

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:	§	Case No. 19-12239 (CSS)
	§	
HIGHLAND CAPITAL MANAGEMENT, LP, <sup>1</sup>	§	Chapter 11
	§	
Debtor.	§	<b>Re: Docket Nos. 69, 70</b>
	§	

Objection Deadline: November 12, 2019 at 4:00 p.m. (Eastern time)  
Hearing Date: November 19, 2019 at 12:00 p.m. (Eastern time)

**LIMITED OBJECTION TO THE DEBTOR’S: (I) APPLICATION FOR AN ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF FOLEY GARDERE, FOLEY & LARDNER LLP AS SPECIAL TEXAS COUNSEL, *NUNC PRO TUNC* TO THE PETITION DATE; AND (II) APPLICATION FOR AN ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF LYNN PINKER COX & HURST LLP AS SPECIAL TEXAS LITIGATION COUNSEL, *NUNC PRO TUNC TO THE PETITION DATE***

Acis Capital Management, L.P. (“Acis LP”) and Acis Capital Management GP, LLC (collectively “Acis”), creditors and parties-in-interest, object on a limited basis to the Debtor’s: (i) *Application for an Order Authorizing the Retention and Employment of Foley Gardere, Foley & Lardner LLP as Special Texas Counsel, Nunc Pro Tunc to the Petition Date* [Docket No. 69] (the “Foley Application”); and (ii) *Application for an Order Authorizing the Retention and Employment of Lynn Pinker Cox & Hurst LLP as Special Texas Litigation Counsel, Nunc Pro Tunc to the Petition Date* [Docket No. 70] (the “Lynn Pinker Application” and together with the Foley Application, the “Applications”).

**Statement of Facts**

1. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

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



2. On October 29, 2019, the Debtor filed the Foley Application, seeking to employ the law firm of Foley Gardere, Foley & Lardner LLP (“Foley”) as special Texas litigation counsel pursuant to 11 U.S.C. §327(e).

3. Also on October 29, 2019, the Debtor filed the Lynn Pinker Application, seeking to employ the law firm of Lynn Pinker Cox & Hurst LLP (“Lynn Pinker”) as special Texas litigation counsel pursuant to 11 U.S.C. § 327(e).

4. Foley and Lynn Pinker are both being hired to represent the Debtor in connection with Acis’ post-confirmation bankruptcy case (the “Acis Bankruptcy Case”),<sup>2</sup> two appeals from the Acis Bankruptcy Case (both initiated by the Debtor as an appellant)<sup>3</sup> and an adversary proceeding pending in the Acis Bankruptcy Case.<sup>4</sup>

### **Objection**

#### **A. The Applications Lack Important Disclosures.**

5. The Applications disclose that Foley and Lynn Pinker represent and have performed work in the Acis Bankruptcy Case for clients related to the Debtor – clients they identify as Neutra and the Cayman Defendants. The Foley Application also admits that, before the Petition Date, Foley billed the Debtor for work performed for Neutra and the Cayman Defendants.<sup>5</sup> There is no disclosure from Lynn Pinker on this point, but presumably its payment arrangements were similar because Lynn Pinker represents many, if not all, of the same clients as

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<sup>2</sup> Jointly administered Case Nos. 18-30264 and 18-30265 in the United States Bankruptcy Court for the Northern District of Texas.

<sup>3</sup> *Highland Cap. Mgmt, L.P. v. Phelan*, Case No. 19-10847 in the United States Court of Appeals for the Fifth Circuit; *Highland Cap. Mgmt, L.P. v. Winstead PC*, Case No. 3:19-cv-01477-D in the United States District Court for the Northern District of Texas

<sup>4</sup> Adversary No. 18-03078 in the United States Bankruptcy Court for the Northern District of Texas.

<sup>5</sup> See ¶ 3 of Declaration of Holland O’Neil attached as Exhibit A to the Foley Application [Docket No. 69-2] (“The Firm billed Highland for all services as to the related other parties since there was significant overlap among legal issues for Highland, Neutra and the Cayman Defendants.”).

Foley in the Acis Bankruptcy Case. While the Applications disclose the amounts paid by the Debtor to each of Foley and Lynn Pinker during the year prior to the Petition Date, the Applications do not disclose the proportionate amounts billed to and paid by the Debtor for work performed for Neutra and the Cayman Defendants. Acis reserves its rights to compel disclosure of this information including under Fed. R. Bankr. P. 2017(a).<sup>6</sup>

6. This structure creates significant fraudulent transfer concerns and highlights the multifarious nature of the Debtor's operations including its pervasive use of offshore shadow companies controlled by James Dondero. As both District Judge Sidney Fitzwater and Bankruptcy Judge Stacey Jernigan found in published opinions arising from the Acis Bankruptcy Case, Neutra and the Cayman Defendants are actually offshore companies that were created around the time Joshua Terry obtained a judgment against Acis in order receive transfers of Acis' assets and Acis' equity. *Neutra, Ltd. v. Terry (In re Acis Cap. Mgmt. L.P.)*, 604 B.R. 484, 501-02 (N.D. Tex. 2019); *In re Acis Cap. Mgmt. L.P.*, 584 B.R. 115, 127-31 (Bankr. N.D. Tex. 2018). Even more, the business justification proffered by the Debtor for these transfers from Acis was found to be "a seemingly manufactured narrative to justify prior actions" and that "the evidence established overwhelmingly that there is a substantial likelihood that the transfers were part of an intentional scheme to keep assets away from [Terry]." *Neutra*, 604 B.R. at 502 (citing *In re Acis Cap. Mgmt. L.P.*, 2019 Bankr. Lexis 292 (Bankr. N.D. Tex. January 31, 2019)). It was clear to everyone in the Acis Bankruptcy Case that Neutra and the Cayman Defendants were simply fronts for Dondero's machinations.

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<sup>6</sup> Fed. R. Bankr. P. 2017(a) provides: "Payment or Transfer to Attorney Before Order for Relief. On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case, to an attorney for services rendered or to be rendered is excessive."

7. The Debtor's Schedules and Statement of Financial Affairs will not be filed by the time parties must object to the Foley Application and Lynn Pinker Application, or by the time the Court will hold a hearing on the Applications.<sup>7</sup> Thus, the scope of these payments and liabilities (or other connections) will not be disclosed until well after the engagement of Foley and Lynn Pinker.

8. The Applications also do not disclose whether the Debtor intends to continue to be billed and pay Foley and Lynn Pinker for work performed for Neutra and the Cayman Defendants once Foley and Lynn Pinker are engaged by the Debtor pursuant to the Applications. If this is the Debtor's intent, it should be specifically disclosed and approval of such employment should be requested in accordance with the Bankruptcy Code and the applicable rules. For example, Bankruptcy Rule 2017(b) specifically requires disclosure of payments made by a debtor to *any attorney* for services *in any way related to the case*. Fed. R. Bankr. P. 2017(b).<sup>8</sup> In any event, if the Debtor does intend to pay Neutra and the Cayman Defendants' legal expenses, Acis would oppose this relief. The fact that Neutra and the Cayman Defendants are sham entities created only to receive fraudulent transfers and, thus, have no substance does not change, and in fact compels, this result.<sup>9</sup>

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<sup>7</sup> The Debtor has requested an additional 30-day extension of time to file its Schedules and Statement of Financial Affairs [Docket No. 4]. If granted, this would make such disclosures due December 13, 2019.

<sup>8</sup> For example, Fed R. Bankr. P. 2017(b) provides: "Payment or Transfer to Attorney After Order for Relief. On motion by the debtor, the United States trustee, or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property, or any agreement therefor, by the debtor to an attorney after entry of an order for relief in a case under the Code is excessive, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the case."

<sup>9</sup> To be clear, Neutra and the Cayman Defendants' are entitled to hire counsel to represent them and Dondero or some other non-debtor entity that he controls are certainly welcome to pay the litigation costs. But this is not a cost the Debtor should bear.

9. Further, the Foley engagement letter<sup>10</sup> discloses a conflict with Foley's representation of HRA Holdings, LLC that required the consent of the parties in order for Foley to proceed with its initial representation of the Debtor. This conflict, or potential conflict, is not disclosed or discussed anywhere in the Foley Application or the various disclosure affidavits that accompany it. Thus, the nature of the conflict is unclear, and it is unknown how it might limit Foley's representation of the Debtor.

10. The Debtor did not attach Lynn Pinker's engagement letter to the Lynn Pinker Application, so this Court and the creditors in this case do not know the full terms of the Lynn Pinker engagement. However, Acis is aware of various connections between Lynn Pinker and the Debtor and its related parties that are not disclosed or are only partially disclosed in the Lynn Pinker Application. For example, Lynn Pinker hired the Debtor's General Counsel, Scott Ellington, as an expert witness in a case tried in Dallas just last year.<sup>11</sup> It is unclear if this is a regular occurrence or what compensation Mr. Ellington receives for providing these services to Lynn Pinker and its clients.

11. Further, in a footnote the Lynn Pinker Application discloses that it represents the Charitable Donor Advised Fund, L.P. (the "DAF") in "unrelated" litigation. However, this is only the tip of the iceberg in describing this allegedly "unrelated" litigation.

12. On August 6, 2019, Lynn Pinker, at that time representing NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund and Highland Income Fund (collectively, the "Highland Retail Funds"),<sup>12</sup> sent nearly identical letters to Moody's Investor Services and

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<sup>10</sup> Attached as Exhibit B to the Foley Application [Docket No. 69-3].

<sup>11</sup> See attached **Exhibit A** found at <https://www.pettitfirm.com/legacytexas>. Highlighting has been added to some exhibits.

<sup>12</sup> The Highland Retail Funds are affiliates of, or are managed by affiliates of, the Debtor and Dondero. See attached **Exhibits B, C and D** found at <https://www.highlandcapital.com/nexpoint-strategic-opportunities-fund-announces-the-regular-monthly-dividend-2/> (NexPoint Strategic Opportunities Fund); <https://www.highlandfunds.com/global->

S&P Global.<sup>13</sup> In essence, these letters request a ratings downgrade or withdrawal on certain Acis CLO securities which the Highland Retail Funds purport to own. Obviously, it is highly unusual for an investor to request a ratings downgrade for its own investment. Curiously, when Lynn Pinker filed the litigation it threatened in these letters, Lynn Pinker no longer represented the Highland Retail Funds, but now represented the DAF.<sup>14</sup>

13. In its current form, the DAF litigation seeks: (i) damages from US Bank, as indenture trustee for various Acis CLOs, for failing to take what the DAF believes was appropriate action in the Acis Bankruptcy Case and otherwise failing to perform its obligations as indenture trustee; and (ii) damages from Moody's for refusing to downgrade the Acis CLO securities or withdraw the ratings altogether as demanded in Lynn Pinker's letters.<sup>15</sup> A downgrade or ratings withdrawal in the Acis CLO securities or the resignation of US Bank as indenture trustee may precipitate liquidation of the Acis CLOs, which would violate the plan injunction entered as part of Acis's bankruptcy plan since it was clearly procured by the Debtor and its affiliates (and their proposed counsel).<sup>16</sup> None of this tangled web is disclosed in the Lynn Pinker Application, rather it is simply written off in a footnote as "unrelated."

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[allocation-fund/](#) (Highland Global Allocation Fund); <https://www.highlandfunds.com/income-fund/> (Highland Income Fund).

<sup>13</sup> Copies of these letters are attached hereto as **Exhibits E** and **F**. Other letters were later sent to Moody's and S&P, but Acis does not have copies of these later letters.

<sup>14</sup> The Highland Retail Funds are publicly traded closed end funds. Further, one of the Highland Retail Funds, Highland Global Allocation Fund, and its advisors are already being sued by an investor for self-dealing and conflicts of interest with other funds affiliated with the Debtor. See *Lanotte v. Highland Capital Mgt. Fund Adv., L.P., et al.*, Case No. 18-cv-02360, in the United States District Court for the Northern District of Texas. Thus, the Highland Retail Funds may have realized that publicly acknowledging that they inexplicably requested a ratings downgrade or withdrawal for their own investment is not a helpful fact in this or future litigation, and Dondero and Lynn Pinker then simply donned another hat to file the lawsuit.

<sup>15</sup> Amended Complaint attached hereto as **Exhibit G**.

<sup>16</sup> *In re Acis Cap. Mgmt., L.P.*, 2019 Bankr. LEXIS 292 \* 30-32 (Bankr. N.D. Tex., Jan. 31, 2019) (confirmation opinion from Acis Bankruptcy Case); *In re Acis Cap. Mgmt., L.P.*, 2019 Bankr. LEXIS 294 \* 59-62 (Bankr. N.D. Tex., Jan. 31, 2019) (confirmation order and confirmed plan from Acis Bankruptcy Case). Acis reserves all rights in this regard and obviously has been monitoring the situation.

**B. Acis Reserves the Right to Seek Disqualification and Disgorgement of Foley and Lynn Pinker Based on Conflict Of Interest Allegations the Debtor Made and is Appealing in the Acis Bankruptcy Case.**

14. In the Acis Bankruptcy Case, the Debtor has alleged an actual conflict of interest prohibiting employment of special counsel for Acis' Chapter 11 trustee (Winstead) and requiring disgorgement of all fees paid to counsel. The Debtor's objection to counsel's employment and payment has been rejected and overruled multiple times. The issue is currently being appealed in the Northern District of Texas, and this is one of the matters for which Foley and Lynn Pinker are to be engaged.

15. The alleged conflict is based on Winstead's engagement as special counsel by the Chapter 11 trustee for Acis (then a debtor in the Acis Bankruptcy Case) when Winstead represented a creditor of Acis (Josh Terry) and Winstead was retained to be adverse to another creditor of Acis (the Debtor).<sup>17</sup> Per the Debtor's argument, engagement as counsel to be adverse to a creditor while concurrently representing a different creditor creates a *per se* actual conflict of interest under 11 U.S.C. § 327(c).<sup>18</sup> Indisputably, Foley represents CLO Holdco, Ltd., which is one of the Debtor's largest creditors.<sup>19</sup> And in fact, Foley is *itself* one of the Debtor's ten largest creditors, and Lynn Pinker is likewise a significant creditor of the Debtor.<sup>20</sup> Foley and Lynn Pinker will also be engaged as special counsel to litigate with (and be adverse to) Acis and Mr.

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<sup>17</sup> See ¶ 24 and 25 of Objection of Highland Capital Management, L.P. to Supplemental Application Regarding the Scope of Winstead PC's Retention as Special Counsel to the Chapter 11 Trustee filed in the Acis Bankruptcy Case and attached hereto as **Exhibit H**.

<sup>18</sup> Although neither the Foley Application nor the Lynn Pinker Application reference § 327(c), that section is clearly applicable to their retention. As outlined below, the Foley and Lynn Pinker attorneys that will be engaged by the Debtor are employed by creditors of the Debtor and represent at least one known creditor of the Debtor.

<sup>19</sup> See Notice of Appearance filed by Foley in the Acis Bankruptcy Case and attached hereto as **Exhibit I**; see also Foley engagement letter attached as Exhibit B to the Foley Application [Docket No. 69-3].

<sup>20</sup> See Docket No. 1 disclosing that Foley is owed \$1,398,432.44 by the Debtor. Although it is not listed on the top 20 creditor list, according to its Rule 2016 statement Lynn Pinker is owed \$319,419.58 by the Debtor. See Docket No. 70-4.

Terry, also creditors of the Debtor. Thus, Foley and Lynn Pinker now have the exact “conflict” that they alleged disqualified Winstead and required disgorgement from Winstead in the Acis Bankruptcy Case.

16. All rights are reserved to raise this as an issue for disqualification and disgorgement of fees by Foley and Lynn Pinker if the Debtor prevails on its argument on appeal.<sup>21</sup>

*[Remainder of page intentionally left blank]*

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<sup>21</sup> To be clear, Acis believes this argument and related appeal are frivolous, and all rights are reserved to seek sanctions against the Debtor, Foley and Lynn Pinker in the appropriate forum.



WHEREFORE, Acis respectfully (i) requests Foley and Lynn Pinker provide full and complete disclosure of all connections with the Debtor as required under the Bankruptcy Code, Bankruptcy Rules and Local Rules in order to assess their employment Applications; (ii) objects to the employment of Foley and Lynn Pinker to the extent that the Debtor intends to be responsible for fees and expenses incurred by other Foley and Lynn Pinker clients, including the Cayman Defendants and Neutra; (iii) reserves all rights to seek disqualification and disgorgement of fees from Foley and Lynn Pinker based on conflicts of interest that may become apparent as this case moves forward; and (iv) requests such other further relief as is just and proper.

**BLANK ROME LLP**

Dated: November 12, 2019  
Wilmington, Delaware

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*Attorneys for Acis Capital Management GP  
LLC and Acis Capital Management, L.P.*

**Exhibit A**

Press Release re: Scott Eillington



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LEGACYTEXAS™

## The Pettit Law Firm and Lynn Pinker Cox Hurst Secure a \$4.2 Million Fraud and Breach of Fiduciary Duty Judgment Against LegacyTexas Bank

December 28, 2018

The judgment was signed on December 28, 2018 following a 2-week trial earlier this fall before Judge Dale Tillery in the 134th District Court in Dallas County, Texas.

Co-lead counsel Julie Pettit and Michael K. Hurst represent Plaintiff Robert Imel, an oil and gas entrepreneur in a suit against LegacyTexas bank for fraud, breach of fiduciary duty, declaratory judgment, conspiracy, and breach of contract.

LegacyTexas Bank, through its head of energy finance, Chris Parada, represented to Imel that it would release Imel from a personal guaranty related to his oil and gas company's financing agreement if certain oil and gas assets were sold and a loan by LegacyTexas was paid off by a time certain. LegacyTexas then acted as a broker and persuaded Imel to negotiate the sale of the assets to Energy Reserves Group, LLC ("ERG"). Meanwhile, LegacyTexas Bank and ERG secretly negotiated a sale of the note and Imel's personal guaranty to ERG so that ERG could pursue Imel under the guaranty and force Imel to surrender the assets as well as valuable non-collateral oil and gas assets.

The Court found Legacy liable for its tortious conduct for \$3.6 million in actual damages and over \$636,000 in attorneys' fees. The Court also found ERG liable in the amount of \$159,000 in attorneys' fees.

"We are pleased with the decision," said Julie Pettit, co-lead counsel for Imel. "The judgment affirms our position regarding LegacyTexas' misrepresentations and fraudulent conduct toward its own borrower."

"This important judgment underscores that in business, no one has a license to hide the truth, steal and double deal— especially from those who they are entrusted to protect," said Michael K. Hurst, co-lead counsel for Imel.

Along with Pettit and Hurst, the trial team included David Urteago and Jane Cherry of The Pettit Law Firm.

Trial Days: 10

Settlement Negotiations: Nothing meaningful

Expert for Imel: Scott Ellington, Chief Legal Officer, General Counsel and Secretary, Highland Capital Management L.P.

The case is Robert A. Imel v. LegacyTexas Bank and Energy Reserves Group, case number DC-16-01372, in the 134th District Court in Dallas County, Texas. LegacyTexas was represented by John Leininger, Steve Shapiro, and Alexis Reller of Shapiro Biegging Barber Otteson LLP. ERG was represented by Marty Brimmage, Molly Whitman, and Keertan Chauhan of Akin Gump Strauss Hauer & Feld LLP.

A copy of the judgment can be found [here](#).



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## CONTACT US

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Phone: 214.329.0151  
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Name \*

Email \*

Subject

Message

Send



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The principal offices of Pettit Rice PC dba The Pettit Law Firm are located in Dallas, Texas. Attorney responsible for the content of this homepage: Julie Pettit. Pettit Rice PC Phone: 214.329.0151 All Rights Reserved. Member of the Texas State Bar.

**Exhibit B**

NexPoint Strategic Opportunities Fund



# NexPoint Strategic Opportunities Fund Announces the Regular Monthly Dividend



July 3, 2018 | Nexpoint Advisors, Nexpoint Funds, Sites

DALLAS, July 2, 2018 /PRNewswire/ — NexPoint Strategic Opportunities Fund (NYSE: NHF) (“NHF” or the “Fund”) today announced its regular monthly dividend on its common stock of **\$.20** per share. The dividend will be payable on July 31, 2018 to shareholders of record at the close of business July 23, 2018.

The Fund is a closed-end fund managed by NexPoint Advisors, L.P. (the “Manager”), an affiliated adviser of Highland Capital Management, L.P. The Fund invests primarily in below investment grade debt, equity securities and real estate and has the ability to hedge risk. The Manager attempts to deliver consistent returns in excess of the Dow Jones Credit Suisse Hedge Fund and the HFRX Global Hedge Fund indices in a transparent, registered fund format consistent with monthly dividends.

Total Returns as of 06/30/18	1-year	3-year	5-year	10-year	Since Inception (6/29/06)
NexPoint Strategic Opportunities Fund (NAV)	13.63%	4.71%	15.21%	7.07%	5.17%
NexPoint Strategic Opportunities Fund (Market Price)	16.06%	4.60%	14.76%	6.72%	3.80%





**Total Returns as of 03/31/18**
1-year
3-year
5-year
10-year
Since Inception
LOG IN



	1-year	3-year	5-year	10-year	Since Inception
NexPoint Strategic Opportunities Fund (NAV)	17.20%	3.65%	16.21%	7.19%	5.13%
NexPoint Strategic Opportunities Fund (Market Price)	14.95%	3.97%	15.30%	7.16%	3.72%

Total operating expenses as of the most recent fund annual report are 2.21%. Performance data represents past performance, which does not guarantee future results. Current performance may be higher or lower than the figures shown. Investment return and principal value will fluctuate with market conditions, and you may have a gain or loss when you sell your shares. For most recent month-end performance please visit [www.nexpointadvisors.com](http://www.nexpointadvisors.com) or call 866-351-4440.

**Investors should consider the investment objectives, risks, charges and expenses of the NexPoint Strategic Opportunities Fund carefully before investing. This and other information can be found in the Fund's prospectus, which may be obtained by calling 1-866-351-4440 or visiting [www.nexpointadvisors.com](http://www.nexpointadvisors.com). Please read the prospectus carefully before you invest.**

**Interest Rate Risk.** Interest rate risk is the risk that debt securities, and the Fund's net assets, may decline in value because of changes in interest rates. Generally, fixed rate debt securities will decrease in value when interest rates rise and increase in value when interest rates decline.

**Leverage Risk.** The Fund uses leverage through borrowings from notes and a credit facility, and may also use leverage through the issuances of preferred shares. The use of leverage magnifies both the favorable and unfavorable effects of price movements in the investments made by the Fund. Insofar as the Fund employs leverage in its investment operations, the Fund will be subject to substantial risks of loss.



**Closed-End Fund Risk.** The Fund is a closed-end investment company designed primarily for long-term investors and not as a trading vehicle. No assurance can be given that a shareholder will be able to sell his or her shares on the NYSE when he or she chooses to do so, and no



...ch any such sale may be effected.

...st invest at least 25% of the value of its total assets at the time of purchase in securities of issuers conducting their principal business activities in the real estate industry. The Fund may be subject to greater market fluctuations than a fund that does not concentrate its investments in a particular industry. Financial, economic, business, and other developments affecting issuers in the real estate industry will have a greater effect on the Fund, and if securities of the real estate industry fall out of favor, the Fund could underperform, or its NAV may be more volatile than, funds that have greater industry diversification.

**Credit Risk.** Investments rated below investment grade are commonly referred to as high-yield, high risk or "junk debt." They are regarded as predominantly speculative with respect to the issuing company's continuing ability to meet principal and/ or interest payments. Non-payment of scheduled interest and/or principal would result in a reduction of income to the Fund, a reduction in the value of the asset experiencing non-payment and a potential decrease in NAV of the Fund.

**Illiquidity of Investments Risk.** The investments made by the Fund may be illiquid, and consequently the Fund may not be able to sell such investments at prices that reflect the Investment Adviser's assessment of their value or the amount originally paid for such investments by the Fund.

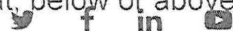
### About NexPoint Strategic Opportunities Fund

NexPoint Strategic Opportunities Fund (formerly known as NexPoint Credit Strategies Fund) is a closed-end fund managed by NexPoint Advisors, L.P. The Fund's investment objectives are to provide both current income and capital appreciation. The Fund is invested primarily in below investment grade debt, equity securities and real estate and has the ability to hedge risk. The Fund's investment adviser attempts to deliver consistent returns in excess of the Dow Jones Credit Suisse Hedge Fund and the HFRX Global Hedge Fund indices in a transparent, registered fund format consistent with monthly dividends. No assurance can be given that the Fund will achieve its investment objectives.

Shares of closed-end investment companies frequently trade at a discount to net asset value. The price of the Fund's shares is determined by a number of factors, several of which are



beyond the control of the Fund. Therefore, the Fund cannot predict whether its shares will trade at, below or above net asset value. Past performance does not guarantee future results.



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**Exhibit C**

Highland Global Allocation Fund

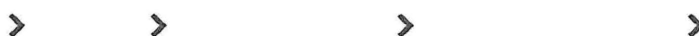


HIGHLAND CAPITAL HIGHLAND FUNDS AFFILIATES FINRA'S BROKERCHECK LOG IN

# HIGHLAND CAPITAL MANAGEMENT

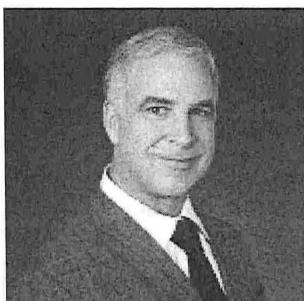


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# Global Allocation Fund

## PORTFOLIO MANAGER



**JAMES DONDERO, CFA**  
Co-Founder,  
President

**BIO >**

## FACTS

### Fund Overview

**Investment Objective**

The Global Allocation Fund, managed by James Dondero, invests primarily in U.S. and foreign equity and debt securities that the portfolio manager considers to be undervalued by the market but have solid growth prospects. Undervalued securities are those securities that are undervalued relative to the market, their peers, their historical valuation or their growth rate.

**Low Correlation to Domestic Equity Markets**

The Fund seeks above-average risk-adjusted total returns by investing in U.S. and foreign equities and fixed income securities, along with select alternative investments in the pursuit of long-term capital growth and future income.

- Rigorous top down allocation process
- Collaborative management structure where highly experienced portfolio managers in six disciplines bring their best ideas to the fund
- Global thematic investment style
- Extensive analytical support
- Relative value discipline
- May complement a portfolio of only U.S. securities as well as one of only stocks or fixed income

**Fund NAV** (As of Nov 07, 2019)

SYMBOL	NAV
HGLB	\$12.03

**Fund AUM** (As of Nov 07, 2019)

	AUM
<b>Total Net Assets</b>	<b>\$271.77</b>
	<b>M</b>

[VIEW FULL PERFORMANCE](#)

Symbol	HGLB
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Inception	01/05/98
Gross Expense Ratio	2.67%
Net Expense Ratio <sup>1</sup>	2.67%

## PERFORMANCE

## LITERATURE

## INSIGHTS

The performance data quoted here represents past performance and is no guarantee of future results. Investment returns and principal value will fluctuate so that an investor's shares when redeemed may be worth more or less than their original cost. Current performance may be lower or higher than performance data quoted.

Note: Effective April 9, 2013, Highland Core America Equity Fund was renamed Highland Global Allocation Fund. At the same time, Highland Capital Management Fund Advisors, L.P. became the sole Adviser to the Fund and the Fund no longer utilizes a sub-adviser. In addition to these changes, the Fund's investment strategies were revised and the Fund will no longer invest at least 80% of its assets in domestic equity securities. For more information, please view the Fund's prospectus which can be found under the "Literature" tab above or by calling 877-665-1287.

Please consider the investment objectives, risks, charges and expenses of Highland Funds carefully before investing. A prospectus with this and other information about Highland's mutual funds can be found on the Literature tab above. You may also obtain a prospectus for our mutual funds by calling 877-665-1287. Please read the prospectus carefully before investing.

1. Performance results reflect the contractual waivers and/or reimbursements of fund expenses by the Advisor. Absent this limitation, performance results would have been lower. The Advisor has contractually agreed to limit the total annual operating expenses through at least January 31, 2019.

\*The maximum sales charge for Class A shares is 5.75%.

**Securities Market Risk.** The value of the securities may go up or down, sometimes rapidly or unpredictably, due to factors affecting particular companies or the securities market generally. A general downturn in the securities market may cause multiple asset classes to decline in value simultaneously, although equity securities generally have greater price volatility than fixed income securities.

**Illiquid and Restricted Securities Risk.** Certain investments made by the Funds are, and others may be, illiquid, and consequently the Funds may not be able to sell such investments at prices that reflect the Investment Adviser's assessment of their value or the amount originally paid for such investments by the Funds. Illiquidity may result from the absence of an established market for the investments as well as legal, contractual or other restrictions on their resale and other factors. Furthermore, the nature of the Funds' investments, especially those in financially distressed companies, may require a long holding period prior to profitability. Restricted securities (i.e., securities acquired in private placement transactions) and illiquid securities may offer higher yields than comparable publicly traded securities. The Funds, however, may not be able to sell these securities when the Investment Adviser considers it desirable to do so or, to the extent they are sold privately, may have to sell them at less than the price of otherwise comparable securities. Restricted securities are subject to limitations on resale which can have an adverse effect on the price obtainable for such securities. Also, if in order to permit resale the securities are registered under the Securities Act at a Fund's expense, the Fund's expenses would be increased. A high percentage of illiquid securities in a Fund creates risk that such a Fund may not be able to redeem its shares without causing significant dilution to remaining shareholders.

**Focused Investment Risk** is the risk that although the Fund is a diversified fund, it may invest in securities of a limited number of issuers in an effort to achieve a potentially greater investment return than a fund that invests in a larger number of issuers. As a result, price movements of a single issuer's securities will have a

greater impact on the Fund's net asset value, causing it to fluctuate more than that of a more widely diversified fund.

**MLP Risk** is the risk of investing in MLP units, which involves some risks that differ from an investment in the equity securities of a company. The Fund currently holds and may in the future hold a significant investment in MLP units. Holders of MLP units have limited control and voting rights on matters affecting the partnership. Holders of units issued by an MLP are exposed to a remote possibility of liability for all of the obligations of that MLP in the event that a court determines that the rights of the holders of MLP units to vote to remove or replace the general partner of that MLP, to approve amendments to that MLP's partnership agreement, or to take other action under the partnership agreement of that MLP would constitute "control" of the business of that MLP, or a court or governmental agency determines that the MLP is conducting business in a state without complying with the partnership statute of that state. Holders of MLP units are also exposed to the risk that they will be required to repay amounts to the MLP that are wrongfully distributed to them. Additionally:

- A sustained reduced demand for crude oil, natural gas and refined petroleum products could adversely affect MLP revenues and cash flows.
- Changes in the regulatory environment could adversely affect the profitability of MLPs.

Investments in MLP units also present special tax risks. See "MLP Tax Risk" in the prospectus.

**Value Investing Risk.** The risk of investing in undervalued stocks that may not realize their perceived value for extended periods of time or may never realize their perceived value. Value stocks may respond differently to market and other developments than other types of stocks.

**Foreign Investment Risk.** The risk that investing in foreign (non-U.S.) securities may result in the Fund experiencing more rapid and extreme changes in value than a fund that invests exclusively in securities of U.S. companies, due to smaller markets, differing reporting, accounting and auditing standards, nationalization, expropriation or confiscatory taxation, currency blockages and political changes of diplomatic developments. The cost of investing in many foreign markets are higher than the U.S. and investments may be less liquid.

**Currency Risk.** The risk that the values of foreign investments may be affected by changes in the currency rates or exchange control regulations. If a foreign currency

weakens against the U.S. dollar, the value of a foreign investment denominated in that currency would also decline in dollar terms.

**Credit Risk.** The risk that the Fund could lose money if the issuer or guarantor of a fixed income security, or the counterparty of a derivatives contract or repurchase agreement, is unable or unwilling (or is perceived to be unable or unwilling) to make a timely payment of principal and/or interest, or to otherwise honor its obligations.

**Interest Rate Risk.** The risk that fixed income securities will decline in value because of changes in interest rates. A fund with a longer average portfolio duration will be more sensitive to changes in interest rates than a fund with a shorter average portfolio duration.

**Derivatives Risk.** The risk that an investment in derivatives may not correlate completely to the performance of underlying securities and may be volatile, and may result in a loss greater than the principal amount invested. Equity derivatives may also be subject to liquidity risk as well as the risk the derivative may be different than what would be produced through the use of another methodology or if it had been priced using market quotations.

**Glossary:** [Click for important terms and definitions](#)

**Source:** State Street Bank and Trust Company

Highland Funds' mutual funds are distributed by Highland Capital Funds Distributor

## FUND DOWNLOADS

[Fund Fact Sheet](#)





Summary Prospectus

Annual Report



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Disclosure Statement



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# Highland Global Allocation Fund Completes Conversion from Open- End Fund to Closed-End Fund

HIGHLAND CAPITAL  
MANAGEMENT

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NEWS PROVIDED BY

**Highland Capital Management Fund Advisors, L.P.** →

Feb 13, 2019, 19:26 ET

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DALLAS, Feb. 13, 2019 /PRNewswire/ -- **Highland Capital Management Fund Advisors, L.P.** (together with its affiliates "Highland") announced today that the **Highland Global Allocation Fund**, a series of Highland Funds II (the "Fund") successfully converted from an open-end fund to a closed-end fund (the "Conversion"). The Conversion was approved by shareholders during the November 8, 2018 special meeting. The Fund expects to list its shares for trading on the New York Stock Exchange (the "NYSE") on or about February 19, 2019.

As a result of the Conversion, the Fund will effect a reverse stock split of Class A, Class C and Class Y shares of the Fund and will combine such shares into a single class of common shares under the CUSIP 43010T104 with an initial net asset value of \$15.00 per share.

Conversion ratios will be available on February 14, 2019.

Shareholders will not receive fractional shares because of the Conversion, but instead will receive a number of shares, rounded down to a whole number. Shareholders will receive a cash-in-lieu check related to the fractional portion of their shares shortly after the Conversion.

The shares will be listed under the ticker "HGLB" and at an initial listing price of \$15.00. Any shareholder seeking to move shares to a brokerage account will need an adviser or broker dealer to transfer the shares through the Depository Trust Company's ("DTC") Profile System. Shares of the Fund are DTC Eligible.

Effective February 14, 2019, American Stock Transfer & Trust Company, LLC ("AST") will serve as the Fund's transfer agent and dividend disbursing agent. All shareholder records have been transferred to AST. Shareholders may obtain more information on the shareholder services to be offered to the converted Fund by calling AST at the Fund's dedicated toll free number 1-800-357-9167.

Additional details regarding the Conversion are available on the Fund's website at [www.highlandfunds.com/global-allocation-fund/](http://www.highlandfunds.com/global-allocation-fund/).

### **About Highland Capital Management Fund Advisors, L.P.**

Highland Capital Management Fund Advisors, L.P. is the retail arm of Highland Capital Management, L.P., a multibillion-dollar global alternative investment manager founded in 1993 by Jim Dondero and Mark Okada. A pioneer in the leveraged loan market, the firm has evolved over 25 years, building on its credit expertise and value-based approach to expand into other asset classes. Today, Highland operates a diverse investment platform, serving both institutional and retail investors worldwide. In addition to high yield credit, Highland's investment capabilities include public equities, real estate, private equity and special situations, structured credit, and sector- and region-specific verticals built round

specialized teams. Highland is headquartered in Dallas, Texas and maintains offices in New York, Buenos Aires, Rio de Janeiro, Singapore, and Seoul. For more information visit [www.highlandfunds.com](http://www.highlandfunds.com).

*Before investing, you should carefully consider the Fund's investment objectives, risks, charges and expenses. For a copy of a prospectus or summary prospectus, which contains this and other information, please visit our website at [www.highlandfunds.com](http://www.highlandfunds.com) or call 1-877-665-1287. Please read the fund prospectus carefully before investing.*

## **CONTACTS**

### **Media Relations:**

Lucy Bannon  
lbannon@highlandcapital.com  
1-972-419-6272

### **Fund Transfer Agent:**

American Stock Transfer & Trust Company, LLC  
1-800-357-9167

SOURCE Highland Capital Management Fund Advisors, L.P

Related Links

<https://www.highlandfunds.com>

**Exhibit D**

Highland Income Fund



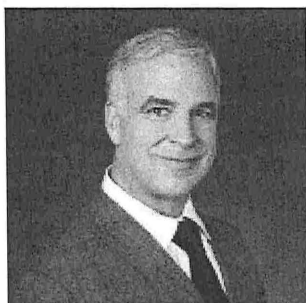
HIGHLAND CAPITAL HIGHLAND FUNDS AFFILIATES FINRA'S BROKERCHECK LOG IN

# HIGHLAND CAPITAL MANAGEMENT



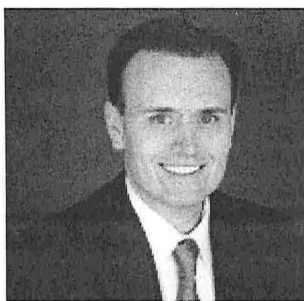
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## Income Fund



**JAMES DONDERO, CFA**  
Co-Founder, President

[Bio »](#)



**JON POGLOTSCH, CFA**  
Head of Credit Research

[Bio »](#)



Oct. 4, 2019 - Update on the Claymore Holdings LLC v. Credit Suisse AG Case Related to the Highland Income Fund

October 4, 2019 – The Texas Supreme Court released an order today on the case against Credit Suisse, AG, Cayman Islands Branch, and Credit Suisse Securities (USA), LLC (“Credit Suisse”), which granted a hearing of the case. The case was filed in 2013 by Claymore Holdings LLC, the Highland and NexPoint affiliate (together “Highland”) that pursued the collective claims on behalf of the Highland Income Fund (formerly, Highland Floating Rate Opportunities Fund) (NYSE:HFRO) (“HFRO”) and the NexPoint Strategic Opportunities Fund (NYSE:NHF) (“NHF”) (together the “Funds”).

Per the order, the Texas Supreme Court will review the case at a hearing scheduled for January 8, 2020. While this prolongs the legal process, it does not affect Highland’s conviction in our claims against Credit Suisse or our commitment to recovering damages for investors.

The total aggregate award stands at \$393.2 million today; it is comprised of the \$287.5 million judgment initially awarded by the trial court and now twice confirmed on appeal, plus \$105.7 million in accrued interest. The award will continue to accrue interest in the event that the judgment becomes final.

Any final judgment amount would be reduced by attorney’s fees and other litigation-related expenses. The net proceeds would then be allocated to the Funds based on respective damages (approximately 82% to HFRO and 18% to NHF).

We do not know the exact timing of the Texas Supreme Court’s decision following the January hearing; however, the decision should be issued by the end of the Court’s term in June 2020 at the latest.

We knew this would be a long process but have been committed to recovering damages for our investors since day one.



## FACTS

Effective May 20, 2019, the Highland Floating Rate Opportunities Fund is named the Highland Income Fund. For more information, please read the press release from March 20, 2019.

### Fund Overview

#### Investment Objective

The investment objective of the closed-end Highland Floating Rate Opportunities Fund is to provide a high level of current income, consistent with the preservation of capital.

#### Attractive Alternatives for Income-Oriented Investors

- High income potential in all markets
- Yields that reset when short-term interest rates move, which may mitigate price declines in a rising short-term interest rate environment
- Low correlation to other asset classes
- Access to one of the largest and most experienced senior loan managers
- Most fixed rate securities experience price declines when interest rates rise. Floating Rate Senior loans are different.

They are short-duration, floating-rate securities. So, as interest rates rise, yields on bank loans increase, while their short duration helps keep prices relatively stable.

#### Fund NAV (As of Nov 07, 2019)

SYMBOL	NAV
HFRO	\$13.65

#### Fund AUM (As of Nov 07, 2019)

	AUM	^
Total Net Assets	\$982.33	
	M	



Fund AUM (As of Nov 07, 2019)

AUM

VIEW FULL PERFORMANCE

Symbol	HFRO
Inception	01/13/00
Gross Expense Ratio	1.26%
Net Expense Ratio <sup>1</sup>	1.26%

PERFORMANCE

LITERATURE



THOMSON REUTERS  
LIPPER FUND AWARD  
UNITED STATES

Lipper Award Winner - Loan Participation Funds

- 2014 Best Fund Over 3 Years
- 2015 Best Fund Over 3 Years
- 2015 Best Fund Over 5 Years
- 2016 Best Fund Over 3 Years



The performance data quoted here represents past performance and is no guarantee of future results. Investment returns and principal value will fluctuate so that an investor's shares when redeemed may be worth more or less than their original cost. Current performance may be lower or higher than performance data quoted.

Effective shortly after close of business on November 3, 2017, the Highland Floating Rate Fund converted from an open-end fund to a closed-end fund, and began trading on the NYSE under the symbol HFRO on November 6, 2017. The performance data presented above reflects that of Class Z shares of the Fund when it was an open-end fund, HFRZX. The closed-end Fund pursues the same investment objective and strategy as it did before its conversion.

<sup>1</sup> The expense ratio shown is reported in the Fund's Semi-annual Report dated December 31, 2017.

Closed-end funds, unlike open-end funds, are not continuously offered. There is a one-time public offering and once issued, shares of closed-end funds are sold in the open market through a stock exchange and frequently trade at prices lower than their net asset value, which may increase an investor's risk of loss. Net Asset Value (NAV) is total assets less total liabilities, which includes preferred shares, divided by the number of common shares outstanding. At the time of sale, your shares may have a market price that is above or below NAV, and may be worth more or less than your original investment. For additional information, please contact your investment adviser or visit our website [www.highlandfunds.com](http://www.highlandfunds.com).

Please consider the investment objectives, risks, charges and expenses of Highland Floating Rate Opportunities Fund carefully before investing. A prospectus with this and other information about Highland Floating Rate Opportunities Fund can be found on the Literature tab above.

**Closed-End Fund Risk.** The Fund is a closed-end investment company designed primarily for long-term investors and not as a trading vehicle. No assurance can be given that a shareholder will be able to sell his or her shares on the NYSE when he or she chooses to do so, and no assurance can be given as to the price at which any such sale may be effected.



**Non-Payment Risk.** Senior Loans, like other corporate debt obligations, are subject to the risk of non-payment of scheduled interest and/or principal. Non-payment

would result in a reduction of income to the Fund, a reduction in the value of the Senior Loan experiencing non-payment and a potential decrease in the NAV of the Fund.

**Credit Risk.** The Fund may invest all or substantially all of its assets in Senior Loans or other securities that are rated below investment grade and unrated Senior Loans deemed by Highland to be of comparable quality. Securities rated below investment grade are commonly referred to as “high yield securities” or “junk securities.” They are regarded as predominantly speculative with respect to the issuing company’s continuing ability to meet principal and interest payments. Non-payment of scheduled interest and/or principal would result in a reduction of income to the Fund, a reduction in the value of the Senior Loan experiencing non-payment and a potential decrease in the NAV of the Fund. Investments in high yield Senior Loans and other securities may result in greater NAV fluctuation than if the Fund did not make such investments.

**Senior Loans Risk.** The risks associated with senior loans are similar to the risks of below investment grade securities in that they are considered speculative. In addition, as with any debt instrument, senior loans are also generally subject to the risk of price declines and to increases in prevailing interest rates. Senior loans are also subject to the risk that, as interest rates rise, the cost of borrowing increases, which may also increase the risk and rate of default. In addition, the interest rates of floating rate loans typically only adjust to changes in short-term interest rates; long term interest rates can vary dramatically from short term interest rates. Therefore, senior loans may not mitigate price declines in a rising long-term interest rate environment.

**Illiquidity of Investment Risk.** The investments made by the Fund may be illiquid, and consequently the Fund may not be able to sell such investments at prices that reflect the Investment Adviser's assessment of their value or the amount originally paid for such investments by the Fund.

**Ongoing Monitoring Risk.** On behalf of the several Lenders, the Agent generally will be required to administer and manage the Senior Loans and, with respect to collateralized Senior Loans, to service or monitor the collateral. Financial difficulties of Agents can pose a risk to the Fund.

**Glossary:** [Click for important terms and definitions](#)



Source: State Street Bank and Trust Company

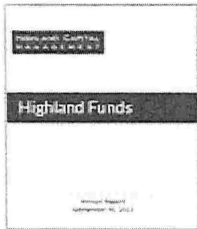
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Fund Fact Sheet




Summary Prospectus

Annual Report



Fund Commentary



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**Exhibit E**

Letter to Moody's re U.S. Bank

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August 6, 2019

**VIA EMAIL:** [Shana.Sethi@moodys.com](mailto:Shana.Sethi@moodys.com)

Shana Sethi  
Vice President- Senior Credit Officer  
Moody's Investors Service

**Re: Mismanagement of the Acis CLOs, in violation of the rights of Secured Note Holders  
NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and  
Highland Income Fund.**

Dear Ms. Sethi:

My Firm represents NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and Highland Income Fund (collectively, the "Highland Retail Funds"), in connection with the enforcement and protection of their rights as Holders of Secured Notes under certain Acis Indentures dated as of February 25, 2014, June 5, 2014, November 18, 2014, and April 16, 2015 (collectively, the "Acis Indentures").<sup>1</sup>

For your reference, enclosed to this correspondence is a copy of the demand letter served by the Highland Retail Funds on August 6, 2019 to U.S. Bank National Association, the Trustee of the Acis Indentures. The demand letter puts U.S. Bank on notice of its material violations of the terms of the Acis Indentures, by among others, mismanaging and allowing the impermissible gaming of the Acis Indentures by the portfolio manager thereof, and failing to perform required tasks with due care. The Highland Retail Funds are prepared to take all actions necessary to protect their rights from further deterioration.

Representatives of the Highland Retail Funds are available to meet with Moody's to discuss whether U.S. Bank's wrongful conduct has caused a default, such that the ratings on some or all rated tranches should be reconsidered or withdrawn.

---

<sup>1</sup> The Acis Indentures collectively include: that certain Indenture dated as of February 25, 2014 issued by ACIS CLO-2014-3 Ltd. as Issuer, ACIS CLO 2014-3 LLC as Co-Issuer, and US Bank as Indenture Trustee; that certain Indenture dated as of June 5, 2014 issued by ACIS CLO-2014-4 Ltd. as Issuer, ACIS CLO 2014-4 LLC as Co-Issuer, and US Bank as Indenture Trustee; that certain Indenture dated as of November 18, 2014 issued by ACIS CLO-2014-5 Ltd. as Issuer, ACIS CLO 2014-5 LLC as Co-Issuer, and US Bank as Indenture Trustee, and; that certain Indenture dated as of April 16, 2015 issued by ACIS CLO-2015-6 Ltd. as Issuer, ACIS CLO 2015-6 LLC as Co-Issuer, and US Bank as Indenture Trustee.

Ms. Sethi  
Moody's Investors Service  
August 6, 2019  
Page 2

We look forward to engaging with you on this serious matter.

Yours very truly,

A handwritten signature in blue ink that reads "Michael K. Hurst". The signature is written in a cursive style with a long horizontal stroke at the end.

Michael K. Hurst

MKH/ceb

Enclosure

cc: David Coale (*of the Firm*)  
Chisara Ezie-Boncoeur (*of the Firm*)



MICHAEL K. HURST  
Partner  
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Texas Board of Legal Specialization

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August 6, 2019

**VIA EMAIL: [dnovakov@fbtlaw.com](mailto:dnovakov@fbtlaw.com)**

Daniel P. Novakov  
FROST BROWN TODD LLC  
100 Crescent Court, Suite 350  
Dallas, Texas 75201  
Tel: (214) 580-5840  
Fax: (214) 545-3473

**Re: US Bank’s mismanagement of the Acis Indentures, in violation of the rights of Secured Note Holders NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and Highland Income Fund.**

Dear Mr. Novakov:

My Firm represents NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and Highland Income Fund (collectively, the “Highland Retail Funds”), in connection with the enforcement and protection of their rights as Holders of Secured Notes under certain Acis CLOs dated as of February 25, 2014, June 5, 2014, November 18, 2014, and April 16, 2015 (collectively, the “Acis Indentures”).<sup>1</sup>

This letter provides formal notice that your client, U.S. Bank National Association (“US Bank” or “Indenture Trustee”), has: (1) materially violated the terms of the Acis Indentures, and (2) failed to perform all basic, non-discretionary, ministerial tasks under the Acis Indentures with due care. US Bank’s wrongful conduct is actionable under New York law, and has caused the Highland Retail Funds to sustain significant damages, discussed below.

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<sup>1</sup> The Acis Indentures are abbreviated herein as follows: “Indenture 3” means that certain Indenture dated as of February 25, 2014 issued by ACIS CLO-2014-3 Ltd. as Issuer, ACIS CLO 2014-3 LLC as Co-Issuer, and US Bank as Indenture Trustee; “Indenture 4” means that certain Indenture dated as of June 5, 2014 issued by ACIS CLO-2014-4 Ltd. as Issuer, ACIS CLO 2014-4 LLC as Co-Issuer, and US Bank as Indenture Trustee; “Indenture 5” means that certain Indenture dated as of November 18, 2014 issued by ACIS CLO-2014-5 Ltd. as Issuer, ACIS CLO 2014-5 LLC as Co-Issuer, and US Bank as Indenture Trustee, and; “Indenture 6” means that certain Indenture dated as of April 16, 2015 issued by ACIS CLO-2015-6 Ltd. as Issuer, ACIS CLO 2015-6 LLC as Co-Issuer, and US Bank as Indenture Trustee. Together, such CLOs are referred to “Acis CLOs” and each, an “Acis CLO” or “CLO” herein.

US Bank  
 August 6, 2019  
 Page 2

**I. US Bank’s allowance of continued failure of the collateral quality test, as well as rampant portfolio mismanagement, violates the Acis Indentures.**

Every purchase or sale made under the Acis Indentures must satisfy the collateral quality test imposed by each Acis Indenture.<sup>2</sup> As such, US Bank is required to ensure that every purchase or sale made under the Acis Indentures maintains or improves any failing collateral quality test. US Bank failed to satisfy this requirement by, among others, allowing transactions to be effectuated that do not maintain or improve the failing Weighted Average Life Test (“WAL”) for trades made under the Acis Indentures.

*First*, US Bank violated its obligation to seek best execution on trades reasonably available to the Acis CLOs. By allowing multiple same day trades, US Bank has disregarded the obligation in the Acis Indentures requiring maintenance or improvement of the collateral quality test in each respective Acis CLO for each individual trade made. US Bank has allowed a circumvention of these collateral quality requirements by allowing the consolidation of the weighted average maturity date of such same-day trades, in so doing, creating the false appearance of a maintained or improved WAL test. But, absent consolidation, the same-day purchases allowed by US Bank cannot maintain or improve the WAL test on an individual basis. US Bank cannot perform its duties by allowing such Acis CLOs to act as a market taker, nor by engaging in a practice of buying long collateral that is improper under the Acis Indentures. Indeed, the value destruction of this forced “bunched trading” is clear when prices at trade date vs. prices on the day before trade date are compared. For example:

CLO	Trade	Issuer	Commitment	Date	Trade Px	Day Before	Close Mid Price	2 Day Before	Close Mid Price	Change	P&L
CLO 4	Purchase	Diebold Inc - Diebold DD T/L A	2,430,000.00	3/15/2019	98.00	3/14/2019	94.50	3/13/2019	94.5	-3.50	(85,050.00)
CLO 6	Purchase	Diebold Inc - Diebold DD T/L A	1,578,541.42	3/26/2019	99.00	3/25/2019	95.50	3/22/2019	95.5	-3.50	(55,248.95)
CLO 4	Purchase	Diebold Nixdorf Incorporated - Diebold T/L B New Dollar	4,985,751.99	5/23/2019	96.75	5/22/2019	95.75	5/21/2019	95.75	-1.00	(49,857.52)
CLO 5	Purchase	Diebold Nixdorf Incorporated - Diebold T/L B New Dollar	4,985,751.99	5/23/2019	96.75	5/22/2019	95.75	5/21/2019	95.75	-1.00	(49,857.52)
CLO 4	Purchase	Air Medical Group Holdings Inc - Air Medical T/L B	2,200,000.00	1/8/2019	96.50	1/7/2019	94.45	1/4/2019	93.839	-2.05	(45,177.00)
CLO 3	Purchase	MA FinanceCo LLC - MA FinanceCo T/L B2	2,000,000.00	1/7/2019	98.50	1/4/2019	96.63	1/3/2019	96	-1.88	(37,500.00)
CLO 6	Purchase	Team Health Holdings Inc - Team Health Holdings T/L	1,279,236.64	3/26/2019	88.50	3/25/2019	86.13	3/22/2019	86.9375	-2.38	(30,381.87)

<sup>2</sup> See e.g., Indenture 3 at p. 16 (see definition of “Collateral Quality Test”), p. 37 (see definition of “Market Value”), and §§ 1.2, 7.17, and 12; Indenture 4 at p. 15 (see definition of “Collateral Quality Test”), p. 37 (see definition of “Market Value”), and §§ 1.2, 7.18, and 12; Indenture 5 at p. 14 (see definition of “Collateral Quality Test”), p. 36 (see definition of “Market Value”), and §§ 1.2, 7.18, and 12; Indenture 5 at p. 14 (see definition of “Collateral Quality Test”), p. 36 (see definition of “Market Value”), and §§ 1.2, 7.18, and 12; Indenture 6 at p. 14 (see definition of “Collateral Quality Test”), p. 35 (see definition of “Market Value”), and §§ 1.2, 7.18, and 12.

US Bank  
 August 6, 2019  
 Page 3

What's more, this artificial trading philosophy, disguised as "responsible management", has resulted in myriad poorly conceived and timed buys, which positions have plummeted, destroying value for the investors. For example:

Issuer	Buy/Sell	Row Labels	Sum of 8/2/19 P&L	Cost	8/2/19 Mark
Lumileds Holding	Buy	LX171142	(3,603,604.17)	99.00	61.60
Libbey Glass	Buy	LX136370	(2,773,860.00)	99.29	77.40
KCA Deutag UK Finance PL	Buy	LX172320	(1,172,068.16)	84.89	69.58
Doncasters	Buy	LX128948	(1,532,695.82)	95.51	75.00
Envision Healthcare	Buy	LX175867	(1,172,343.58)	94.14	85.30

Tellingly, the transaction history authorized by US Bank makes clear that it appreciates the import of trading on specific days. In connection with Indenture 5, US Bank allowed the sale of varying amounts of the same term loan, Doncasters, over three different days: June 28, 2019, July 3, 2019, and July 8, 2019. US Bank allowed this because these selected dates positively impacted the collateral quality of the term loan sold. However, US Bank cannot ensure that the Acis CLOs enjoy best execution on purchases under the Acis Indentures if it turns a blind eye to the date on which purchases are made.

An analysis of the individual trades made under US Bank's approval further underscores the Trustee's failure to adhere to the respective indenture's collateral quality requirements. On July 12, 2019, in connection with Indenture 5, US Bank authorized the purchase of a term loan in Capital Automotive 1st Lien with a maturity date of March 25, 2024. But, to maintain or improve the WAL test for Indenture 5, US Bank should have required the CLOs to purchase assets with a maturity date of April 4, 2023 or earlier. US Bank facilitated similar misconduct across the Acis Indentures.

*Second*, the Weighted Average Rating Factor ("WARF") of each of the Acis CLO's portfolios has steadily increased this year, further demonstrating US Bank's facilitating the mismanagement of the Acis Indentures' collateral. On January 31, 2019, in a consolidated adversary proceeding involving the Acis CLOs, the United States Bankruptcy Court for the Northern District of Texas entered a Third Amended Joint Plan for Acis Capital Management, L.P. and Acis Capital Management GP, LLC ("Plan D"). Plan D approved Brigade Capital Management, LP ("Brigade") to perform certain services related to the Acis Indentures, previously provided by Highland Capital Management.<sup>3</sup> Since the entry of Plan D, and Brigade's "management" of the Acis Indentures, US Bank allowed the collective WARF of the Acis CLO's portfolios to change from one of the cleanest pools in the market, to one of the dirtiest pools in

<sup>3</sup> See Case No. 18-30264-SGJ-11 and Case No. 18-30265-SGJ-1, Jointly Administered Under Case No. 18-30264-SGJ-11), referred to herein as the Adversary Proceeding.

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the market in a matter of months. As of August 2019, since Brigade's involvement with the Acis Indentures, the WARF of each Acis CLO has dramatically increased, as follows:

CLO 3: 2522 → 2678  
 CLO 4: 2680 → 2941  
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*Third*, US Bank failed to protect the cash flow levels of its equity holders. Since the entry of Brigade, equity holders under Indentures 3-5 have received a total of **zero** cash flows. This damage has metastasized into the secured tranches of the CLOs and created direct harm to the Highland Retail Funds. The value decline of the equity positions is obvious:

ACIS Equity Positions	CUSIP	1/31/2019	2/28/2019	3/31/2019	4/30/2019	5/31/2019	6/30/2019
ACIS 2014-3A 0.0000% - 2/2026 - SUB - 00100GAE3 @0.0000 02/01/2026	00100GAE3	14.5000	16.5000	17.3333	15.8333	13.0000	11.8333
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*Fourth*, US Bank has allowed the Acis CLOs to incur exorbitant expenses under its watch, at levels which exceed market standards.

In sum, US Bank's facilitation and approval of extensive portfolio mismanagement, and failure to require trades in accordance with industry standards and contrary to the best interests of its investors, violates the express terms of the Acis Indentures. US Bank's wrongful conduct has diluted the value of the Highland Retail Funds' Secured Notes and deteriorated the credit profile of the Acis CLOs. The Highland Retail Funds cannot allow US Bank to shirk its contractual obligations under the Acis Indentures. As Holders of Secured Notes, the Highland Retail Funds negotiated for superior rights under the Acis Indentures with the expectation that at a minimum, their collateral would remain protected in accordance with industry standards. *Indeed, US Bank must explain how this blatant gaming and chicanery in the name of artificially maximizing management fees is not a default under the Acis Indentures or a clear, actionable conflict of interest.*

## II. US Bank Failed to reserve rights, or otherwise protect the Highland Retail Funds' rights affected by Plan D.

The Acis Indentures do not permit US Bank to "authorize or consent to or vote for or accept or adopt on behalf of any Secured Noteholders, **any plan** of reorganization, arrangement, adjustment or composition **affecting the Secured Notes or any Holder thereof**, or to authorize the Trustee to vote in respect of the claim of any Secured Noteholders, as applicable, in any such

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Proceeding except, as aforesaid, to vote for the election of a trustee in bankruptcy or similar person.” (emphasis added).<sup>4</sup> Despite these express terms, US Bank tacitly accepted or adopted the entry of Plan D, which contains provisions that directly affect the Secured Notes that the Highland Retail Funds hold. Among others, Plan D imposes an injunction that adversely affects the Highland Retail Funds’ rights by prohibiting beneficial trading activity that would serve to protect Noteholder interests. In addition to other restrictions, Plan D impedes the ability of Noteholders under the Acis Indentures to make optional redemptions, which restriction has decimated the value of such investments across the capital stack of each Acis CLO.<sup>5</sup>

US Bank did not reserve any Noteholders’ rights, or otherwise object to the entry of Plan D. US Bank’s election to take no action regarding the entry of Plan D amplified the exposure, and overall risk that the Highland Retail Funds face during the pendency of the Plan D injunction. In fact, the Bankruptcy Court set a deadline for all parties, including US Bank, to submit any objections to the final approval of the Disclosure Statement and/or confirmation of Plan D.<sup>6</sup> As recognized by the Bankruptcy Court, US Bank failed to file objections to Plan D.<sup>7</sup> In fact, the Bankruptcy Court explicitly identified US Bank’s failure to oppose the Plan in its opinion, making clear that notably, “[t]he indenture trustee has retained and appeared through its own separate counsel during the Chapter 11 Bankruptcy Cases and is not currently objecting to the Plan.”<sup>8</sup> What’s more, US Bank previously filed prior reservations of rights and/or objections in the Adversary Proceeding.<sup>9</sup> In relation to Plan B and Plan C (previously implemented as part of the Chapter 11 Trustee’s First Amended Joint Plan), which each proposed re-writing the Acis Indentures to protect Acis’ management fee stream for several years, US Bank acknowledged that the Plans “adversely affect[ed] the rights of Noteholders.”<sup>10</sup> The same holds true for Plan D. US Bank is not excused from failing to protect the Highland Retail Funds’ rights affected by Plan D, and the Adversary Proceeding.

---

<sup>4</sup> See e.g., Indenture 3 at § 5.3; Indenture 4 at § 5.3; Indenture 5 at § 5.3; Indenture 6 at § 5.3.

<sup>5</sup> See e.g., the Adversary Proceeding at Dkt. No. 830 p. 75, Findings of Fact, Conclusions of Law, and Order Granting Final Approval of Disclosure Statement and Confirming the Third Amended Joint Plan for Acis Capital Management, L.P. and Acis Capital Management GP, LLC, as Modified Findings of Fact and Conclusions of Law.

<sup>6</sup> See e.g., the Adversary Proceeding at Dkt. No. 829 ¶ W (“The following objections to final approval of the Disclosure Statement and/or confirmation of the Plan (the “Objections”) were timely filed in accordance with the Solicitation Order [identifying three Objections filed, none of which filed by US Bank].) (emphasis original).

<sup>7</sup> See *id.*

<sup>8</sup> See e.g., the Adversary Proceeding at Dkt. No. 827 p. 5.

<sup>9</sup> See e.g., the Adversary Proceeding at Dkt. Nos. 499-505.

<sup>10</sup> See e.g., the Adversary Proceeding at Dkt. No. 505 ¶ 3.

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**III. The Highland Retail Funds are not limited to filing contract claims against US Bank.**

In addition to contract claims based on US Bank's violations of the Acis Indentures, US Bank's failure to perform all basic, non-discretionary, ministerial tasks under the Acis Indentures with due care subjects it to additional tort liability. *See e.g., Royal Park Investments SA/NV v. HSBC Bank USA, Nat. Ass'n*, 109 F. Supp. 3d 587, 597 (S.D.N.Y. 2015) ("Prior to an Event of Default, an indenture trustee's duty is governed solely by the terms of the indenture, with two exceptions: **a trustee must still** '(1) avoid conflicts of interest, and (2) **perform all basic, non-discretionary, ministerial tasks with due care.**'") (emphasis added). And, consistent with the Trust Indenture Act, US Bank is not relieved "from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct..."<sup>11</sup> Succinctly, US Bank appears unwilling or unable to fulfill its duties to the Noteholders. The four corners of each Indenture create a framework of Noteholder protections, and such investors deserve an Indenture Trustee that will enforce the spirit and the letter of the Indentures. If US Bank cannot do its duty, it should resign as Indenture Trustee.

The Highland Retail Funds are prepared to take all action necessary to preserve their rights, and remedy their losses sustained to date due to US Bank's misconduct. The Highland Retail Funds demand that US Bank provide written assurances by **August 15, 2019** detailing: (1) the specific measures that US Bank will take, effective immediately, to remediate the wrongful conduct described herein, and (2) US Bank's offer to resolve this matter and make the Highland Retail Funds whole.

You are advised to review this letter carefully. Nothing in this letter shall constitute a waiver of any of the Highland Retail Funds' rights and/or remedies at law and at equity, all of which they expressly reserve should this matter proceed to litigation.

Your immediate attention to this matter is appreciated.

Sincerely,



Michael K. Hurst

MKH/sb

cc: David Coale (*of the Firm*)  
Chisara Ezie-Boncoeur (*of the Firm*)

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<sup>11</sup> Compare Indenture 3 at § 6.1(c), Indenture 4 at § 6.1(c), Indenture 5 at § 6.1(c), and Indenture 6 at § 6.1(c) with 15 U.S.C. § 7700o (d).

**Exhibit F**

Letter to S&P Global re U.S. Bank

MICHAEL K. HURST  
Partner  
Board Certified – Civil Trial Law  
Texas Board of Legal Specialization

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August 6, 2019

**VIA EMAIL: [lauren.fastiggi@spglobal.com](mailto:lauren.fastiggi@spglobal.com)**

Lauren Fastiggi  
Director and Lead Analyst  
S&P Global

**Re: Mismanagement of the Acis CLOs, in violation of the rights of Secured Note Holders  
NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and  
Highland Income Fund.**

Dear Ms. Fastiggi:

My Firm represents NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and Highland Income Fund (collectively, the “Highland Retail Funds”), in connection with the enforcement and protection of their rights as Holders of Secured Notes under certain Acis Indentures dated as of February 25, 2014, June 5, 2014, November 18, 2014, and April 16, 2015 (collectively, the “Acis Indentures”).<sup>1</sup>

For your reference, enclosed to this correspondence is a copy of the demand letter served by the Highland Retail Funds on August 6, 2019 to U.S. Bank National Association, the Trustee of the Acis Indentures. The demand letter puts U.S. Bank on notice of its material violations of the terms of the Acis Indentures, by among others, mismanaging and allowing the impermissible gaming of the Acis Indentures by the portfolio manager thereof, and failing to perform required tasks with due care. The Highland Retail Funds are prepared to take all actions necessary to protect their rights from further deterioration.

Representatives of the Highland Retail Funds are available to meet with S&P Global to discuss whether U.S. Bank’s wrongful conduct has caused a default, such that the ratings on some or all rated tranches should be reconsidered or withdrawn.

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<sup>1</sup> The Acis Indentures collectively include: that certain Indenture dated as of February 25, 2014 issued by ACIS CLO-2014-3 Ltd. as Issuer, ACIS CLO 2014-3 LLC as Co-Issuer, and US Bank as Indenture Trustee; that certain Indenture dated as of June 5, 2014 issued by ACIS CLO-2014-4 Ltd. as Issuer, ACIS CLO 2014-4 LLC as Co-Issuer, and US Bank as Indenture Trustee; that certain Indenture dated as of November 18, 2014 issued by ACIS CLO-2014-5 Ltd. as Issuer, ACIS CLO 2014-5 LLC as Co-Issuer, and US Bank as Indenture Trustee, and; that certain Indenture dated as of April 16, 2015 issued by ACIS CLO-2015-6 Ltd. as Issuer, ACIS CLO 2015-6 LLC as Co-Issuer, and US Bank as Indenture Trustee.



Ms. Fastiggi  
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We look forward to engaging with you on this serious matter.

Yours very truly,

A handwritten signature in blue ink that reads "Michael K. Hurst". The signature is written in a cursive style with a long horizontal flourish at the end.

Michael K. Hurst

MKH/ceb

Enclosure

cc: David Coale (*of the Firm*)  
Chisara Ezie-Boncoeur (*of the Firm*)

MICHAEL K. HURST  
Partner  
Board Certified – Civil Trial Law  
Texas Board of Legal Specialization

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Suite 2700  
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[lynnllp.com](http://lynnllp.com)

August 6, 2019

**VIA EMAIL: [dnovakov@fbtlaw.com](mailto:dnovakov@fbtlaw.com)**

Daniel P. Novakov  
FROST BROWN TODD LLC  
100 Crescent Court, Suite 350  
Dallas, Texas 75201  
Tel: (214) 580-5840  
Fax: (214) 545-3473

**Re: US Bank’s mismanagement of the Acis Indentures, in violation of the rights of Secured Note Holders NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and Highland Income Fund.**

Dear Mr. Novakov:

My Firm represents NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and Highland Income Fund (collectively, the “Highland Retail Funds”), in connection with the enforcement and protection of their rights as Holders of Secured Notes under certain Acis CLOs dated as of February 25, 2014, June 5, 2014, November 18, 2014, and April 16, 2015 (collectively, the “Acis Indentures”).<sup>1</sup>

This letter provides formal notice that your client, U.S. Bank National Association (“US Bank” or “Indenture Trustee”), has: (1) materially violated the terms of the Acis Indentures, and (2) failed to perform all basic, non-discretionary, ministerial tasks under the Acis Indentures with due care. US Bank’s wrongful conduct is actionable under New York law, and has caused the Highland Retail Funds to sustain significant damages, discussed below.

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<sup>1</sup> The Acis Indentures are abbreviated herein as follows: “Indenture 3” means that certain Indenture dated as of February 25, 2014 issued by ACIS CLO-2014-3 Ltd. as Issuer, ACIS CLO 2014-3 LLC as Co-Issuer, and US Bank as Indenture Trustee; “Indenture 4” means that certain Indenture dated as of June 5, 2014 issued by ACIS CLO-2014-4 Ltd. as Issuer, ACIS CLO 2014-4 LLC as Co-Issuer, and US Bank as Indenture Trustee; “Indenture 5” means that certain Indenture dated as of November 18, 2014 issued by ACIS CLO-2014-5 Ltd. as Issuer, ACIS CLO 2014-5 LLC as Co-Issuer, and US Bank as Indenture Trustee, and; “Indenture 6” means that certain Indenture dated as of April 16, 2015 issued by ACIS CLO-2015-6 Ltd. as Issuer, ACIS CLO 2015-6 LLC as Co-Issuer, and US Bank as Indenture Trustee. Together, such CLOs are referred to “Acis CLOs” and each, an “Acis CLO” or “CLO” herein.

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**I. US Bank’s allowance of continued failure of the collateral quality test, as well as rampant portfolio mismanagement, violates the Acis Indentures.**

Every purchase or sale made under the Acis Indentures must satisfy the collateral quality test imposed by each Acis Indenture.<sup>2</sup> As such, US Bank is required to ensure that every purchase or sale made under the Acis Indentures maintains or improves any failing collateral quality test. US Bank failed to satisfy this requirement by, among others, allowing transactions to be effectuated that do not maintain or improve the failing Weighted Average Life Test (“WAL”) for trades made under the Acis Indentures.

*First*, US Bank violated its obligation to seek best execution on trades reasonably available to the Acis CLOs. By allowing multiple same day trades, US Bank has disregarded the obligation in the Acis Indentures requiring maintenance or improvement of the collateral quality test in each respective Acis CLO for each individual trade made. US Bank has allowed a circumvention of these collateral quality requirements by allowing the consolidation of the weighted average maturity date of such same-day trades, in so doing, creating the false appearance of a maintained or improved WAL test. But, absent consolidation, the same-day purchases allowed by US Bank cannot maintain or improve the WAL test on an individual basis. US Bank cannot perform its duties by allowing such Acis CLOs to act as a market taker, nor by engaging in a practice of buying long collateral that is improper under the Acis Indentures. Indeed, the value destruction of this forced “bunched trading” is clear when prices at trade date vs. prices on the day before trade date are compared. For example:

CLO	Trade	Issuer	Commitment	Date	Trade Px	Day Before	Close Mid Price	2 Day Before	Close Mid Price	Change	P&L
CLO 4	Purchase	Diebold Inc - Diebold DD T/L A	2,430,000.00	3/15/2019	98.00	3/14/2019	94.50	3/13/2019	94.5	-3.50	(85,050.00)
CLO 6	Purchase	Diebold Inc - Diebold DD T/L A	1,578,541.42	3/26/2019	99.00	3/25/2019	95.50	3/22/2019	95.5	-3.50	(55,248.95)
CLO 4	Purchase	Diebold Nixdorf Incorporated - Diebold T/L B New Dollar	4,985,751.99	5/23/2019	96.75	5/22/2019	95.75	5/21/2019	95.75	-1.00	(49,857.52)
CLO 5	Purchase	Diebold Nixdorf Incorporated - Diebold T/L B New Dollar	4,985,751.99	5/23/2019	96.75	5/22/2019	95.75	5/21/2019	95.75	-1.00	(49,857.52)
CLO 4	Purchase	Air Medical Group Holdings Inc - Air Medical T/L B	2,200,000.00	1/8/2019	96.50	1/7/2019	94.45	1/4/2019	93.839	-2.05	(45,177.00)
CLO 3	Purchase	MA FinanceCo LLC - MA FinanceCo T/L B2	2,000,000.00	1/7/2019	98.50	1/4/2019	96.63	1/3/2019	96	-1.88	(37,500.00)
CLO 6	Purchase	Team Health Holdings Inc - Team Health Holdings T/L	1,279,236.64	3/26/2019	88.50	3/25/2019	86.13	3/22/2019	86.9375	-2.38	(30,381.87)

<sup>2</sup> See e.g., Indenture 3 at p. 16 (see definition of “Collateral Quality Test”), p. 37 (see definition of “Market Value”), and §§ 1.2, 7.17, and 12; Indenture 4 at p. 15 (see definition of “Collateral Quality Test”), p. 37 (see definition of “Market Value”), and §§ 1.2, 7.18, and 12; Indenture 5 at p. 14 (see definition of “Collateral Quality Test”), p. 36 (see definition of “Market Value”), and §§ 1.2, 7.18, and 12; Indenture 5 at p. 14 (see definition of “Collateral Quality Test”), p. 36 (see definition of “Market Value”), and §§ 1.2, 7.18, and 12; Indenture 6 at p. 14 (see definition of “Collateral Quality Test”), p. 35 (see definition of “Market Value”), and §§ 1.2, 7.18, and 12.

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What's more, this artificial trading philosophy, disguised as "responsible management", has resulted in myriad poorly conceived and timed buys, which positions have plummeted, destroying value for the investors. For example:

Issuer	Buy/Sell	Row Labels	Sum of 8/2/19 P&L	Cost	8/2/19 Mark
Lumileds Holding	Buy	LX171142	(3,603,604.17)	99.00	61.60
Libbey Glass	Buy	LX136370	(2,773,860.00)	99.29	77.40
KCA Deutag UK Finance PL	Buy	LX172320	(1,172,068.16)	84.89	69.58
Doncasters	Buy	LX128948	(1,532,695.82)	95.51	75.00
Envision Healthcare	Buy	LX175867	(1,172,343.58)	94.14	85.30

Tellingly, the transaction history authorized by US Bank makes clear that it appreciates the import of trading on specific days. In connection with Indenture 5, US Bank allowed the sale of varying amounts of the same term loan, Doncasters, over three different days: June 28, 2019, July 3, 2019, and July 8, 2019. US Bank allowed this because these selected dates positively impacted the collateral quality of the term loan sold. However, US Bank cannot ensure that the Acis CLOs enjoy best execution on purchases under the Acis Indentures if it turns a blind eye to the date on which purchases are made.

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<sup>7</sup> See *id.*

<sup>8</sup> See e.g., the Adversary Proceeding at Dkt. No. 827 p. 5.

<sup>9</sup> See e.g., the Adversary Proceeding at Dkt. Nos. 499-505.

<sup>10</sup> See e.g., the Adversary Proceeding at Dkt. No. 505 ¶ 3.

US Bank  
August 6, 2019  
Page 6

**III. The Highland Retail Funds are not limited to filing contract claims against US Bank.**

In addition to contract claims based on US Bank's violations of the Acis Indentures, US Bank's failure to perform all basic, non-discretionary, ministerial tasks under the Acis Indentures with due care subjects it to additional tort liability. *See e.g., Royal Park Investments SA/NV v. HSBC Bank USA, Nat. Ass'n*, 109 F. Supp. 3d 587, 597 (S.D.N.Y. 2015) ("Prior to an Event of Default, an indenture trustee's duty is governed solely by the terms of the indenture, with two exceptions: **a trustee must still** '(1) avoid conflicts of interest, and (2) **perform all basic, non-discretionary, ministerial tasks with due care.**'") (emphasis added). And, consistent with the Trust Indenture Act, US Bank is not relieved "from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct..."<sup>11</sup> Succinctly, US Bank appears unwilling or unable to fulfill its duties to the Noteholders. The four corners of each Indenture create a framework of Noteholder protections, and such investors deserve an Indenture Trustee that will enforce the spirit and the letter of the Indentures. If US Bank cannot do its duty, it should resign as Indenture Trustee.

The Highland Retail Funds are prepared to take all action necessary to preserve their rights, and remedy their losses sustained to date due to US Bank's misconduct. The Highland Retail Funds demand that US Bank provide written assurances by August 15, 2019 detailing: (1) the specific measures that US Bank will take, effective immediately, to remediate the wrongful conduct described herein, and (2) US Bank's offer to resolve this matter and make the Highland Retail Funds whole.

You are advised to review this letter carefully. Nothing in this letter shall constitute a waiver of any of the Highland Retail Funds' rights and/or remedies at law and at equity, all of which they expressly reserve should this matter proceed to litigation.

Your immediate attention to this matter is appreciated.

Sincerely,



Michael K. Hurst

MKH/sb

cc: David Coale (*of the Firm*)  
Chisara Ezie-Boncoeur (*of the Firm*)

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<sup>11</sup> Compare Indenture 3 at § 6.1(c), Indenture 4 at § 6.1(c), Indenture 5 at § 6.1(c), and Indenture 6 at § 6.1(c) with 15 U.S.C. § 7700o (d).

**Exhibit G**

Complaint, *The Charitable Donor Advised Fund, L.P. v. U.S. Bank National Association, et al.*



IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE CHARITABLE DONOR ADVISED  
FUND, L.P.,

*Plaintiff,*

v.

U.S. BANK NATIONAL ASSOCIATION and  
MOODY'S INVESTORS SERVICE, INC.,

*Defendants.*

CASE NO.: 1:19-CV-09857-NRB

PLAINTIFF'S FIRST  
AMENDED COMPLAINT  
AND JURY DEMAND

TO THE HONORABLE COURT:

Plaintiff The Charitable Donor Advised Fund, L.P. ("The Charitable DAF"), by and through its attorneys of record, files this First Amended Complaint against Defendants U.S. Bank National Association ("U.S. Bank") and Moody's Investors Service, Inc. ("Moody's"), and in support thereof, respectfully states and alleges as follows:

**NATURE OF LAWSUIT**

The Charitable DAF files this lawsuit to enforce and protect its rights. U.S. Bank, which serves as Trustee of certain indentures, has severely compromised The Charitable DAF's rights thereunder through its misconduct and failure to act. The Charitable DAF, a Holder of Secured Notes under those ACIS indentures, possesses beneficial interests in the collateral that U.S. Bank has mismanaged and failed to protect. U.S. Bank's wrongful and negligent conduct has diluted the value of The Charitable DAF's Secured Notes, deteriorated the credit profile of the collateralized loan obligations ("CLOs"), and caused The Charitable DAF to incur other direct damages. To protect its rights, The Charitable DAF seeks two things through this lawsuit.

*First*, it seeks to recover the losses it sustained in connection with U.S. Bank’s negligence and breach of its extra-contractual duties to The Charitable DAF, including the duties to perform all basic, non-discretionary, ministerial tasks with due care, and to avoid conflicts of interest.

*Second*, The Charitable DAF seeks judicial intervention to protect its interests before U.S. Bank commits or facilitates any further wrongful conduct. The Charitable DAF cannot allow U.S. Bank to continue to shirk its duties as indenture Trustee.

### **PARTIES**

1. Plaintiff The Charitable Donor Advised Fund, L.P. is a limited partnership, with its principal place of business at Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman KY1-9005, Cayman Islands.

2. Defendant U.S. Bank National Association is a national banking association that is Trustee of the ACIS Indentures, as defined further herein. Pursuant to the ACIS Indentures, Defendant U.S. Bank may be served at its corporate office located at 190 South LaSalle Street, 8th Floor, Chicago, Illinois 60603.

3. Defendant Moody’s Investors Service, Inc., is a Delaware corporation registered to do business in New York State. Moody’s may be served through its registered agent CT Corporation System, located at 28 Liberty Street, New York, New York 10005. Moody’s is a nationally recognized statistical rating organization (“NRSRO”).

### **JURISDICTION AND VENUE**

4. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(2), in that the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs, and is between a citizen of a State and a citizen of a foreign state.

5. Jurisdiction and venue over Moody's are proper in this District because Moody's is registered to do business in New York, and the transactions and occurrences that are the subject of The Charitable DAF's claims against Moody's took place in New York, New York.

6. Jurisdiction and venue over US Bank are proper in this District because, pursuant to Section 14.10 of the ACIS Indentures, as defined further herein, each party to such indentures, including U.S. Bank:

[H]ereby irrevocably and unconditionally submits, for itself and its property, to the nonexclusive jurisdiction of . . . the United States District Court of the Southern District of New York . . . in any action or proceeding arising out of or relating to the notes or th[ese] indenture[s] . . .

7. Venue is also proper because U.S. Bank waived any objection to venue in this District under the ACIS Indentures, as defined further herein. Section 14.10 specifically provides that:

Each of the parties hereto hereby irrevocably and unconditionally waives, to the fullest extent it may legally and effectively do so, any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to th[ese] indenture[s] in any court referred to in the previous paragraph. Each of the parties hereto hereby irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such action or proceeding in any such court.

8. New York law governs the claims in this lawsuit.

### **STATEMENT OF FACTS**

#### **A. U.S. Bank is Trustee of certain ACIS collateralized loan obligations.**

9. Between 2014 and 2015, U.S. Bank agreed to serve as the Trustee of three indentures governing CLOs to which The Charitable DAF holds beneficial interests as a Holder of Secured Notes, including: (i) the Indenture dated June 5, 2014 among ACIS CLO 2014-4 LTD., as Issuer, ACIS CLO 2014-4 LLC, as Co-Issuer, and U.S. Bank as Trustee ("Indenture 4"); (ii) the Indenture dated November 18, 2014 among ACIS CLO 2014-5 LTD., as Issuer, ACIS CLO 2014-5

LLC, as Co-Issuer, and U.S. Bank as Trustee (“Indenture 5”); and (iii) the Indenture dated April 16, 2015 among ACIS CLO 2015-6 LTD., as Issuer, ACIS CLO 2015-6 LLC as Co-Issuer, and U.S. Bank as Trustee (“Indenture 6”, and together with Indenture 4 and Indenture 5, the “ACIS Indentures”). The ACIS Indentures impose a number of obligations on U.S. Bank in connection with its role as Trustee.

10. *First*, the ACIS Indentures provide that U.S. Bank shall hold in trust, for the “benefit and security” of the noteholders, all “Collateral Obligations” that secure the Co-Issuers’ financial obligations to the noteholders. In connection therewith, the ACIS Indentures also provide that, for future purchases and sales of collateral obligations, the Trustee shall only consummate these transactions where certain investment criteria are satisfied. One such criterion is that, for all purchases, “either (A) each requirement . . . of the . . . Collateral Quality Test will be satisfied or (B) if any such requirement or test was not satisfied immediately prior to such reinvestment, such requirement or test will be maintained or improved after giving effect to the reinvestment.” *See, e.g.*, Indenture 4 § 12.2(a)(iv). The ACIS Indentures define “Collateral Quality Test” as:

A test satisfied if, as of any date of determination . . . in the aggregate, the Collateral Obligations owned (or, for purposes of *pro forma* calculations in relation to a proposed purchase of a Collateral Obligation, proposed to be owned) by the Issuer satisfy . . . the Maximum Moody’s Rating Factor Test . . . [and the] Weighted Average Life Test.

*Id.* at 15.

11. These tests are defined, in turn, as follows:

“Maximum Moody’s Rating Factor Test”: The test that will be satisfied on any date of determination if the Weighted Average Adjusted Moody’s Rating Factor<sup>1</sup> of the Collateral Obligations is

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<sup>1</sup> “Weighted Average Adjusted Moody’s Rating Factor” means “[a]s of any date of determination, a number equal to the Weighted Average Moody’s Rating Factor determined in the following manner: for purposes of this definition, the last paragraph of the definition of “Moody’s Default Probability Rating,” the second to last paragraph of the definition of “Moody’s Rating” and the last paragraph of the definition of “Moody’s Derived Rating” will be disregarded, and instead each applicable rating on credit watch by Moody’s that is on (a) positive watch will be treated

less than or equal to the number set forth in the column entitled “Maximum Weighted Average Moody’s Rating Factor” in the Moody’s Asset Quality Matrix, based upon the applicable “row/column combination” chosen by the Portfolio Manager with notice to the Collateral Administrator . . . plus the Rating Factor Adjustment Amount.

“Weighted Average Life Test”: A test that is satisfied if the Aggregate Weighted Average Life<sup>2</sup> on such date of determination is not later than June 5, 2022.

*See, e.g.*, Indenture 4 at 37-38, 66.

12. These provisions seek to maintain the integrity of the collateral securing the Co-Issuers’ obligations by requiring certain parties, including the Trustee, to ensure that any purchase or sale of such collateral complies with detailed, industry-recognized, and bargained-for tests.

13. **Second**, the ACIS Indentures provide that, in performing its duties as Trustee, U.S. Bank may not “authorize or consent to or vote for or accept or adopt on behalf of any Secured Noteholders, any plan of reorganization, arrangement, adjustment or composition affecting the Secured Notes or any Holder thereof”. Like the provisions concerning collateral quality, these provisions also seek to ensure that the Trustee does not prejudice the rights of any secured noteholder under the ACIS Indentures, like The Charitable DAF.

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as having been updated by one rating subcategory, (b) negative watch will be treated as having been downgraded by two rating subcategories and (c) negative outlook will be treated as having been downgraded by one rating subcategory. *See, e.g.*, Indenture 4 at 66.

“Weighted Average Moody’s Rating Factor” means “[t]he number (rounded up to the nearest whole number) equal to: (i) the sum of the products of (a) the Principal Balance of each Collateral Obligation (excluding Equity Securities) multiplied by (b) the Moody’s Rating Factor of such Collateral Obligation, divided by (ii) the Aggregate Principal Balance of all such Collateral Obligations.” *Id.*

<sup>2</sup> “Aggregate Weighted Average Life” means “[w]ith respect to all Collateral Obligations as of any date of determination is a date equal to (a) the number of years following such date obtained by (i) *summing* the products obtained by *multiplying* the Weighted Average Life at such time of each Collateral Obligation *by* the Principal Balance at such time of such Collateral Obligation and (ii) *dividing* such sum *by* the Aggregate Principal Balance at such time of all Collateral Obligations *plus* (B) such date of determination. *Id.* at 6.

14. The ACIS Indentures do more than require that U.S. Bank observe certain safeguards – they also grant U.S. Bank the broad power to “execute any of the trusts or powers hereunder or perform any duties hereunder either directly or by or through agents, nominees, custodians, or attorneys”.

*ii. U.S. Bank must also satisfy extra-contractual obligations owed to The Charitable DAF.*

15. U.S. Bank must satisfy certain extra-contractual obligations in connection with its role as Trustee, and the broad powers associated therewith. These pre-default extra-contractual obligations include the duty to perform all basic, non-discretionary, ministerial tasks with due care, and to avoid conflicts of interest.

16. For example, U.S. Bank was required to perform all basic, non-discretionary, ministerial tasks with due care, including, but not limited to, the following extra-contractual tasks: reserving noteholder rights impacted by active litigation, such as bankruptcy proceedings; exercising due care in connection with the payment of expenses; collecting and distributing the interest and dividends due on the portfolio securities; and providing noteholders with periodic reports concerning the interest received, amounts distributed and securities in the portfolio.

17. Notably, no provisions of the ACIS Indentures “shall be construed to relieve the Trustee from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct”.

**B. U.S. Bank fails to reserve or otherwise protect The Charitable DAF’s rights in connection with bankruptcy proceedings.**

18. The Charitable DAF’s rights as a secured noteholder under the ACIS Indentures have been compromised by certain proceedings and judicial rulings in a consolidated Chapter 11 bankruptcy proceeding, and related adversary proceeding, pending before the United States

Bankruptcy Court for the Northern District of Texas, jointly administered under case number 18-30264-SGJ-11 (the “Bankruptcy Proceeding”).<sup>3</sup>

19. On July 29, 2018, the Chapter 11 Trustee in the Bankruptcy Proceeding filed a First Amended Joint Plan for Acis Capital Management, L.P. and Acis Capital Management, GP, LLC (the “First Amended Plan”).

20. The First Amended Plan provided for certain amendments to the ACIS Indentures that would be effected through a certain Plan B and Plan C. These proposals concerned, among other things, re-writing the ACIS Indentures to protect Acis’ management fee stream for several years.

21. In full recognition that the First Amended Plan encroached on the rights of noteholders under the ACIS Indentures like The Charitable DAF, the Trustee filed a Reservation of Rights and Limited Objections to the First Amended Plan in the Bankruptcy Proceeding. The Trustee took prompt measures to protect noteholder rights, filing these pleadings only fifteen days after the filing of the First Amended Plan.

22. Among other infringements on the rights of noteholders under the ACIS Indentures, the Trustee explained that: “In other words, both Plan B and Plan C purport to ignore the express terms of the Indenture and the rights of the Noteholders with respect to amending the Indenture.”<sup>4</sup>

23. On January 31, 2019, a Third Amended Joint Plan for Acis Capital Management, L.P. and Acis Capital Management GP, LLC was entered in the Bankruptcy Proceeding (“Plan D”).

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<sup>3</sup> The two case numbers in the consolidated Bankruptcy Proceeding include case numbers 18-30264-SGJ-11 and 18-30265-SGJ-11.

<sup>4</sup> See Bankruptcy Proceeding, case number 18-30264-SGJ-11 at Dkt. Nos. 500, 501, and 500; *see id.* at Dkt. No. 505.

24. Like Plan B and C, Plan D also substantially impacted the rights of noteholders under the ACIS Indentures, including The Charitable DAF.

25. Among other infringements, Plan D imposes an injunction that adversely affects The Charitable DAF's rights by prohibiting beneficial trading activity that would serve to protect noteholder interests.

26. In addition to other restrictions, Plan D impedes the ability of noteholders under the ACIS Indentures to make optional redemptions, which restriction has decimated the value of such investments across the capital stack of each CLO covered by the ACIS Indentures.

27. Moreover, Plan D conflicts with the express terms of the ACIS Indentures. Specifically, the ACIS Indentures do not permit U.S. Bank to “authorize or consent to or vote for or accept or adopt on behalf of any Secured Noteholders, **any plan** of reorganization, arrangement, adjustment or composition **affecting the Secured Notes or any Holder thereof**”. (emphases added).

28. Tellingly, in its Reservation of Rights filed in 2018, U.S. Bank acknowledged that the specific plans “adversely affect[ed] the rights of Noteholders.”<sup>5</sup> The same holds true for Plan D.

29. Notwithstanding its ability to do so, U.S. Bank did not reserve any noteholders' rights, or otherwise object to the entry of Plan D.

30. Instead, as noted by the court's ruling approving confirmation of Plan D on January 31, 2019, “[t]he indenture trustee has retained and appeared through its own separate counsel during the Chapter 11 Bankruptcy Cases **and is not currently objecting to the Plan.**”<sup>6</sup> (emphasis added).

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<sup>5</sup> See e.g., Bankruptcy Proceeding at Dkt. No. 505 ¶ 3; see also, Bankruptcy Proceeding at Dkt. Nos. 499-505

<sup>6</sup> See e.g., Bankruptcy Proceeding, case number 18-30264-SGJ-11 at Dkt. No. 827 p. 5.



31. U.S. Bank’s election to take no action regarding the entry of Plan D amplified the exposure of The Charitable DAF and the overall risk that it faces during the pendency of the Plan D injunction. Though U.S. Bank has a duty to avoid conflicts of interest, its election to take no action regarding the entry of Plan D underscores the Trustee’s self-serving conduct.

**C. U.S. Bank fails to ensure that certain transactions satisfy the collateral quality tests.**

32. As set forth above, U.S. Bank must ensure that every purchase made under the ACIS Indentures satisfies the collateral quality tests, including the Weighted Average Life Test (“WAL test”) and the Minimum Weighted Average Moody’s Recovery Rate Test (“WAM test”), or maintains or improves any failing collateral quality tests. U.S. Bank failed to satisfy these obligations in at least two ways.

33. *First*, U.S. Bank allowed the “Portfolio Manager” under the ACIS Indentures to effectuate certain transactions that did not satisfy the WAL test or maintain or improve such failing WAL test. Specifically, U.S. Bank allowed the Portfolio Manager to make multiple same-day trades and to consolidate the weighted average maturity date for these trades. In so doing, U.S. Bank permitted the Portfolio Manager to create the false appearance of a maintained or improved WAL test. Absent this consolidation, the same-day purchases could not have maintained or improved the failing WAL tests on individual bases.

34. The value destruction of this forced “bunched trading” is clear when one compares the prices at trade date against the prices from the previous day. For example:

CLO	Trade	Issuer	Commitment	Date	Trade Px	Day Before	Close Mid Price	2 Day Before	Close Mid Price	Change	P&L
CLO 4	Purchase	Diebold Inc - Diebold DD T/L A	2,430,000.00	3/15/2019	98.00	3/14/2019	94.50	3/13/2019	94.5	-3.50	(85,050.00)
CLO 6	Purchase	Diebold Inc - Diebold DD T/L A	1,578,541.42	3/26/2019	99.00	3/25/2019	95.50	3/22/2019	95.5	-3.50	(55,248.95)
CLO 4	Purchase	Diebold Nixdorf Incorporated - Diebold T/L B New Dollar	4,985,751.99	5/23/2019	96.75	5/22/2019	95.75	5/21/2019	95.75	-1.00	(49,857.52)
CLO 5	Purchase	Diebold Nixdorf Incorporated - Diebold T/L B New Dollar	4,985,751.99	5/23/2019	96.75	5/22/2019	95.75	5/21/2019	95.75	-1.00	(49,857.52)
CLO 4	Purchase	Air Medical Group Holdings Inc - Air Medical T/L B	2,200,000.00	1/8/2019	96.50	1/7/2019	94.45	1/4/2019	93.839	-2.05	(45,177.00)

CLO 3	Purchase	MA FinanceCo LLC - MA FinanceCo T/L B2	2,000,000.00	1/7/2019	98.50	1/4/2019	96.63	1/3/2019	96	-1.88	(37,500.00)
CLO 6	Purchase	Team Health Holdings Inc - Team Health Holdings T/L	1,279,236.64	3/26/2019	88.50	3/25/2019	86.13	3/22/2019	86.9375	-2.38	(30,381.87)

35. What is more, this artificial trading philosophy, disguised as “responsible management,” has resulted in myriad poorly conceived and timed buys, which positions have plummeted, destroying value for the investors. For example:

Issuer	Buy/Sell	Row Labels	Sum of 8/2/19 P&L	Cost	8/2/19 Mark
Lumileds Holding	Buy	LX171142	(3,603,604.17)	99.00	61.60
Libbey Glass	Buy	LX136370	(2,773,860.00)	99.29	77.40
KCA Deutag UK Finance PL	Buy	LX172320	(1,172,068.16)	84.89	69.58
Doncasters	Buy	LX128948	(1,532,695.82)	95.51	75.00
Envision Healthcare	Buy	LX175867	(1,172,343.58)	94.14	85.30

36. The transaction history of the ACIS Indentures makes clear that U.S. Bank appreciates the import of trading on specific days. In connection with one such indenture, U.S. Bank authorized the purchase of a term loan in Capital Automotive 1st Lien with a maturity date of March 25, 2024. But, to maintain or improve the WAL test for this indenture, U.S. Bank should have required the CLOs to purchase assets with a maturity date of April 4, 2023 or earlier. U.S. Bank facilitated similar misconduct across the ACIS Indentures.

37. *Second*, the Weighted Average Moody’s Rating Factor” (“WARF”) a factor on which the WAM test turns, has steadily increased this year for each portfolio of the ACIS Indentures.

38. U.S. Bank turned a blind eye to The Charitable DAF’s collateral quality, which has suffered under Plan D’s new management. Plan D, which was implemented in the Bankruptcy Proceeding on January 31, 2019, appointed Brigade Capital Management, LP (“Brigade”) to

perform certain services related to the ACIS Indentures, previously performed by Highland Capital Management, L.P.<sup>7</sup>

39. Since the entry of Plan D, and Brigade’s “management” of the ACIS Indentures, U.S. Bank has allowed the collective “Weighted Average Moody’s Rating Factor” (“WARF”) of the portfolios to become one of the dirtiest pools in the market in a matter of months. As of October 2019, and since Brigade’s involvement with the ACIS Indentures, the WARF of each such indenture has dramatically increased, as follows:

CLO 4:	<del>2680</del>	2941
CLO 5:	<del>2673</del>	3004
CLO 6:	<del>2627</del>	2917

40. U.S. Bank is not excused from failing to protect The Charitable DAF’s rights affected by Plan D or by the Bankruptcy Proceeding generally.

**D. U.S. Bank’s conduct has damaged The Charitable DAF substantially.**

41. U.S. Bank’s conduct, described herein, has resulted in myriad damage to The Charitable DAF, including, but not limited to, the following.

42. U.S. Bank’s failure to ensure that transactions under the ACIS Indentures comply with the collateral quality tests set forth therein constitute violations of U.S. Bank’s contractual and extra-contractual obligations to The Charitable DAF. By facilitating extensive portfolio mismanagement, U.S. Bank has further violated its contractual and extra-contractual obligations to The Charitable DAF. These violations have compromised, among other things, the credit profile of the ACIS Indentures and the value of The Charitable DAF’s secured notes thereunder.

43. Under its watch, since the appointment of Brigade, U.S. Bank has allowed the ACIS Indentures to incur exorbitant fees which have diminished the equity that The Charitable DAF

<sup>7</sup> See Case No. 18-30264-SGJ-11 and Case No. 18-30265-SGJ-1, Jointly Administered Under Case No. 18-30264-SGJ-11), referred to herein as the Adversary Proceeding.

owns indirectly pursuant to the ACIS Indentures. Specifically, because of the payment of uncharacteristically high fees, equity holders under certain ACIS Indentures have received **zero** cash flows.

44. Further, as Trustee, U.S. Bank owed a duty to The Charitable DAF to avoid conflicts of interest. It shirked this duty by, among other things, facilitating trades that did not comply with the collateral test in order to artificially maximize certain management fees. Likewise, despite U.S. Bank's duty to avoid conflicts of interest, in failing to object or otherwise reserve **any** noteholder rights impacted by Plan D, U.S. Bank further demonstrated its inability to prioritize or protect the rights of noteholder The Charitable DAF.

**E. Moody's knowingly or recklessly published false ratings of the ACIS Indentures.**

45. Moody's is a nationally recognized statistical rating organization ("NRSRO"). As an NRSRO, Moody's "evaluate[s] a debt offering based on public, and sometimes nonpublic, information regarding the assets of an issuer and assign[s] the debt offering a rating to convey information to a potential creditor/investor about the creditworthiness of the issuer's debt." *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 651 F. Supp. 2d 155, 164 (S.D.N.Y. 2009). This rating is important to issuers and investors because, among other things, a "[debt offering]'s success depends on the credit quality of the [underlying] assets," and "[i]f stable [assets] comprise the [debt offering], then [i]nvestors are much less likely to suffer a loss." *Id.* at 165; *see also In re Fitch, Inc.*, 330 F.3d 104, 106 (2d Cir. 2003) ("[Moody's] endorsement of a given security has regulatory significance, as many regulated institutional investors are limited in what types of securities they may invest based on the securities' NRSRO ratings.")

46. Between June and November 2014, Moody's gave both Indenture 4 and Indenture 5 a AAA rating. This is a top rating, and the "same as those usually assigned by the Rating

Agencies to bonds backed by the full faith and credit of the United States Government, such as Treasury Bills.” *Abu Dhabi Commercial Bank*, 651 F. Supp. 2d at 165. The rating is “commonly understood in the marketplace to [indicate an investment is] stable, secure, and safe.” *Id.*

47. Still, depending upon the circumstances, an NRSRO like Moody’s can downgrade a particular rating to reflect new information. To that end, on August 6, 2019, certain ACIS noteholders provided Moody’s with written notice of U.S. Bank’s misconduct, including its practice of bunched trading under the ACIS Indentures by effectuating multiple same day transactions that did not satisfy the WAL test or maintain or improve such failing WAL test.

48. The same noteholders provided Moody’s with a supplemental notice of U.S. Bank’s trading misconduct on September 13, 2019.

49. Nevertheless, and since that time, Moody’s has continued to publish false ratings of those assets. Indeed, Moody’s has continued to rate Indenture 4 and Indenture 5 as AAA investments, notwithstanding its notice of the facts set forth in more detail above.

50. This, in turn, has allowed U.S. Bank and the portfolio manager to continue disregarding their obligations under the ACIS Indentures, further compromising the value of the assets securing the Co-Issuers’ obligations thereunder. Moody’s wrongful conduct has therefore diminished the equity that The Charitable DAF owns indirectly pursuant to the ACIS Indentures.

**COUNT I: BREACH OF THE DUTY TO PERFORM ALL BASIC, NON-DISCRETIONARY, MINISTERIAL TASKS WITH DUE CARE**

51. The Charitable DAF hereby alleges and incorporates the preceding allegations as if fully set forth herein.

52. As Trustee, U.S. Bank has an extra-contractual duty to perform all basic, non-discretionary, ministerial tasks under the ACIS Indentures with due care. This duty subjects U.S. Bank to tort liability.

53. U.S. Bank breached this duty in at least two ways.

54. First, it breached this duty by permitting the ACIS Indentures to incur exorbitant expenses, which have diminished the equity that The Charitable DAF owns indirectly pursuant to the ACIS Indentures.

55. Second, U.S. Bank breached its duty by negligently failing to act, and by accepting the entry of “Plan D” in the Bankruptcy Proceeding, which directly affects the secured noteholders. Among other things, Plan D adversely impacts the rights of The Charitable DAF by imposing an injunction that prohibits beneficial trading activity, and impeding the ability of noteholders to make optional redemptions.

56. U.S. Bank’s omission to act was not in good faith. In 2018, U.S. Bank filed multiple pleadings in the Bankruptcy Proceeding, including, but not limited to, a Reservation of Rights, and Limited Objections to the entry of the predecessor plans to Plan D. U.S. Bank failed to take any action whatsoever in regard to Plan D.

57. These breaches were the proximate cause of damages to Charitable DAF.

58. Based on investigation to date, such damages include, but are not limited to, The Charitable DAF’s inability to make certain trades or redemptions, which restriction has decreased the value of The Charitable DAF’s investment across the capital stack of each contract. They also include the diminished value of the collateral securing the issuer and co-issuer’s financial obligations to The Charitable DAF. U.S. Bank’s failure to reserve or otherwise protect The Charitable DAF’s rights impacted by the Bankruptcy Proceeding has caused it to suffer damages.

**COUNT II: BREACH OF THE DUTY TO AVOID CONFLICTS OF INTEREST**

59. The Charitable DAF hereby alleges and incorporates the preceding allegations as if fully set forth herein.

60. As Trustee, U.S. Bank has an extra-contractual duty to avoid conflicts of interest. This duty subjects U.S. Bank to tort liability.

61. Under this duty, U.S. Bank is prohibited from advancing its own interests at the expense of The Charitable DAF.

62. U.S. Bank breached this duty by, among other things, facilitating extensive portfolio mismanagement and failing to ensure compliance with the collateral quality tests in order to artificially maximize management fees. Such facilitation of noncompliant trades gives rise to an inference of bad faith.

63. U.S. Bank also breached this duty by allowing the ACIS Indentures to incur exorbitant fees which have diminished the equity that The Charitable DAF owns indirectly pursuant to the ACIS Indentures.

64. U.S. Bank's breaches were the proximate cause of damages to The Charitable DAF.

65. These breaches were the proximate cause of damages to Charitable DAF.

66. Based on investigation to date, such damages include, but are not limited to, the diminished value of the collateral securing the issuer and co-issuer's financial obligations to Charitable DAF.

67. U.S. Bank's breaches, set forth herein, have damaged The Charitable DAF in not less than \$5,000,000.00.

### **COUNT III: DEFAMATION (AGAINST MOODY'S)**

68. The Charitable DAF hereby alleges and incorporates the preceding allegations as if fully set forth herein.

69. On August 6, 2019, certain ACIS noteholders provided Moody's with credible information regarding U.S. Bank's wrongful trading conduct and portfolio mismanagement, as

described in more detail above. Since that date, Moody's has had actual or constructive notice of US Bank's wrongful trading conduct.

70. Notwithstanding such notice, Moody's has continued to publish a false rating of AAA for Indenture 4 and Indenture 5 to investors.

71. Moody's published these ratings with knowledge of their falsity or with reckless disregard thereto.

72. In so doing, Moody's has caused The Charitable DAF to suffer special damages. Specifically, by continuing to provide an AAA rating for Indenture 4 and Indenture 5, Moody's has enabled U.S. Bank and the portfolio manager to compromise the value of the assets securing the Co-Issuer's obligations under the ACIS Indentures. Since August 2019, when Moody's first learned of U.S. Bank's misconduct, these assets have continued to decrease in value.

### **CONDITIONS PRECEDENT**

73. Pursuant to Federal Rule of Civil Procedure 9(c), Charitable DAF hereby pleads that all conditions precedent have occurred or been performed. Although the ACIS Indentures contain "no-action" clauses that require certain noteholders to make written request to U.S. Bank to institute any judicial proceedings in its own name, the Second Circuit has held that noncompliance with a no-action provision is excused in a suit against the indenture trustee. *See Cruden v. Bank of New York*, 957 F.2d 961, 968 (2d Cir. 1992) ("The district court held that the 'no action' clause applied only to the debenture holder suits against [the issuer], not the Indenture Trustees . . . This construction of [the limitation on suits provision] obviously is correct, as it would be absurd to require the debenture holders to ask the Trustee to sue itself.").



**DEMAND FOR ATTORNEYS' FEES**

74. Pursuant to Section 5.15 of the ACIS Indentures, Charitable DAF hereby makes a demand for the attorneys' fees and court costs it has sustained in bringing this action.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff The Charitable Donor Advised Fund, L.P. respectfully requests that judgment be entered in its favor and against Defendants U.S. Bank and Moody's as follows:

- A. An award of damages sustained as a result of U.S. Bank National Association's activities in not less than \$5,000,000.00;
- B. An award of damages sustained as a result of Moody's conduct in an amount to be determined at trial;
- C. An award of reasonable attorneys' fees and court costs;
- D. An award of pre-judgment and post-judgment interest on all sums awarded; and
- E. For such other and further relief as the Court may deem just, equitable and appropriate.

DATED: November 1, 2019

Respectfully submitted,

/s/ V. Chisara Ezie-Boncoeur

Michael K. Hurst (*pro hac admission pending*)

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**ATTORNEYS FOR THE CHARITABLE  
DONOR ADVISED FUND, L.P.**

**Exhibit H**

Highland Objection to Supplemental Application re Winstead PC's Retention

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**COUNSEL FOR HIGHLAND CAPITAL  
MANAGEMENT, L.P.**

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

In re: § Case No. 18-30264-SGJ-11  
§ Case No. 18-30265-SGJ-11  
ACIS CAPITAL MANAGEMENT, L.P. and §  
ACIS CAPITAL MANAGEMENT GP, LLC, § (Jointly Administered Under Case No.  
§ 18-30264-SGJ-11)  
§  
Debtors. § Chapter 11

**OBJECTION OF HIGHLAND CAPITAL MANAGEMENT, L.P. TO SUPPLEMENTAL  
APPLICATION REGARDING THE SCOPE OF WINSTEAD PC’S RETENTION AS  
SPECIAL COUNSEL TO THE CHAPTER 11 TRUSTEE**

Highland Capital Management, L.P., party-in-interest and creditor (“Highland”) to Acis Capital Management, L.P. and Acis Capital Management GP, LLC (collectively the “Debtors”), files this objection (the “Objection”) to the *Supplemental Application Regarding the Scope of Winstead PC’s Retention as Special Counsel to the Chapter 11 Trustee* [Docket No. 669] (the “Supplemental Application”). In support of the Objection, Highland states as follows:

## BACKGROUND

### A. The Bankruptcy Case and the Winstead Application

1. On May 30, 2018, after weeks of protesting Winstead's purported representation of the Chapter 11 Trustee in light of Winstead's ongoing representation of Josh Terry – the sole involuntary petitioning creditor who forced the Debtors into bankruptcy – Highland filed the *Motion to Disqualify Winstead PC as Proposed Special Counsel to Robin Phelan, Chapter 11 Trustee* (the "Motion to Disqualify") [Doc. No. 244].

2. After the Motion to Disqualify was filed to compel the conflict issues to be brought before the Court, later that evening on May 30, 2018, the Chapter 11 Trustee filed the *Application to Employ Winstead PC as Special Counsel to the Chapter 11 Trustee* [Doc. No. 246] (the "Winstead Application"). The Chapter 11 Trustee had already sought the employment of Forshey & Prostok, LLC ("Forshey & Prostok") to serve as counsel to the estates pursuant to 11 U.S.C. § 327(a), via the *Application for Order Authorizing the Employment and Retention of Forshey & Prostok, LLP as Counsel to the Chapter 11 Trustee* [Doc. No. 222] (the "Forshey & Prostok Application"). The Forshey & Prostok Application was later approved on June 18, 2018 without contest. *See Order Granting Application for Order Authorizing the Employment and Retention of Forshey & Prostok, LLP as Counsel to the Chapter 11 Trustee* [Doc No. 296] (the "Forshey & Prostok Retention Order"). Notably, the Forshey & Prostok Application sought the firm's representation for, among other things, "[p]reparing on behalf of the Trustee all necessary and appropriate motions, pleadings, proposed orders, and other documents that are necessary in connection with these chapter 11 cases, including in connection with any adversary proceedings or appeals associated therewith," and "[i]nvestigating and prosecuting chapter 5 causes of action and other potential litigation that may be brought by the Trustee." *See* Forshey & Prostok

Application at ¶¶ 9(b), (c) (emphasis added). The Forshey & Prostock Retention Order so provided. *See* Forshey & Prostock Retention Order at ¶ 2 (granting the Forshey & Prostock Application “on the terms and conditions, set forth in the Application.”).

3. By the Winstead Application, the Chapter 11 Trustee sought to distinguish his retention of Winstead from that of Forshey & Prostock by presenting them as special counsel under 11 U.S.C. § 327(a) and (c)<sup>1</sup> to provide legal services for the following “limited” purposes:

- a. Management, liquidation, disposition, and monetization of the CLO assets;
- b. Investment Advisors Act;
- c. Operation of the portfolio management agreements and the indentures, issues arising therefrom, and, specifically including, litigation related thereto or arising therefrom; and
- d. Certain other litigation matters related to or arising in these Chapter 11 cases, as requested by the Chapter 11 Trustee (emphasis added).

*See* Winstead Application at ¶ 25(d). The Winstead Application was supported by the *Declaration of Rakhee Patel in Support of Application to Employ Winstead PC as Special Counsel to the Chapter 11 Trustee* (the “Patel Declaration”).

4. Notably, the Patel Declaration stated:

Further, Winstead will confer with the Trustee and Forshey & Prostock on a regular basis to ensure that the services provided by Winstead do not overlap with, and are not otherwise duplicative of, services provided by Forshey & Prostock, as proposed general counsel, to the Trustee.

With respect to these specified purposes, Winstead's representation will not conflict with Forshey & Prostock's role as general counsel to the Trustee in the Cases, and Winstead will confer regularly with the Trustee and Forshey & Prostock to ensure the same. Accordingly, except to the extent necessary to effectuate the specific services outlined above,

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<sup>1</sup> The Winstead Application also provided that the Trustee “reserves its rights to seek approval for such retention under Section 327(e).” Winstead Application at fn. 2.

Winstead will not represent the Trustee with respect to plan negotiations or formulation; business or bankruptcy restructuring or reorganization; or otherwise in matters arising purely under the Bankruptcy Code. With respect to the various Appeals, the underlying issues are discrete, and will not affect Winstead's representation of the Trustee in the Cases.

5. On June 9, 2018, the Trustee filed the *Supplement to Application to Employ Winstead PC as Special Counsel to the Chapter 11 Trustee* [Doc. No. 266] (the "Supplement"). The Supplement acknowledged that Winstead would continue to represent Josh Terry, but asserted that the representation did not conflict with Winstead's representation of the Trustee. The Supplement was supported by the *Supplemental Declaration of Rakhee Patel in Support of the Application to Employ Winstead PC as Special Counsel to the Chapter 11 Trustee* (the "Supplemental Patel Declaration"). Again, the Supplement and the Supplemental Patel Declaration reiterated that "Winstead will not represent the estate with respect to plan negotiations or formulation; business or bankruptcy restructuring or reorganization; or otherwise in matters purely under the Bankruptcy Code." See Supplement at ¶ 6; Supplemental Patel Declaration at ¶ 14.

6. In addition to its pending Motion to Disqualify, on June 11, 2018, Highland filed its objection to the Winstead Application [Doc. No. 267] (the "Highland Objection"). By the Highland Objection, Highland asserted that retention of Winstead as special counsel was impermissible and inappropriate because: (1) the delineated services proposed to encompass the scope of services operated as Winstead's *de facto* general representation of the Trustee; (2) retention under Bankruptcy Code section 327(a) was improper because Winstead was not disinterested; and (3) Winstead had an actual conflict of interest relating to certain state court litigation with Highland (the "Winstead Litigation").

7. Likewise, on June 11, 2018, the Office of the United States Trustee filed its objection to the Winstead Application [Doc. No. 279] (the “U.S. Trustee Objection”). By the U.S. Trustee Objection, the U.S. Trustee asserted substantively similar objections as in the Highland Objection, including that the relief sought in ¶ 12(d) of the Winstead Application was “too broad a delegation of the Court’s retention authority” and that “given Winstead’s prior retention of Terry, any employment should be cabined and specifically defined, with any necessary supplemental disclosures.” U.S. Trustee Objection at ¶ 23.

8. The Court held a hearing on the Winstead Application on June 14, 2018. The following representations were made by the Trustee:

Winstead is going to do a lot of the CLO stuff. But Forshey & Prostok, he’s doing the real bankruptcy stuff. For example, they’re drafting the plan. They’re doing the turnover stuff. They will do the claim objections. . . . They’re doing the bankruptcy stuff in this Chapter 11 case, but they aren’t CLO experts, they’ll readily admit that.<sup>2</sup>

9. After considering the arguments of counsel for Highland and the U.S. Trustee, the Court approved the Winstead Application, in part, but not without materially paring back the scope. Specifically, the Court did not authorize part (d) of the proposed scope of services, thus rejecting Winstead’s employment by the Trustee as to “[c]ertain other litigation matters related to or arising in these Chapter 11 cases, as requested by the Chapter 11 Trustee.” The Court stated:

We’re going to scratch D, Certain Other Litigation Matters. Anything beyond those three tasks [A, B, and C], Mr. Phelan, you’ll have to file another application on notice to creditors and parties in interest, and we’ll have a hearing deciding whether an expanded scope is appropriate or not.<sup>3</sup>

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<sup>2</sup> June 14, 2018 Hr’g Tr. at 63:11-19 (testimony of Trustee, emphasis added). Excerpts of the hearing transcript are attached hereto as Exhibit A.

<sup>3</sup> *Id.* at 68:16-21.

10. On June 21, 2018, the Court entered its order consistent with its ruling [Doc. No. 313] (the “Winstead Employment Order”).<sup>4</sup>

**B. The Court’s Limitations Have Been Ignored**

11. From the inception of these bankruptcy cases and despite the Court’s limitations on the scope of Winstead’s employment (and Winstead’s own representations in the Winstead Application and the Supplement), Winstead has appeared on every pleading filed by the Trustee, appeared at every hearing in this case, and has *de facto* served as lead counsel to the Trustee. The Court need only review the record in this case as evidence that Winstead has ignored the limits of the Court’s ruling. In short, it has proceeded in these cases unrestrained.

12. As an example, representation of the Trustee during the prior failed Plan process was dominated by Winstead.<sup>5</sup> In addition, Winstead has taken the lead role in the Adversary Proceedings and in every one of the Appeals, each as defined and described below.

13. As the Court is aware, the Trustee is currently in the process of seeking confirmation of “Plan D.” Once again, any reasonable review of Winstead’s role in the plan process to-date demonstrates that neither Winstead nor the Trustee are taking seriously their responsibility to adhere to the Court’s limits on Winstead’s role.

**C. The Adversary Proceedings**

14. There are currently two adversary proceedings pending in this case that involve Highland and Highland related entities: Adversary Case No. 18-03078, and Adversary Case No.

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<sup>4</sup> Highland sought leave to appeal this interlocutory order to the District Court, but was denied leave to appeal. Highland reserves the rights to appeal and, at this time, intends to pursue the appeal of the Trustee’s retention of Winstead when the matter is otherwise deemed final and appealable.

<sup>5</sup> Winstead attorney Rakhee Patel examined Trustee witness Zach Alpern and cross examined witnesses Daniel Castro, Hunter Covitz and Isaac Leventon. Winstead attorney Joseph Wielebinski examined Trustee witness Richard Klein. Winstead attorney Rakhee Patel was the only Trustee attorney to make closing arguments. Notably, no fee applications reflecting time expended in the failed Plan endeavor have been filed.



18-03212 (collectively referred to herein as the “Adversary Proceedings”). Adversary Case No. 18-03078 was originally filed by Highland and HCLOF against the Trustee, seeking an injunction related to a June 14, 2018 optional redemption. The Trustee thereafter filed counterclaims and third party claims against Highland and HCLOF, including a fraudulent transfer claim that the Trustee has alleged is fundamental to this bankruptcy case.

15. Given the passage of time and circumstances that mooted the original relief sought by Highland and HCLOF, the parties in case no. 18-03078 agreed to the form of agreed order dismissing Highland and HCLOF’s claims without prejudice and allowing the Trustee to amend his answer. The order was entered on November 1, 2018.

16. Adversary Case No. 18-03212 was brought by the Trustee against Highland, HCLOF, Neutra, Ltd. and the CLOs seeking a temporary restraining order and preliminary injunction preventing optional redemptions and also seeking related declaratory judgments.

17. In both Adversary Proceedings, Winstead has taken a lead role, despite the limits of the Court’s Order.<sup>6</sup>

18. Discovery in the Adversary Proceedings and in the bankruptcy case is governed by an *Agreed Protective Order* entered by this Court on August 21, 2018 [Doc. No. 535] (the “Protective Order”).

#### **D. The Appeals**

19. There are a number of appeals to the District Court currently pending in relation to this bankruptcy case and the Adversary Proceedings (the “Appeals”). Once again, despite the

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<sup>6</sup> The Court need only consider one of the most recent hearings on the adversaries held October 9, 2018, where Winstead attorney Phil Lamberson presented all of the arguments on behalf of the Trustee.

limits of this Court’s Order, Winstead has consistently taken the lead in such “other litigation matters related to or arising in these Chapter 11 cases.”<sup>7</sup>

#### **E. The Supplemental Application**

20. After almost 4½ months of ignoring the limitations prescribed by the Court’s ruling (and contradicting prior representations to the Court), on October 28, 2018, the Trustee filed the Supplemental Application. The basis provided for expanding the scope of Winstead’s retention includes:

- a. The need of Winstead to “reference . . . and [have] a comprehensive understanding of all agreements and documents underlying Acis’s business . . . .” Application at ¶ 2 and ¶ 11 (emphasis added).
- b. The need for Winstead to continue “evaluating the estates’ numerous claims, counterclaims, third-party claims and defenses . . . .” Application at ¶ 9.

21. The Trustee is seeking to employ Winstead in relation to “[a]ny litigation against Highland Capital and/or any of its affiliates, including Highland CLO Funding, Ltd., Highland CLO Management, Ltd. and Highland CLO Holdings, Ltd.” Application at ¶ 13(a). The Supplemental Application also identifies the pending Adversary Proceedings and appeals involving Highland and Highland-related entities. Application at ¶ 13(b) and (c). But, practically speaking, the all-inclusive scope of “any litigation” in Application paragraph 13(a) would make paragraphs 13(b) and (c) superfluous.

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<sup>7</sup> See, e.g., *Robin Phelan, Chapter 11 Trustee’s Response to Emergency Motion of Appellants Highland and HCLOF to Consolidated Appeals and Expedited Briefing and Brief in Support*, filed by Winstead (signed by Rahkee Patel) on behalf of the Trustee on July 30, 2018 in District Court Case No. 3:18-cv-01822 (Highland CLO Funding Ltd. v. Robin Phelan, Chapter 11 Trustee, et al.); see also *Notice of Appearance and Designation of Lead Counsel* (emphasis added, each signed by Rahkee Patel) in Case Nos. 3:18-cv-01822-B, 3:18-cv-01810-S, and 3:18-cv-01817-G.

22. On October 29, 2018, the Trustee filed a motion seeking to expedite the hearing on the Supplemental Application [Doc. No. 672] (the “Motion to Expedite”). The Trustee stated in the Motion to Expedite that the hearing on the Application will be “merely a rehashing of the hearing on the [original] Application.” Motion to Expedite at ¶ 4. Whether or not that is the case, it would be for good reason, since the Trustee and Winstead have demonstrably ignored the Court’s Order.

### **OBJECTION**

#### **A. The Circumstance of the Case Clearly Demonstrate that Winstead Has a Conflict of Interest**

23. As noted above, Highland’s appeal of the Order was dismissed by the District Court as interlocutory. As such, there is nothing preventing the Court at this point from reconsidering issues that were previously asserted by the parties in this matter. Both Highland and the U.S. Trustee asserted that Bankruptcy Code section 327(c) prohibited Winstead’s retention because it has an actual conflict of interest related to the Winstead Litigation and related to Winstead’s on-going representation of Terry. As to the Winstead Litigation, the Court ordered Winstead to erect an ethical wall.<sup>8</sup>

24. The issue of Winstead’s representation of Terry, however, remains and constitutes an unwaivable, actual conflict of interest. At the June 14, 2018 hearing on the Application, both Highland and the U.S. Trustee expressed concerns to the Court of various ways Winstead’s concurrent representation was problematic. Subsequent events have proven the point. The lead law firm in the Adversary Proceedings (Winstead) currently represents Highland’s principal adversary (Terry). The parties are currently engaged in discovery related to the Adversary

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<sup>8</sup> June 14, 2018 Hr’g Tr. at 71:19-25.

Proceedings and Highland has designated certain of the documents “Confidential,” and a much smaller portion of the documents “Attorneys Eyes Only,” as is permitted under the Protective Order. Notably, the Trustee has directed Winstead to handle the recent discovery, including documents currently in the process of being produced by Highland to Winstead. One of Highland’s principal concerns is that sensitive documents or information dealing with Highland’s business operations will fall into the hands of Terry, who is a current adversary and a potential future competitor.<sup>9</sup> It simply has to be the case that some of the attorneys at Winstead who are reviewing the produced documents will be the very same attorneys advising Terry in the related appeals. What if certain Confidential Information reviewed by Winstead has nothing to do with maximizing value for the estate, but would be helpful for Terry to compete against Highland and/or to advance his appeal? As it stands, Winstead will be under Court order not to discuss or otherwise reveal that information. Winstead attorneys are in the impossible position of parsing every piece of information to determine whether it falls under the Trustee’s duty to maximize value, as opposed to merely being useful information for an adversary and competitor of Highland. Furthermore, Winstead attorneys must keep track of exactly where they obtained every piece of information they discuss with their client Terry when prosecuting his appeal. For that reason alone, it is not possible for Winstead to simultaneously maintain confidences for both the Trustee and Terry. In addition, Winstead’s duty of loyalty is being violated because Winstead is in the position of affirmatively protecting Confidential Information available to one client (the Trustee) against the other client (Terry).

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<sup>9</sup> The prior Plans attempted, and the current Plan D is attempting again, to put into place a mechanism where Terry will be a direct competitor of Highland. Terry thus is not motivated simply to recover on his claim. Terry has a non-creditor interest that is furthered by learning as much non-public information about Highland’s recent actions and investment activities as possible.

25. This is untenable situation and there is no good reason to permit it. As previously stated in this matter by the U.S. Trustee, these circumstances directly challenge Winstead's ethical duty of loyalty and duty to maintain confidences. *See* U.S. Trustee Objection at ¶ 15 (citing *In re American Airlines*, 972 F.2d 605, 618 (5th Cir. 1992) and *Humble Place Joint Venture v. Fory (In re Fory)*, 936 F.2d 814, 819 (5th Cir. 1991)). Winstead is conflicted and Bankruptcy Code section 327(c) prohibits its retention in this case.

**B. Winstead Cannot Maintain the Façade: It Has Represented, and is Seeking to Represent, the Chapter 11 Trustee Without Any Meaningful Limitation**

26. This Court chose to limit the scope of Winstead's retention to exclude the broadly-worded "certain other litigation matters." The Court did that to put into place "prophylactic measures" to ensure that the Trustee's goal of maximizing value lines up with Terry's goal of recovering as a creditor in the case.<sup>10</sup> The Court recognized that the Application, as originally requested, was not tied in any way to Winstead's alleged CLO expertise and giving Winstead free reign to litigate such matters could create problems relating to changing "bedfellows" and "crossway" motivations.<sup>11</sup>

27. Since the entry of the Order, a critical point seems to have gotten lost in the various litigation fronts among the parties: Winstead was retained as special counsel based on the Trustee's assertion that Winstead had unique expertise related to CLOs. The hearing on the Supplemental Application provides the Court with an opportunity to address whether Winstead and the Trustee actually complied with the limitation imposed by the Court. To that end, at hearing on this matter, the Court should: (1) review the evidence related to the scope of Winstead's representation since being retained, and (2) consider whether the role Winstead

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<sup>10</sup> June 14, 2018 Hr'g Tr. at 68:4-6.

<sup>11</sup> *Id.*

proposes going forward has any realistic tie to the concept of “special counsel.” To the first point, as noted above, Winstead clearly did not limit its role to CLO related matters following its retention. There was absolutely no meaningful distinction between Winstead and Forshey & Prostok during the failed contested Plan process. Moreover, any assertion by Winstead that it worked to limit duplication of effort with Forshey & Prostok is not relevant to the scope of employment point before the Court. *See In re Polaroid Corp.*, 424 B.R. 446, 452 (Bankr. D. Minn. 2010) (holding that special counsel should not provide general advice to a debtor); *see also In re Abrass*, 250 B.R. 432, 455 (Bankr. M.D. Fla. 2000); *In re Running Horse, L.L.C.*, 371 B.R. 446, 452 (Bankr. E.D. Cal. 2007). Special counsel requires retention based on specialized knowledge and, naturally, the firm should limit itself to matters involving such knowledge. Winstead’s demonstrated track record fails that test. This is especially problematic given that every representation by the Trustee and Winstead to this Court was that Winstead would be taking on such a limited role.

28. On the second point, after months of violating the Court’s Order requiring limitations on its representation, Winstead has now explicitly dispensed with any pretense of special counsel and is requesting to be involved in any litigation involving Highland and to allow Winstead to review and provide analysis on any agreement and document of the Debtors. Any pretext that Winstead is in this case because of its CLO expertise has been cast aside.

29. The Trustee has also chosen to challenge Highland’s motivations related to this Objection. Specifically, the Trustee suggests improper motive in the Supplemental Application by stating that Highland and HCLOF opposed the original Application because they were “highly motivated to attempt to hamstring and otherwise limit the Trustee’s ability to litigate effectively with them.” Supplemental Application at ¶ 6. This is simply inaccurate. Highland is

one of the largest creditors in this case and it has valid concerns that enforcing no meaningful limits on purported special counsel is an impermissible use of estate funds. The Trustee and Winstead have ignored the limitations put into place by this Court. The Court should refuse to grant the Supplemental Application.

**WHEREFORE**, Highland respectfully requests that the Court deny the relief sought in the Supplemental Application and provide such other and further relief that this Court deems just and proper.

Dated: November 5, 2018

Respectfully submitted,

/s/ Jason B. Binford

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Shiva D. Beck (TX 24086882)

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**COUNSEL FOR HIGHLAND CAPITAL  
MANAGEMENT, L.P.**



**CERTIFICATE OF SERVICE**

This is to certify that on November 5, 2018, a true and correct copy of the foregoing was served electronically via the Court's ECF system on those parties registered to receive such service.

*/s/ Jason B. Binford* \_\_\_\_\_  
Jason B. Binford

**Exhibit I**

Foley Notice of Appearance for Highland CLO Funding, Ltd.,  
CLO Holdco, Ltd. and Neutra, Ltd.

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Jason B. Binford (TX 24045499)  
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**COUNSEL FOR HIGHLAND CLO FUNDING,  
LTD., CLO HOLDCO, LTD. AND NEUTRA, LTD.**

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

**In re:** § **Chapter 7**  
§  
**ACIS CAPITAL MANAGEMENT, L.P.,** § **Case No. 18-30264-SGJ7**  
§  
**Alleged Debtor.** §

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**In re:** § **Chapter 7**  
§  
**ACIS CAPITAL MANAGEMENT, GP,** § **Case No. 18-30265-SGJ7**  
**L.L.C.,** §  
§  
**Alleged Debtor.** §

**NOTICE OF APPEARANCE AND  
REQUEST FOR SERVICE OF PAPERS**

PLEASE TAKE NOTICE that Holland N. O’Neil, Jason B. Binford, Shiva D. Beck, Melina N. Bales and the law firm of Foley Gardere, Foley & Lardner LLP, attorneys for Highland CLO Funding, Ltd., CLO Holdco, Ltd. and Neutra, Ltd. (collectively, the “**Equity Holders**”), parties-in-interest in the above-referenced matter, and pursuant to Rules 2002, 3017, and 9010 of the Federal Rules of Bankruptcy Procedure and 11 U.S.C. § 1109(b), request that all notices given or required to be given in this case and all papers served or required to be served in this case be given to and served upon them at the following address:

Holland N. O'Neil (TX 14864700)  
Jason B. Binford (TX 24045499)  
Shiva D. Beck (TX 24086882)  
Melina N. Bales (TX 24106851)  
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Please take further notice that the foregoing request includes notices and papers referred to in the Federal Rules of Bankruptcy Procedure and includes, without limitation, any plans of reorganization, objections, notices of hearings, orders, pleadings, motions, applications, complaints, demands, requests, petitions, disclosure statements, memoranda, briefs and any other documents brought before this Court with respect to these proceedings, whether formal or informal, whether written or oral, whether transmitted or conveyed by mail, hand delivery, telephone, telecopier, telegraph, or telex.

This Notice of Appearance and Request for Notices shall not be deemed or construed to be a waiver of the rights of the Equity Holders (i) to have final orders in non-core matters entered only after de novo review by a District Judge, (ii) to trial by jury in any proceeding so triable in this case or any case, controversy, or proceeding related to this case, (iii) to have a District Court withdraw the reference in any matter subject to mandatory or discretionary withdrawal, (iv) respecting in personam jurisdiction, or (v) any other rights, claims, actions, setoffs, or recoupments to which the Equity Holders are or may be entitled, in law or in equity, all of which rights, claims, actions, defenses, setoffs, and recoupments are expressly reserved.

Dated: April 18, 2018

Respectfully submitted,

*/s/ Holland N. O'Neil*

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**COUNSEL FOR HIGHLAND CLO FUNDING,  
LTD., CLO HOLDCO, LTD. AND NEUTRA,  
LTD.**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Notice of Appearance and Request for Service of Papers was served electronically by the Court's PACER system on April 18, 2018.

*/s/Melina N. Bales*

Melina N. Bales

**CERTIFICATE OF SERVICE**

I, Josef W. Mintz, hereby certify that on November 12, 2019, I served or caused to be served the *Limited Objection to Debtor's: (I) Application for an Order Authorizing the Retention and Employment of Foley Gardere, Foley & Lardner LLP as Special Texas Counsel, Nunc Pro Tunc to the Petition Date; and (II) Application for an Order Authorizing the Retention and Employment of Lynn Pinker Cox & Hurst LLP as Special Texas Litigation Counsel, Nunc Pro Tunc to the Petition Date* upon the following persons listed in the manner indicated and upon all subscribed parties via CM/ECF.

Via Email and Hand Delivery:

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/s/Josef W. Mintz

Josef W. Mintz (DE No. 5644)