MR. MORRIS: -- the Defendants' lawyer --

THE COURT: One and Two.

MR. MORRIS: What I informed the Debtor was that we currently intend to move for summary judgment on all counts that are not subject to the motion to dismiss, and we would await the Court's ruling on the balance.

I just, if I may, Your Honor, I really -- I have never sandbagged anybody in my life and I just need to read into the

record the last sentence of my email to all defense counsel yesterday. The last sentence, "Highland's schedule is reasonable under the circumstances, and we will ask the Court to adopt it tomorrow." That's what I told her yesterday. That's what she's characterizing as sandbagging.

MS. DEITSCH-PEREZ: And we responded, I didn't get a response to that, and so I do not have the concurrence of all of the lawyers involved.

And Your Honor, yes, today went rather smoothly and was organized. But it takes quite a lot of work with so many parties and so many lawyers involved to do that. And it takes longer, not less time. You know, it's the old saying it takes a lot longer to make a shorter brief. That is very true. And we don't yet know what issues the Debtor is going to move on because Mr. Morris did not say. He said on some or all. And so until we see the pleading, we don't actually know how long it takes.

We made several suggestions to give us longer because the same lawyers are involved in this as are involved in the Kirschner case, and all of the answers or motions are due in February on that. So could we have a few weeks to clear that? Or, alternatively, could the Debtor move earlier, and we could keep the compressed schedule if it was earlier. Or we suggested that the Debtor could take longer and it could file after January, and so we would have less time but it would not

overlap as much.

There were lots of options that we suggested. Perhaps the best thing to do is for the Debtor to make its motion, we will see what's in it, and then be able to suggest an appropriate timetable. At this point, it's a pig-in-a-poke or whatever --

MR. MORRIS: Your Honor, --

MS. DEITSCH-PEREZ: -- that means.

MR. MORRIS: -- to be clear, what -- I couldn't -- I just couldn't be more clearer in what I write, and what I told them is, "We intend to move for summary judgment on some or all of the counts in the notes litigation. We will share with you the specific counts as soon as practicable after the hearing on the motion to dismiss, but the motion will certainly cover at least all counts not subject to the motion to dismiss and all defenses thereto."

The only -- the only thing they don't know at this moment is Your Honor's ruling on the motion to dismiss, and I apologize to counsel, I can't foresee what that is. But the moment that you issue that ruling on Friday, we'll make a decision and they'll know.

MS. DEITSCH-PEREZ: Okay, but that means they are saying, which I didn't appreciate, that they're moving on the fraudulent transfer claim. So this is not, you know, as Your Honor is wont to say, a simple note case.

And so I would ask that we simply await the Debtor's

motion and then attempt to negotiate a schedule at that point. If we're unable to negotiate a schedule, then we would ask that the Court hear us on an expedited basis to hear the competing schedules suggested by the parties.

THE COURT: Okay. Well, --

MR. MORRIS: Your Honor?

THE COURT: I've heard enough. I am going to accept the proposed schedule of Mr. Morris. And let me be clear. I mean, I've got the timeline in front of me. The adversary, of course, was filed January 22nd of this year. So that means we'll be having a hearing on a motion for summary judgment or motions for summary judgment -- I said adversary; adversary proceedings, plural -- you know, more than a year after the adversary was filed. Now, I understand that the adversary morphed, and it wasn't --

MS. DEITSCH-PEREZ: Exactly?

THE COURT: It wasn't until, I guess, well, August 12rd, I granted -- August 17, Debtor filed a motion for leave to amend, and then August 23rd I granted. So it morphed several months later. But, I mean, it morphed because of the Defendants raising surprise issues. And so all of the information, the discovery, is kind of more in the Defendants' set of knowledge than the Plaintiff's. I mean, it would -- well, I think you get what I'm saying. We --

MS. DEITSCH-PEREZ: Your Honor, may I point out one

more thing?

THE COURT: Okay.

MS. DEITSCH-PEREZ: There also -- there's also a pending motion to extend the period for expert discovery that I think Mr. Rukavina made, and then we made similar motions the same day, to add an expert relating to some facts that came up in the last few weeks in discovery, an expert on shared services agreement. That motion, I think the earliest --

THE COURT: What on earth --

MS. DEITSCH-PEREZ: -- anyone could get a hearing --

THE COURT: What on earth does that have to do with this litigation? I don't mean to be flippant and laugh, but what on earth does that have to do with notes --

MS. DEITSCH-PEREZ: Well, I'll --

THE COURT: -- and maybe an agreement that the notes didn't have to be repaid?

MS. DEITSCH-PEREZ: Because there are issues that the Debtor has -- that have not been something that had to come before Your Honor that the Debtor conspicuously avoids, which is that three of the notes were term loans that Highland was supposed to be keeping track of and paying under shared services agreements and Highland failed to pay the notes and then Highland claimed a default because they failed to pay the notes.

So that's another issue in the case, and there was some surprising testimony --

THE COURT: It sounds like you're talking about an affirmative defense that hasn't been articulated yet. Or I don't know if I should say affirmative defense, but --

MS. DEITSCH-PEREZ: No, it has been --

THE COURT: -- a defense that hasn't been articulated.

MS. DEITSCH-PEREZ: Yes, Your Honor, it has been articulated. It has been. It is in the -- it is in the answers, and it's been in the answers the whole time. It just hasn't been something that has come before Your Honor.

So there are more issues in this case than the Debtor dwells on. The Debtor only dwells on, oh, there are notes, they need to be paid. But these are more complicated cases than that.

So all I'm saying is, Your Honor, is that motion is not set to be heard until December 15th. While there will be a report done well before then sort of, you know, in anticipation and so the Debtor will know about it and obviously be able to, if Your Honor allows it, be able to take the deposition, it's just another reason that there is a little bit more to do here. And so --

THE COURT: Okay. I --

MS. DEITSCH-PEREZ: -- the schedule --

THE COURT: You know, you can file --

MS. DEITSCH-PEREZ: -- might need a little flexibility.

THE COURT: You can file whatever motion you want to file, but for today I'm approving this schedule that Mr. Morris has requested. I think it does sound reasonable under all of the circumstances. I'm just letting you know you have a very uphill battle convincing me that experts regarding shared services agreements would be germane here under the current set of pleadings.

I, by the way, have heard a lot about shared services agreements during the past few years, including experts on the witness stand during the *Acis* case. But, again, under the pleadings as now in the record, I just can't imagine why experts on shared services agreement are going to be relevant evidence. But again, I'm approving the motion or, you know, the oral motion with regard to schedule on motions for summary judgment and responses and replies. Again, people can make whatever motion they think they can make or should make with regard to experts and whether that ends up extending the time. But I, again, I just want to reiterate that -- well, I hope it's helpful for me to say this. I don't think this is as complicated as maybe certain people think it is or are arguing, okay?

I mean, I know a defense has been raised that there is an

oral agreement that was made that provided that these notes did not have to be repaid under circumstances *x*, *y*, *z*, but there's either going to be evidence of that or not. And I don't view it as complicated just because there are four adversary proceedings and a lot of dollars involved.

So that is my view of things. We're going to have to adjourn. But my courtroom deputy will reaching out to you, again, I anticipate Friday before the middle of the --

(Proceedings concluded at 4:49 p.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **11/16/2021**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

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