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ATTORNEYS FOR JAMES DONDERO

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

**IN RE:**

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

**Debtor.**

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**Case No. 19-34054**

**Chapter 11**

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**JAMES DONDERO’S OBJECTION TO DEBTOR’S PROPOSED  
ASSUMPTION OF EXECUTORY CONTRACTS AND CURE  
AMOUNTS PROPOSED IN CONNECTION THEREWITH  
[Relates to Docket No. 1719]**

James Dondero (“Dondero”), a creditor, indirect equity security holder, and party in interest in the above-captioned bankruptcy case, hereby files objection to the proposed assumption of executory contracts and cure amounts proposed in connection therewith by the Debtor through the *Second Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, If Any, and (III) Related Procedures in Connection Therewith* [Docket No. 1719] filed by Highland Capital Management, L.P. (the “Debtor”) on January 11, 2021. In support of this objection, Dondero respectfully represents as follows:



## I. BACKGROUND

1. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the U.S. Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”).

2. On October 29, 2019, the Official Committee of Unsecured Creditors (the “Committee”) was appointed by the U.S. Trustee in Delaware.

3. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor’s Bankruptcy Case to this Court [Docket No. 186].

4. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the “Settlement Motion”). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the “Settlement Order”).

5. In connection with the Settlement Order, an independent board of directors was appointed on January 9, 2020, for the Debtor’s general partner, Strand Advisors, Inc. (the “Board”). The members of the Board are James P. Seery, Jr., John S. Dubel, and Russell F. Nelms.

6. Before the filing of the bankruptcy case and the imposition of the Board, Dondero was the President of Strand Advisors, Inc. (“Strand”). He also remains and the sole shareholder of Strand. In turn, Strand maintains a 0.2508% partnership interest in the Debtor.

7. On November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472] (the “Plan”) along with the *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1473] (the “Disclosure Statement”).

8. On November 24, 2020, this court entered an order approving the Disclosure Statement [Docket No. 1476] (the “Disclosure Statement Order”).

9. In connection with the Disclosure Statement Order the Court approved certain procedures related the Debtor’s assumption or rejection of executory contracts.

10. On January 11, 2021, the Debtor filed the *Second Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, If Any, and (III) Related Procedures in Connection Therewith* [Docket No. 1719] (the “Assumption Notice”).

11. The Assumption Notice provides that any claims with respect to an Executory Contract may be disallowed or expunged if no objection to the proposed cure amount is lodged, even if the applicable party timely filed a proof of claim.

12. Similarly, the Plan includes the following provision regarding the treatment of cure amounts, and claims arising from executory contracts:

Assumption or assignment of any Executory Contract or Unexpired Lease pursuant to the Plan or otherwise and full payment of any applicable cure amounts pursuant to this ARTICLE V.C shall result in the full release and satisfaction of any cure amounts, Claims, or defaults, whether monetary or nonmonetary, including defaults of provisions restricting the change in control or ownership interest composition or other bankruptcy-related defaults, arising under any assumed or assigned Executory Contract or Unexpired Lease at any time prior to the effective date of assumption or assignment. Any and all Proofs of Claim based upon Executory Contracts or Unexpired Leases that have been assumed or assigned in the Chapter 11 Case, including pursuant to the Confirmation Order, and for which any cure amounts have been fully paid pursuant to this ARTICLE V.C, shall be deemed disallowed and expunged as of the Effective Date without the need for any objection thereto or any further notice to or action, order, or approval of the Bankruptcy Court.

Plan, Article V, Section C.

13. The Assumption Notice lists a number of contracts the Debtor proposes to assume, all with a proposed cure of \$0.

14. Among these are the (i) Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, LP between the Debtor and Strand Advisors, Inc. (the “HCMLP LPA”); the (ii) Highland Multi-Strategy Fund, LP Limited Partnership Agreement, by and between Highland Multi-Strategy Fund, L.P. on the one hand and Highland Multi-Strategy Fund GP, L.P. and James Dondero on the other (the “Multi-Strat LPA”); and (iii) the Fourth Amended and Restated Limited Partnership Agreement of Highland Multi Strategy Credit Fund, L.P. (the “MSCF LPA”).

15. The HCMLP LPA contains an indemnification provision that indemnifies any director, officer, employee, agent, and/or representative of Strand for all matters enumerated in the Partnership Agreement, including, but not limited to, all liabilities, losses, and damages suffered by such party by reason of any act performed or omitted to be performed in the name of or on behalf of the Debtor in connection with the Debtor’s business.

16. Dondero, at all relevant times prior to the petition date, and until the Board was put in place, was a director, officer, employee, agent, and/or representative of Strand.

17. In connection with Dondero’s role as a director, officer, employee, agent, and/or representative of Strand, Dondero filed a proof of claim to claim, assert, and preserve his rights under the HCMLP LPA and in particular his right to indemnification (as a Strand director, officer, employee, agent, and/or representative) from the Debtor related to any and all liabilities, losses, and damages suffered by such party as provide under the agreement. See Proof of Claim No. 142, filed on April 8, 2020.<sup>1</sup>

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<sup>1</sup> See *Lycoming Engines v. Superior Air Parts, Inc.*, Civil Action No. 3:13-CV-1162-L, 2014 U.S. Dist. LEXIS 66819, at \*15-16 (N.D. Tex. May 15, 2014). (The majority rule “holds that a right to indemnity under a prepetition contract is categorized as a prepetition claim under the Bankruptcy Code, even if the facts giving rise to liability did not occur until after discharge; that is, the relevant conduct is the execution of the indemnification agreement, not the alleged failure to indemnify.”).

18. While Dondero's right to indemnification remains ongoing and the amounts owed are not fully liquidated as they continue to accrue, a number of claims subject to indemnification have been made against Dondero, including, without limitation, in the following matters: (i) *Daugherty v. Highland Capital Management, L.P. et al.*, pending in the Delaware Chancery Court; (ii) *Daugherty v. Dondero et al.*, pending in the Chancery Delaware Court; (iii) *Terry v. Highland Capital Management, L.P., et al.*, pending in the Dallas County 162<sup>nd</sup> District Court; and (iv) a number of proceedings commenced by Acis Capital Management, LP and Acis Capital Management GP, LLC against the Debtor and/or Dondero.

19. Dondero objects to the assumption of the HCMLP LPA and the \$0 cure amount proposed by the Debtor because (i) the Debtor is proposing to assume the HCMLP LPA without providing for payment of, or the provision for, the amounts owed to Dondero and/or his rights under the HCMLP indemnification provisions; and (ii) the Debtor proposes to disallow and expunge any and all claims filed related to the HCMLP LPA, even if a proof of claim was timely filed.

20. Further, Dondero objects to the proposed assumption and cure of the Multi-Strat LPA and the MSCF LPA to the extent (i) Dondero has any potential claims, rights, and/or causes of action that have accrued or may accrue post-petition under or related to these agreements that the Debtor purports to extinguish by the assumption; and (ii) the proposed assumption and \$0 cure purports to extinguish claims that have been brought or potential post-petition claims that have accrued or may later accrue for third parties who are not parties to these agreements.

## **II. ARGUMENT AND AUTHORITIES**

21. A debtor must cure any existing defaults under an executory contract prior to assumption. *See* 11 U.S.C. § 365(b)(1). "Under the Bankruptcy Code, a debtor normally has to

‘cure’ all defaults before it may assume a pre-petition executory contract.” *In re Texas Commercial Energy*, 607 F.3d 153, 160 (5th Cir. 2010). Specifically, where a debtor has defaulted under a contract, section 365 also requires that a trustee or debtor-in-possession at the time of assumption (1) cure or provide adequate assurance of prompt cure of that default; (2) compensate or provide adequate assurance of prompt compensation; and, (3) provide adequate assurance of future performance under the contract. *See* 11 U.S.C. § 365(b)(1). In the Chapter 11 context, the debtor’s reorganization plan must provide means for curing or waiving any outstanding defaults. *See* 11 U.S.C. § 1123(a)(5)(G).

22. “A contract is executory if ’performance remains due to some extent on both sides,” *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019). In other words, an executory contract is a contract where the obligations of both parties “are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.” *In re Interstate Bakeries Corp.*, 751 F.3d 955, 962 (8th Cir. 2014).

23. “Once an assumption order is entered, the creditor must perform in accordance with the terms of the assumed agreements. . . In other words, the debtor must cure all defaults, assure future performance, and make the other contracting party whole before it may be permitted to assume the agreement.” *In re Kiwi Intern. Air Lines, Inc.*, 344 F.3d 311, 318 (3rd Cir. 2003); accord, 3 COLLIERS ON BANKRUPTCY § 365.05[2] (“The other party to the contract or lease that the [debtor in possession or] trustee proposes to assume is entitled to insist that any defaults, whenever they may have occurred, be cured, that appropriate compensation be provided, and that, a past default having occurred, adequate assurance of future performance is available.”).

24. Courts have held that contracts containing indemnification provisions are executory contracts within section 365. *See, e.g., Philip Servs. Corp. v. Luntz (In re Philip Servs. (Del.), Inc.)*,

284 B.R. 541, 546-47 (Bankr. D. Del. 2002) (holding a merger agreement executory because unperformed indemnification obligations were “substantial elements of the overall transaction”)

25. In this case, Dondero objects to the assumption of the HCMLP LPA and the \$0 cure amount proposed by the Debtor because (i) the Debtor is proposing to assume the HCMLP LPA without providing for payment of, or the provision for, the amounts owed to Dondero and/or his rights under the HCMLP indemnification provisions; and (ii) the Debtor proposes to disallow and expunge any and all claims filed related to the HCMLP LPA, even if a proof of claim was timely filed.

26. Further, Dondero objects to the proposed assumption and cure of the Multi-Strat LPA and the MSCF LPA to the extent (i) Dondero has any potential claims, rights, and/or causes of action that have accrued or may accrue post-petition under or related to these agreements that the Debtor purports to extinguish by the assumption; and (ii) the proposed assumption and \$0 cure purports to extinguish claims that have been brought or potential post-petition claims that have accrued or may later accrue for third parties who are not parties to these agreements.

27. Dondero also objects to the assumption and assignment of the HCMLP LPA and requests adequate assurance of future performance is provided with respect to the indemnification provision.

28. Dondero also objects to the extent the Debtor purports to sever the HCMLP LPA upon assumption and/or assumption and assignment as not being authorized under the Bankruptcy Code.

### **RESERVATION OF RIGHTS**

29. Dondero hereby expressly reserves all rights, interests, claims, counterclaims, rights of setoff and recoupment and/or defenses pertaining to any or all contracts purported to be

assumed by the Debtor with a \$0 cure, including those that may purport to disallow or expunge claims of non-parties to the listed agreements, including, without limitation, (a) the right to object to the assumption and/or assignment by the Debtors of any such contract, (b) the right to payment of all monetary defaults that exist with respect to each such contract, and/or (c) the right to have the assignment of any such contract specifically conditioned on the Court finding, based on competent evidence, that the actual, proposed assignee of such contract is capable of performing all terms and conditions of such contract including, without limitation, payment of all amounts that will come due and owing subsequent to any such assignment.

### **CONCLUSION**

Dondero therefore respectfully requests entry of an order (i) conditioning the assumption of the HCMLP LPA and other agreements upon the timely cure of all monetary defaults thereunder; (ii) granting the other relief requested herein; and (iii) granting Dondero such other and further relief as the Court deems just and proper.

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Dated: January 20, 2021

Respectfully submitted,

/s/ Bryan C. Assink

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**ATTORNEYS FOR JAMES DONDERO**

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that, on January 20, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for the Debtor and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink

Bryan C. Assink